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WEST VIRGINIA SUPREME COURT OF APPEALS.

CLIFFORD SCHOONOVER, by Next
Friend, Plff. in Err.,
v.

BALTIMORE & OHIO RAILROAD COM-
PANY.

(69 W. Va. 560, 73 S. E. 266.)

Judgment — neglect to enter — correc- tion.

1. A final judgment, rendered but not entered by reason of inadvertency of the clerk, may be entered by a nunc pro tunc order at a term of the court subsequent to the one at which it was rendered, provided the evidence of the rendition thereof is sufficient. *For other cases, see Judgment, I. f, 2, in Dig. 1-52 N. S.*

Appeal — judgment not entered — cor- rection.

2. A writ of error to such a judgment awarded and perfected before entry thereof may be sustained by the filing of a supplemental record in the appellate court, showing amendment by such nunc pro tunc order. *For other cases, see Appeal and Error, IV. d, in Dig. 1-52 N. S.*

Negligence — youth — bar of action.

3. In an action by an infant between eleven and twelve years old against a railroad company to recover damages for an injury sustained by the former on a highway crossing, or one treated as such, by the negligence of the latter, the trial court may hold the plaintiff barred by his contributory negligence, upon a proper appli-

cation for such ruling, if the facts and circumstances of the case warrant it.

For other cases, see Negligence, II. b, 1, in Dig. 1-52 N. S.

Highway — use by child — care.

4. In the use of highways, children must exercise such reasonable care, caution, and prudence for their safety as may be expected from them, in view of their immaturity. The standard or measure of duty in each case is determinable by the capacity ordinarily possessed and exercised by children of the age and development of the class to which the individual belongs.

For other cases, see Negligence, II. b, 1, in Dig. 1-52 N. S.

Railroad — private crossing — care.

5. In passing its train over a crossing provided by itself for public use, though not legally a public crossing, a railroad company must comply with the common-law requirements imposed for the safety of persons using public crossings.

For other cases, see Railroads, II. d, 3, in Dig. 1-52 N. S.

Same — last clear chance.

6. Though a person injured on such a crossing by a train was himself in fault, his negligence does not preclude recovery for the injury, if the servants of the railway company in charge of the train could have discovered the danger and prevented the injury by keeping a lookout on the crossing and checking or stopping the train. In such case their failure of duty is the latest negligence, and the proximate cause of the injury.

For other cases, see Negligence, II. f, in Dig. 1-52 N. S.

(October 24, 1911.)

ERROR to the Circuit Court for Cabell County to review a judgment in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Headnotes by POFFENBARGER, J.

Note. — As to contributory negligence of children generally, see annotation following *Jacobs v. H. J. Koehler Sporting Goods Co.* post, 10, and for various concrete phases of the subject, subdivision VII. page 92, of that annotation, and other annotations there referred to.

L.R.A.1917F.

Messrs. Williams, Scott, & Lovett, for plaintiff in error:

Liability because of defendant's negligence is fixed, even though the conduct of the boy could, in its most unfavorable light, be deemed negligence, because the defendant had ample time and might with reasonable exercise of means at hand have avoided the consequences of the plaintiff's negligence, if any is to be imputed to him in the premises.

Carrico v. West Virginia C. & P. R. Co. 35 W. Va. 389, 14 S. E. 12, 10 Am. Neg. Cas. 420; **Downey v. Chesapeake & O. R. Co.** 28 W. Va. 732; **Washington v. Baltimore & O. R. Co.** 17 W. Va. 190; **Inland & S. Coasting Co. v. Tolson**, 139 U. S. 551, 35 L. ed. 270, 11 Sup. Ct. Rep. 653; **Beyel v. Newport News & M. Valley R. Co.** 34 W. Va. 538, 12 S. E. 532; **Berkeley v. Chesapeake & O. R. Co.** 43 W. Va. 11, 26 S. E. 349.

Defendant was negligent in not giving the statutory signal or alarm required at a street crossing.

Ray v. Chesapeake & O. R. Co. 57 W. Va. 333, 50 S. E. 413.

A boy of plaintiff's age would be required in law to exercise such reasonable care as a reasonably prudent boy of the same age and with like capacity would have exercised under the same circumstances.

Turner v. Norfolk & W. R. Co. 40 W. Va. 676, 22 S. E. 83; **Giebell v. Collins Co.** 54 W. Va. 518, 46 S. E. 569, 15 Am. Neg. Rep. 733; **Swift v. Staten Island Rapid Transit Co.** 123 N. Y. 645, 25 N. E. 378; **Omaha & R. Valley R. Co. v. Morgan**, 40 Neb. 604, 59 N. W. 81, 16 Am. Neg. Cas. 542; **Cleveland Rolling Mill Co. v. Corrigan**, 46 Ohio St. 283, 3 L.R.A. 385, 15 Am. St. Rep. 596, 20 N. E. 466.

On petition for rehearing.

The amendment of the record may properly be made by the court below while the case is pending on appeal.

McClure-Mabie Lumber Co. v. Brooks, 46 W. Va. 732, 34 S. E. 921; **Wells v. Smith**, 49 W. Va. 78, 38 S. E. 547; **James Sons v. Gott**, 55 W. Va. 223, 47 S. E. 649; **Carter v. Elmore**, 119 N. C. 296, 26 S. E. 35; **King v. State Bank**, 9 Ark. 186, 47 Am. Dec. 739; **Gamble v. Daugherty**, 71 Mo. 599; **Exchange Nat. Bank v. Allen**, 68 Mo. 474; **DeKalb Co. v. Hixon**, 44 Mo. 341; **Jones v. St. Joseph F. & M. Ins. Co.** 55 Mo. 342; **Freel v. State**, 21 Ark. 212; **McNeill v. Arnold**, 17 Ark. 157; **Farmer v. Wilson**, 34 Ala. 75; **Moore v. Horn**, 5 Ala. 234; **Cunningham v. Fontaine**, 25 Ala. 644; **Dow v. Whitman**, 36 Ala. 604; **Dreyfuss v. Tompkins**, 67 Cal. 339, 7 Pac. 732; **Rousset v. Boyle**, 45 Cal. 65; **Tatum v. Snidow**, 2 Hen. & M. 542.

It was competent for the court to make L.R.A.1917F.

the amendment and to enter the order making the same nunc pro tunc as of the date of the original order.

Allen v. Bradford, 3 Ala. 281, 37 Am. Dec. 689; **Glass v. Glass**, 24 Ala. 468; **Belkin v. Rhodes**, 76 Mo. 643; 1 Black. Judgm. § 130; **Farmer v. Wilson**, 34 Ala. 75; **Freeman, Judgm.** 2d ed. §§ 61, 67; **Vance v. Ravenswood, S. & G. R. Co.** 53 W. Va. 338, 44 S. E. 461, 14 Am. Neg. Rep. 483; **Ninde v. Clark**, 62 Mich. 124, 4 Am. St. Rep. 823, 28 N. W. 765; **Burnett v. State**, 14 Tex. 455, 65 Am. Dec. 131; **Jordan v. Petty**, 5 Fla. 326; **Graham v. Lynn**, 4 B. Mon. 17, 39 Am. Dec. 493; **Chichester v. Cande**, 3 Cow. 39, 15 Am. Dec. 238; **Jones v. Lewis**, 30 N. C. (8 Ired. L.) 70, 47 Am. Dec. 338; **Davis v. Shaver**, 61 N. C. (Phill. L.) 18, 91 Am. Dec. 92.

Messrs. Vinson & Thompson for defendant in error.

Poffenbarger, J., delivered the opinion of the court:

In an action of trespass on the case brought by Clifford Schoonover against the Baltimore & Ohio Railroad Company in the circuit court of Cabell county, for the recovery of damages for a personal injury alleged to have been wrought by the negligence of the defendant, there was a demurrer to the evidence of the plaintiff, which the court sustained, after a conditional verdict had been found by the jury, assessing the damages at the sum of \$3,000. Agreeably to the finding of the court upon the law of the case, an order was entered, sustaining the demurrer and giving the defendant a judgment for costs, but not dismissing the action. However, a writ of error was awarded, and the case submitted to the court as upon a final judgment. That this was not a final judgment in appellate law appears from **Epstein v. Totten**, 63 W. Va. 602, 60 S. E. 614; **DeArmit v. Whitmer**, 63 W. Va. 301, 60 S. E. 136; **Ritchie County Bank v. Bee**, 60 W. Va. 386, 55 S. E. 380; **Corley v. Corley**, 53 W. Va. 142, 44 S. E. 132, 47 S. E. 145; **Hannah v. Charleston Nat. Bank**, 53 W. Va. 82, 44 S. E. 152.

After submission of the case in this court, however, the circuit court entered an order, reciting rendition of judgment of nil capiat at the time of the entry of the order above described and clerical omission to include it in that order, and entering the judgment nunc pro tunc. This raises the question of power in the trial court to amend its record after perfection of a writ of error and submission in the appellate court.

Legally the inquiry divides into two parts, the first of which is whether a final judgment can be entered nunc pro tunc; and the other whether an amendment so made will

sustain the writ of error. Such an amendment may be made. *Vance v. Ravenswood, S. & G. R. Co.* 53 W. Va. 338, 44 S. E. 461, 14 Am. Neg. Rep. 483; *Ninde v. Clark*, 4 Am. St. Rep. 832, note, pp. 828-830. In this valuable note we find the following proposition, sustained by numerous decisions: "A court which has ordered a judgment which the clerk has failed or neglected to enter in the record has power, even after the term at which it was rendered has passed, to order the judgment so rendered to be entered *nunc pro tunc*, provided there be satisfactory evidence that the judgment was rendered as alleged, and of the nature and extent of the relief granted by it." Sufficiency of the evidence upon which the amendment was made is not questioned.

That an amendment of the record of a case in the trial court, pending a writ of error, may be carried into the record in the appellate court and made effective there is also affirmed by authority. After such an amendment, carried up as aforesaid, the appellate court will act upon the record as corrected. *Wells v. Smith*, 49 W. Va. 78, 38 S. E. 547; *Gauley Coal Land Asso. v. Spies*, 61 W. Va. 19, 55 S. E. 903; *Hopkins v. Baltimore & O. R. Co.* 42 W. Va. 535, 26 S. E. 187; 18 Enc. Pl. & Pr. 958. We find no authority inconsistent with this view. Hastily read, *Tatum v. Snidow*, 2 Hen. & M. 542, may seem to be so, but it is not. Though the subsequent order therein entered recited omission of entry of the judgment by the clerk, the judgment was not entered *nunc pro tunc* and virtually dated back, as in this case, so as to work an amendment.

Reason and justice, as well as authority, sustain our conclusion. The defect resulted from mere inadvertence and was purely technical. Until the hearing on the writ of error, both parties proceeded under the impression that the judgment was technically, as well as substantially, final. Discovery of the defect then was matter of surprise to them, as, no doubt, it was to the trial court on the application for amendment. Correction thereof by amendment saves time and expense and facilitates disposition of business, without working injury in any respect.

The plaintiff, a boy about eleven and one-half years old, was so badly injured on the track of the defendant company that one of his legs had to be amputated below the knee. The injury occurred at a point used as a crossing, but the status of that crossing is an element in the case. It would be in the line of Seventeenth street, of the city of Huntington, if extended northward so as to cross the railroad, but had never been established by the city as a street or public crossing. The general direction of the rail-

road at that point is east and west. On the south side thereof, and west of Seventeenth street, running to the railroad at right angles, there was a park, boarded up along the railroad on one side, and along said street on another, in which a game of baseball was played on the day of the injury. The grandstand, occupied by spectators, was in the angle. Occasionally foul balls would go over the fence, and boys on the outside recovered and returned them, in consideration of which they were admitted into the park. The plaintiff and a number of other persons were on the outside, some watching the game through cracks in the fence, and others looking over the fence from the tops of box cars standing on a switch on the opposite side of the railroad track. A foul ball having gone over the fence and diagonally across the railroad in a northeasterly direction, and stopped a short distance beyond, from 15 to 30 feet, the plaintiff ran after it; and having obtained it, ran back on the track, whence he threw it into the park, halting momentarily, some of the witnesses say. At this time a train, consisting of an engine and two cars, drawn by the engine running backwards, was approaching from the east at the rate of 10 or 15 miles per hour. When the boy threw the ball, in apparent ignorance of its approach, the engine was not more than 60 or 70 feet distant. The train was going west, and he diagonally across the track in a southwesterly direction. Hence his face was turned from the train, but he went on the track without looking for an approaching train or engine. Wholly absorbed in what he was doing, he was oblivious of the train. Some witnesses testify that they and others, seeing the danger, called to him, but are unable to say he heard them, as there was much noise and confusion, both inside and outside of the park. As he left the track, the train, rushing on, caught his right foot and leg. Some distance east of the place of the injury there was a cattle pen, near which some witnesses say there were two long blasts of the whistle of the approaching engine, one east and the other west. Others say they never heard them. There is no evidence that any bell was rung as the train approached the crossing and all the witnesses agree that just about the time the boy was struck two or three short sharp blasts from the whistle were heard. There was nobody on the tender of the backing engine, nor does it appear that anybody on the engine kept a lookout upon the crossing.

That the train was running at a higher rate of speed than the city ordinance permitted seems not to be controverted. At any rate, it could have been inferred from the evidence. That a lower rate of speed

would have avoided the injury is another inference justified by it, since the boy was almost out of danger when the train struck him. Therefore we may safely assume negligence on the part of the defendant company.

Whether the conduct of the plaintiff amounted to contributory negligence is an important inquiry in the case. Had he been an adult, his contributory negligence in going upon the railroad track directly in front of the approaching train, plainly in view without looking in either direction along the track, or in any way exercising his powers of observation for his own safety, would be clearly manifest. *Riedel v. Wheeling Traction Co.* 63 W. Va. 522, 16 L.R.A. (N.S.) 1123, 61 S. E. 821. But this boy was only about eleven years and five months old. He testified, in January, 1906, that he had attained his thirteenth year in the preceding November. The action was brought at October rules, 1904, and the declaration avers that he was hurt on the 23d day of April, 1904. As to whether a person of that age is *sui juris* within the law of negligence, and how the fact is to be determined, there is some conflict among the authorities. In some jurisdictions the courts hold that between the ages of seven and fourteen there is a presumption of a lack of prudence, foresight, caution, and comprehension of danger which carries every case to the jury, and denies to the court the power to say there was contributory negligence as matter of law. *Trumbo v. City Street Car Co.* 89 Va. 780, 17 S. E. 124; *Washington, A. & Mt. V. Electric R. Co. v. Quayle*, 95 Va. 741, 30 S. E. 391; *Roanoke v. Shull*, 97 Va. 419, 75 Am. St. Rep. 791, 34 S. E. 34. Other cases, proceeding upon the same theory, will be found cited in the note to *Barnes v. Shreveport City R. Co.* 49 Am. St. Rep. 400, 410. See also 3 Elliott, Railroads, § 1261, note 122. But this rule is by no means generally accepted. Numerous decisions declare that in cases of injury occurring upon highways and railroads, failure of a child to exercise such care, caution, and foresight as is ordinarily possessed and exercised by children of his age will bar recovery for an injury thereby occasioned.

In these cases the measure or standard of care required is not that of adults, but of the class of persons to which the injured party belongs, and seems to rest upon the view that in using a highway, provided for all classes of persons who are accustomed to go abroad without guardians or protectors, the traveler is bound to use, in the exercise of that right, such judgment and prudence as are usually and ordinarily possessed by persons of the class to which he belongs; and that failure to exercise the same con-

stitutes negligence, whether he be above or below the age of fourteen. This proposition is sustained by a decided weight of authority in all actions by infants for personal injuries except those between master and servant. *Baltimore City Pass. R. Co. v. McDonnell*, 43 Md. 534; *Government Street R. Co. v. Hanlon*, 53 Ala. 70; *Chicago & A. R. Co. v. Murray*, 71 Ill. 601; *Swift v. Staten Island Rapid Transit R. Co.* 123 N. Y. 645, 25 N. E. 378; *Hayes v. Norcross*, 162 Mass. 546, 39 N. E. 282; *Wright v. Detroit, G. H. & M. R. Co.* 77 Mich. 123, 43 N. W. 765; *Collins v. South Boston R. Co.* 142 Mass. 301, 56 Am. Rep. 675, 7 N. E. 856; *Messenger v. Dennie*, 141 Mass. 335, 5 N. E. 283, id. 137 Mass. 197, 50 Am. Rep. 295; *Stackpole v. Boston Elev. R. Co.* 193 Mass. 562, 79 N. E. 740; *Fitzhenry v. Consolidated Traction Co.* 64 N. J. L. 674, 46 Atl. 698, 8 Am. Neg. Rep. 288; *North Hudson County R. Co. v. Flanagan*, 57 N. J. L. 696, 32 Atl. 216; *Brady v. Consolidated Traction Co.* 63 N. J. L. 25, 42 Atl. 1054; *Payne v. Chicago & A. R. Co.* 129 Mo. 405, 31 S. W. 885; *Colomb v. Portland & B. Street R. Co.* 100 Me. 418, 61 Atl. 898, 19 Am. Neg. Rep. 9; *Fenton v. Second Ave. R. Co.* 126 N. Y. 625, 26 N. E. 967; *Tucker v. New York C. & H. R. R. Co.* 124 N. Y. 308, 21 Am. St. Rep. 670, 26 N. E. 916; *Thompson v. Buffalo R. Co.* 145 N. Y. 196, 39 N. E. 709, 12 Am. Neg. Cas. 322; *Atchison, T. & S. F. R. Co. v. Todd*, 54 Kan. 551, 38 Pac. 804; *Chicago, R. I. & P. R. Co. v. Eininger*, 114 Ill. 79, 29 N. E. 196; *Masser v. Chicago, R. I. & P. R. Co.* 68 Iowa, 602, 27 N. W. 776; *Normand v. Hull Electric Co.* Rap. Jud. Quebec 35 C. S. 329; *Mowrey v. Central City R. Co.* 51 N. Y. 666; *Evans v. Josephine Mills*, 119 Ga. 449, 46 S. E. 674, 15 Am. Neg. Rep. 503; *Young v. Small*, 188 Mass. 4, 108 Am. St. Rep. 457, 73 N. E. 1019.

Practically all courts hold infants between the ages of seven and fourteen capable of contributory negligence. Those in which the view here announced does not prevail submit to the jury, upon the facts and circumstances, the inquiry whether there has been contributory negligence. The mere submission of the question asserts capacity of the infant negligently to contribute to his injury, within the meaning of the law, under certain circumstances. The difference or conflict respects a rule of practice, not principle, some courts saying the question is always one for the jury, and others that it is for jury determination only when the evidence makes it a jury question, under the rules of practice applicable to other questions. If the act of an infant plaintiff is so obviously dangerous that no reasonable man can truthfully say children of his age do not ordinarily know it to be dangerous

and voluntarily abstain from it, there is no more reason for submitting the question of contributory negligence to the jury than in the case of an adult plainly guilty of such negligence, and there is the same reason why it should not do so. Prudence and capacity to comprehend danger are not the only elements involved. These may be clear beyond doubt, as in the case of an adult. The defensive issue raised is negligence, in which the age, intelligence, and characteristics of the plaintiff are only factors. Hence it is fallacious to say that because these are inferior to those of an adult, the issue must be submitted to a jury. Though inferior in that sense, they may be amply and indisputably such as to hold the plaintiff to responsibility for his acts under the circumstances of the case. Inferiority to an adult in these respects does not absolve him from responsibility. If it did, the case could not even go to the jury on the question of contributory negligence. That defense could not be made. But practically all courts admit it, except in the cases of very young children, deemed incapable of appreciating common or ordinary danger. The standard or measure of responsibility is lower than that for adults, but if an infant plaintiff comes clearly up to it, there is no occasion for submitting his capacity to the jury as a doubtful question; and if the danger encountered by him was so plainly obvious that one of his years must have appreciated it, or the duty omitted by him so clear and natural that he must be deemed to have been cognizant of it, the court should declare his contributory negligence, upon a proper application, as in other cases.

The basis of the conflict in authority seems, therefore, to arise from failure or refusal on the part of those courts which insists upon making the question of negligence on the part of an infant between the ages of seven and fourteen years always one for the jury to recognize any standard or measure of responsibility in children. That they have some intelligence cannot be denied. Nor is it possible to say they do not have enough to enable them to appreciate or comprehend certain forms of obvious danger, or to know how to avoid it, or to feel a sense of duty under certain circumstances. If the court can say, and it does, as matter of judicial knowledge, that an adult ought to know certain things and be able to take adequate precaution for his own safety, why has it not the same power to say, as a matter of judicial knowledge, that children of certain ages are able to comprehend and avoid certain kinds of danger? The adoption of the theory or view that a child must exercise such care, caution, prudence, and foresight as children of his age ordinarily

possess and exercise makes the question of contributory negligence in the case of a child, treated as one of law for determination by the court, just as easy of solution as in the case of an adult, and the conclusion is reached by exactly the same process of reasoning.

That contributory negligence in cases of this class is frequently declared to be generally a question for the jury is not inconsistent with the conclusion here stated, for that is said of all cases involving this defense, and it is true. More cases of each class go to the juries than are decided by the courts. The expression means only that determination by the jury is the general rule, and by the court the exception thereto.

This conclusion does not necessarily conflict with the principle declared in *Bare v. Crane Creek Coal & Coke Co.* 61 W. Va. 28, 8 L.R.A.(N.S.) 284, 123 Am. St. Rep. 966, 55 S. E. 907, and *Wilkinson v. Kanawha & H. Coal & Coke Co.* 64 W. Va. 93, 20 L.R.A.(N.S.) 331, 61 S. E. 875, and other cases arising between master and servant, and vastly different in many respects from this. As between master and servant there is a contractual relation. There is none here. These parties were strangers, standing substantially upon an equal footing in respect to the use of a highway. The difference between the reciprocal rights of the plaintiff and defendant here and those between an adult and such defendant, in a similar situation, is the requirement of more care on the part of the latter in its relations with the former, in view of his immaturity, lowering the standard of responsibility. Highway and railroad risks, dangers, and reciprocal rights are matters of daily cognizance and experience with boys and with men. No presumption of their ignorance thereof can be indulged or supposed. They are not brought into or kept in contact with them by the compulsion or restraint of the railroad companies or other persons using the highways. Boys employed in mills, factories, and mines are held by their contracts to duties which necessitate unaccustomed precautions against danger, and constantly expose them to hazards dangerous and unfamiliar. Frequent recurrence of these exposures and precautionary duties, incident to the performance of the work, requires vigilance, constancy, and singleness and steadiness of purpose,—characteristic of adults, rather than children. That such ability, natural or acquired, is necessary to the protection of themselves and their fellow servants in such situations seems to be reasonably clear. Hence there is cogent reason for a higher standard or measure of capacity on the part of the infant in cases arising between master and servant. In service the boy is charged

with novel duties and exposed to unaccustomed hazards, and charged with responsibilities like or very similar to those imposed upon adults. He has not grown up with them as he has with the hazards of the street, the playground, and mere casual contact with men, structures, machines, animals, vehicles, and other means of injury. Without noting it, or giving any reason for it, the courts seem to make this distinction. In cases between master and servant in which the plaintiff is an infant under fourteen years of age, contributory negligence is seldom declared as matter of law. In other cases this result is of frequent occurrence, as will appear from an examination of the long list of decisions herein cited.

We have no doubt the plaintiff knew the danger of going upon a railroad track without looking for trains. His home was in Clay county, on the line of a railroad, and he was in Huntington at the time of the injury, attending the spring term of school at Marshall College. His situation and engagement at the time indicate possession of the intelligence and discretion of boys of his age, thousands of whom daily cross railroads, trolley lines, and highways, exercising discretion and prudence requisite to their safety. Hence the trial court properly held him guilty of negligence as matter of law.

But if the servants of the railway company in charge of the train omitted a duty, performance of which would have avoided the injury, such omission must be deemed the proximate cause thereof, and the defendant is liable, notwithstanding the plaintiff's negligence. Though not established by the city as a public one, the crossing on which the boy was hurt was a way provided by the defendant company itself for travel across its tracks. It was at the end of a city street regularly established and maintained, and planked between the rails and on the outside thereof by the defendant, and a post with crossarms, bearing the warning, "Look out for the locomotive. Railroad Crossing,"—stood near it. Under principles declared in *Ray v. Chesapeake & O. R. Co.* 57 W. Va. 333, 50 S. E. 413, this may have been such a crossing as required the statutory signals. Be that as it may, persons coming upon the track at that point were there by invitation, and the company owed them the common-law duty imposed in favor of persons on a public crossing, since they were neither trespassers nor bare licensees. *Elliott, Railroads*, § 1154, sustained by ample authorities cited. Such common-law duty includes maintenance of a lookout or other adequate means of avoiding collision at crossings, and failure to do so is negligence, constituting proximate cause of injury, even though the plaintiff himself was negligent in going upon the track, if the performance of such duty would have prevented injury. 2 *Thomp. Neg.* §§ 1596, 1597; *Elliott, Railroads*, § 1175. The principle has been recognized and applied in a crossing case, as well as others, by this court. *Riedel v. Wheeling Traction Co.* 69 W. Va. 18, 71 S. E. 174; *Washington v. Baltimore & O. R. Co.* 17 W. Va. 190; *Downey v. Chesapeake & O. R. Co.* 28 W. Va. 732; *Vance v. Ravenswood, S. & G. R. Co.* 53 W. Va. 338, 44 S. E. 461, 14 Am. Neg. Rep. 483; *McKelvey v. Chesapeake & O. R. Co.* 35 W. Va. 500, 14 S. E. 261; *Layne v. Ohio River R. Co.* 35 W. Va. 338, 14 S. E. 123; *Raines v. Chesapeake & O. R. Co.* 39 W. Va. 50, 24 L.R.A. 226, 19 S. E. 565. Opinions of witnesses vary as to the distance of the train when the boy came upon the track, as well as the rate of speed; but the jury could have found the distance to be 50 or 60 feet, and the rate of speed 12 miles per hour, and also that injury would have been avoided by a checking of the speed of the train. Uncontradicted testimony was adduced, showing the engineer could have checked the speed almost instantaneously, had he seen the boy when he came on the track and adopted emergency precautions. It was also competent for them to infer that the engineer would have seen him when he came on the track,—or even earlier, and apparently intending to come upon it,—if he had performed the duty incumbent upon him in running his train over a crossing. Opposing this is evidence tending to prove the boy was struck almost as soon as he got on the track, and that the train was so close no assistance could be rendered him; but this is not conclusive. We are of the opinion, therefore, that the case should have been permitted to go to the jury, and that the trial court erred in sustaining the demurrer to the evidence.

The judgment will be reversed, the demurrer to the evidence overruled, and judgment rendered for the damages assessed by the jury and costs, both in this court, and the court below.

Brannon and Miller, JJ., concur. Robinson, J., concurs only in result and syllabus.

Williams, President, concurring:

I concur in the judgment, but not in the correctness of all the principles asserted in the opinion. I do not believe it accords with the weight of authority, and I know it does not with our own previous decisions, to say that the court can determine, as matter of law, whether or not an infant under the age of fourteen is guilty of negligence. Nor

do I acquiesce in the view that the relation of master and servant can have any effect to vary the rules of evidence respecting negligence. Such relation may, and often does, determine relative duties. But once they are determined, it must be ascertained what is negligence in any given case, independent of any contractual relation. The law of negligence rests upon relative duties. The policy of the law forbids anyone to contract against negligence. Everyone is bound to exercise reasonable care for his own safety, and for the safety of others. He may by contract enlarge his duties, but he cannot lessen them, whether he be employer or employee. The degree of care required must be commensurate with the danger attending the business the party is engaged in, if he is employer; or commensurate with the amount of risk he has assumed, if he is employee. Negligence which causes injury is a wrong, and the remedy therefor is by an action in tort. The duty to exercise care, both for one's own safety and the safety of others, exists, independent of contractual relations, and I can see no sufficient reason for applying one rule of evidence to prove what is negligence in one case, and a different rule to prove it in another. Of course, contractual relation may have the effect to create duties which did not before exist, but once the new duties are determined, the rules respecting the kind and quantity of evidence necessary to prove whether a party has failed in the performance of his duty, or not, are the same. In other words, an infant under fourteen years of age, is no more capable of caring for his safety when he is unemployed than when he is employed.

According to the weight of authorities, and according to our own decisions, the question of negligence in an infant under fourteen years of age cannot be determined, as matter of law, by the court, but must be left to the jury to decide, under proper instructions by the court as to the principles of law to be applied in determining a fact. Negligence of an infant under fourteen depends largely upon his capacity, knowledge of danger, and the degree of caution which a child of his temperament will exercise, even in the presence of a known danger. These are such variable quantities in children between seven and fourteen years of age that the law provides no fixed standard by which to measure the negligence of all children between those ages. The same act which would constitute negligence in one child might not amount to negligence in another of the same age. By a unanimous opinion, we held, in *Ewing v. Lanark Fuel Co.* 65 W. Va. 726, 29 L.R.A. (N.S.) 487, 65 S. E. 200, that an infant under fourteen years of age is not presumed to have sufficient capacity to avoid danger, and that his capacity had to be proven in order to make out the defense of his contributory negligence. Now, if there is no presumption in favor of capacity, and the capacity is a question of fact essential to be proven in order to determine whether or not the child has been guilty of negligence, how can it be properly said that the court can determine the question of negligence as matter of law?

Petition for rehearing denied January 12, 1912.

NEW YORK COURT OF APPEALS.

HENRY JACOBS, Admr., etc., of Charles Jacobs, Deceased, Respt.,
v.

H. J. KOEHLER SPORTING GOODS COMPANY, Appt.

(208 N. Y. 416, 102 N. E. 519.)

Infants — care required to avoid accidents.

A fourteen-year-old boy is not required to use the same degree of care as an adult in avoiding vehicles passing in the street.

For other cases, see *Negligence*, II. b, 1, in Dig. 1-52 N. S.

(May 20, 1913.)

Note. — As to contributory negligence of children, see annotation following this case, post, 10, and for various concrete phases of the subject, VII. page 92, of that annotation and other annotations there referred to.
L.R.A.1917F.

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a Trial Term, Part II., for Kings County, in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Affirmed.

The facts are stated in the opinion.

Mr. Paul Bonyngue for appellant:

The deceased, being over fourteen years of age, was chargeable with the same degree of care and caution as an adult.

Tucker v. New York C. & H. R. R. Co. 124 N. Y. 308, 21 Am. St. Rep. 670, 26 N. E. 916; *McGrell v. Buffalo Office Bldg. Co.* 153 N. Y. 265, 47 N. E. 305, 2 Am. Neg. Rep. 598; *Reynolds v. New York C. & H. R. R. Co.* 58 N. Y. 248; *Murphy v. Perlstein*, 73 App. Div. 256, 76 N. Y. Supp. 657; *Thompson v. Buffalo R. Co.* 145 N. Y. 196, 39 N. E. 709, 12 Am. Neg. Cas. 322; *Zwack*

v. New York L. E. & W. R. Co. 160 N. Y. 362, 54 N. E. 785, 6 Am. Neg. Rep. 669; Costello v. Third Ave. R. Co. 161 N. Y. 317, 55 N. E. 897; Perez v. Sandrowitz, 180 N. Y. 397, 73 N. E. 228; Fox v. Le Comte, 2 App. Div. 61, 37 N. Y. Supp. 316; Koehler v. Syracuse Specialty Mfg. Co. 12 App. Div. 50, 42 N. Y. Supp. 182, 1105; McCarthy v. New York C. & H. R. R. Co. 37 App. Div. 187, 55 N. Y. Supp. 1013; Turell v. Erie R. Co. 49 App. Div. 94, 63 N. Y. Supp. 402; Noonan v. Obermeyer & L. Brewing Co. 50 App. Div. 377, 63 N. Y. Supp. 1066, 7 Am. Neg. Rep. 556; Leary v. Fitchburg R. Co. 53 App. Div. 52, 65 N. Y. Supp. 699; Hudson v. Erie R. Co. 61 App. Div. 134, 70 N. Y. Supp. 350; Hill v. Baltimore & N. Y. R. Co. 75 App. Div. 325, 78 N. Y. Supp. 134, 12 Am. Neg. Rep. 338; McDonald v. Metropolitan Street R. Co. 80 App. Div. 233, 80 N. Y. Supp. 577; Dempsey v. Brooklyn Heights R. Co. 98 App. Div. 182, 90 N. Y. Supp. 639; Gerber v. Boorstein, 112 App. Div. 808, 99 N. Y. Supp. 1091; Fortune v. Hall, 122 App. Div. 250, 106 N. Y. Supp. 787; Batchelor v. Degnon Realty & Terminal Improv. Co. 131 App. Div. 136, 115 N. Y. Supp. 93; Lee v. Sterling Silk Mfg. Co. 134 App. Div. 123, 118 N. Y. Supp. 846.

Plaintiff's intestate was guilty of contributory negligence and therefore the submission of the case to the jury was error.

Perez v. Sandrowitz, 180 N. Y. 397, 73 N. E. 228; Peterson v. Ballantine & Sons, 205 N. Y. 29, 39 L.R.A.(N.S.) 1147, 98 N. E. 202; Mastin v. New York, 201 N. Y. 81, 33 L.R.A.(N.S.) 784, 94 N. E. 611, 2 N. C. C. A. 652; Zucker v. Whitridge, 205 N. Y. 50, 41 L.R.A.(N.S.) 683, 98 N. E. 209, Ann. Cas. 1913D, 1250; Bambace v. Interurban Street R. Co. 188 N. Y. 288, 80 N. E. 913; Jordan v. American Sight Seeing Coach Co. 129 App. Div. 313, 113 N. Y. Supp. 786; Griffith v. Long Island R. Co. 147 App. Div. 693, 132 N. Y. Supp. 641; Gelderman v. Curtis, 120 App. Div. 400, 105 N. Y. Supp. 221; Manion v. Richmond Ice Co. 133 App. Div. 254, 117 N. Y. Supp. 353.

Mr. William H. Griffin, with Mr. Martin T. Manton, for respondent:

The requests to charge that the deceased was required to exercise the same degree of care and caution, and the same degree of diligence in avoiding danger, as would be expected and exacted of an adult, were properly refused.

Ardolino v. Reinhardt, 130 App. Div. 119, 114 N. Y. Supp. 508; Swift v. Staten Island Rapid Transit R. Co. 123 N. Y. 645, 25 N. E. 378; Murphy v. Perlstein, 73 App. Div. 256, 76 N. Y. Supp. 657; Zwack v. L.R.A.1917F.

New York L. E. & W. R. Co. 160 N. Y. 362, 54 N. E. 785, 6 Am. Neg. Rep. 669; Simkoff v. Lehigh Valley R. Co. 190 N. Y. 256, 83 N. E. 15; Costello v. Third Ave. R. Co. 161 N. Y. 317, 55 N. E. 897; Marius v. Motor Delivery Co. 146 App. Div. 608, 131 N. Y. Supp. 357; Lafferty v. Third Ave. R. Co. 85 App. Div. 592, 83 N. Y. Supp. 405, affirmed in 176 N. Y. 594, 68 N. E. 1118.

Courts properly apply a less strict standard of conduct on the part of a pedestrian injured by an automobile than if he received his hurt on a trolley track or steam railroad, and refuse to hold that the degree of care of such person must be commensurate with his peril, and increases according as injury from reckless driving becomes more imminent.

Baker v. Close, 204 N. Y. 92, 38 L.R.A.(N.S.) 487, 97 N. E. 501, 2 N. C. C. A. 289; Moebus v. Herrmann, 103 N. Y. 349, 2 Am. St. Rep. 440, 15 N. E. 415; Hickman v. Schimper, 125 App. Div. 216, 109 N. Y. Supp. 325; Doyle v. Foster, 128 App. Div. 279, 112 N. Y. Supp. 673; Quinlan v. Richmond Light & R. Co. 133 App. Div. 402, 117 N. Y. Supp. 641; Berler v. Kane, 139 App. Div. 76, 123 N. Y. Supp. 835; Hallett v. S. Liebmann's Sons Brewing Co. 129 App. Div. 617, 114 N. Y. Supp. 232; Brewster v. Barker, 129 App. Div. 724, 113 N. Y. Supp. 1026; McFarland v. Elmira Water, Light & R. R. Co. 136 App. Div. 194, 120 N. Y. Supp. 292; Swift v. Staten Island Rapid Transit R. Co. 123 N. Y. 645, 25 N. E. 378; Sullivan v. Union R. Co. 81 App. Div. 596, 81 N. Y. Supp. 449; Stone v. Dry Dock, E. B. & B. R. Co. 115 N. Y. 104, 21 N. E. 712; Gerber v. Boorstein, 113 App. Div. 808, 99 N. Y. Supp. 1091; Mastin v. New York, 148 App. Div. 925, 132 N. Y. Supp. 1138, affirmed in 208 N. Y. 553, 101 N. E. 1110; Bohringer v. Campbell, 154 App. Div. 879, 137 N. Y. Supp. 241.

Cullen, Ch. J., delivered the opinion of the court:

This action was brought by the father as administrator of a boy fourteen years of age, who was killed by the defendant's automobile, to recover damages for the death. It would be without profit to relate the circumstances of the accident. It is sufficient to say that both the negligence of the defendant's servant and the absence of contributory negligence on the part of the deceased were questions of fact. The case was, therefore, properly for the jury to determine.

But one question is presented by this appeal which we are required to notice. The learned trial judge charged: "The deceased

was probably *sui juris*, as they call it; but that does not mean that he must exercise the degree of care that an adult person must exercise, but he was charged with the duty of exercising the measure of care and caution that is common and usual with boys of that age." To this the defendant excepted, and requested the court to charge "that the burden of proof is upon the plaintiff to show that the deceased used the same degree of diligence in avoiding danger that would be exacted of an adult under the same circumstances." This was refused, and the defendant excepted.

The learned counsel for the defendant insists that the decision of this court in *Tucker v. New York C. & H. R. R. Co.* 124 N. Y. 308, 21 Am. St. Rep. 670, 26 N. E. 916, justified and required the court to charge as requested, and that the refusal to so charge is error. In other words, he contends that the law of this state is that a child of the age of deceased, in the absence of evidence to the contrary, must be deemed to be *sui juris*, and be held to the same degree of care and prudence that is required of an adult.

That the deceased was *sui juris* is clear, but that an infant whenever he becomes *sui juris* is required to exercise the same degree of caution as an adult is not the law of this state, nor was it so decided in the *Tucker Case*. We think the rules governing the contributory negligence of infants are very well settled by the decisions of this court, though these rules do not obtain in many other jurisdictions.

An infant may be of such tender years as to be incapable of personal negligence. At such age the infant is termed non *sui juris*; but if not responsible for its own negligence, the negligence of its parents or guardians in suffering it to incur danger may be imputed to it. This is what is called the doctrine of imputed negligence. *Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273; *Mangam v. Brooklyn R. Co.* 38 N. Y. 455, 98 Am. Dec. 66; *Kunz v. Troy*, 104 N. Y. 344, 58 Am. Rep. 508, 10 N. E. 442; *Birkett v. Knickerbocker Ice Co.* 110 N. Y. 504, 18 N. E. 108; *Weil v. Dry-Dock, E. B. & B. R. Co.* 119 N. Y. 147, 23 N. E. 487.

Later, children emerge from this condition, and are responsible for their failure to exercise reasonable care for their own protection. But they are not required to exercise the degree of care required of an adult, but only to exercise the degree expected from one of its years. *Sheridan v. Brooklyn City & N. R. Co.* 36 N. Y. 39, 42, 93 Am. Dec. 490, 9 Am. Neg. Cas. 619; *Thurber v. Harlem Bridge, M. & F. R. Co.* 60 N. Y. 326; *McGovern v. New York, C. L.R.A.1917F.*

& H. R. R. Co. 67 N. Y. 417; *Byrne v. New York C. & H. R. R. Co.* 83 N. Y. 620; *Dowling v. New York C. & H. R. R. Co.* 90 N. Y. 670; *Stone v. Dry-Dock, E. B. & B. R. Co.* 115 N. Y. 104, 21 N. E. 712; *McCarragher v. Rogers*, 120 N. Y. 526, 24 N. E. 812; *Swift v. Staten Island Rapid Transit R. Co.* 123 N. Y. 645, 25 N. E. 378; *Zwack v. New York, L. E. & W. R. Co.* 160 N. Y. 362, 54 N. E. 785, 6 Am. Neg. Rep. 669; *Costello v. Third Ave. R. Co.* 161 N. Y. 317, 55 N. E. 897; *Simkoff v. Lehigh Valley R. Co.* 190 N. Y. 256, 83 N. E. 15. In the *Byrne Case*, 83 N. Y. 621, an infant ten years of age was the plaintiff. Judge Earl there said: "An infant to avoid the imputation of negligence is bound only to exercise that degree of care which can reasonably be expected of one of its age." p. 621. And the language of this learned judge has been cited with approval in the later cases.

The question when an infant ceases to be non *sui juris* and becomes responsible for its negligence has been the subject of some difference of views in this court. In the *Thurber Case* it was held that the plaintiff, an infant of eight or nine years of age, was not non *sui juris*. In *Moebus v. Herrmann*, 108 N. Y. 349, 2 Am. St. Rep. 440, 15 N. E. 415, where the injured child was less than seven years old, the court treated the infant as if it was *sui juris*. There is a strong intimation that the trial court erred in that respect, but the error was harmless, as the plaintiff recovered. It was with this doubtful question of when an infant becomes *sui juris* that the *Tucker Case* was dealing, and it was there held, as already stated, that an infant over twelve years of age was presumed to be *sui juris*. True, it was also held in that case that, being *sui juris*, the child was guilty of contributory negligence which barred its recovery; but that ruling did not import, nor does the opinion declare, that the measure of care required of an infant is the same as that of an adult. Of course, when an infant becomes responsible for its own negligence, the question whether its conduct constitutes negligence or not, like the question of negligence in regard to an adult, may be a question of law, or may be a question of fact. But, even when determined as a question of law, the condition of the party injured is to be considered. All that was decided in the *Tucker Case* was that the conduct of the plaintiff was so careless as to constitute negligence even in the case of an infant twelve years of age. The case of *Thompson v. Buffalo R. Co.* 145 N. Y. 196, 199, 39 N. E. 709, 710, 12 Am. Neg. Cas. 322, is of a similar character. There the administrator of an infant aged fourteen was nonsuited for

the contributory negligence of the deceased, but the rule applicable to the case is very clearly stated by Judge Haight: "Although a minor, no claim is made that Alcy was not *sui juris*. Whilst she may not have possessed the judgment, caution, and prudence of persons of more mature years, she was expected and required to exercise the measure of care and caution that is common and usual in one of her age." The action was defeated because the deceased did not exercise the care to be expected of one of her age, not that to be expected from an adult. There is but one authority in this court in support of the contrary rule, that of *Honegsberger v. 2d Ave. R. Co.* 1 Keyes, 570, the doctrine of which was expressly repudiated in *Thurber v. Harlem Bridge, M. & F. R. Co.* *supra*. The charge of the trial court was, therefore, correct.

There doubtless comes a time in the life of a child when, though still in law an infant, it reaches such maturity that no distinction on account of age can be drawn in

its favor. It is not necessary to determine what that time is. It is sufficient to say that, if a question of law and not of fact, the age is greater than that of deceased. The statutes of the state recognize this lack of judgment and responsibility on the part of immature persons. Thus, it is forbidden to employ a child under the age of fourteen years in a factory under any circumstances, or a child between fourteen and sixteen without the employment certificate provided by the statute (*Labor Law* [Consol. Laws, chap. 31], § 70), while a criminal act which would be a felony if committed by an adult is only a misdemeanor when committed by a child under the age of sixteen (*Penal Law* [Consol. Laws, chap. 40], § 2186).

The judgment should be affirmed, with costs.

Willard Bartlett, Hiscock, Chase, Collins, and Hogan, JJ., concur; Werner, J., absent.

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I. Introduction and scope.

The present annotation is concerned with personal contributory negligence of infants as distinguished from imputed

negligence of parents, guardians, or others.¹ It does not include the question of contributory negligence of minor servants so far as it depends upon considerations distinctive to the relation of master and servant, the question in that aspect being closely associated with that of assumption of risk, and of the duty of the master to instruct the servant in the duties of the employment, various phases of which are covered in other notes.² It is the intention, however, to include master and servant cases so far as they discuss the principles to be applied generally in determining the question of contributory negligence on the part of a child.

The doctrine of last clear chance is beyond the scope of the note,³ as is also the question of the necessity of pleading contributory negligence, or freedom therefrom,⁴ and the burden of proof as to contributory negligence.⁵

Cases in which the decision turns on

the ground of contributory negligence should be clearly distinguished from those in which it turns on the ground of lack of negligence on the part of the defendant. In many cases recovery has been denied, notwithstanding the injured person, in view of his age and lack of discretion, was not chargeable with contributory negligence, because the injury resulted from an unavoidable accident, and actionable negligence was not shown on the part of the defendant;⁶ and it should be observed in this connection that a child, although non sui juris, may be precluded from recovery for an injury on the ground that its act was not such as the defendant might reasonably anticipate from one of its years; in other words, the question of negligence on the part of the defendant may be affected by what an ordinary child, although non sui juris, might reasonably be expected to do.⁷

It has been held also that even a child

¹As to imputed negligence of parent to child, see notes cited in Index to L.R.A. Notes, under the title, "Negligence."

²See notes cited in Index to L.R.A. Notes, under the title, "Master and Servant."

³See Index to L.R.A. Notes, under the title, "Negligence," under subtitle, "Last clear chance; humanitarian doctrine."

⁴As to necessity of alleging freedom from contributory negligence, see note in 33 L.R.A.(N.S.) 1152, 1201.

⁵On this question, see note to Oklahoma City v. Reed, 33 L.R.A.(N.S.) 1085.

⁶In holding that there could be no recovery for injury by a street car to a boy nearly seven years old because negligence on the part of the defendant was not shown, the court in Culbertson v. Crescent City R. Co. (1896) 48 La. Ann. 1376, 20 So. 902, said: "Courts are averse to finding children guilty of contributory negligence, and are readily and properly inclined to disregard the thoughtlessness natural to boyhood, but accidents may happen for which the unconscious agent may not be responsible. The fact that a child may not be capable of contributory negligence does not always render a defendant liable upon the mere proof of the injury. The test is negligence vel non."

⁷This principal is illustrated by such cases as Adams v. Nassau Electric R. Co. (1899) 41 App. Div. 334, 58 N. Y. Supp. 543, where a boy nearly five years old was injured, while attempting to cross the street, by running into a street car which was approaching, only 75 feet away when he left the curb 18 feet from the rail, it appearing that at no time was the child on the track, in front of the car, but that he ran into the side of the car. The court said: "What is meant by the requirement that an infant non sui juris must exercise some care has reference to the obligation which the party L.R.A.1917F.

inflicting an injury upon such infant is under toward him, and is to be considered for such purpose. Children early learn that contact with some things will produce pain and injury, and their education with respect thereto proceeds with considerable rapidity. While they lack judgment to act with care and circumspection in respect of such matters, yet they are quite sensible of the necessity of avoiding contact with many objects which experience has taught will inflict harm. A child will not usually place his hand in the fire, as he early learns that if he does he will be burned; and he will not voluntarily run into a moving car, being sensible that pain will follow. A child of sufficient maturity to play about the streets, and of the age of this child, may be assumed to know that injury would result to him from such an act. These well-known facts people engaged in traffic upon the streets may reasonably and fairly take into consideration in operating their vehicles thereon."

And in Hestonville Pass. R. Co. v. Connell (1879) 88 Pa. 520, 32 Am. Rep. 472, where a boy six years and nine months old was injured while attempting to board the front platform of a moving street car, the court said: "Though an infant may be responsible for its trespass, yet ordinarily negligence cannot be imputed to one so young as the plaintiff, since but little can be predicated of its intelligence or discretion; nevertheless, it may be assumed that a child old enough to be trusted to run at large has wit enough to avoid ordinary danger, and so persons who have business on the streets may reasonably conclude that such an one will not voluntarily thrust itself under the feet of his horses or under the wheels of his carriage; a fortiori, may they conclude that they are not to provide against possible damages that may result to the infant from

too young to be guilty of contributory negligence may be precluded from recovery for an injury on the ground that it was a trespasser,⁸ or wrongdoer,⁹ and that the defendant was not liable because as to the child he was not guilty of a breach of legal duty.

The general principles underlying the distinctive question as to the contributory negligence of a child are for the most part well established. But in the

its own wilful trespass? All this, however, bears only on the inquiry concerning the defendant's negligence, concurrent negligence in one of the plaintiff's age being out of the question."

So, in *Morse v. Consolidated R. Co.* (1908) 81 Conn. 395, 71 Atl. 553, an action for injury to a four-year-old girl by a street car, the court said that if it assumed, as claimed by the plaintiff, that a child of that age could not be charged with contributory negligence, this did not excuse the plaintiff from showing what her conduct and situation were at and immediately before the time of the accident.

⁸ As to the duty of a property owner to a trespassing child, see note to *Walsh v. Pittsburgh R. Co.* 32 L.R.A.(N.S.) 559. It is there said: "There has been an inclination on the part of some courts to hold that a child of tender years cannot be a trespasser; but the overwhelming weight of authority is the other way."

The doctrine of attractive nuisance, or the "turntable doctrine," is discussed generally in the note to *Cahill v. Stone*, 19 L.R.A.(N.S.) 1143; and various specific aspects of that question are treated in other notes referred to in the Indexes to L.R.A. Notes under the title, "Negligence."

As considering the question of trespass rather than contributory negligence of children, see the following cases, among others; *Cardwell v. Louisville & N. R. Co.* (1914) 185 Ala. 628, 64 So. 564 (nine-year-old boy injured by train); *Nashville, C. & St. L. R. Co. v. Harris* (1904) 142 Ala. 249, 110 Am. St. Rep. 29, 37 So. 794 (child nineteen months old may be precluded from recovery for an injury by a train on the ground that it was a trespasser, though incapable of contributory negligence); *Thomas v. Chicago, M. & St. P. R. Co.* (1895) 93 Iowa, 248, 61 N. W. 967 (infant too young to be chargeable with contributory negligence may be precluded from recovering for injury on the ground that it is a trespasser to whom the defendant did not owe a duty); *Shawnee v. Cheek* (1913) 41 Okla. 227, 51 L.R.A.(N.S.) 672, 137 Pac. 724, Ann. Cas. 1915C, 290 (where a nine-year-old child was drowned in abandoned pump pit); *Chicago, R. I. & P. R. Co. v. Wright* (1917) — Okla. —, 161 Pac. 1070 (where a nine-year-old boy was injured by hot water and steam discharged from a blow pipe extending from a round house); *McMullen v. Pennsylvania R. Co.* (1890) 132 Pa. 107, 19 Am. St. Rep. 591, 19 Atl. 27 (ten-year-old boy trespassing L.R.A.1917F.

multitude of cases on the subject many decisions are found tending to mislead, because of inaccurate expressions of the law, even though a correct result may have been reached in the particular case. And in the application of the principles conclusions which are irreconcilable have frequently been reached by the different courts.

It is the purpose to consider first certain general questions and then to indi-

on railroad track); *Rodgers v. Lees* (1891) 140 Pa. 475, 12 L.R.A. 216, 23 Am. St. Rep. 250, 21 Atl. 399 (six-year-old boy injured while attempting to ride on a ball attached to a chain used as a hoisting apparatus for a mill); *Mitchell v. Philadelphia, W. & B. R. Co.* (1890) 132 Pa. 226, 19 Atl. 28 (nine-year-old boy struck by train while walking on track).

"It is manifest, that while a child may not be chargeable with contributory negligence, he may, nevertheless, be in a situation where he is a trespasser, and not entitled to a greater degree of vigilance to discover his presence than anyone else would be." *Palmer v. Oregon Short Line R. Co.* (1908) 34 Utah, 466, 98 Pac. 689, 16 Ann. Cas. 229 (where a two-year-old child was killed by a train).

⁹ The youth of a wrongdoer and trespasser, although he acted as reasonably as might be expected of him, if his conduct contributes to an injury which he receives, will not prevent his contributory negligence from constituting a defense to a person whose negligence also contributed to the injury. *Gay v. Essex Electric Street R. Co.* (1893) 159 Mass. 238, 21 L.R.A. 448, 38 Am. St. Rep. 415, 34 N. E. 186. To a similar effect is *McGinness v. Butler* (1893) 159 Mass. 233, 34 N. E. 259.

In *Gay v. Essex Electric Street R. Co.* (Mass.) supra, where, in an action for injury to a child while playing on a street car left standing in a public street, the court stated that if the child could be regarded as a trespasser and a joint actor with the other children, the question whether he was in the exercise of due care became immaterial; that his wrongdoing as a trespasser and joint actor would in such event be a cause contributing to the injury, though in doing what he did he might be doing no more than would naturally be expected from a child of his age.

In *Hughes v. Macfie* (1863) 2 Hurlst. & C. 744, 159 Eng. Reprint, 308, 33 L. J. Exch. N. S. 177, 10 Jur. N. S. 682, 9 L. T. N. S. 513, 12 Week. Rep. 315, where the cover of a cellar beneath a street was placed on edge against the adjoining wall and a five-year-old child by playing on the cover and jumping from it caused it to fall upon him, the ground of the decision that there could be no recovery for the injury so sustained is apparently that the child by voluntarily meddling, for no lawful purpose, had brought the injury upon himself.

cate the applications of the principles, in so far as they are not covered by other notes. Some of the questions arising are, for example: Is there a conclusive presumption that children of a certain age are incapable of contributory negligence? If so, to what age does the presumption continue? Is there a prima facie presumption of incapacity after the conclusive presumption ceases, and if so, to what age does it continue? What is the standard by which to measure the care which a child is required to exercise, assuming that it has reached an age at which it is bound to exercise some degree of care? When is the child's conduct to be measured by the same standard as that applied to an adult? May a child be held guilty of contributory negligence as matter of law, and if so, under what circumstances?

II. Standard of care required of children.

a. In general.

Although there are several of the ear-

lier decisions to the contrary,¹⁰ it is well settled that the rigid rule applied to the conduct of an adult in determining whether he exercised due care to avoid danger is not to be applied to the conduct of a child, but that the standard by which the conduct of a child should be measured, in determining whether it exercised due care, is the care which is ordinarily exercised by children of the same age, capacity, discretion, knowledge, and experience, under the same or similar circumstances.¹¹ This rule is so well settled and its applications are so numerous that it would be almost useless to attempt to cite all the authorities which by implication at least have recognized and adopted it. The cases cited at this point are, for the most part, those which have expressly recognized and adopted the rule. It has been so recognized and adopted in many cases¹² in actions for injuries by engines or cars sustained while crossing railroad tracks;¹³ while riding in vehicles driven

¹⁰ *Honegsberger v. Second Ave. R. Co.* (1864) 1 Keyes (N. Y.) 570, 2 Abb. App. Dec. 378, 33 How. Pr. 193; *Burke v. Broadway & S. Ave. R. Co.* (1867) 49 Barb. (N. Y.) 529, 34 How. Pr. 239; see also *Pittsburg, Ft. W. & C. R. Co. v. Vining* (1867) 27 Ind. 513, 92 Am. Dec. 269.

¹¹ It is not the purpose at this point to consider particularly the various elements which should be taken into consideration, this question being discussed in II. c, *infra*. See that subdivision, also other subdivisions under II. for amplification of the rule, and for its limitations.

¹² The cases cited in which the child was very young do not necessarily hold that a child of the age indicated has or may have such capacity as to be chargeable with negligence; but hold that, assuming that it may be so chargeable, the standard of care required is only that above stated. Following the citation of the case, the age of the child is indicated in parentheses, and also the particular elements which the court stated should be taken into consideration.

¹³ *Baltimore & P. R. Co. v. Cumberland* (1899) 176 U. S. 232, 44 L. ed. 447, 20 Sup. Ct. Rep. 380, affirming (1898) 12 App. D. C. 598 (twelve); *McGuire v. Chicago, M. & St. P. R. Co.* (1889) 37 Fed. 54 (ten—age and capacity); *Felton v. Aubrey* (1896) 20 O. C. A. 436, 43 U. S. App. 278, 74 Fed. 350, 7 Am. Neg. Cas. 405 (nine—age, experience, and intelligence); *Atchison, T. & S. F. R. Co. v. Hardy* (1899) 37 C. C. A. 359, 94 Fed. 294 (fourteen); *Illinois C. R. Co. v. Jones* (1899) 37 C. C. A. 106, 95 Fed. 370 (ten); *Erie R. Co. v. Weinstein* (1909) 92 C. C. A. 189, 166 Fed. 271 (fourteen); *Northern P. R. Co. v. Heaton* (1911) 111 C. C. A. 548, 191 Fed. 24 (twelve—age, experience, capacity); L.R.A.1917F.

Birmingham & A. R. Co. v. Mattison (1909) 166 Ala. 602, 52 So. 49 (eleven); *St. Louis, I. M. & S. R. Co. v. Sparks* (1906) 81 Ark. 187, 99 S. W. 73 (nine); *Garrison v. St. Louis, I. M. & S. R. Co.* (1909) 92 Ark. 437, 123 S. W. 657 (sixteen—age, maturity, and intelligence); *Meeks v. Southern P. R. Co.* (1880) 56 Cal. 513, 38 Am. Rep. 67 (where six-year-old child in crossing track became dizzy, fell on track, and was run over by train); *Baltimore & P. R. Co. v. Webster* (1895) 6 App. D. C. 182 (eleven—age and capacity); *Conger v. Baltimore & O. R. Co.* (1908) 31 App. D. C. 139 (twelve); *Western & A. R. Co. v. Young* (1888) 81 Ga. 397, 12 Am. St. Rep. 320, 7 S. E. 912, later appeal in (1889) 83 Ga. 512, 10 S. E. 197 (nine—age and capacity); *Georgia Midland & G. R. Co. v. Evans* (1891) 87 Ga. 673, 13 S. E. 580 (under fourteen); *Atkinson v. Elkin* (1913) 14 Ga. App. 83, 80 S. E. 210, later appeal (1915) 16 Ga. App. 770, 86 S. E. 413 (twelve); *Chicago & A. R. Co. v. Murray* (1874) 71 Ill. 601 (where seven-year-old girl was struck by a backing engine at a street crossing); *Chicago & A. R. Co. v. Becker* (1875) 76 Ill. 25, later appeal in (1877) 84 Ill. 483 (six); *Illinois C. R. Co. v. Slater* (1889) 129 Ill. 91, 6 L.R.A. 418, 16 Am. St. Rep. 242, 21 N. E. 575 (nine—age, capacity, and experience); *Baltimore & O. S. W. R. Co. v. Then* (1896) 159 Ill. 535, 42 N. E. 971, affirming (1895) 59 Ill. App. 561 (twelve—age, capacity, and discretion); *Chicago, R. I. & P. R. Co. v. Ohlsson* (1897) 70 Ill. App. 487 (six); *Chicago & E. I. R. Co. v. Body* (1899) 85 Ill. App. 133 (six); *Illinois C. R. Co. v. Bandy* (1900) 88 Ill. App. 629 (seven—age and discretion); *Cunningham v. Illinois C. R. Co.* (1911) 165 Ill. App. 382 (eight—age, intelligence, capacity,

- and experience); Indianapolis, D. & W. R. Co. v. Wilson (1893) 134 Ind. 95, 33 N. E. 793 (where a year-old boy attempted to cross track after engine had passed and was struck by detached cars following the engine—age and discretion); Cleveland, C. C. & St. L. R. Co. v. Miles (1904) 162 Ind. 646, 70 N. E. 985 (eleven—maturity, experience, and capacity); Shirk v. Wabash R. Co. (1895) 14 Ind. App. 126, 42 N. E. 656 (twelve); Baltimore & O. S. W. R. Co. v. Hickman (1907) 40 Ind. App. 315, 81 N. E. 1086 (ten); Plummer v. Indianapolis Union R. Co. (1914) 56 Ind. App. 615, 104 N. E. 601 (ten—maturity, experience, and capacity); Allen v. Ames College R. Co. (1898) 106 Iowa, 602, 76 N. W. 848 (six); Chicago, R. I. & P. R. Co. v. Kennedy (1896) 2 Kan. App. 693, 43 Pac. 802 (ten); Paducah & M. R. Co. v. Hoehl (1876) 75 Ky. 41 (twelve—crossing behind train, injury by engine following train); Kentucky C. R. Co. v. Smith (1892) 93 Ky. 449, 18 L.R.A. 63, 20 S. W. 392, 11 Am. Neg. Cas. 604 (thirteen—flying switch); Louisville & N. R. Co. v. Kimble (1910) 140 Ky. 759, 131 S. W. 790 (nine); Louisville & N. R. Co. v. Allnutt (1912) 150 Ky. 831, 151 S. W. 14 (eight—age, experience, and discretion); Adkisson v. Louisville, H. & St. L. R. Co. (1908) 33 Ky. L. Rep. 204, 110 S. W. 284 (eleven—age and experience); Mitchell v. Illinois C. R. Co. (1903) 110 La. 630, 98 Am. St. Rep. 472, 34 So. 714 (twelve—flying switch); Baltimore & O. R. Co. v. Breinig (1866) 25 Md. 378, 90 Am. Dec. 49 (six); Hassenyer v. Michigan C. R. Co. (1882) 48 Mich. 205, 42 Am. Rep. 470, 12 N. W. 155 (thirteen); Baker v. Flint & P. M. R. Co. (1888) 68 Mich. 90, 35 N. W. 836 (seven); Grenell v. Michigan C. R. Co. (1900) 124 Mich. 141, 82 N. W. 843 (thirteen—age, intelligence, and experience); Trudell v. Grand Trunk R. Co. (1901) 126 Mich. 73, 53 L.R.A. 271, 85 N. W. 250 (seven—standing on or attempting to cross track; age and experience); Knickerbocker v. Detroit, G. H. & M. R. Co. (1911) 167 Mich. 596, 133 N. W. 504 (ten—age, development, and intelligence); Olsen v. Minneapolis & St. L. R. Co. (1907) 102 Minn. 395, 113 N. W. 1010 (eleven—car “kicked” over crossing); Louisville, N. O. & T. R. Co. v. Hirsch (1891) 69 Miss. 126, 13 So. 244 fourteen; Mason v. Northern P. R. Co. (1912) 45 Mont. 474, 124 Pac. 271 (sixteen); Eswin v. St. Louis, I. M. & S. R. Co. (1888) 96 Mo. 290, 9 S. W. 577 (eleven-year-old boy killed by backing train while coasting across track); Spillane v. Missouri P. R. Co. (1896) 135 Mo. 414, 58 Am. St. Rep. 580, 37 S. W. 198 (where nine-year-old boy was injured by engine striking rope with which he was dragging a piece of ice across the track—age, intelligence, and experience); Payne v. Chicago & A. R. Co. (1895) 129 Mo. 405, 31 S. W. 885, later appeal in (1896) 136 Mo. 562, 38 S. W. 308 (eleven—age, understanding, and intelligence); Anderson v. Union Terminal R. Co. (1901) 161 Mo. 411, 61 S. W. 874 (nine—age and capacity); Holmes v. Missouri P. R. Co. (1905) 190 Mo. 98, 88 S. W. 623, later L.R.A.1917F. appeal (1907) 207 Mo. 149, 105 S. W. 624 (eight); Walker v. Wabash R. Co. (1906) 193 Mo. 453, 92 S. W. 83 (fourteen); Deschner v. St. Louis & M. River R. Co. (1906) 200 Mo. 310, 98 S. W. 737 (eleven); McGee v. Wabash R. Co. (1908) 214 Mo. 530, 114 S. W. 33 (thirteen); Duffy v. Missouri P. R. Co. (1885) 19 Mo. App. 380 (nine—age, knowledge, discretion); Gass v. Missouri P. R. Co. (1894) 57 Mo. App. 574 (thirteen); Anderson v. Union Terminal R. Co. (1899) 81 Mo. App. 116 (where nine-year-old boy stumbled on cinders beside track and fell under train—age and capacity); Gruebel v. Wabash R. Co. (1904) 108 Mo. App. 548, 84 S. W. 170 (eight); McNamara v. Chicago, R. I. & P. R. Co. (1907) 126 Mo. App. 152, 103 S. W. 1093 (fifteen); McNulty v. St. Louis & S. F. R. Co. (1912) 166 Mo. App. 439, 148 S. W. 973 (eight—age and capacity); Geist v. Missouri P. R. Co. (1901) 62 Neb. 309, 87 N. W. 43, 10 Am. Neg. Rep. 414 (six); Crabtree v. Missouri P. R. Co. (1910) 86 Neb. 33, 136 Am. St. Rep. 663, 124 N. W. 932 (nine); Anderson v. Central R. Co. (1902) 68 N. J. L. 269, 53 Atl. 391 (nine); David v. West Jersey & S. R. Co. (1913) 84 N. J. L. 685, 87 Atl. 440 (seven—age, judgment, and experience); Haycroft v. Lake Shore & M. S. R. Co. (1874) 2 Hun (N. Y.) 489, affirmed in (1876) 64 N. Y. 636; Reynolds v. New York C. & H. R. R. Co. (1874) 2 Thomp. & C. (N. Y.) 644, reversed in (1874) 58 N. Y. 248, on the ground of insufficiency of evidence to warrant finding of absence of contributory negligence (twelve); Casey v. New York C. & H. R. R. Co. (1879) 8 Daly (N. Y.) 220, affirmed in (1879) 78 N. Y. 518, 12 Am. Neg. Cas. 309 (fourteen); Costello v. Syracuse, B. & N. Y. R. Co. (1873) 65 Barb. (N. Y.) 92 (seven); Powell v. New York C. & H. R. R. Co. (1880) 22 Hun (N. Y.) 56 (nine); Ryan v. New York C. & H. R. R. Co. (1885) 37 Hun (N. Y.) 186 (eight—injury by detached car following train); Finklestein v. New York C. & H. R. R. Co. (1886) 41 Hun (N. Y.) 34 (nine-year-old girl killed by backing engine as she attempted to cross behind train moving in opposite direction); Collins v. New York C. & H. R. R. Co. (1893) 71 Hun, 504, 24 N. Y. Supp. 1090 (where nine-year-old boy attempted to cross in front of rapidly approaching observed train); Wiley v. Long Island R. Co. (1894) 76 Hun, 29, 27 N. Y. Supp. 722, affirmed without opinion in (1895) 144 N. Y. 717, 39 N. E. 859 (age not stated); Leary v. Fitchburg R. Co. (1900) 53 App. Div. 52, 65 N. Y. Supp. 699 (twelve); Cox v. New York C. & H. R. R. Co. (1902) 69 App. Div. 451, 74 N. Y. Supp. 1011 (fourteen); Wells v. New York C. & H. R. R. Co. (1902) 78 App. Div. 1, 78 N. Y. Supp. 991, 13 Am. Neg. Rep. 189 (eight—car “kicked” across highway); Batchelor v. Degnon Realty & Terminal Improv. Co. (1909) 131 App. Div. 136, 115 N. Y. Supp. 93 (five—crossing track in rear of train which was suddenly backed; age and intelligence); O’Mara v. Hudson River R. Co. (1868) 38 N. Y. 445, 98 Am. Dec. 61 (eleven); McGovern v. New York C. & H. R. R. Co.

by others at railroad crossings;¹⁴ while walking along,¹⁵ or playing on, the track;¹⁶

(1876) 67 N. Y. 417 (eight); *Byrne v. New York C. & H. R. R. Co.* (1881) 83 N. Y. 620 (ten); *Dowling v. New York C. & H. R. R. Co.* (1882) 90 N. Y. 670 (nine); *Wendell v. New York C. & H. R. R. Co.* (1883) 91 N. Y. 420 (seven); *Barry v. New York C. & H. R. R. Co.* (1883) 92 N. Y. 289, 44 Am. Rep. 377 (ten); *Zwack v. New York, L. E. & W. R. Co.* (1899) 160 N. Y. 362, 54 N. E. 785, 6 Am. Neg. Rep. 669 (ten); *Serano v. New York C. & H. R. R. Co.* (1907) 188 N. Y. 156, 80 N. E. 1025, 117 Am. St. Rep. 833, reversing (1906) 114 App. Div. 684, 99 N. Y. Supp. 1103 (nearly six—age and intelligence); *Chicago, R. I. & P. R. Co. v. Baroni* (1912) 32 Okla. 540, 122 Pac. 926 (nine—maturity and capacity); *St. Louis & S. F. R. Co. v. Hodge* (1916) — Okla. —, 157 Pac. 60 (eleven—crossing track near car standing in railroad yard; age, capacity, and understanding); *Schleiger v. Northern Terminal Co.* (1903) 43 Or. 4, 72 Pac. 324, 14 Am. Neg. Rep. 193 (eleven); *Russell v. Oregon R. & Nav. Co.* (1909) 54 Or. 128, 102 Pac. 619 (thirteen); *Philadelphia & R. R. Co. v. Spearen* (1864) 47 Pa. 300, 86 Am. Dec. 544 (five); *Pennsylvania R. Co. v. Lewis* (1875 79 Pa. 33 (eight); *Bracken v. Pennsylvania R. Co.* (1906) 32 Pa. Super. Ct. 22 (twelve); *Galveston, H. & H. R. Co. v. Moore* (1883) 59 Tex. 64, 46 Am. Rep. 265 (six); *Houston & T. C. R. Co. v. Boozier* (1888) 70 Tex. 530, 8 Am. St. Rep. 615, 8 S. W. 119 (twelve); *Texas & P. R. Co. v. Hall* (1892) 83 Tex. 675, 19 S. W. 121 (nearly four); *Texas & P. R. Co. v. Ball* (1903) — Tex. Civ. App. —, 73 S. W. 420, reversed on other grounds in (1903) 96 Tex. 622, 75 S. W. 4 (eleven); *Cromeenes v. San Pedro, L. A. & S. L. R. Co.* (1910) 37 Utah, 475, 109 Pac. 10, Ann. Cas. 1912C, 307 (twelve—age, intelligence, and experience); *Thomas v. Oregon Short Line R. Co.* (1916) — Utah, —, 164 Pac. 777 (eight); *Southern R. Co. v. Daves* (1908) 108 Va. 378, 61 S. E. 748 (eight—backing engine); *Virginia-Carolina R. Co. v. Clawson* (1910) 111 Va. 313, 68 S. E. 1003 (twelve); *Norfolk & W. R. Co. v. Overton* (1911) 111 Va. 716, 69 S. E. 1060 (thirteen); *Steele v. Northern P. R. Co.* (1899) 21 Wash. 287, 57 Pac. 820 (fourteen—flying switch); *Williams v. Northern P. R. Co.* (1911) 63 Wash. 57, 114 Pac. 888, Ann. Cas. 1912D, 340 (fourteen—flying switch); *Schoonover v. Baltimore O. & R. Co.* ante, 1; *Ewen v. Chicago & N. W. R. Co.* (1875) 38 Wis. 613 (nine); *Wade v. Chicago & N. W. R. Co.* (1911) 146 Wis. 99, 130 N. W. 890 (fourteen); *Tabb v. Grand Trunk R. Co.* (1904) 8 Ont. L. Rep. 203 (nine); *Burtch v. Canadian P. R. Co.* (1906) 13 Ont. L. Rep. 632 (ten—coasting across railroad track).

¹⁴ *Bennett v. New York C. & H. R. R. Co.* (1891) 40 N. Y. S. R. 948, 16 N. Y. Supp. 765, affirmed without opinion in (1892) 133 N. Y. 563, 30 N. E. 1149 (thirteen—sleigh driven by adult); *Jones v. Utica & B. R. R. Co.* (1885) 36 Hun (N. Y.) 115 (ten—

sleigh); *Wright v. Detroit, G. H. & M. R. Co.* (1889) 77 Mich. 123, 43 N. W. 765 (fourteen—sleigh driven by another boy of about the same age); *Bracken v. Pennsylvania R. Co.* (1906) 32 Pa. Super. Ct. 22 (twelve—wagon driven by adult); *Foley v. New York C. & H. R. R. Co.* (1909) 132 App. Div. 506, 117 N. Y. Supp. 956 (eight) reversed on other grounds in (1910) 197 N. Y. 430, 90 N. E. 1116, 18 Ann. Cas. 631; *Sherwood v. New York C. & H. R. R. Co.* (1907) 120 App. Div. 639, 105 N. Y. Supp. 547 (sixteen—automobile driven by older boy); *Noakes v. New York C. & H. R. R. Co.* (1907) 121 App. Div. 716, 106 N. Y. Supp. 522, affirmed without opinion in (1909) 195 N. Y. 543, 88 N. E. 1126 (sixteen-year-old girl in automobile driven by experienced chauffeur).

¹⁵ *Cleveland, C. C. & St. L. R. Co. v. Tartt* (1894) 12 C. C. A. 625, 24 U. S. App. 504 64 Fed. 830 (eight); *Wabash R. Co. v. Jones* (1894) 53 Ill. App. 125, reversed on other grounds in (1896) 163 Ill. 167, 45 N. E. 50 (nine—age, intelligence, discretion); *Cleveland, C. C. & St. L. R. Co. v. Adair* (1895) 12 Ind. App. 569, 39 N. E. 672 (seven); *Kansas P. R. Co. v. Whipple* (1888) 39 Kan. 531, 18 Pac. 530 (nine); *Coy v. Missouri P. R. Co.* (1906) 74 Kan. 853, 86 Pac. 468, 20 Am. Neg. Rep. 540 (twelve); *Monahan v. Chicago, M. & St. P. R. Co.* (1903) 88 Minn. 325, 92 N. W. 1115 (twelve—injury by "kicked" cars); *Erdner v. Chicago & N. W. R. Co.* (1911) 115 Minn. 392, 132 N. W. 339 (under sixteen); *Schmitt v. Missouri P. R. Co.* (1901) 160 Mo. 43, 60 S. W. 1043 (ten); *Riley v. Missouri P. R. Co.* (1896) 68 Mo. App. 652 (ten—age and capacity); *Omaha & R. Valley R. Co. v. Cook* (1894) 42 Neb. 577, 60 N. W. 899 (thirteen); *Edwards v. Chicago, M. & St. P. R. Co.* (1907) 21 S. D. 504, 110 N. W. 832 (under seven); *Texas & P. R. Co. v. Phillips* (1897) 91 Tex. 278, 42 S. W. 852 (fourteen—age, intelligence, and ability); *Texas & P. R. Co. v. Crump* (1908) — Tex. Civ. App. —, 110 S. W. 1013, reversed on other grounds but affirmed on this point in (1909) 102 Tex. 250, 115 S. W. 26 (ten); *Gulf, C. & S. F. R. Co. v. Coleman* (1908) 51 Tex. Civ. App. 415, 112 S. W. 690 (seven—"running" switch); *St. Louis, S. F. & T. R. Co. v. Bolen* (1910) 61 Tex. Civ. App. 339, 129 S. W. 860 (seven—age, intelligence); *Mexican C. R. Co. v. Rodriguez* (1911) — Tex. Civ. App. —, 133 S. W. 690 (five-year-old boy walking on track laid along street struck by backing train); *Roth v. Union Depot Co.* (1896) 13 Wash. 525, 31 L.R.A. 855, 43 Pac. 641; 44 Pac. 253 (nine—injury by kicked car); *Whalen v. Chicago & N. W. R. Co.* (1890) 75 Wis. 654, 44 N. W. 849 (thirteen).

¹⁶ *Smith v. Pittsburgh & W. R. Co.* (1898) 90 Fed. 783 (five); *Little Rock & Ft. S. R. Co. v. Barker* (1878) 33 Ark. 350, 34 Am. Rep. 44 (five); *Daley v. Norwich & W. R. Co.* (1858) 26 Conn. 591, 68 Am. Dec. 413 (under three); *Tully v. Philadelphia, W. & B. R. Co.* (1900) 2 Penn. (Del.) 537, 82 Am.

or playing about hand or push cars;¹⁷ or asleep on or near the track;¹⁸ while crossing a railroad bridge or trestle,¹⁹ or playing about a trestle;²⁰ while attempt-

ing to cross a train obstructing a crossing,²¹ or to pass through an opening between cars;²² while attempting to climb on or off moving cars or engines.²³ And

St. Rep. 425, 47 Atl. 1019, retrial in (1901) 3 Penn. (Del.) 455, 50 Atl. 95 (eight—age, maturity, and capacity; playing around freight cars); Illinois C. R. Co. v. Jernigan (1902) 101 Ill. App. 1, affirmed in (1902) 198 Ill. 297, 65 N. E. 88 (under seven-cars "kicked" in street); Kinnare v. Chicago & N. W. R. Co. (1904) 114 Ill. App. 230 (seven—age, intelligence, and experience); Tobin v. Missouri P. R. Co. (1891) — Mo. App. —, 18 S. W. 996 (six); Cleveland Terminal & Valley R. Co. v. Heiman (1898) 16 Ohio C. C. 487, 9 Ohio C. D. 222 (twelve); Johnson v. Chicago & N. W. R. Co. (1880) 49 Wis. 529, 5 N. W. 886, later appeal in (1882) 56 Wis. 274, 14 N. W. 181 (six).

¹⁷ Illinois C. R. Co. v. Wilson (1901) 23 Ky. L. Rep. 684, 63 S. W. 608 (nine—hand car); Cahill v. E. B. & A. L. Stone Co. (1914) 167 Cal. 126, 138 Pac. 712 (twelve—maturity and capacity; loaded push car).

¹⁸ Mann v. Missouri, K. & T. R. Co. (1907) 123 Mo. App. 486, 100 S. W. 566 (where twelve-year-old boy asleep on railroad platform injured by passing train); Chicago, B. & Q. R. Co. v. Grablin (1893) 38 Neb. 90, 56 N. W. 796, 57 N. W. 522 (where there was evidence that nine-year-old boy lay down on track and fell asleep, the question of discovered peril being principally considered); Manly v. Wilmington & W. R. Co. (1876) 74 N. C. 655 (ten-year-old girl killed by train while asleep on track); Gulf, C. & S. F. R. Co. v. Prazak (1916) — Tex. Civ. App. —, 181 S. W. 711, 12 N. C. C. A. 800 (boy, age not stated, asleep near track, killed by train).

¹⁹ McMillan v. Burlington & M. R. Co. (1877) 46 Iowa, 231 (nine); Cassida v. Oregon R. & Nav. Co. (1887) 14 Or. 551, 13 Pac. 438 (seven); Young v. Clark (1897) 16 Utah, 42, 50 Pac. 832, 3 Am. Neg. Rep. 315 (twelve); St. Louis & S. F. R. Co. v. Christian (1894) 8 Tex. Civ. App. 246, 27 S. W. 932 (eight); St. Louis Southwestern R. Co. v. Bolton (1904) 36 Tex. Civ. App. 87, 81 S. W. 123 (eleven); Adams v. Southern R. Co. (1898) 28 C. C. A. 494, 52 U. S. App. 433, 84 Fed. 596 (seven and eleven).

²⁰ Dwyer v. Missouri P. R. Co. (1882) 12 Mo. App. 597 (age not stated—fall of iron from railroad trestle).

²¹ Maglinchey v. Southern P. Co. (1896) 5 Cal. Unrep. 363, 44 Pac. 1021 (seventeen); Studer v. Southern P. Co. (1898) 121 Cal. 400, 66 Am. St. Rep. 39, 53 Pac. 942, 4 Am. Neg. Rep. 361 (twelve); Cleveland, C. C. & St. L. R. Co. v. Keely (1894) 138 Ind. 600, 37 N. E. 406, 11 Am. Neg. Cas. 497 (eleven); Trent v. Norfolk & W. R. Co. (1915) 167 Ky. 319, 180 S. W. 792 (eight); McMahon v. Northern C. R. Co. (1874) 39 Md. 438 (under six—age and intelligence; passing between or under cars); Henderson v. St. Paul & D. R. Co. (1893) 52 Minn. 479, 55 N. W. 53 (eleven); Burger v. Mis-

souri P. R. Co. (1892) 112 Mo. 238, 34 Am. St. Rep. 379, 20 S. W. 439 (nine—age and capacity); Thompson v. Missouri, K. & T. R. Co. (1902) 93 Mo. App. 548, 67 S. W. 693 (age not stated—age and capacity); Lake Erie & W. R. Co. v. Mackey (1895) 53 Ohio St. 370, 29 L.R.A. 757, 53 Am. St. Rep. 640, 41 N. E. 980 (nine—age and intelligence); Rauch v. Lloyd (1858) 31 Pa. 358, 72 Am. Dec. 747 (six or seven—crawling under cars); Pennsylvania R. Co. v. Kelley (1858) 31 Pa. 372 (nine—same age and intelligence); Todd v. Philadelphia & R. R. Co. (1902) 201 Pa. 558, 51 Atl. 332, 11 Am. Neg. Rep. 348 (ten); Chicago, R. I. & G. R. Co. v. Johnson (1908) — Tex. Civ. App. —, 111 S. W. 758 (seventeen); Gesas v. Oregon Short Line R. Co. (1907) 33 Utah, 156, 13 L.R.A.(N.S.) 1074, 93 Pac. 274 (eight—age, capacity, and experience); Carmer v. Chicago, St. P. M. & O. R. Co. (1897) 95 Wis. 513, 70 N. W. 560, 2 Am. Neg. Rep. 94 (eight).

²² Weldon v. Philadelphia, W. & B. R. Co. (1899) 2 Penn. (Del.) 1, 43 Atl. 156 (ten—age, maturity, and capacity); Lehman v. Eureka Iron & Steel Works (1897) 114 Mich. 260, 72 N. W. 183 (nine); Schmitz v. St. Louis, I. M. & S. R. Co. (1893) 119 Mo. 256, 23 L.R.A. 250, 24 S. W. 472, see also earlier appeal (1891) 46 Mo. App. 380 (nine—age and experience).

²³ Miles v. Receivers (1883) 4 Hughes, 172, Fed. Cas. No. 9,544 (recognizing rule where eight-year-old boy jumped on a moving engine); Kline v. Central P. R. Co. (1869) 37 Cal. 400, 99 Am. Dec. 282, 8 Am. Neg. Cas. 58 (where sixteen-year-old boy jumped off moving car on command or threat of conductor); Benton v. Chicago, R. I. & P. R. Co. (1881) 55 Iowa, 496, 8 N. W. 330, 3 Am. Neg. Cas. 349 (where eleven-year-old boy, on order of conductor, attempted to leave moving freight car by climbing through window); Texas & P. R. Co. v. Mother (1893) 5 Tex. Civ. App. 87, 24 S. W. 79 (seventeen—same); Louisville & N. R. Co. v. Webb (1896) 99 Ky. 332, 35 S. W. 1117 (where eleven-year-old boy caught a ride on a freight car and was injured on jumping off—age and intelligence); Vickers v. Atlanta & W. P. R. Co. (1879) 64 Ga. 306 (ten—climbing on moving engine); Moeller v. United R. Co. (1912) 242 Mo. 721, 147 S. W. 1009 (twelve—passenger alighting from slowly moving car carried by momentum beyond platform); Murray v. Richmond & D. R. Co. (1885) 93 N. C. 92 (eight—jumping from moving engine); Greer v. Damascus Lumber Co. (1912) 161 N. C. 144, 76 S. E. 725 (where ten-year-old girl was injured by jumping or falling from tailboard of engine on which she was riding—age and intelligence); Allen v. Texas & P. R. Co. (1894) — Tex. Civ. App. —, 27 S. W. 943 (twelve-year-old girl alight-

the rule has been approved in other cases where children were injured on or about

railroad tracks, in some of which the circumstances do not clearly appear.²⁴

ing from moving train at station); *Hemmingway v. Chicago, M. & St. P. R. Co.* (1888) 72 Wis. 42, 7 Am. St. Rep. 823, 37 N. W. 804, 7 Am. Neg. Cas. 240 (boy nearly eleven years old jumped off slowly moving train as it passed his destination without stopping).

²⁴ *Cleveland, C. G. & St. L. R. Co. v. Morton* (1902) 57 C. C. A. 226, 120 Fed. 936 (twelve—struck by engine while watching engine on another track which obstructed crossing); *Mobile & M. R. Co. v. Crenshaw* (1880) 65 Ala. 566 (five); *Kansas City Southern R. Co. v. Teater* (1916) 124 Ark. 1, 186 S. W. 294 (thirteen—injury while passing over platform between passenger cars in motion); *Central R. Co. v. Brinson* (1883) 70 Ga. 207 (fifteen-year-old boy struck by projecting plank on passing car); *Linder v. Brown* (1912) 137 Ga. 352, 73 S. E. 734 (nine—age and capacity); *Chicago, B. & Q. R. Co. v. Stumps* (1873) 69 Ill. 409 (where seven-year-old child fell under train while running beside it holding to ladder of car); *Rockford, R. I. & St. L. R. Co. v. Delaney* (1876) 82 Ill. 198, 25 Am. Rep. 308 (nine); *Pittsburgh, Ft. W. & C. R. Co. v. Moore* (1903) 110 Ill. App. 304 (twelve—age, capacity, and experience); *Cleveland, C. C. & St. L. R. Co. v. Scott* (1903) 111 Ill. App. 234 (seven-year-old child injured by fall of window on train on which she was a passenger); *Illinois C. R. Co. v. Johnson* (1905) 123 Ill. App. 300, reversed on other grounds in (1906) 221 Ill. 42, 77 N. E. 592 (fourteen—age, capacity, intelligence, and experience); *Indianapolis, P. & C. R. Co. v. Pitzer* (1886) 109 Ind. 179, 58 Am. Rep. 337, 6 N. E. 310, 10 N. E. 70 (seven); *Indianapolis Southern R. Co. v. Emmerson* (1912) 52 Ind. App. 403, 98 N. E. 895 (where sixteen-year-old girl standing near car door, preparatory to alighting, was thrown off by jerk of train); *Atchison, T. & S. F. R. Co. v. Todd* (1895) 54 Kan. 551, 38 Pac. 804 (nine-year-old boy sitting under car in railroad yards); *Atchison, T. & S. F. R. Co. v. Potter* (1899) 60 Kan. 808, 72 Am. St. Rep. 385, 58 Pac. 471, 6 Am. Neg. Rep. 512 (under seven—injury by train in railroad yard); *Kentucky C. R. Co. v. Gastineau* (1885) 83 Ky. 119 (fourteen-year-old boy killed while voluntarily assisting in switching cars); *East Tennessee Coal Co. v. Harshaw* (1895) 16 Ky. L. Rep. 526, 29 S. W. 289 (eight-year-old boy injured by running into side of moving train); *O'Connor v. Boston & L. R. Corp.* (1883) 135 Mass. 352 (five-year-old boy run over by train while foot was caught in crossing); *State use of Coughlan v. Baltimore & O. R. Co.* (1866) 24 Md. 84, 87 Am. Dec. 600 (ten); *Ecliff v. Wabash, St. L. & P. R. Co.* (1887) 64 Mich. 196, 31 N. W. 180 (where twelve-year-old boy riding on engine was killed by collision with another engine—age, capacity, knowledge); *Cooper v. Lake Shore & M. S. R. Co.* (1887) 66 Mich. 261, 11 Am. St. Rep. 482, 33 N. W. 306 (eleven-year-old girl struck L.R.A.1917F.

by train while waiting for passing of train on another track); *Mollica v. Michigan C. R. Co.* (Mich.) post, 118, (nine—same); *Ileffel v. St. Paul, M. & M. R. Co.* (1892) 49 Minn. 263, 51 N. W. 1049 (where twelve-year-old girl climbed on ladder on side of moving freight car and was struck by lumber piled near track); *Benedict v. Minneapolis & St. L. R. Co.* (1902) 86 Minn. 224, 57 L.R.A. 639, 91 Am. St. Rep. 345, 90 S. W. 360 (recognizing rule in action for injury to sixteen-year-old boy by exposing person beyond side of moving train); *Hannula v. Duluth & I. R. R. Co.* (1915) 130 Minn. 3, 153 N. W. 250 (five—riding on footboard of engine); *Williams v. Kansas City, S. & M. R. Co.* (1888) 96 Mo. 275, 9 S. W. 573 (where twelve-year-old boy was run over by car in switch yard—age and capacity); *Graney v. St. Louis, I. M. & S. R. Co.* (1897) 140 Mo. 89, 38 L.R.A. 633, 41 S. W. 246, see also later appeal in (1900) 157 Mo. 666, 50 L.R.A. 153, 57 S. W. 276 (twelve—suction from passing train; intelligence, experience, and knowledge); *Anna v. Missouri P. R. Co.* (1902) 96 Mo. App. 543, 70 S. W. 398, 12 Am. Neg. Rep. 499 (where ten-year-old boy who fell into depression along track, although in a place of safety, attempted to escape while cars were passing above him); *Lange v. Missouri P. R. Co.* (1906) 115 Mo. App. 582, 91 S. W. 989, also *Lange v. Missouri P. R. Co.* (1907) 208 Mo. 458, 106 S. W. 660 (where nine-year-old girl at station became alarmed at steam discharged from engine and stepped in front of car making a flying switch); *Fink v. Kansas City Southern R. Co.* (1912) 161 Mo. App. 314, 143 S. W. 568 (where ten-year-old boy fell from moving freight car in attempting to dodge missile thrown at him by brakeman); *Schreiner v. New York C. & H. R. Co.* (1896) 12 App. Div. 551, 42 N. Y. Supp. 163 (where ten-year-old boy followed adults to platform of car, as train approached station, and was thrown off); *Lodge v. Pittsburgh & L. E. R. Co.* (1914) 243 Pa. 10, 89 Atl. 790 (where eleven-year-old boy was struck by train while standing between the tracks at crossing waiting for train to pass); *Di Meglio v. Philadelphia & R. R. Co.* (1916) 252 Pa. 391, 97 Atl. 476 (where ten-year-old boy playing in box car was knocked off when engine came in contact with car—age and experience); *Gulf, C. & S. F. R. Co. v. Cunningham* (1895) — Tex. Civ. App. —, 30 S. W. 367 (boy seven or eight years old, standing near chute while cattle were being loaded, injured by car striking projecting gang plank); *Missouri, K. & T. R. Co. v. Scarborough* (1902) 29 Tex. Civ. App. 194, 68 S. W. 196 (ten—timber projecting from side of car so as to sweep skidway on which boy was standing); *Christensen v. Oregon Short Line R. Co.* (1905) 29 Utah, 192, 80 Pac. 746 (eight); *Kyne v. Southern P. Co.* (1912) 41 Utah, 368, 126 Pac. 311 (ten—struck by work train while standing near track:

The practical results reached by the application of this standard in the various classes of cases just referred to are shown in the note to *Mollica v. Michi-*

gan C. R. Co. post, 118, and other notes therein referred to.

The rule has been applied also in actions for injuries to children by street cars under various circumstances,²⁵ par-

age, intelligence, and experience); *Blankenship v. Chesapeake & O. R. Co.* (1897) 94 Va. 449, 27 S. E. 20, 2 Am. Neg. Rep. 662 (where ten-year-old boy was run over by engine in railroad yard—age and discretion); *Oregon R. & Nav. Co. v. Egley* (1891) 2 Wash. 409, 26 Am. St. Rep. 860, 26 Pac. 973 (nine-year-old boy stealing ride on switch engine); *Rose v. Northern P. R. Co.* (1914) 81 Wash. 684, L.R.A. 1915B, 166, 143 Pac. 145, 7 N. C. C. A. 1029 (fifteen-year-old boy riding on steps of train and projecting body beyond train); *Schmidt v. Milwaukee & St. P. R. Co.* (1868) 23 Wis. 186, 99 Am. Dec. 158 (approving rule); *Townley v. Chicago, M. & St. P. R. Co.* (1881) 53 Wis. 626, 11 N. W. 55 (seven-year-old girl run over by cars while foot was caught in crossing); *McVoy v. Oakes* (1895) 91 Wis. 214, 64 N. W. 748 (where seven-year-old boy, walking along moving car holding to brake rod, was injured by sudden increase in speed of train); *Correa v. American R. Co.* (1909) 5 Porto Rico Fed. Rep. 251 (where eight-year-old boy took hold of sugar cane projecting from moving car and was jerked under train); *Potvin v. Canadian P. R. Co.* (1904) 4 Ont. Week. Rep. 511 (eight).

²⁵ As to the practical results reached in the application of the rule in street railway cases generally, see VII. n, *infra*.

Pueblo Electric Street R. Co. v. Sherman (1898) 25 Colo. 114, 71 Am. St. Rep. 116, 53 Pac. 322 (thirteen-year-old boy jumping from moving street car); *Denver City Tramway Co. v. Nicholas* (1906) 35 Colo. 462, 84 Pac. 813, 20 Am. Neg. Rep. 16 (thirteen—playing on street car standing in street; age, capacity, and experience); *Brennan v. Fair Haven & W. R. Co.* (1877) 45 Conn. 284, 29 Am. Rep. 679, 2 Am. Neg. Cas. 277 (ten—jumping from front platform of moving street car); *Jollimore v. Connecticut Co.* (1912) 86 Conn. 314, 85 Atl. 373 (eleven—playing in street; age, experience, intelligence, and capacity); *Di Prisco v. Wilmington City R. Co.* (1904) 4 Penn. (Del.) 527, 57 Atl. 906 (eight); *Goldstein v. People's R. Co.* (1905) 5 Penn. (Del.) 306, 60 Atl. 975 (five—falling or jumping from moving street car); *Metropolitan R. Co. v. Falvey* (1895) 5 App. D. C. 176 (where four-year-old child, because of insufficient side rail, fell from street car on which he was a passenger); *Barstow v. Capital Traction Co.* (1907) 29 App. D. C. 382 (where nine-year-old boy stumbled and fell under street car while running beside it to hear motorman, who called him); *Wynn v. City & Suburban R. Co.* (1893) 91 Ga. 344, 17 S. E. 649 (eleven—riding on front platform of street car); *Potter v. Leviton* (1902) 101 Ill. App. 544, judgment affirmed in (1902) 199 Ill. 93, 64 N. E. 1029 (four); L.R.A.1917F.

Swanson v. Chicago City R. Co. (1909) 148 Ill. App. 135 affirmed in (1909) 242 Ill. 388, 90 N. E. 210 (where nine-year-old boy on request of conductor was helping to push street car; age, capacity, intelligence, and experience); *Louisville R. Co. v. Hofgesand* (1907) 31 Ky. L. Rep. 976, 104 S. W. 361 (twelve—walking on street car track); *Lovett v. Salem & S. D. R. Co.* (1866) 9 Allen (Mass.) 557, 3 Am. Neg. Cas. 754 (ten-year-old boy injured in leaving moving street car on command of driver); *Hennessey v. Boston Elev. R. Co.* (1912) 211 Mass. 524, 98 N. E. 578 (eleven—walking along track to avoid obstructions on sidewalk); *Angeli v. Springfield Street R. Co.* (1912) 213 Mass. 110, 99 N. E. 970 (where eleven-year-old boy standing with back to track was struck by running board of street car); *East Saginaw City R. Co. v. Bohn* (1873) 27 Mich. 503 (riding on front platform); *Muehlhausen v. St. Louis R. Co.* (1886) 91 Mo. 332, 2 S. W. 315 (eight—injury in attempting to alight or in falling from street car; age and capacity); *McCarthy v. Cass Ave. & F. G. R. Co.* (1887) 92 Mo. 536, 4 S. W. 516 (eight—catching ride on street car; capacity, age, knowledge, and experience); *Ridenhour v. Kansas City Cable R. Co.* (1890) 102 Mo. 270, 13 S. W. 889, 14 S. W. 760, 4 Am. Neg. Cas. 634 (nine—injury in alighting from street car); *Wise v. St. Louis Transit Co.* (1906) 198 Mo. 546, 95 S. W. 898 (seven-year-old child struck by street car while standing on track waiting for car to pass on parallel track); *Saare v. Union R. Co.* (1886) 20 Mo. App. 211 (ten—riding on street car step); *Fry v. St. Louis Transit Co.* (1905) 111 Mo. App. 324, 85 S. W. 960 (age and capacity; where nine-year-old boy after alighting from street car attempted to cross track and was struck by car moving in opposite direction); *Vessels v. Metropolitan Street R. Co.* (1908) 129 Mo. App. 708, 108 S. W. 578 (under fourteen—passenger riding on running board of street car); *Moeller v. United R. Co.* (1908) 133 Mo. App. 68, 112 S. W. 714 (twelve—alighting from moving street car; age, experience, and capacity); *Solomon v. Public Service R. Co.* (1915) 87 N. J. L. 284, 92 Atl. 942 (nine—boarding moving street car); *Hyland v. Yonkers R. Co.* (1889) 51 Hun, 643, 4 N. Y. Supp. 305, affirmed in (1890) 119 N. Y. 612, 23 N. E. 1143 (two); *Mowrey v. Central City R. Co.* (1867) 66 Barb. (N. Y.) 43, affirmed in (1873) 51 N. Y. 666 (thirteen-year-old boy, while attempting to board moving street car, slipped and fell under it); *Mills v. Woolverton* (1896) 9 App. Div. 82, 41 N. Y. Supp. 90 (eleven—riding on street car step); *Dempsey v. Brooklyn Heights R. Co.* (1904) 98 App. Div. 182, 90 N. Y. Supp. 639 (nine—playing on track); *Manzella v. Rochester*

ticularly while attempting to cross the track;²⁸ in actions for injuries by teams

R. Co. (1905) 105 App. Div. 12, 93 N. Y. Supp. 457 (fifteen-year-old girl killed by street car while attempting to rescue four-year-old child in peril on track); *Smith v. Rochester R. Co.* (1909) 133 App. Div. 847, 118 N. Y. Supp. 78, reversed on other grounds in (1910) 197 N. Y. 600, 91 N. E. 1120 (six—playing in street; age and intelligence); *Fallon v. Central Park, N. & E. River R. Co.* (1876) 64 N. Y. 13 (five); *Connolly v. Knickerbocker Ice Co.* (1889) 114 N. Y. 104, 11 Am. St. Rep. 617, 21 N. E. 101, 12 Am. Neg. Cas. 305 (seven-year-old boy riding on platform of street car injured by car's colliding with wagon); *Cincinnati Street R. Co. v. Wright* (1896) 54 Ohio St. 181, 32 L.R.A. 340, 43 N. E. 688 (fourteen-year-old boy injured by street car's colliding with a wagon in which he was riding without the driver's knowledge); *Crissey v. Hestonville, M. & F. Pass. R. Co.* (1874) 75 Pa. 83 (thirteen—attempting to alight from moving car); *Philadelphia City Pass. R. Co. v. Hassard* (1874) 75 Pa. 367 (ten—same); *West Philadelphia Pass. R. Co. v. Gallagher* (1885) 108 Pa. 524 (three—riding on steps of front platform of crowded street car); *Sanford v. Hestonville, M. & F. Pass. R. Co.* (1890) 136 Pa. 84, 20 Atl. 799 (eight—attempting to alight from moving street car); *Parker v. Washington Electric Street R. Co.* (1904) 207 Pa. 438, 56 Atl. 1001, 15 Am. Neg. Rep. 681 (seven—jumping from moving street car; age and experience); *Denison & S. R. Co. v. Carter* (1904) — Tex. Civ. App. —, 79 S. W. 320, reversed on other grounds in (1904) 98 Tex. 196, 107 Am. St. Rep. 626, 82 S. W. 782 (ten—jumping from moving street car; age, intelligence, and experience); *Riley v. Salt Lake Rapid Transit Co.* (1894) 10 Utah, 428, 37 Pac. 681 (seven—playing in street; age, experience, intelligence); *Washington, A. & Mt. V. Electric R. Co. v. Quayle* (1898) 95 Va. 741, 30 S. E. 391 (thirteen—injury by jumping from moving street car because of threats of motorman; age, experience, and understanding); *Richmond Traction Co. v. Wilkinson* (1903) 101 Va. 394, 43 S. E. 622 (seven-year-old boy jumped from running board of moving street car on command of conductor); *Mitchell v. Tacoma R. & Motor Co.* (1894) 9 Wash. 120, 37 Pac. 341 (eight—playing in street); *Wills v. Ashland Light, P. & Street R. Co.* (1900) 108 Wis. 255, 84 N. W. 998 (nearly fourteen—walking along street car track); *Frasers v. Edinburgh Street Tramways Co.* (1889) 20 Scot. L. R. 192, cited in 21 Laws of England (Halsbury) 453; *Normand v. Hull Electric Co.* (1908) Rap. Jud. Quebec, 35 C. S. 329 (ten-year-old boy injured in attempting to board street car as a trespasser).

²⁸ As to the practical results reached in the application of the rule in this class of cases, see notes to *Holian v. Boston Elev. R. Co.* 11 L.R.A.(N.S.) 168, and *Bothwell v. Boston Elev. R. Co.* post, 172.

Washington & G. R. Co. v. Gladmon L.R.A.1917F.

(1872) 15 Wall. (U. S.) 401, 21 L. ed. 114 (seven); *Birmingham R. Light & P. Co. v. Jones* (1906) 146 Ala. 277, 41 So. 146 (nine); *Rohloff v. Fair Haven & W. R. Co.* (1902) 76 Conn. 689, 58 Atl. 5, 16 Am. Neg. Rep. 299 (eight—age, judgment, and experience); *Igle v. People's R. Co.* (1915) 5 Boyce (Del.) 376, 93 Atl. 666 (fourteen—riding in wagon driven by another person); *Reiners v. Washington & G. R. Co.* (1896) 9 App. D. C. 19 (three); *Chicago City R. Co. v. Wilcox* (1890) — Ill. —, 8 L.R.A. 494, 24 N. E. 419, rehearing in (1891) 138 Ill. 370, 21 L.R.A. 76, 27 N. E. 899, 11 Am. Neg. Cas. 402 (six); *Springfield Consol. R. Co. v. Welsch* (1895) 155 Ill. 511, 40 N. E. 1034 (seven—age and capacity); *Chicago City R. Co. v. Tuohy* (1901) 95 Ill. App. 314, affirmed in (1902) 196 Ill. 410, 58 L.R.A. 270, 63 N. E. 997 (six); *Colehour v. Rockford & Interurban R. Co.* (1907) 132 Ill. App. 558 (ten—age and discretion); *Ras-tetter v. Peoria R. Co.* (1908) 142 Ill. App. 417 (fifteen—age, capacity, experience, and intelligence); *Kravitz v. Chicago City R. Co.* (1912) 174 Ill. App. 182 (twelve); *Names v. Chicago City R. Co.* (1913) 180 Ill. App. 483 (seven); *Elwood Electric Street R. Co. v. Ross* (1900) 26 Ind. App. 258, 58 N. E. 535 (recognizing rule); *Citizens Street R. Co. v. Hamer* (1902) 29 Ind. App. 426, 62 N. E. 658, 63 N. E. 778 (seven); *Indianapolis Street R. Co. v. Ant-robus* (1904) 33 Ind. App. 663, 71 N. E. 971 (seven); *Louisville & S. I. Traction Co. v. Short* (1908) 41 Ind. App. 570, 83 N. E. 265 (six); *Indianapolis Traction & Terminal Co. v. Croly* (1911) 54 Ind. App. 566, 96 N. E. 973, 98 N. E. 1091, later appeal in (1917) — Ind. App. —, 115 N. E. 105 (eleven—age, knowledge, judgment, and experience); *Long v. Ottumwa R. & Light Co.* (1913) 162 Iowa, 11, 142 N. W. 1008 (nine); *Consolidated City & C. P. R. Co. v. Carlson* (1897) 58 Kan. 62, 48 Pac. 635, 2 Am. Neg. Rep. 536 (ten); *Louisville R. Co. v. Phillips* (1900) 22 Ky. L. Rep. 842, 58 S. W. 995 (twelve); *McLaughlin v. New Orleans & C. R. Co.* (1896) 48 La. Ann. 23, 18 So. 703 (eleven); *O'Rourke v. New Orleans City Lake R. Co.* (1899) 51 La. Ann. 755, 25 So. 323 (eleven); *Colomb v. Portland & B. Street R. Co.* (1905) 100 Me. 418, 61 Atl. 898, 19 Am. Neg. Rep. 9 (ten); *Baltimore & O. R. Co. v. State* (1869) 30 Md. 47 (five); *Baltimore City Pass. R. Co. v. McDonnell* (1875) 43 Md. 534 (two-year-old child ran in front of street car); *United R. & Electric Co. v. Carneal* (1909) 110 Md. 211, 72 Atl. 771 (three); *Grant v. Bangor R. & Electric Co.* (1912) 109 Me. 133, 83 Atl. 121 (five); *Collins v. South Boston R. Co.* (1886) 142 Mass. 301, 56 Am. Rep. 675, 7 N. E. 856 (four); *Morey v. Gloucester Street R. Co.* (1898) 171 Mass. 184, 60 N. E. 530 (eight); *Aiken v. Holyoke Street R. Co.* (1901) 180 Mass. 8, 61 N. E. 557, 15 Am. Neg. Rep. 73 (six); *McDermott v. Boston Elev. R. Co.* (1903) 184 Mass. 126, 100 Am. St. Rep. 548, 68 N. E. 34, 14

- Am. Neg. Rep. 571 (six); *Burns v. Worcester Consol. Street R. Co.* (1906) 193 *Mass.* 63, 78 N. E. 740 (eight); *Stackpole v. Boston Elev. R. Co.* (1907) 193 *Mass.* 562, 79 N. E. 740 (eleven); *Holian v. Boston Elev. R. Co.* (1907) 194 *Mass.* 74, 11 L.R.A.(N.S.) 166, 80 N. E. 1 (ten); *Beale v. Old Colony Street R. Co.* (1907) 196 *Mass.* 119, 81 N. E. 867 (seven); *Casey v. Boston Elev. R. Co.* (1908) 197 *Mass.* 440, 83 N. E. 867 (nine); *Purcell v. Boston Elev. R. Co.* (1912) 211 *Mass.* 79, 97 N. E. 626 (six); *Lucarelli v. Boston Elev. R. Co.* (1913) 213 *Mass.* 454, 100 N. E. 632 (ten); *Giaccobe v. Boston Elev. R. Co.* (1913) 215 *Mass.* 224, 102 N. E. 322 (seven); *Kyle v. Boston Elev. R. Co.* (1913) 216 *Mass.* 224, 102 N. E. 322 (seven); *Sheehan v. Boston & N. Street R. Co.* (1913) 215 *Mass.* 463, 102 N. E. 690 (eight); *Travers v. Boston Elev. R. Co.* (1914) 217 *Mass.* 188, 104 N. E. 383 (five); *Hine v. Bay Cities Consol. R. Co.* (1897) 115 *Mich.* 204, 73 N. W. 116 (nine—riding bicycle across track); *Boland v. Missouri R. Co.* (1865) 36 *Mo.* 484 (two—approving rule); *Lynch v. Metropolitan Street R. Co.* (1892) 112 *Mo.* 420, 20 S. W. 642 (ten—age and capacity); *Schmidt v. St. Louis R. Co.* (1901) 163 *Mo.* 645, 63 S. W. 834 (age and capacity); *Campbell v. St. Louis & Suburban R. Co.* (1903) 175 *Mo.* 161, 75 S. W. 86 (sixteen—driving across track); *Heinzle v. Metropolitan Street R. Co.* (1904) 182 *Mo.* 528, 81 S. W. 848 (five); *Mullin v. St. Louis Transit Co.* (1906) 196 *Mo.* 572, 94 S. W. 288 (six); *Butler v. Metropolitan Street R. Co.* (1906) 117 *Mo. App.* 354, 93 S. W. 877 (seven); *Brown v. St. Louis & Suburban R. Co.* (1907) 127 *Mo. App.* 499, 106 S. W. 83 (eight); *Zalotuchin v. Metropolitan Street R. Co.* (1907) 127 *Mo. App.* 577, 106 S. W. 548 (sixteen—riding in wagon driven by adult across street railway tracks); *Sheets v. Connolly Street R. Co.* (1892) 54 *N. J. L.* 518, 24 *Atl.* 483 (ten); *Consolidated Traction Co. v. Scott* (1896) 58 *N. J. L.* 682, 33 L.R.A. 122, 55 *Am. St. Rep.* 620, 34 *Atl.* 1094 (seven—age, judgment, and experience); *Fitzhenry v. Consolidated Traction Co.* (1900) 64 *N. J. L.* 674, 46 *Atl.* 698, 8 *Am. Neg. Rep.* 288 (nine); *Smith v. North Jersey & Street R. Co.* (1906) 73 *N. J. L.* 295, 67 *Atl.* 753 (eight); *Ritscher v. Orange & P. Valley R. Co.* (1910) 79 *N. J. L.* 462, 75 *Atl.* 209 (six); *Costello v. Third Ave. R. Co.* (1900) 161 *N. Y.* 317, 55 *N. E.* 897 (eight); *Nowakowski v. New York & N. S. Traction Co.* (1917) 220 *N. Y.* 51, 114 *N. E.* 1042 (eight); *Motel v. Sixth Ave. R. Co.* (1885) 2 *How. Pr. N. S.* (N. Y.) 30 (eight); *Mentz v. Second Ave. R. Co.* (1869) 3 *Abb. App. Dec.* (N. Y.) 274 (eight-year-old stumbled on track while crossing in front of an approaching car); *Silberstein v. Houston, W. Street & F. Ferry R. Co.* (1889) 4 *N. Y. Supp.* 843, reversed on other grounds in (1889) 117 *N. Y.* 293, 22 *N. E.* 951 (eight); *Block v. Harlem Bridge, H. & F. R. Co.* (1890) 55 *Hun.* 607, 28 *N. Y. S. R.* 495, 9 *N. Y. Supp.* 164 (seven); *Penny v. Rochester R. Co.* (1896) 7 *App. Div.* 595, 40 *N. Y. Supp.* 172, affirmed without opinion in (1897) 154 *N. Y.* 770, 49 *N. E.* 1101 (seven—age and knowledge); *Ellick v. Metropolitan Street R. Co.* (1897) 15 *App. Div.* 556, 44 *N. Y. Supp.* 523, 2 *Am. Neg. Rep.* 435 (nine); *Muller v. Brooklyn Heights R. Co.* (1897) 18 *App. Div.* 177, 45 *N. Y. Supp.* 954 (five); *Finkelstein v. Brooklyn Heights R. Co.* (1900) 51 *App. Div.* 287, 64 *N. Y. Supp.* 915 (seven); *Griffiths v. Metropolitan Street R. Co.* (1901) 63 *App. Div.* 86, 71 *N. Y. Supp.* 406, reversed on other grounds in (1902) 171 *N. Y.* 106, 63 *N. E.* 808 (seven); *Sullivan v. Union R. Co.* (1903) 81 *App. Div.* 596, 81 *N. Y. Supp.* 449, affirmed without opinion in (1903) 177 *N. Y.* 525, 69 *N. E.* 1131 (where seven-year-old boy while pursuing other boys who had taken his cap ran in front of rapidly approaching street car); *Lafferty v. Third Ave. R. Co.* (1903) 85 *App. Div.* 592, 83 *N. Y. Supp.* 405, affirmed without opinion in (1903) 176 *N. Y.* 594, 68 *N. E.* 1118 (six—age and intelligence); *Robinson v. Metropolitan Street R. Co.* (1904) 91 *App. Div.* 158, 86 *N. Y. Supp.* 443, affirmed without opinion in (1904) 179 *N. Y.* 593, 72 *N. E.* 1150 (nine-year-old boy on wagon driven by adult across street car track injured by collision with car); *Wabnick v. Dry Dock, E. B. & B. R. Co.* (1906) 112 *App. Div.* 4, 98 *N. Y. Supp.* 38 (five); *Kostenbaum v. New York City R. Co.* (1907) 120 *App. Div.* 160, 105 *N. Y. Supp.* 65 (six—age and intelligence); *Grealish v. Brooklyn, Q. C. & S. R. Co.* (1909) 130 *App. Div.* 238, 114 *N. Y. Supp.* 582, affirmed without opinion in (1910) 197 *N. Y.* 540, 91 *N. E.* 1114 (eight); *Quinlan v. Richmond Light & R. Co.* (1909) 133 *App. Div.* 402, 117 *N. Y. Supp.* 641 (nine); *Dowd v. Brooklyn Heights R. Co.* (1894) 9 *Misc.* 279, 29 *N. Y. Supp.* 745 (eight); *Young v. Atlantic Ave. R. Co.* (1894) 10 *Misc.* 541, 31 *N. Y. Supp.* 441 (seven); *Goldstein v. Dry Dock, E. B. & B. R. Co.* (1901) 35 *Misc.* 200, 71 *N. Y. Supp.* 477 (four); *Thurber v. Harlem Bridge, M. & F. R. Co.* (1875) 60 *N. Y.* 326 (nine); *Wright v. Cincinnati Street R. Co.* (1895) 2 *Ohio Dec.* 308 (fourteen-year-old boy riding on rear of wagon injured by collision with street car while crossing track); *Columbus R. Co. v. Connor* (1905) 27 *Ohio C. C.* 229 (apparently over fourteen); *Wallace v. City & Suburban R. Co.* (1894) 26 *Or.* 174, 25 L.R.A. 663, 37 *Pac.* 477 (six); *Dubiver v. City & Suburban R. Co.* (1904) 44 *Or.* 227, 74 *Pac.* 915, 75 *Pac.* 693, 1 *Ann. Cas.* 889 (fifteen—driving across street car track; age and capacity); *Thornton v. Portland R. Light & P. Co.* (1912) 63 *Or.* 478, 128 *Pac.* 850 (six—age, judgment, and discretion); *Phillips v. Duquesne Traction Co.* (1897) 183 *Pa.* 255, 38 *Atl.* 611 (nine—crossing track on tricycle); *Phillips v. Duquesne Traction Co.* (1897) 8 *Pa. Super. Ct.* 210 (same); *Warner v. Railroad Co.* (1868) 6 *Phila. (Pa.)* 537 (age not stated); *Poland v. Union R. Co.* (1904) 26 *R. I.* 215, 58 *Atl.* 653 (eight); *Citizens R. Co. v. Rob-*

or wagons,⁷⁷ or by automobiles in the street;⁷⁸ in actions for injuries due to

ertson (1910) 58 Tex. Civ. App. 566, 125 S. W. 343 (ten); Thompson v. Salt Lake Rapid Transit Co. (1898) 16 Utah, 281, 40 L.R.A. 172, 67 Am. St. Rep. 621, 52 Pac. 92 (fourteen); Mitchell v. Tacoma R. & Motor Co. (1896) 13 Wash. 560, 43 Pac. 528 (age not stated); Roberts v. Spokane Street R. Co. (1900) 23 Wash. 325, 54 L.R.A. 183, 63 Pac. 506 (ten—riding bicycle across track); Tecker v. Seattle, R. & S. R. Co. (1910) 60 Wash. 570, 111 Pac. 791, Ann. Cas. 1912B, 842 (six); Ryan v. La Crosse City R. Co. (1900) 108 Wis. 122, 83 N. W. 770 (eight); Van Salvellergh v. Green Bay Traction Co. (1907) 132 Wis. 166, 111 N. W. 1120 (nearly six—age, experience, and discretion).

⁷⁷ As to the practical results reached in the application of the rule in this class of cases, see VII. e, and notes therein referred to.

Pierce v. Conners (1894) 20 Colo. 178, 46 Am. St. Rep. 279, 37 Pac. 721 (seven-year-old girl killed by runaway team in street); Weick v. Lander (1874) 75 Ill. 93 (twelve—struck by pole of following wagon while riding on rear end of wagon); Illinois Iron & Metal Co. v. Weber (1902) 196 Ill. 526, 63 N. E. 1008 (eleven—same); Star Brewery Co. v. Hauck (1906) 222 Ill. 348, 113 Am. St. Rep. 420, 78 N. E. 827 (ten—playing in street); McGuire v. Richard Guthmann Transfer Co. (1908) 234 Ill. 125, 84 N. E. 723 (seven—age, intelligence, capacity, discretion, and experience); Fonner v. Stamatatos (1910) 153 Ill. App. 147 (ten); Sutton v. Arrow Transfer Co. (1914) 186 Ill. App. 188 (nine—age, intelligence, experience, and capacity); Seifert v. Schaible (1909) 81 Kan. 323, 105 Pac. 529 (twelve); Ewing v. Callahan (1907) 32 Ky. L. Rep. 46, 105 S. W. 387 (thirteen—age, experience, intelligence, and discretion); Lynch v. Smith (1870) 104 Mass. 52, 6 Am. Rep. 188 (under five—age and capacity); Matvey v. Whittier Mach. Co. (1885) 140 Mass. 337, 4 N. E. 575 (six); O'Shaughnessy v. Suffolk Brewing Co. (1888) 145 Mass. 560, 14 N. E. 779 (eight-year-old girl struck by wagon while sitting on curb); Dealey v. Muller (1899) 149 Mass. 432, 21 N. E. 763 (seven); Brown v. Sherer (1891) 155 Mass. 83, 29 N. E. 50 (six); Johnson v. Kelleher (1891) 155 Mass. 125, 29 N. E. 200 (ten—crossing bridge driveway); Russo v. Charles S. Brown Co. (1908) 198 Mass. 473, 84 N. E. 840 (nine—rule implied); Dowd v. Tighe (1911) 209 Mass. 464, 95 N. E. 853 (three years and eight months—playing in street); Daniels v. Clegg (1873) 28 Mich. 32 (where an instruction was approved, in an action for injury to a horse and buggy driven by a girl twenty years old, by collision with another wagon on a highway, which directed the jury to consider the age and sex of the driver in determining whether she exercised ordinary care); Jennings v. Schwab (1895) 64 Mo. App. 13 (nine); Keubler v. New York (1891) 39 N. Y. S. R. 520, 15 N. Y. Supp. 187 (nine-year-old boy sitting on edge of sidewalk run over by cart driven along

street); Goff v. Akers (1893) 1 Misc. 468, 21 N. Y. Supp. 454, affirmed without opinion in (1893) 139 N. Y. 653, 35 N. E. 207 (thirteen-year-old boy was injured while passing along sidewalk by truck being suddenly backed without warning across the walk); Elze v. Baumann (1893) 2 Misc. 72, 21 N. Y. Supp. 782 (six); Birnbaum v. Lord (1894) 7 Misc. 493, 28 N. Y. Supp. 17 (twelve); Keller v. Haaker (1896) 2 App. Div. 245, 37 N. Y. Supp. 792 (five); Kennedy v. Hills Bros. Co. (1900) 54 App. Div. 29, 66 N. Y. Supp. 280, 8 Am. Neg. Rep. 520 (three); Gerber v. Boorstein (1906) 113 App. Div. 808, 99 N. Y. Supp. 1091 (nine); Ardolino v. Reinhardt (1909) 130 App. Div. 119, 114 N. Y. Supp. 508 (four and one half); Herron v. High Ground Dairy Co. (1912) 153 App. Div. 338, 138 N. Y. Supp. 3 (eight-year-old boy reaching under wheel of wagon standing in street, for purpose of picking up object under it, injured by starting of wagon); Moebus v. Herrmann (1888) 108 N. Y. 353, 2 Am. St. Rep. 440, 15 N. E. 415 (seven); Roth Packing Co. v. Wainer (1912) 33 Ohio C. C. 636 (twelve-year-old boy riding bicycle in street was run over by team); Smith v. O'Connor (1864) 48 Pa. 218, 86 Am. Dec. 582 (seven); Robinson v. Cone (1850) 22 Vt. 213, 54 Am. Dec. 67 (four—age and capacity); Lynch v. Nurdin (1841) 4 Perry & D. 672, 1 Q. B. 29, 113 Eng. Reprint, 1041, 10 L. J. Q. B. N. S. 73, 5 Jur. 797 (boy six years old playing on cart left standing unattended in street.)

⁷⁸ As to the practical results reached in the application of the rule in this class of cases, see note to Albert v. Munch, L.R.A. —, —, on the question of the reciprocal duty of driver of automobile and children in street.

Lynch v. Shearer (1910) 83 Conn. 73, 75 Atl. 88 (eleven—age, judgment, and experience); Cecchi v. Lindsay (1910) 1 Boyce (Del.) 185, 75 Atl. 376 (six); Travers v. Hartmann (1914) 5 Boyce (Del.) 302, 92 Atl. 855 (fifteen); Shaw v. Corrington (1912) 171 Ill. App. 232 (ten—instruction omitting element of experience erroneous); Burke v. Waterman (1914) 187 Ill. App. 440 (minor, age not stated—age, intelligence, capacity, discretion, and experience); Rasmussen v. Whipple (1912) 211 Mass. 546, 98 N. E. 592 (twelve); Tripp v. Taft (1914) 219 Mass. 81, 106 N. E. 578 (seven); Winkowski v. Dodge (1914) 183 Mich. 303, 149 N. W. 1061 (eight—age, capacity, and understanding); Jacobs v. H. J. KOENIGSPORTING GOODS Co. ante, 7 (fourteen); Thies v. Thomas (1902) 77 N. Y. Supp. 276 (six); Buscher v. New York Transp. Co. (1906) 114 App. Div. 85, 99 N. Y. Supp. 673 (eight); Gross v. Foster (1909) 134 App. Div. 243, 118 N. Y. Supp. 889 (nine—age and intelligence); Marius v. Motor Delivery Co. (1911) 146 App. Div. 608, 131 N. Y. Supp. 357 (eight-year-old child killed by motor truck while playing in street); Ackerman v. Stacey (1913) 157 App. Div. 835, 143 N. Y. Supp. 227 (ten); Edelman

defective sidewalks,²⁹ streets, or highways,³⁰ or bridges,³¹ or to obstructions or other objects in a street or high-

way;³² in actions for injuries or death by falling into ponds, reservoirs, etc.;³³ in actions for injuries by dogs,³⁴ or other

v. Connell (1917) — Pa. —, 101 Atl. 653 (eleven—coasting in street); Deputy v. Kimmell (1914) 73 W. Va. 595, 51 L.R.A. (N.S.) 989, 80 S. E. 919, Ann. Cas. 1916E, 656, 8 N. C. C. A. 369 (ten); Quinn v. Ross Motor Car Co. (1914) 157 Wis. 543, 147 N. W. 1000 (thirteen).

²⁹ As to the practical results reached in the application of the rule in this class of cases, see VII. d, infra, and notes therein referred to.

Herrington v. Macon (1906) 125 Ga. 58, 54 S. E. 71 (four and one half); Chicago v. Keefe (1885) 114 Ill. 222, 55 Am. Rep. 860, 2 N. E. 267 (ten—rolling hoop on defective sidewalk); Strudgeon v. Sand Beach (1895) 107 Mich. 496, 65 N. W. 616 (ten—age and discretion); Beaudin v. Bay City (1904) 136 Mich. 333, 99 N. W. 285, 4 Ann. Cas. 248, 16 Am. Neg. Rep. 108 (age not stated—running on defective sidewalk); Stern v. Bensieck (1901) 161 Mo. 146, 61 S. W. 594, 9 Am. Neg. Rep. 520 (minor, age not stated); Caskey v. La Belle (1903) 101 Mo. App. 590, 74 S. W. 113 (eight); Crawford v. Wilson & B. Mfg. Co. (1894) 8 Misc. 48, 23 N. Y. Supp. 519 (eight); Brown v. Syracuse (1894) 77 Hun, 411, 28 N. Y. Supp. 792 (eight—age and intelligence); Wertz v. Girardville (1906) 30 Pa. Super. Ct. 260 (fourteen); Roanoke v. Shull (1899) 97 Va. 419, 75 Am. St. Rep. 791, 34 S. E. 34 (eleven—maturity and capacity); Lorence v. Ellensburgh (1895) 13 Wash. 341, 52 Am. St. Rep. 42, 43 Pac. 20 (eight—intelligence, capacity, and judgment); Reed v. Madison (1892) 83 Wis. 171, 17 L.R.A. 733, 53 N. W. 547 (seven); Collins v. Ganesville (1900) 107 Wis. 436, 83 N. W. 695, see later appeals in (1901) 111 Wis. 348, 87 N. W. 241, 1087, 10 Am. Neg. Rep. 520, and (1903) 117 Wis. 415, 94 N. W. 309 (thirteen).

³⁰ As to the practical results reached in the application of the rule in this class of cases, see VII. d, infra, and notes therein referred to.

Louisville v. Lee (1914) 157 Ky. 285, 162 S. W. 1141 (sixteen); Lorenz v. New Orleans (1905) 114 La. 802, 38 So. 566 (nine); Dowd v. Chicopee (1874) 116 Mass. 96 (fifteen—age and capacity); Snow v. Provincetown (1876) 120 Mass. 580 (nineteen-year-old girl injured in passing along highway by falling from unprotected embankment); Donoho v. Vulcan Iron Works (1882) 75 Mo. 401, affirming (1879) 7 Mo. App. 447 (eleven-year-old boy was killed while in street by fall of embankment—age and discretion); Ryder v. New York (1884) 18 Jones & S. (N. Y.) 220 (four-year-old child fell into excavation while playing in street); Oakland R. Co. v. Fielding (1864) 48 Pa. 320 (sixteen—injury through defect in street while drawing engine to fire; age and capacity); Secard v. Rhinelander Lighting Co. (1911) 147 Wis. 614, 133 N. W. 45 (nine—falling into unguarded excavation in street).

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³¹ See also VII. d, infra, and notes therein referred to, as to practical results reached by application of the rule in this class of cases.

Bronson v. Southbury (1870) 37 Conn. 199 (twelve—driving over submerged bridge which was without railing); Buechner v. New Orleans (1904) 112 La. 603, 66 L.R.A. 334, 103 Am. St. Rep. 455, 36 So. 603 (eight—falling through hole in bridge); Gigoux v. Yamhill County (1914) 73 Or. 212, 144 Pac. 437 (ten—same; age, knowledge, and mental capacity).

³² As to the practical results reached in the application of the rule in this class of cases, see VII. d, infra, and note therein referred to.

Kerr v. Forgue (1870) 54 Ill. 482, 5 Am. Rep. 146 (where twelve-year-old boy placed his hand on a counter standing on sidewalk and was injured by its fall—age, capacity, and discretion); Anderson v. Pierce (1903) 68 Kan. 57, 74 Pac. 638, 15 Am. Neg. Rep. 303 (where fourteen-year-old boy thrust his hand behind heavy vault door standing in insecure position on street and was injured by its fall); Louisville R. Co. v. Esselman (1906) 29 Ky. L. Rep. 333, 93 S. W. 50 (eleven—building material negligently stacked in street; age, experience, and intelligence); Cincinnati, N. & C. R. Co. v. Cooke (1909) — Ky. —, 121 S. W. 467 (where eight-year-old girl was injured while attempting to cross street, by falling over obstructions); Westerfield v. Levis Bros. (1891) 43 La. Ann. 63, 9 So. 52 (five-year-old child meddling with iron roller in street—maturity and capacity); O'Leary v. Michigan State Teleph. Co. (1906) 146 Mich. 243, 109 N. W. 434 (seven—hand injured in pulley used in stringing telephone cable in street); Burns v. F. Knight & Son (1913) 213 Mass. 510, 100 N. E. 618 (seven-year-old boy on sidewalk injured by foot being caught in roller on which iron girder was being moved); Rachmel v. Clark (1900) 205 Pa. 314, 62 L.R.A. 959, 54 Atl. 1027, 14 Am. Neg. Rep. 208 (seven—fall of stone slab standing on sidewalk in front of defendant's premises; age and discretion); Mulligan v. Homestead (1914) 243 Pa. 361, 90 Atl. 71 (eleven—injury by contact with loose ends of barbed wire on sidewalk); Burekell v. Memphis Street R. Co. (1911) 2 Tenn. C. A. 576 (seven-year-old boy struck by cable suddenly elevated as it was being tightened in street); Freeman v. Carter (1904) — Tex. Civ. App. —, 81 S. W. 81 (ten—fall of partially burned wall in street).

³³ As to the practical results reached in the application of the rule in this class of cases, see VII. l, infra.

Brinkley Car Works & Mfg. Co. v. Cooper (1895) 60 Ark. 545, 46 Am. St. Rep. 216, 31 S. W. 154 (six-year-old child scalded by stepping into pool of hot water on defendant's premises); Pekin v. McMahon (1895)

animals;³⁵ or by fires;³⁶ in actions for injuries sustained on turntables;³⁷ ele-

154 Ill. 141, 27 L.R.A. 206, 45 Am. St. Rep. 114, 39 N. E. 484, affirming (1894) 53 Ill. App. 189 (where eight-year-old boy playing near pond stepped on log in the water, which turned—age, capacity, and intelligence); Soens v. Chicago, W. & V. Coal Co. (1911) 160 Ill. App. 467 (eleven—playing with raft on pond; age, capacity, intelligence, and experience); Elwood v. Addison (1900) 26 Ind. App. 28, 59 N. E. 47 (where seven-year-old boy was drowned in pool of water negligently permitted to accumulate by side of street); Price v. Atchison Water Co. (1897) 58 Kan. 551, 62 Am. St. Rep. 625, 50 Pac. 450, 3 Am. Neg. Rep. 392 (eleven-year-old boy drowned in reservoir to which he had gone to fish and play); Curtis v. Grand Trunk R. Co. (1914) 178 Mich. 382, 144 N. W. 824 (where thirteen-year-old boy while scuffling in street fell into pool of hot water in street); Omaha v. Richards (1896) 49 Neb. 244, 68 N. W. 528 (ten-year-old boy drowned while playing with raft in pond adjacent to street); Cook v. Houston Direct Nav. Co. (1890) 76 Tex. 353, 18 Am. St. Rep. 52, 13 S. W. 475 (where thirteen-year-old girl on invitation of employees went upon tugboat, fell from it, and was drowned—age and discretion); Bottum v. Hawks (1911) 84 Vt. 370, 35 L.R.A. (N.S.) 440, 79 Atl. 858, Ann. Cas. 1913A, 1025, 3 N. C. C. A. 186 (five-year-old boy playing near open bulkhead maintained by mill owner drowned by falling into it—age, intelligence, and want of experience are to be considered); Coney Island Co. v. Dennen (1907) 79 C. C. A. 375, 149 Fed. 687 (twelve-year-old boy drowned while attempting to alight from boat on which he was a passenger).

³⁴ As to the practical results reached in the application of the rule in this class of cases, see VII. b, 1, *infra*.

Linck v. Scheffel (1889) 32 Ill. App. 17, 1 Am. Neg. Cas. 87 (seven); Wolff v. La-mann (1900) 108 Ky. 345, 56 S. W. 408 (eleven); Garland v. Hewes (1906) 101 Me. 549, 64 Atl. 914 (eight); Milliken v. Fender-son (1913) 110 Me. 306, 86 Atl. 174 (four-teen); Munn v. Reed (1862) 4 Allen (Mass.) 431, citing Wright v. Malden & M. R. Co. (1862) 4 Allen (Mass.) 283 (four—age and capacity); Plumley v. Birge (1878) 124 Mass. 57, 26 Am. Rep. 645, 1 Am. Neg. Cas. 135 (thirteen-year-old boy bitten by dog which he struck with stick—age and capacity); Meibus v. Dodge (1875) 38 Wis. 300, 20 Am. Rep. 6 (seven-year-old boy bitten by dog while attempting to pull stick from sleigh which dog was guarding); Bernier v. G  n  reux (1902) Rap. Jud. Que-bec 12 B. R. 24 (thirteen).

³⁵ As to the practical results reached in the application of the rule in this class of cases, see VII. b, 2, *infra*.

Kierkowsky v. Connell (1916) 253 Pa. 566, 98 Atl. 766 (twelve-year-old boy kicked by mule); Marsland v. Murray (1888) 148 Mass. 91, 12 Am. St. Rep. 520, 18 N. E. L.R.A. 1917F.

680 (four-year-old child kicked by horse straying in highway).

³⁶ As to the practical results reached in the application of the rule in this class of cases, see VII. k, *infra*.

Arkansas Valley Trust Co. v. McIlroy (1911) 97 Ark. 160, 31 L.R.A. (N.S.) 1020, 133 S. W. 816 (twelve-year-old girl burned while guarding fire—age, intelligence, ca-pacity); Standard Oil Co. v. Marlow (1912) 150 Ky. 647, 150 S. W. 832 (ten—playing with fire); Union P. R. Co. v. McDonald (1893) 162 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619 (where twelve-year-old boy on becoming frightened at threats of other boys ran along a path skirting a burning slack pit and fell into it).

³⁷ As to the practical results reached in the application of the rule in this class of cases, see VII. m, *infra*.

Sioux City & P. R. Co. v. Stout (1873) 17 Wall. (U. S.) 657, 21 L. ed. 745 (six); Barrett v. Southern P. R. Co. (1891) 91 Cal. 296, 25 Am. St. Rep. 186, 27 Pac. 666 (eight); Edgington v. Burlington, C. R. & N. R. Co. (1902) 116 Iowa, 444, 57 L.R.A. 561, 90 N. W. 95 (seven—age, experience, and intelligence); Kansas C. R. Co. v. Fitz-simmons (1879) 22 Kan. 691, 31 Am. Rep. 203 (twelve); Keffe v. Milwaukee & St. P. R. Co. (1875) 21 Minn. 207, 18 Am. Rep. 393 (seven); Twist v. Winona & St. P. R. Co. (1888) 39 Minn. 164, 12 Am. St. Rep. 626, 39 N. W. 402 (ten—age and capacity); Edwards v. Metropolitan Street R. Co. (1906) 112 Mo. App. 656, 87 S. W. 587 (twelve—age and capacity); Bridger v. Ashville & S. R. Co. (1887) 27 S. C. 456, 13 Am. St. Rep. 653, 3 S. E. 860 (ten—capacity and intelligence); Evansich v. Gulf, C. & S. F. R. Co. (1882) 57 Tex. 126, 44 Am. Rep. 586 (seven); Houston & T. C. R. Co. v. Simpson (1883) 60 Tex. 103 (ten); Gulf, C. & St. F. R. Co. v. McWhirter (1890) 77 Tex. 356, 19 Am. St. Rep. 755, 14 S. W. 26 (five—recognizing rule); Stephenville, N. & S. T. R. Co. v. Voss (1913) — Tex. Civ. App. —, 159 S. W. 64 (thirteen); Coley v. Canadian P. R. Co. (1906) Rap. Jud. Quebec 29 C. S. 282 (under ten).

³⁸ As to the practical results reached in the application of the rule in this class of cases, see note to Derringer v. Tatley, post, 187.

Shellabarger v. Fisher (1906) 5 L.R.A. (N.S.) 250, 75 C. C. A. 9, 143 Fed. 937 (be-tween five and six); Otis Elevator Co. v. Mann (1911) 112 C. C. A. 306, 191 Fed. 716 (sixteen—servant); Citizens' Bank v. Fair-weather (1917) — Ark. —, 191 S. W. 911 (fourteen); Jenson v. Will & F. Co. (1907) 150 Cal. 398, 89 Pac. 113 (twelve—servant); Kentucky Hotel Co. v. Camp (1895) 97 Ky. 424, 30 S. W. 1010 (under seven—age, ex-perience, and discretion); Davis v. Ohio Valley Bkg. & T. Co. (1908) 127 Ky. 800, 15 L.R.A. (N.S.) 402, 106 S. W. 843 (twelve—riding on top of elevator); Craig v. Bene-dictine Sisters Hospital Asso. (1903) 88

vators,³⁸ or drawbridges;³⁹ in actions for injuries by explosions or firearms;⁴⁰ or by contact with wires charged with elec-

tricity;⁴¹ and in various actions, in some of which the circumstances are not stated.⁴²

Minn. 535, 93 N. W. 669 (ten—attempting to leave moving elevator); *Obermeyer v. F. H. Logeman Chair Mfg. Co.* (1906) 120 Mo. App. 59, 96 S. W. 673 (fifteen—servant); *Winkle v. George B. Peek Dry Goods Co.* (1908) 132 Mo. App. 656, 112 S. W. 1026 (thirteen—servant); *Shortridge v. Scarritt Estate Co.* (1910) 145 Mo. App. 295, 130 S. W. 126 (eleven—age and capacity); *Timmerman v. Frankel* (1913) 172 Mo. App. 174, 157 S. W. 1051 (sixteen—servant); *Marshall v. United R. Co.* (1916) — Mo. App. —, 184 S. W. 159 (fifteen-year-old boy in defendant's employ injured by falling down elevator shaft—age and capacity); *Krey v. Schlusner* (1891) 42 N. Y. S. R. 917, 16 N. Y. Supp. 695 (fifteen); *Guichard v. New* (1895) 84 Hun, 55, 31 N. Y. Supp. 1080, later appeal in (1896) 9 App. Div. 485, 41 N. Y. Supp. 456 (where eight-year-old boy projected head into elevator shaft and was struck by descending car); *Hoehman v. Moss Engraving Co.* (1893) 4 Misc. 160, 23 N. Y. Supp. 787 (fourteen—servant); *Derringer v. Tatley* (N. D.) post, 187 (fourteen—servant); *Strawbridge v. Bradford* (1889) 128 Pa. 200, 15 Am. St. Rep. 670, 18 Atl. 346 (thirteen—servant).

³⁹ As to the practical results reached in the application of the rule in this class of cases, see VII. f, *infra*.

Cusimano v. New Orleans (1909) 123 La. 565, 49 So. 195 (ten—jumping on swing bridge after it began to turn); *Brown v. European & N. A. R. Co.* (1870) 58 Me. 384 (nine—attempting to jump on drawbridge as it was being closed).

⁴⁰ As to the practical results reached in the application of this doctrine in this class of cases, see notes to *Akin v. Bradley Engineering & Mach. Co.* 14 L.R.A.(N.S.) 586; *Finkbeiner v. Solomon*, 24 L.R.A.(N.S.) 1257; *Juntti v. Oliver Iron Min. Co.* 42 L.R.A.(N.S.) 840; and *Folsom-Morris Coal Min. Co. v. DeVork*, L.R.A.1917A, 1295.

Binford v. Johnston (1882) 82 Ind. 426, 42 Am. Rep. 508 (ten-year-old boy killed by pistol—cartridge purchased by him from defendant); *McEldon v. Drew* (1908) 138 Iowa, 390, 128 Am. St. Rep. 203, 116 N. W. 147 (twelve—playing with gunpowder—age, experience, capacity, and understanding); *Powers v. Harlow* (1884) 53 Mich. 507, 51 Am. Rep. 154, 19 N. W. 257, later appeal (1885) 57 Mich. 107, 23 N. W. 606 (eight—exploding dynamite cartridge with stone); *Mattson v. Minnesota & N. W. R. Co.* (1905) 95 Minn. 477, 70 L.R.A. 503, 101 Am. St. Rep. 483, 104 N. W. 443, 5 Ann. Cas. 498, 18 Am. Neg. Rep. 511 (under nine—exploding dynamite); *Travell v. Bannerman* (1903) 174 N. Y. 47, 66 N. E. 583 (age not stated—boy injured by explosive with which companions were playing); *Akin v. Bradley Engineering & Mach. Co.* (1909) 51 Wash. 658, 99 Pac. 1038, see also earlier appeal in (1907) 48 Wash. 97, 14 L.R.A.(N.S.) 586, 92 Pac. 903 (eleven-year-old boy

injured by exploding dynamite cap with electric battery); *Olson v. Gill Home Invest. Co.* (1910) 58 Wash. 151, 27 L.R.A.(N.S.) 884, 108 Pac. 140 (where thirteen-year-old boy attempted to pry cap off dynamite stick); *Davis v. Wenatchee* (1915) 86 Wash. 13, 149 Pac. 337 (eleven—exploding dynamite cap); *Moran v. Burroughs* (1912) 10 D. L. R. 181, 4 Ont. Week. N. 539, 27 Ont. L. Rep. 639 (twelve-year-old boy injured by gun while engaged with other boys in shooting at a mark).

⁴¹ As to the practical results reached in the application of the rule in this class of cases, see VII. g, *infra*.

Pierce v. United Gas & E. Co. (1911) 161 Cal. 176, 118 Pac. 700 (thirteen); *Madison v. Thomas* (1908) 130 Ga. 153, 60 S. E. 461 (seven); *Quincy Gas & E. Co. v. Bauman* (1902) 104 Ill. App. 600, affirmed in (1903) 203 Ill. 295, 67 N. E. 807 (eleven—age, capacity, intelligence, and experience); *Lexington R. Co. v. Fain* (1903) 24 Ky. L. Rep. 1443, 71 S. W. 628 (fourteen—quoting rule); *Macon v. Paducah Street R. Co.* (1901) 110 Ky. 680, 62 S. W. 496 (twelve); *Owensboro v. York* (1904) 117 Ky. 294, 77 S. W. 1130 (twelve); *Charette v. L'Anse* (1908) 154 Mich. 304, 117 N. W. 737 (fourteen—age, knowledge, experience); *Potera v. Brookhaven* (1909) 95 Miss. 774, 49 So. 617 (ten or twelve—age, experience, knowledge, intelligence); *Brubaker v. Kansas City Electric Light Co.* (1908) 130 Mo. App. 439, 110 S. W. 12 (nine); *Citizens' Electric R. Light & P. Co. v. Bell* (1903) 26 Ohio C. C. 691, affirmed without opinion in (1904) 70 Ohio St. 482, 72 N. E. 1155 (seven); *Daltry v. Media Electric Light, Heat & P. Co.* (1904) 208 Pa. 403, 57 Atl. 833 (ten); *Dowlen v. Texas Power & Light Co.* (1915) — Tex. Civ. App. —, 174 S. W. 674 (thirteen—age, intelligence, and experience); *Lynchburg Teleph. Co. v. Booker* (1905) 103 Va. 594, 50 S. E. 148 (eight); *Bice v. Wheeling Electrical Co.* (1907) 62 W. Va. 685, 59 S. E. 626 (sixteen).

⁴² *Crane Elevator Co. v. Lippert* (1894) 11 C. C. A. 521, 24 U. S. App. 176, 63 Fed. 942 (fifteen-year-old boy falling over obstructions in unlighted hallway); *Rosenberg v. Durfee* (1891) 87 Cal. 545, 26 Pac. 793 (eight—riding on pole or sweep drawn by horse, used to propel machinery for pumping water); *Quill v. Southern P. Co.* (1903) 140 Cal. 268, 73 Pac. 991 (thirteen—age and capacity); *Richardson v. El Paso Consol. Gold Min. Co.* (1911) 51 Colo. 440, 118 Pac. 982 (nine-year-old boy stepped or jumped on loose cover of abandoned mine shaft); *Wilmot v. McPadden* (1905) 78 Conn. 276, 61 Atl. 1069 (where seven-year-old boy playing in building which was being torn down injured by fall of chimney); *Western & A. R. Co. v. Rogers* (1898) 104 Ga. 224, 30 S. E. 804, 4 Am. Neg. Rep. 606 (age not stated); *Cole v. Searfoss* (1912) 49 Ind. App. 334, 97 N. E. 345 (fifteen—

Illustrative cases also are cited in the footnote, in which the rule has been expressly recognized and adopted in ac-

tions for injuries or death of a minor servant.⁴³

The proposition supported by these

drinking liquor to excess; age, knowledge, and experience); *Fishburn v. Burlington & N. W. R. Co.* (1905) 127 Iowa, 483, 103 N. W. 481 (snow fence along railroad right of way blown on six-year old child on father's premises); *Kinchlow v. Midland Elevator Co.* (1896) 57 Kan. 374, 46 Pac. 703 (ten-year-old boy, to warm himself, stepped on defective cover of steam-exhaust barrel, the top of which was nearly level with ground); *Biggs v. Consolidated Barb-Wire Co.* (1899) 60 Kan. 217, 44 L.R.A. 655, 56 Pac. 4, 5 Am. Neg. Rep. 335, later appeal (1901) 62 Kan. 492, 63 Pac. 740, 9 Am. Neg. Rep. 263 (fourteen—death by contact with projecting set screw on rapidly revolving shaft); *Covington v. Bramble* (1892) 14 Ky. L. Rep. 395 (seven—recognizing rule); *Moynihan v. Whidden* (1887) 143 Mass. 287, 9 N. E. 645 (eight-year-old boy took hold of rope used for hoisting purposes in erection of building and was injured by hand being drawn into wheel); *McNeil v. Boston Ice Co.* (1899) 173 Mass. 570, 54 N. E. 257 (injury to child two years and ten months old in street by ice falling on her from defendant's wagon); *Slattery v. Lawrence Ice Co.* (1906) 190 Mass. 79, 76 N. E. 459, 19 Am. Neg. Rep. 298 (six years and eight months—injury by ice dropped on child sitting on curb; age and intelligence); *Harris v. Crawley* (1912) 170 Mich. 381, 136 N. W. 356 (injury to thirteen-year-old girl on merry-go-round—age, experience, and intelligence); *Johnson v. St. Paul City R. Co.* (1897) 67 Minn. 260, 36 L.R.A. 586, 69 N. W. 900, 1 Am. Neg. Rep. 93 (obiter) (age and discretion); *Kempinger v. St. Louis & I. M. R. Co.* (1877) 3 Mo. App. 581 (twelve); *Lee v. St. Louis Hame Mfg. Co.* (1879) 6 Mo. App. 578 (age not stated); *Houck v. Chicago & A. R. Co.* (1906) 116 Mo. App. 559, 92 S. W. 738 (nine or ten—injury by contact with pumping machinery); *Herd v. Koenig* (1909) 137 Mo. App. 589, 119 S. W. 56 (ten—leaning against decayed fence); *O'Leary v. Brooks Elevator Co.* (1898) 7 N. D. 554, 41 L.R.A. 677, 75 N. W. 919, 4 Am. Neg. Rep. 451 (recognizing rule); *Weaver v. Bullis* (1891) 38 N. Y. S. R. 989, 14 N. Y. Supp. 338, affirmed without opinion in (1891) 128 N. Y. 634, 29 N. E. 147 (where 9-year-old boy was injured by mowing machine in use by defendant); *Schmidt v. Cook* (1893) 4 Misc. 86, 30 Abb. N. C. 285, 23 N. Y. Supp. 799 (eleven-year-old girl injured by fall of flagstone standing on edge against the fence in the yard where she was playing) later appeal (1895) 12 Misc. 449, 33 N. Y. Supp. 624; *Cincinnati Traction Co. v. Blackson* (1905) 27 Ohio C. C. R. 191 (eleven—age, intelligence, and experience); *Whirley v. Whiteman* (1858) 1 Head (Tenn.) 610 (recognizing rule); *Western U. Teleg. Co. v. Hoffman* (1891) 80 Tex. 420, 26 Am. St. Rep. 759, 15 S. W. 1048 (fifteen—failure to summon physician in time to treat personal injury); *North Texas Constr.* L.R.A.1917F.

Co. v. Bostick (1904) — Tex. Civ. App. —, 80 S. W. 109, reversed on other grounds in (1904) 98 Tex. 239, 83 S. W. 12 (eight-year-old boy injured by contact with machinery of cotton gin); *Houston & T. C. R. Co. v. Bulger* (1904) 35 Tex. Civ. App. 478, 80 S. W. 557 (thirteen—injury by discharge of steam at railway pumping station); *Galveston, H. & N. R. Co. v. Olds* (1908) — Tex. Civ. App. —, 112 S. W. 787 (eleven); *Crocker v. Banks* (1888) 4 Times L. R. (Eng.) 324 (where seventeen-year-old girl employed by defendant in filling soda-water bottles was injured because of failure to wear protection mask); *Coburn v. Hardwick* (1902) 1 Ont. Week. Rep. 733 (where men were playing in street by throwing heavy iron ball, and ten-year-old boy was injured in attempting to stop ball for purpose of returning it to players); see also *Briese v. Maechtle* (1911) 146 Wis. 89, 35 L.R.A.(N.S.) 574, 130 N. W. 893, Ann. Cas. 1912C, 176, 1 N. C. A. 769 (recognizing rule as regards negligence of defendant, a boy ten years old, who collided with the plaintiff while at play).

⁴³ *Blumenthal v. Craig* (1897) 26 C. C. A. 427, 55 U. S. App. 8, 81 Fed. 320 (age not stated); *Force v. Standard Silk Co.* (1908) 160 Fed. 992 (fourteen); *Foley v. California Horseshoe Co.* (1896) 115 Cal. 184, 56 Am. St. Rep. 87, 47 Pac. 42 (fourteen); *Adams v. Clymer* (1893) 1 Marv. (Del.) 80, 36 Atl. 1104 (sixteen—age, capacity, and experience); *Vinson v. Morning News* (1903) 118 Ga. 655, 45 S. E. 481 (seventeen); *Evans v. Josephine Mills* (1904) 119 Ga. 448, 46 S. E. 674, 15 Am. Neg. Rep. 503 (eleven); *Elk Cotton Mills v. Grant* (1913) 140 Ga. 727, 48 L.R.A.(N.S.) 656, 79 S. E. 836 (eleven); *Norton v. Volzke* (1895) 158 Ill. 402, 49 Am. St. Rep. 167, 41 N. E. 1085 (ten—age and discretion); *Glover v. Gray* (1881) 9 Ill. App. 329 (twelve—age and capacity); *Chicago, W. & V. Coal Co. v. Moran* (1903) 110 Ill. App. 664, affirmed in (1904) 210 Ill. 9, 71 N. E. 38 (sixteen); *St. Louis & S. E. R. Co. v. Valirius* (1877) 56 Ind. 511 (sixteen); *Keller v. Gaskill* (1894) 9 Ind. App. 670, 36 N. E. 303 (seventeen—age, maturity, and capacity); *Sachau v. Milner* (1904) 123 Iowa, 387, 98 N. W. 900 (thirteen—age, intelligence, and experience); *Hazlerigg v. Dobbins* (1909) 145 Iowa, 495, 123 N. W. 196 (twelve); *Smith v. National Coal & I. Co.* (1909) 135 Ky. 671, 117 S. W. 280 (fourteen); *Wyman v. Berry* (1909) 106 Me. 43, 75 Atl. 123, 20 Ann. Cas. 439 (sixteen); *Berdos v. Tremont & S. Mills* (1911) 209 Mass. 489, 95 N. E. 876, Ann. Cas. 1912B, 797 (under fourteen—age, experience, intelligence, judgment, and alertness); *Swoboda v. Ward* (1879) 40 Mich. 420 (age, intelligence, and experience); *Dowling v. Gerard B. Allen & Co.* (1885) 88 Mo. 293, later appeal (1890) 102 Mo. 213, 14 S. W. 751 (seventeen); *Jackson v. Butler* (1913) 249 Mo. 342, 155 S. W. 1071 (seventeen);

cases is thus stated by the Federal Supreme Court:⁴⁴ "The rule of law in regard to the negligence of an adult and the rule in regard to that of an infant of tender years is quite different. By the adult there must be given that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. If he fails to give it, his injury is the result of his own folly, and cannot be visited upon another. Of an infant of tender years

less discretion is required, and the degree depends upon his age and knowledge. Of a child of three years of age less caution would be required than one of seven; and of a child of seven less than one of twelve or fifteen. The caution required is according to the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case."

A few of the various statements of the rule will be found in the footnotes.⁴⁵

Rogers v. Meyerson Printing Co. (1903) 103 Mo. App. 683, 78 S. W. 79 (thirteen—age and capacity); Coleman v. Himmelberger-Harrison Land & Lumber Co. (1904) 105 Mo. App. 254, 79 S. W. 981 (eighteen—brakeman); Stanley v. Chicago, M. & St. P. R. Co. (1905) 112 Mo. App. 601, 87 S. W. 112 (twenty); Longree v. Jackes-Evans Mfg. Co. (1906) 120 Mo. App. 478, 97 S. W. 272 (fifteen—age and capacity); Stegmann v. Gerber (1909) 146 Mo. App. 104, 123 S. W. 1041 (fifteen); Ludwig v. Williams Cooperage Co. (1911) 156 Mo. App. 117, 136 S. W. 749 (seventeen); Fitzgerald v. Alma Furniture Co. (1902) 131 N. C. 636, 42 S. E. 946 (nine); Rolin v. R. J. Reynolds Tobacco Co. (1906) 141 N. C. 300, 7 L.R.A. (N.S.) 335, 53 S. E. 891, 8 Ann. Cas. 638 (twelve—age, intelligence, and knowledge); Huff v. Ames (1884) 16 Neb. 139, 49 Am. Rep. 716, 19 N. W. 623 (eleven—discretion); Omaha & R. Valley R. Co. v. Morgan (1894) 40 Neb. 604, 50 N. W. 81, 16 Am. Neg. Cas. 542 (twelve—age, development, and experience); Ittner Brick Co. v. Killian (1903) 67 Neb. 589, 93 N. W. 951, 13 Am. Neg. Rep. 552 (fourteen); McCarragher v. Rogers (1890) 120 N. Y. 526, 24 N. E. 812 (thirteen); Baird v. Richardson (1886) 4 N. Y. S. R. 648 (twelve); Keating v. Coon (1905) 102 App. Div. 112, 92 N. Y. Supp. 474 (sixteen); Rahn v. Standard Optical Co. (1906) 110 App. Div. 501, 96 N. Y. Supp. 1080 (fifteen); Cleveland Rolling Mill Co. v. Corrigan (1888) 46 Ohio St. 283, 3 L.R.A. 385, 15 Am. St. Rep. 596, 20 N. E. 466 (under fourteen); Mundhenke v. Oregon City Mfg. Co. (1905) 47 Or. 127, 1 L.R.A. (N.S.) 278, 81 Pac. 977 (sixteen); Westman v. Wind River Lumber Co. (1907) 50 Or. 137, 91 Pac. 478 (fifteen); Kehler v. Schwenk (1891) 144 Pa. 348, 13 L.R.A. 374, 27 Am. St. Rep. 633, 22 Atl. 910 (fourteen); Dynes v. Bromley (1904) 208 Pa. 633, 57 Atl. 1123, 16 Am. Neg. Rep. 576 (thirteen); Le Febvre v. Lawton Spinning Co. (1902) 24 R. I. 215, 52 Atl. 1025 (twelve); Queen v. Dayton Coal & I. Co. (1895) 95 Tenn. 458, 30 L.R.A. 82, 49 Am. St. Rep. 935, 32 S. W. 460 (ten—age and capacity); International & G. N. R. Co. v. Hinzie (1891) 82 Tex. 623, 18 S. W. 681 (age and experience); Hill v. Southern P. Co. (1900) 23 Utah, 94, 63 Pac. 814 (under nineteen); Gage v. Springfield Lumber Co. (1907) 47 Wash. 141, 91 Pac. 558 (fifteen); Turner v. Norfolk & W. R. Co. (1895) 40 W. Va. 675, 22 L.R.A. 1917F.

S. E. 83 (sixteen—age, capacity, and experience); Bare v. Crane Creek Coal & Coke Co. (1906) 61 W. Va. 28, 8 L.R.A. (N.S.) 284, 123 Am. St. Rep. 966, 55 S. E. 907 (twelve); Kucera v. Merrill Lumber Co. (1895) 91 Wis. 637, 65 N. W. 374 (sixteen—age, intelligence, and experience); Klatt v. N. C. Foster Lumber Co. (1897) 97 Wis. 641, 73 N. W. 563 (seventeen—same); Anderson v. Chicago Brass Co. (1906) 127 Wis. 273, 106 N. W. 1077 (sixteen—same); Moore v. J. D. Moore Co. (1902) 4 Ont. L. Rep. 167, 1 Ont. Week. Rep. 290 (fourteen); see also cases in note 38.

⁴⁴ Washington & G. R. Co. v. Gladmon (1872) 15 Wall. (U. S.) 410, 21 L. ed. 116.

⁴⁵ The degree of care required of children to avoid personal injuries is well stated in a Delaware case, as follows: "While it is a rule of law that contributory negligence on the part of the person injured will defeat the recovery of damages for the injury, yet such rule is somewhat affected by the relative rights and duties of the plaintiff and the defendant at the time and under the circumstances of the accident, growing out of the infancy of the plaintiff or person injured. It is a well-established rule of law that the conduct of children in the matter of contributory negligence should not be governed by the same rule that governs adults. For while it is the duty of the infant to exercise ordinary care to avoid the injuries of which he complains, ordinary care for him is that degree of care which children of the same age, of ordinary care and prudence, are accustomed to exercise under like circumstances. But this is not an inflexible rule, and is to be modified according to the maturity and capacity of the infant, his ability to understand and appreciate the danger, and his familiarity with all the surroundings and conditions in each particular case, and it is for the jury to say whether under all the circumstances the infant exercised reasonable care." *Linthicum v. Truitt* (1911) 2 Boyce (Del.) 338, 80 Atl. 245.

"Ordinary care has relation to the situation and condition of the parties, and varies according to the exigencies which require vigilance and attention, and when contributory negligence is sought to be attributed to a child, the child can only be held to that degree of care which may reasonably be expected from one under the same conditions, of the same age, sex, intelligence, and judgment." *Baker v. Flint & P. M. R. Co.*

The converse of the above proposition is equally true; namely, that infancy will not preclude the defense of contributory negligence, if the injured person failed to exercise the care ordinarily exercised by children of the same age, capacity, discretion, knowledge, and experience, under the same or similar cir-

cumstances. The cases already cited in general support this proposition.⁴⁶ Various statements of this aspect of the rule and cases particularly emphasizing it will be found in the footnote.⁴⁷

It has been held that it is the duty of the trial court, when it is sought to hold one under fourteen years of age guilty

(1888) 68 Mich. 90, 35 N. W. 836; *Young v. Clark* (1897) 16 Utah, 42, 50 Pac. 832, 3 Am. Neg. Rep. 315.

"The precedents very generally agree in stating the rule that, in considering the question of contributory negligence of a child, reference must be had not only to the bare facts of what he did or omitted to do, but due consideration must be given also to his age, experience, and maturity or immaturity of judgment, and in this connection, especially where the child is quite young, the power and influence of childish instincts are not to be overlooked." *Long v. Ottumwa R. & Light Co.* (1913) 182 Iowa, 11, 142 N. W. 1008 (injury to a nine-year-old boy by a street car).

The terms "ordinary" or "reasonable care," applied to the conduct of a child eight years old, mean such care as may reasonably be expected of children of similar age, judgment, and experience under similar circumstances. *Rohloff v. Fair Haven & W. R. Co.* (1904) 76 Conn. 689, 58 Atl. 5, 16 Am. Neg. Rep. 299; *Smith v. North Jersey Street R. Co.* (1906) 73 N. J. L. 295, 67 Atl. 753.

The general rule with reference to the care required of an infant was said in *McEldon v. Drew* (1908) 138 Iowa, 390, 128 Am. St. Rep. 203, 116 N. W. 147, to be that degree of care which children of the same age ordinarily exercise under the same circumstances, taking into account the age, experience, capacity, and understanding of the child.

Ordinary care in the case of a child is only such care as the great mass of children of his age, intelligence, and experience ordinarily exercise under similar circumstances. *Quinn v. Ross Motor Car Co.* (1914) 157 Wis. 543, 147 N. W. 1000 (injury to thirteen-year-old boy by collision with automobile in street).

A child's capacity is the measure of his responsibility. *Philadelphia City Pass. R. Co. v. Hassard* (1874) 75 Pa. 367; *Strawbridge v. Bradford* (1889) 129 Pa. 200, 15 Am. St. Rep. 670, 18 Atl. 346; *Kehler v. Schwenk* (1891) 144 Pa. 348, 13 L.R.A. 374, 27 Am. St. Rep. 633, 22 Atl. 910; *Kelly v. Pittsburg & B. Traction Co.* (1903) 204 Pa. 623, 54 Atl. 482; *Mulligan v. Homestead* (1913) 243 Pa. 361, 90 Atl. 71; *DiMeglio v. Philadelphia & R. R. Co.* (1916) 262 Pa. 391, 97 Atl. 476; *Kierkowsky v. Connell* (1916) 253 Pa. 566, 98 Atl. 786; *Phillips v. Duquesne Traction Co.* (1898) 8 Pa. Super. Ct. 210.

⁴⁶ See cases cited in notes 13 to 43, supra.

⁴⁷ "Ordinarily a less degree of care is required of an infant than of an adult, but L.R.A.1917F.

his responsibility is always to be measured according to his maturity and capacity, and determined by the circumstances of the case as shown by the evidence. . . . While the law sedulously guards the safety of an infant who is too young and inexperienced to be conscious of danger, or to exercise judgment and discretion in protecting himself, the rule is otherwise where he has attained sufficient age and experience to observe and avoid danger. In the latter case the law imposes upon him the obligation of using the reason he possesses, and of exercising a degree of care for his protection commensurate with his maturity and capacity, and for failure to do so will visit upon him the consequences of his own negligence." *Virginia-Carolina R. Co. v. Clawson* (1910) 111 Va. 813, 68 S. E. 1003.

An infant is bound to exercise the degree of care of which he is capable, and a failure to do so may constitute contributory negligence as matter of law. *Chicago, B. & Q. R. Co. v. Laughlin* (1906) 74 Kan. 567, 87 Pac. 749 (injury to a boy thirteen years old in crossing a railroad track); *Wilson v. Atchison, T. & S. F. R. Co.* (1903) 66 Kan. 183, 71 Pac. 282 (injury to twelve-year-old boy in attempting to climb upon a moving freight train).

A sixteen-year-old boy to avoid the charge of contributory negligence must exercise such judgment and discretion as he possesses in view of his age, experience, and ability; and hence, an instruction, in an action by him for damages sustained while in the defendant's employ, which omits all reference to the proposition of contributory negligence, and charges that under certain circumstances the defendant is guilty of negligence and the plaintiff is entitled to a verdict, is erroneous. *Killelea v. California Horseshoe Co.* (1903) 140 Cal. 602, 74 Pac. 157, 15 Am. Neg. Rep. 18.

A girl nine years old, in crossing a street, is required to exercise such a degree of care to avoid passing teams as is reasonably to be expected of a child of her years. *Young v. Small* (1905) 188 Mass. 4, 108 Am. St. Rep. 457, 73 N. E. 1019.

A boy twelve years old must exercise such care to avoid teams in a public street as ordinarily prudent boys of his age and intelligence are accustomed to exercise under like circumstances. *Gleason v. Smith* (1901) 180 Mass. 6, 55 L.R.A. 622, 91 Am. St. Rep. 261, 61 N. E. 220, 10 Am. Neg. Rep. 599.

While the law does not require a child to use the same degree of care as is required of an adult, he is, nevertheless, bound to use such reasonable care as one of his age,

of contributory negligence, to define in its instructions the care required of the minor as that reasonably to be expected of one of his age and capacity, whether

requested so to do or not, and that to omit thus to limit the degree of care and to enarge the infant with the same degree of diligence required of an adult

mental capacity and experience is capable of using; and his failure so to do is negligence. *Fitzgerald v. Chicago, B. & Q. R. Co.* (1901) 114 Ill. App. 118; *A. M. Rothchild & Co. v. Levy* (1905) 118 Ill. App. 78.

A boy nearly twelve years old and of average intelligence is bound to exercise at least such care and caution for his own safety in crossing street car tracks as one of his age, intelligence, capacity, and experience would exercise under similar circumstances. *Burke v. Chicago City R. Co.* (1910) 153 Ill. App. 388.

In an action for the death of a twelve-year-old boy who was killed by a train at a crossing, the court in *Crosby v. Maine C. R. Co.* (1915) 113 Me. 270, L.R.A.1915E, 225, 93 Atl. 744, said: "Children *sui juris* are not relieved from exercising prudence and care merely because they are children. The well-established rule is that they are bound to exercise that degree or extent of care which ordinarily prudent children of their age and experience are accustomed to use under similar circumstances. The standard is the conduct of boys who are ordinarily careful."

In an action for injury to an eighteen-year-old servant, the court in *Krisch v. Richter* (1910) 61 Tex. Civ. App. 563, 130 S. W. 186, said: "It is the rule in this state that a minor who possesses such a degree of intelligence as to know and appreciate the danger of his act is chargeable with contributory negligence, just as the adult person is chargeable. If he has the knowledge of the situation and the intelligence to appreciate the dangers thereof, his minority cannot shield him from the consequences of his negligent acts."

A minor who possesses such a degree of intelligence as to appreciate the danger involved in his acts is as chargeable with contributory negligence as any other person. *Freeman v. Garcia* (1909) 56 Tex. Civ. App. 638, 121 S. W. 886, where a boy eleven years old was injured by voluntarily jumping from the running board of a moving switch engine, and the boy's own testimony showed beyond question that he appreciated the danger of injury likely to result from his act, it being held that he was guilty of contributory negligence as matter of law.

A legal duty rests upon a child to avoid a danger which he knows and understands, or which is perfectly obvious to one of his years, and he may be declared negligent as matter of law for failing to avoid it. *Battles v. United R. Co.* (1913) 178 Mo. App. 596, 161 S. W. 614.

"The rule seems to be well settled that an infant, whatever his age may be, is not in law excused from exercising some care in approaching and passing known places of danger. If he fails to do this and is so young that he is termed in law *non sui juris*, then his negligence is imputed to his

parent or guardian." *Weiss v. Metropolitan Street R. Co.* (1898) 33 App. Div. 221, 53 N. Y. Supp. 449, affirmed without opinion in (1901) 165 N. Y. 665, 59 N. E. 1132.

"The fact that he may not have the mature judgment of an adult will not excuse a child from exercising the degree of judgment and discretion which he possesses, or for disregarding the warnings and orders of his seniors, and heedlessly rushing into known danger. . . . But the authorities are all one way, and to the effect that even a child is bound to use such reasonable care as one of his age and mental capacity is capable of using; and his failure to do so is negligence." *Twist v. Winona & St. P. R. Co.* (1888) 39 Minn. 164, 12 Am. St. Rep. 626, 39 N. W. 402.

As particularly emphasizing the positive rule that a child is bound to exercise the care ordinarily exercised by children of the same age, capacity, discretion, knowledge, and experience, under the same or similar circumstances, see also the following, among other, cases: *Studer v. Southern P. R. Co.* (1898) 121 Cal. 400, 66 Am. St. Rep. 39, 53 Pac. 942, 4 Am. Neg. Rep. 36 (holding a twelve-year-old boy guilty of contributory negligence as matter of law in attempting to cross a train obstructing a street); *Atchison, T. & S. F. R. Co. v. Todd* (1895) 54 Kan. 551, 38 Pac. 804 (holding that it was contributory negligence as matter of law for a boy nine years old to seat himself under a car in a railroad yard, although he had been cautioned of the danger and knew the peril of his position); *Peerless Mfg. Co. v. Denham* (1893) 15 Ky. L. Rep. 95; *Colomb v. Portland & B. Street R. Co.* (1905) 100 Me. 418, 61 Atl. 898, 19 Am. Neg. Rep. 9 (holding a girl ten years old guilty of contributory negligence as matter of law in crossing a street car track in front of a car approaching in plain sight and only about 40 feet away); *Connor v. Wabash R. Co.* (1910) 149 Mo. App. 675, 129 S. W. 777; *Ridenhour v. Kansas City Cable R. Co.* (1890) 102 Mo. 270, 13 S. W. 889, 14 S. W. 760, 4 Am. Neg. Cas. 634 (nine-year-old boy injured in alighting from a street car); *Buch v. Amory Mfg. Co.* (1897) 69 N. H. 257, 76 Am. St. Rep. 163, 44 Atl. 809 (injury to eight-year-old child by machinery in mill); *Anderson v. Central R. Co.* (1902) 68 N. J. L. 269, 53 Atl. 391 (holding a nine-year-old boy guilty of contributory negligence as matter of law in failing to observe train approaching, in plain sight when he attempted to cross the track); *Mitchell v. Tacoma R. & Motor Co.* (1894) 9 Wash. 120, 37 Pac. 341 (injury by street car to eight-year-old girl playing in the street); *Rose v. Northern P. R. Co.* (1915) 81 Wash. 684, L.R.A.1915B, 166, 143 Pac. 145, 7 N. C. C. A. 1029 (holding a boy nearly fifteen years old negligent as matter of law in riding on the lower steps of a rapidly moving railroad

is error;⁴⁸ although a different rule has been applied as to an infant over fourteen years of age.⁴⁹ And in an action for injury to a child, at least one of tender years, to justify an instruction that it is required to exercise only that degree of care which a child of its age, intelligence, capacity, discretion, and experience would naturally and ordinarily use under the same circumstances, it is not necessary for the plaintiff to prove the extent of the child's intelligence, capacity, discretion, and experience, because, in the absence of proof to the contrary, the child will be presumed to have only such capacity to appreciate danger and such discretion and intelligence to protect itself therefrom as might reasonably be expected of an average child of its age under like circumstances.⁵⁰

The contention has been overruled that the elements of comprehension and appreciation of danger apply only in actions involving the relation of master and servant, and are not pertinent in other cases, in determining whether a child has exercised the required degree of care for its own safety.⁵¹

b. Capacity of individual child.

As is apparent from the general rule above stated regarding the standard by which a child's conduct is to be measured, the law requires, in determining the question of contributory negligence, consideration of the mental development, knowledge, capacity, and experience of the individual child. That is, the question is not whether the child acted as an ordinarily prudent child of its age would have acted, but whether it

acted as a child of its age, and of its capacity, discretion, knowledge, and experience would ordinarily have acted under the same or similar circumstances. In some cases this distinction is pointed out. Thus, in an Alabama case⁵² it was said: "There is no inflexible rule by which we can determine the capacity of all children under all circumstances for observing and avoiding danger; each child is bound to use the reason it possesses and to exercise the degree of care and caution of which it is capable. One child may understand and appreciate one danger, and not another. Another child, of the same age as the first, may understand the danger the first does not, and be insensible to the danger of which the first was aware. A child raised in the city may be perfectly capable of understanding and avoiding the danger of street cars, railroads, and crowded streets, but insensible of the dangers of a mowing or threshing machine, a foot adz, or a scythe blade, etc.; while a child of the same age and average intelligence, raised on a farm, would fully comprehend and understand the dangers of the latter class, but be wholly unconscious or ignorant of those of the former. Some children at the age of seven better understand the dangers of trains and cars than do others at fourteen. Therefore, the capacity, the intelligence, the knowledge, the experience, and discretion of the child are always evidentiary circumstances. There is no ideal standard by which the court or jury can determine whether a given child in a particular case exercised that measure of care which the law requires." And in a recent Utah decision⁵³ it was held that

car, engaged in exercises which caused his body to project beyond the side of the car).

⁴⁸ *Wright v. Detroit, G. H. & M. R. Co.* (1889) 77 Mich. 123, 43 N. W. 765, where boy under fourteen years of age was killed by train at crossing.

⁴⁹ See note 220, *infra*.

⁵⁰ *McGuire v. Richard Guthmann Transfer Co.* (1908) 234 Ill. 125, 84 N. E. 723 (seven-year-old child injured by team in street).

The law does not require of a child six years and three months old, even if found by the jury to be *sui juris*, the same degree of care as is exercised by ordinarily prudent adults, or cast on such a child the burden of showing that it is incapable of exercising the degree of care required of adults. *Lafferty v. Third Ave. R. Co.* (1903) 85 App. Div. 592, 83 N. Y. Supp. 405, affirmed without opinion in (1903) 176 N. Y. 594, 68 N. E. 1118, where a child six years and three months old was injured by a street car while attempting to cross the street. L.R.A.1917F.

⁵¹ *Secard v. Rhineland Lighting Co.* (1911) 147 Wis. 614, 133 N. W. 45.

⁵² *Birmingham & A. R. Co. v. Mattison* (1909) 166 Ala. 602, 52 So. 49.

⁵³ *Thomas v. Oregon Short Line R. Co.* (1916) — Utah, —, 154 Pac. 777. The action was for injury to an eight-year-old girl who was struck by a train while attempting to cross the track. An instruction was held not prejudicial to the plaintiff that, in determining whether the child was negligent, the jury should "take into consideration, her age, development, experience, intelligence, and knowledge and appreciation of the danger incident to being upon or crossing railroad tracks as shown by the evidence; and if you should find therefrom that she did know and appreciate such danger she would be held to exercise that degree of care that a person of her knowledge, experience, and understanding would ordinarily exercise under such circumstances. In other words, if she were above the standard of ordinary children of her age in under-

a child is required to use that degree of care which a person of its knowledge, experience, and understanding would ordinarily use under the circumstances, which may be greater than that required of an ordinary child of the same age,

standing, knowledge, and appreciation of the circumstances she would be held to the degree of care that persons of her intelligence, knowledge, and experience would ordinarily exercise under such circumstances and in view of such knowledge."

⁵⁴ Reasonable care on the part of a child to avoid personal injury is that care which could fairly be expected of a child of the same age, capacity, intelligence, and physical condition, and if the child has greater natural capacity and intelligence than the average child of his age he is bound to exercise a degree of care proportionately greater. *Marius v. Motor Delivery Co.* (1911) 146 App. Div. 608, 181 N. Y. Supp. 357 (action for death of a boy eight and a half years old caused by a motor truck while playing in the street).

In determining whether a child is guilty of contributory negligence, the jury is not to consider as an abstract proposition the intelligence of a child of the age in question, but should consider the understanding and appreciation of danger on the part of the particular child for whose injury recovery is sought. *Grealish v. Brooklyn, Q. C. & S. R. Co.* (1909) 130 App. Div. 238, 114 N. Y. Supp. 582, affirmed without opinion in (1910) 197 N. Y. 540, 91 N. E. 1114 (eight-year-old girl crossing street car track).

"The degree of care required of an infant of tender years the omission of which will constitute negligence on his part is entirely different from that required of an adult. It is to be measured in each case by the maturity and capacity of the individual." *Finkelstein v. New York C. & H. R. R. Co.* (1886) 41 Hun (N. Y.) 34.

Due care for its own safety in a child nine years of age is such care as its capacity, mental and physical, fits it for exercising under the circumstances; neither the average child of its own age nor the prudent man is a standard by which to measure its diligence with legal exactness; but the law requires such care as the capacity of the particular child enables it to use naturally and reasonably. *Western & A. R. Co. v. Young* (1888) 81 Ga. 397, 12 Am. St. Rep. 320, 7 S. E. 912; see also *Linder v. Brown* (1912) 137 Ga. 352, 73 S. E. 734.

In an action for injuries to a child four and a half years old due to a defective sidewalk, the court in *Harrington v. Macon* (1906) 125 Ga. 58, 54 S. E. 71, said: "In several parts of his charge the court compared the conduct of the plaintiff with that of the average child of its age. If a child four and a half years of age was capable of being guilty of contributory negligence this was not a correct statement of the rule. Due care in a child of tender years

if its intelligence and appreciation of the danger is greater than that of an ordinary child of that age. Other decisions are to a similar effect."⁵⁴

So, if the experience, capacity, and appreciation of the particular danger on

is such care as its capacity, mental and physical, fits it for exercising in the actual circumstances of the occasion and situation under investigation. . . . The average child of its own age is not the standard by which to measure its legal diligence with exactness. "Such care as the capacity of the particular child enables it to use naturally and reasonably is what the law requires." And it was held that an instruction was erroneous that if the jury believed that the defendant was negligent, and that the act of the child was the proximate cause of the injury and of such a nature as was naturally to be expected of a child of his age, the plaintiff would be entitled to recover, provided the jury believed that the child's act was in accordance with the usual, natural, and expected indiscretions characteristic of the average child of his years and development.

The brightness or intelligence of a child is an important consideration in determining the issue of contributory negligence in an action for his injury. *Atchison, T. & S. F. R. Co. v. Potter* (1899) 60 Kan. 808, 72 Am. St. Rep. 385, 58 Pac. 471, 6 Am. Neg. Rep. 512 (injury to boy under seven years of age by a train).

In *Weldon v. Philadelphia, W. & B. R. Co.* (1899) 2 Penn. (Del.) 1, 43 Atl. 156, where a boy ten years old was injured while attempting to pass between an opening in cars standing on a siding, the jury were instructed that the care required of an infant to avoid danger is that which children of the same age of ordinary care and prudence would exercise under like circumstances; that this is not, however, an inflexible rule, but is to be modified according to the maturity and capacity of the infant, his ability to understand and appreciate the danger, and his familiarity with all the surroundings and conditions in the particular case. To a similar effect is *Tully v. Philadelphia, W. & B. R. Co.* (1901) 3 Penn. (Del.) 455, 50 Atl. 95; see also earlier decision in the same case in (1900) 2 Penn. (Del.) 537, 82 Am. St. Rep. 425, 47 Atl. 1019.

In an action for injury to a seventeen-year-old boy while in the employ of the defendant, it was held in *Keller v. Gaskill* (1894) 9 Ind. App. 670, 36 N. E. 303, that a finding that the plaintiff exercised all the prudence, judgment, care, and skill "ordinarily possessed by inexperienced boys of his then apparent age, to wit, the age of from thirteen to sixteen years," was not a sufficient finding that the plaintiff was free from contributory negligence, as he was bound to exercise such care as might reasonably be expected of one of his age, maturity, and capacity, irrespective of his apparent age, in the absence of a finding

the part of an infant is shown to equal that of the average adult, allowance because of minority in determining whether he exercised due care are improper.⁵⁵

c. Elements to be considered; age, maturity, discretion, knowledge, expertise, recklessness, etc.,

In citing the cases in notes 13 to 43, supra, as to the care required of children, the particular elements of the child's nature which the court indicated should be taken into consideration are stated. The language used, however, seems frequently to be somewhat accidental, indicating that the court was not intending to lay down an exact rule. Thus, in many of the cases cited in the notes above referred to, it is variously said that the care which a child must exercise is that ordinarily exercised by children of the same age; age and capacity; age, experience, and capacity; age, experience, and intelligence; age, maturity, and intelligence; age, capacity, and discretion; age and discretion; age, intelligence, capacity, and experience; maturity, experience, and capacity; under-

that he possessed only such prudence, judgment, or skill as is generally possessed by boys between the ages stated.

⁵⁵ See notes 204 and 205, infra.

⁵⁶ It was said in *Western & A. R. Co. v. Young* (1888) 81 Ga. 397, 12 Am. St. Rep. 320, 7 S. E. 912: "Conceding that average may serve as a standard in adults, it will not follow that a like standard should have recognition as to children. Could we assume an ideal constant as to the former, who that knows how precocious are some children, and how backward are others, would carry the assumption down to childhood, and apply it to children? Capacity (which includes personal experience as well as natural gifts) is the main thing. Age is of no significance, except as a mark or sign of capacity. Some of the decisions mention age only, but most of them couple capacity with it. . . . While the name 'ordinary care' is frequently applied to the diligence exacted by law of a child, there is little propriety in doing so,—'due care' is always the better and more accurate description." See also later appeal in (1899) 83 Ga. 512, 10 S. E. 197.

An instruction, in an action for injury to a boy nine years old by a train, which fixes the standard of care required of the child at that which could be expected of one of his age, and ignores the capacity of the boy, of which there is evidence and an allegation in his petition, is erroneous. *Linder v. Brown* (1912) 137 Ga. 352, 73 S. E. 734.

In an action for injury to a boy eleven years old, while riding on the rear of a wagon, by being struck by the pole of a following wagon, it was held error to instruct the jury that if they believed from L.R.A.1917F.

standing and intelligence; judgment and experience; etc. And it is apparent frequently that the form of expression was not given careful consideration, the courts often even in the same opinion varying the statement of the particular elements which should be taken into consideration in fixing the standard of care required of a child. All of the elements indicated above, it appears, are proper for consideration, although some of them may be so fully included in others that their omission in an instruction would not be erroneous.

It is the rule that the care which a child is bound to exercise to avoid the charge of negligence does not depend simply on its age, but depends more largely on its knowledge, capacity, experience, and other elements above indicated. Age alone is not the proper or controlling test, but is an element for consideration only as it bears on the question of knowledge and discretion, appreciation of the danger, and the ability to avoid it. Many cases support this view.⁵⁶ It was said on this point in a Washington case: "There can be no

the evidence that the plaintiff, while in the exercise of ordinary care "for a boy of his age," was injured by the negligence of the defendant, they should find the defendant guilty; since age is not the only element to be considered, but intelligence, capacity, and experience are also to be taken into account. *Illinois Iron & Metal Co. v. Weber* (1902) 196 Ill. 528, 63 N. E. 1008, reversing (1900) 89 Ill. App. 368. And it was held that the error was not cured by another instruction, that if the jury believed that the boy had sufficient age, intelligence, and experience to comprehend the risk of his action the law charged him with the same responsibility for his conduct as if he were of full age, and that want of ordinary care would be a defense the same as if he were of full age.

The question of contributory negligence of children is to be determined not from their age alone, but from their intelligence, experience, and ability to understand and comprehend danger and to care for themselves. *Wabash R. Co. v. Jones* (1905) 121 Ill. App. 390.

The caution required of an infant is measured by its capacity and maturity; age is not significant except as a mark of capacity. *Bess v. Atchison, T. & S. F. R. Co.* (1900) 62 Kan. 299, 62 Pac. 996, 8 Am. Neg. Rep. 25; *Mendenhall v. Atchison, T. & S. F. R. Co.* (1903) 66 Kan. 438, 61 L.R.A. 120, 97 Am. St. Rep. 380, 71 Pac. 846; *Coy v. Missouri P. R. Co.* (1906) 74 Kan. 853, 86 Pac. 468, 20 Am. Neg. Rep. 540.

Age alone, irrespective of intelligence and natural capacity, is not a proper test of the degree of care required of children in actions for their injuries. *Louisville & N. R.*

fixed period when a minor may be held, as a matter of law, to appreciate danger

which may surround him. His appreciation of danger will depend more upon his

Co. v. Webb (1896) 99 Ky. 332, 35 S. W. 1117.

Intelligence and not age is the controlling test in determining the degree of care required of a child to avoid personal injury. *Trudell v. Grand Trunk R. Co.* (1901) 126 Mich. 73, 53 L.R.A. 271, 85 N. W. 250.

Intelligence and experience, as well as age, should be considered in determining whether a child has exercised due care to avoid a personal injury. *Harris v. Crawley* (1912) 170 Mich. 381, 136 N. W. 356 (injury to thirteen-year-old girl by falling from a merry-go-round).

An instruction, in an action for injury to a boy ten or twelve years old due to voluntarily touching an electric light wire in the street, that the boy was chargeable with contributory negligence "if he was an intelligent boy for one of his years," is erroneous, because age, intelligence, knowledge, and experience are all to be considered in determining whether he had sufficient discretion to permit of his being charged with negligence. *Potera v. Brookhaven* (1909) 95 Miss. 774, 49 So. 617.

"Not only the age, but the experience and capacity, of a minor enter as factors into the degree of care he is required to observe." *Longree v. Jackes-Evans Mfg. Co.* (1906) 120 Mo. App. 478, 97 S. W. 272.

"It is the capacity, not the age, of an infant that is the criterion of his responsibility; that is, the individual infant is singled out and his conduct is measured by his own acts,—whether it was such as was ordinarily careful for one of his capacity and age, and not of his age alone." *Fink v. Kansas City S. R. Co.* (1912) 161 Mo. App. 314, 143 S. W. 568, holding, in an action for injuries to a boy ten years old by falling from a moving freight car to which he was clinging, in an effort to dodge a missile thrown at him by a brakeman, that an instruction was erroneous which in effect made the question of ordinary care on the part of the boy dependent simply on his age. The court said: "The jury in determining whether plaintiff exercised care or was negligent should have been authorized to take into consideration not only his age, but his experience and capacity, as factors, and his proved capacity to understand the danger to which he was exposed, and should not have been limited in this consideration to the care usually exercised by a boy of his age." And it was held that the giving of the instruction was material error, in view of evidence of the boy's ability to care for himself. See also *Saller v. Friedman Bros. Shoe Co.* (1908) 130 Mo. App. 712, 109 S. W. 794, where a similar rule was laid down in an action for injury to a fifteen-year-old employee.

An instruction in an action for injury to a twelve-year-old boy which permits the jury to take into consideration, in determining the degree of care which he should have exercised, the age of the boy, without any

reference to his intelligence, capacity, or knowledge of the dangers attending the situation, is erroneous; the true test of responsibility being the ability of the child to know and appreciate the danger, and age being an element for consideration only in so far as it bears on that question. *Cherry v. St. Louis & S. F. R. Co.* (1912) 163 Mo. App. 53, 145 S. W. 837, where a boy was injured in attempting to climb over cars which blocked a crossing, and it appeared that he had an appreciation of the danger possibly beyond that ordinarily possessed by one of his years.

In an action for injury to a boy fourteen years old who was struck by a train approaching from the rear while he was walking on a railroad track, the trial court charged that the degree of care required of the injured boy is that care which would be exercised by a reasonably prudent person of the same age. On appeal, the court said that, in view of another trial, the judgment being reversed on other grounds, it would invite the attention of the trial court to the case of *Missouri, K. & T. R. Co. v. Rodgers* (1896) 89 Tex. 675, 36 S. W. 243, in which it had laid down the rule that to determine the question of liability for injury to a child it is proper to take into consideration his age, intelligence, and ability to understand the character of the act and its consequences. *Texas & P. R. Co. v. Phillips* (1897) 91 Tex. 278, 42 S. W. 852.

In an action for injury to a boy eleven years old from being struck by a street car in attempting to cross the track, an instruction was held erroneous in *Norfolk R. & Light Co. v. Higgins* (1908) 108 Va. 324, 61 S. E. 766, that the law presumes that an infant between seven and fourteen years of age cannot be guilty of contributory negligence, which presumption may be overcome by evidence that the infant has more than "the average capacity of children of his age." It was said: "While age is, of course, a circumstance to be considered in determining the capacity of a child between seven and fourteen years of age, it is by no means the sole criterion; but that question, as all the authorities agree, should be left to the jury, to be determined by the circumstances of the particular case, unencumbered by language in the instructions from the court of doubtful interpretation as to what is meant by 'average capacity of children of his age,' and as to how this 'average capacity' of other children is to be determined. The instruction in question was in this respect plainly calculated to confuse and mislead the jury, and the objection of the defendant thereto should have been sustained."

See also *Hackett v. Toronto R. Co.* (1907) 10 Ont. Week. Rep. 582, where it was said by one of the judges that it is not age, but intelligence, that is the test in applying the doctrine of contributory negligence to children.

intelligence and experience than upon his age. A boy of fourteen of average intelligence with no experience with dangerous appliances may know less of danger than one of less intelligence who has had experience. So that the question of age, when compared with natural intelligence and past experience, may have very little influence in determining the ability of a minor to appreciate danger."⁵⁷

Whether or not an instruction which omits some of the elements above indicated as proper for consideration in

submitting to the jury the question of contributory negligence constitutes prejudicial error is a question as to which no fixed rule can be laid down. This depends on the particular circumstances and on the elements included or omitted; and, in a close case, apparently an error of this kind may be prejudicial which in another case would not be ground for reversal. Cases on this point will be found in the footnote, it being frequently, however, as is indicated, unnecessary directly to decide the question involved.⁵⁸

It is important to observe in this con-

⁵⁷ *Boyer v. Northern P. Coal Co.* (1902) 27 Wash. 707, 68 Pac. 348 (where a fourteen-year-old boy was injured while employed in the defendant's coal mine).

⁵⁸ An instruction omitting the term "experience" in defining the degree of care required of a child, and defining due care as "such care and caution as children of her age, capacity, and intelligence" are capable of exercising under the same circumstances, was held reversible error, where there was no other instruction on the subject, in *Lake Erie & W. R. Co. v. Klinkrath* (1907) 227 Ill. 439, 81 N. E. 377, a close case, in which a thirteen-year-old girl, who had lived for a number of years near a railroad yard, and had previously been at the turntable on which the injury occurred, and had been cautioned to be careful by an employee of the railway company who saw her playing there, was injured as a result of permitting her leg to hang over the edge of the table while it was in motion. Two of the judges, however, dissented, on the ground that the words "age, capacity, and intelligence" included all the elements necessary to enable the jury properly to decide the question of contributory negligence, and particularly that the term "experience" was included in the term "capacity."

In *Shaw v. Corrigton* (1912) 171 Ill. App. 232, an action for injury to a ten-year-old boy by an automobile in a street, it was held that an instruction was erroneous which omitted the element of experience in determining the question of due care on the part of the child. The instruction, however, was erroneous also in other respects, so that it was not necessary to decide whether this particular error would have been sufficient to require reversal of the judgment.

In an action for the death of a boy ten years old due to a defect in a sidewalk, on which he was rolling a hoop, the court in *Chicago v. Keefe* (1885) 114 Ill. 222, 55 Am. Rep. 860, 2 N. E. 267, instructed the jury that the degree of care to be observed by the boy was such as "from his age and intelligence, under the circumstances was required." On appeal the court said that this phraseology was not free from objection, but it thought the instruction was not misleading; that it was sufficient if the boy exercised "such care as under the circum-

stances might be expected from one of his age and intelligence."

An instruction in an action for injury to a twelve-year-old boy by a train defining ordinary care on the part of the boy as that which an "ordinarily prudent child would exercise under the circumstances and in the same situation, for one of his age and experience," was said in *Pittsburgh, Ft. W. & C. R. Co. v. Moore* (1903) 110 Ill. App. 304, to be subject to criticism in that it omitted the element of the intelligence of the child, and that the instruction, instead of the phrase, "for one of his age and experience," should have been "for one of his age, capacity, and experience." It was, however, unnecessary to decide whether this objection would constitute reversible error, the judgment being reversed on other grounds.

In *Illinois C. R. Co. v. Johnson* (1906) 221 Ill. 42, 77 N. E. 592, where an instruction was given that the deceased, a boy fourteen years old, who was killed by an engine on alighting from a train, was required to exercise only such care and caution as persons of his age and discretion would ordinarily use under the circumstances, the supreme court defined the degree of care as that which ought reasonably to be expected of children of like age, capacity, intelligence, and experience, but stated that the omission of some of these elements to be considered might not have been of much importance. It was unnecessary to decide the question as the judgment was reversed on other grounds.

It was held in *Ft. Worth & D. C. R. Co. v. Poteet* (1908) 53 Tex. Civ. App. 44, 115 S. W. 883, an action for injury to a seven-year-old boy who while walking on the track was struck by a train approaching from the rear, that an instruction was properly refused which directed the jury to find the boy guilty of contributory negligence if they found that he had "sufficient mental capacity to realize the danger of being upon the track;" and that the court properly submitted the issue of contributory negligence to the jury in an instruction authorizing them to consider on the issue of contributory negligence the child's age, intelligence, experience, and knowledge or information of the danger, with all the other facts and circumstances.

nection that the element merely of knowledge is not so important, in determining due care on the part of a child, as the elements of judgment, discretion, and appreciation of the probability and extent of the danger; also that daring and rashness are characteristics of children of certain ages. So that, as a study of the cases discloses, it frequently happens that a child, because of its adventurous spirit, natural to one of its years, without a proper appreciation of the probability and extent of the danger, places itself in a perilous position and is injured, while a younger and more timid child avoids the danger. And familiarity with the particular danger has a bearing also on this aspect of the question, since it may, in the case of a child not having an appreciation of the probability and extent of the danger, cause it to incur greater risks than it other-

wise would incur. These considerations should be borne in mind in determining whether a child acted as other children of the same age, capacity, discretion, knowledge, and experience would have acted under the same or similar circumstances. And these considerations point also to the importance of the element of judgment or discretion in determining whether a child in any case exercised due care, as compared with the element simply of knowledge. On this point, it was said in a New Jersey case:⁵⁹ "The reason for the rule [that a child is required to exercise only that degree of care usually exercised by persons of similar age, judgment, and experience] is this: The conduct of a child should not be measured by the standard of care applied to an adult, because the immaturity of youth ordinarily embraces not only imperfect knowledge of natural

In an action for injury to a boy thirteen years old by the negligent discharge of steam at a railway pumping station, the court, on the question of contributory negligence, instructed the jury that the boy was required to exercise such a degree of care as would reasonably be expected of him, taking into consideration his age, experience, and intelligence. On appeal, the court said it was settled by the overwhelming weight of authority that a child is held, so far as he is personally concerned, to the exercise of such degree of care and discretion as is reasonably to be expected from children of his age, that the instruction was in substantial, though not in literal, compliance with this principle, and that when it was considered that the evidence tended to show that the plaintiff was a dull boy and might not on that account have had such discretion as is reasonably to be expected from a child of his age, a slight departure in the charge from the general rule of contributory negligence as applicable to children was not error, but was required by the particular facts in the case; that, in fact, the rule had been laid down by the supreme court in that state that to determine the question of liability for injury to a child it is proper to take into consideration his age, intelligence, and ability to understand the character of the act performed and its consequences. *Houston & T. C. R. Co. v. Bulger* (1904) 35 Tex. Civ. App. 478, 80 S. W. 557.

In an action for injury to a nine-year-old boy sustained after he alighted from a street car by being struck by a car moving in the opposite direction, an instruction requiring the boy to exercise that degree of care usually exercised by boys of his age and capacity was objected to on the ground that it should have gone farther and told the jury that the law required the exercise of care and prudence equal to the boy's capacity, age, knowledge, and experience. *L.R.A.1917F.*

The court said the instruction was in substantial compliance with its ruling in other cases and must be held sufficient; but that on a retrial (the decision being reversed on other grounds) it would suggest that the instruction be changed to meet the objection urged against it. *Van Natta v. People's Street R. Electric Light & P. Co.* (1896) 133 Mo. 13, 34 S. W. 505.

In *Stanley v. Chicago, M. & St. P. R. Co.* (1905) 112 Mo. App. 601, 87 S. W. 112, an action for injury to a twenty-year-old employee, although it was held that an instruction that the jury must believe, before they could find against the plaintiff on the ground of contributory negligence, that he did not use such care and caution as a person of his age and experience would have ordinarily used under the circumstances, did not constitute prejudicial error, the evidence not raising any question whether his capacity was above or below the average, the court intimated that a more proper instruction would have included the terms, "capacity, age, knowledge, and experience."

"The reason of the rule exempting children from responsibility does not depend so much on the knowledge and sprightliness of the child as it does upon his indiscretion, imprudence, lack of judgment, and impulsiveness." *Anderson v. Union Terminal R. Co.* (1899) 81 Mo. App. 116.

The capacity for contributory negligence of an infant between the ages of seven and fourteen years is dependent not only upon his general intelligence, but also upon his experience and maturity. *Norfolk & W. R. Co. v. Overton* (1911) 111 Va. 716, 69 S. E. 1060 (thirteen-year-old boy killed by a train in crossing track).

⁵⁹ *David v. West Jersey & S. R. Co.* (1913) 84 N. J. L. 685, 87 Atl. 440. To the same effect is *Mann v. Missouri, K. & T. R. Co.* (1907) 123 Mo. App. 486, 100 S. W. 566.

facts and laws and of the proper relation between cause and effect, but, when possessed of these elements necessary to the exercise of reasonable care, it still lacks the discretion, thoughtfulness, and judgment presumed to be an attribute of the ordinary prudent adult, and which may be said to come only with experience. Thoughtlessness, impulsiveness, and indifference to all but patent and imminent dangers are natural traits of childhood, and must be taken into account when we come to classify the conduct of the child." And, on the same point, it was well said in a Missouri case:⁶⁰ "A boy may have the knowledge of an adult person in respect to the danger which will attend a particular act, but at the same time he may not have the prudence, thoughtfulness, and discretion to avoid them which is possessed by the ordinarily prudent adult person; and therefore it has become a settled rule of law in this

state that a child is not negligent if he exercise that degree of care which under like circumstances would be expected of one of his years and capacity. And whether he uses such care in any given case is a question to be left for the jury to decide. . . . Although the jury may have found that the plaintiff had sufficient capacity to understand the danger, yet he had the right to have it left to them to further determine whether or not he had the prudence, thoughtfulness, and discretion to avoid such danger which is possessed by an ordinarily prudent adult; and if not, then to further determine whether or not he exercised that degree of care which under like circumstances would be reasonably expected of one of his years and capacity. And this omission in the instructions is a fault which we think fatal to the judgment."

Other cases are to a similar effect.⁶¹

⁶⁰ *Thompson v. Missouri, K. & T. R. Co.* (1902) 93 Mo. App. 548, 67 S. W. 693, holding, in an action for injury to a minor (age not stated) while attempting to pass between cars which blocked a street crossing, that it was error to instruct the jury, in effect, that if the plaintiff had sufficient mental capacity to know the danger attending an attempt to pass between the cars he was guilty of contributory negligence, since the instruction ignored the elements of prudence, thoughtfulness, and discretion to avoid the danger. See also *Burger v. Missouri P. R. Co.* (1892) 112 Mo. 238, 34 Am. St. Rep. 379, 20 S. W. 439, which lays down a rule similar to that above quoted.

⁶¹ See also notes 110 and 111, *infra*.

Lack of appreciation of the risks he may be running is one of the reasons why a child is not held to the same degree of care as an adult. *Burns v. F. Knight & Son* (1913) 213 Mass. 510, 100 N. E. 618.

On this point, it was said in an action for injury to an eleven-year-old boy by a train while crossing the track: "The evidence showed that he had the intelligence, education, and experience of youths of his age. He knew how trains were operated, and must be held to have known that if he was on the track when the engine came along it would strike and injure him. But while he knew the danger of being on the track when the engine passed, he may have lacked the discretion to appreciate the imprudence of attempting to cross the track under the circumstances which surrounded him. If a person of ordinary prudence would not have attempted to cross the track as he did, nevertheless, if the boy lacked the discretion, on account of his undeveloped judgment, to appreciate the danger, his act would be excusable." *Texas & P. R. Co. v. Ball* (1903) — Tex. Civ. App. —, 73 S. W. 420, reversed on other grounds in (1903) 96 Tex. 622, 75 S. W. 4. L.R.A.1917F.

An instruction in an action for the negligent killing of a girl about nine years old by a street car, that if she was old enough to know that if she got in front of an approaching car she was liable to get hurt, her negligence would defeat a recovery, was held unduly favorable to the defendant in *Schmidt v. St. Louis R. Co.* (1901) 163 Mo. 645, 63 S. W. 834.

It is the want of discretion of the child, rather than the want of information, which underlies the rule exempting him from the same degree of care required of an adult. *Owensboro v. York* (1904) 117 Ky. 294, 77 S. W. 1130 (where a twelve-year-old boy, on a dare, touched a live electric wire).

In an action for injury to a thirteen-year-old boy who was bitten by a dog which he struck with a stick, in holding that an instruction was not erroneous that if the boy was old enough to know that striking the dog would be likely to incite it to bite, and did strike the dog and thereby incited it to bite, he might nevertheless recover if the jury found he was in the exercise of such care as would be due care in a boy of his years, the court said: "If the court had ruled that if the plaintiff was old enough to know that striking the dog would be likely to incite him to bite he could not recover, it would have been erroneous. This is not a true test. It entirely disregards the thoughtlessness and heedlessness natural to boyhood. The plaintiff may have been old enough to know, if he stopped to reflect, that striking a dog would be likely to provoke him to bite, and yet in striking him he may have been acting as a boy of his age would ordinarily act under the same circumstances." *Plumley v. Birge* (1878) 124 Mass. 57, 26 Am. Rep. 645, 1 Am. Neg. Cas. 135.

In determining the responsibility for negligence on the part of children, the question is not whether the child had the capacity

Indeed, in the case of injury to a child between seven and fourteen years of age, it has been held that it is not the ability to know or even appreciate the danger which makes it responsible for contributory negligence, but that as a basis for such responsibility there must be a maturity and discretion beyond its years which would lead it to take care.⁶³

Attention is called, however, to several important distinctions in connection with the above considerations. Thus, in a South Carolina case,⁶³ where an action was brought for injuries sustained by a boy ten years old on a turntable, it was held that while the question of contributory negligence was properly left to the jury to determine in view of the intelligence and capacity of the boy, testimony as to caution, prudence, reckless-

ness, or impetuosity on his part, as an excuse for contributory negligence, notwithstanding his intelligence and capacity should have taught him better, was properly excluded. So, carelessness or negligence under the particular circumstances, it has been held, should not be considered in determining whether the child had the capacity to appreciate the danger or was in the exercise of due care.⁶⁴ And in a recent Maine decision⁶⁵ it was said that children who are sui juris are bound to exercise that degree or extent of care which ordinarily prudent children of their age and experience are accustomed to use under similar circumstances; that the standard is the conduct of children who are ordinarily careful.

and intelligence to know that it would be injured if the events in question occurred, but whether it was of an age, and had the capacity and experience, to realize and appreciate the risk of injury to which it was exposing itself. *Cahill v. E. B. & A. L. Stone Co.* (1914) 167 Cal. 126, 138 Pac. 712.

On this point, it was well said in a Michigan Case: "We cannot hesitate to hold that in all cases where the responsibility of action or self-preservation is involved it is both absurd and cruel, and plainly unlawful, to expect or demand of any human being judgment or caution not naturally to be expected from persons of his age and capacity. It is equally absurd to make mere intellect any controlling test in such matters. Children may differ very much in quickness, but the habits of caution and reflection come only with time and experience. The law does not prohibit the free agency of minors from any theory that they have not, long before reaching majority, as much knowledge on many subjects as they need. It is because from youth itself, in spite of education and surroundings, there must always be expected a greater liability to business errors, and to imposition, and a greater lack of care in guarding against dangers of all kinds, than experience shows to be likely in manhood. Cases of early maturity are exceptional, and any rule of law, civil or criminal, which treats a child as anything but a child, is inhuman and barbarous. And any standard of liability which regards knowledge and mere intellectual capacity, without reference to age and the discretion which is to be fairly expected of it, is not a fair standard, and cannot fail to do great wrong." *Hargreaves v. Deacon* (1872) 25 Mich. 1.

A special finding that a nine-year-old child, who was injured by a backing engine in attempting to cross the track, was of sufficient age, intelligence, and experience to know and realize the danger usually attendant upon crossing railroad tracks, was held in *Crabtree v. Missouri P. R. Co.* (1910) L.R.A.1917F.

86 Neb. 33, 136 Am. St. Rep. 663, 124 N. W. 932, not inconsistent with a verdict in her favor for injuries so sustained, based upon the view that she used such care as might ordinarily be expected from a child of her years.

⁶³ *Birmingham R. Light & P. Co. v. Landrum* (1907) 153 Ala. 192, 127 Am. St. Rep. 25, 45 So. 198. The action was for injury to a boy eleven years old, who, on alighting from a street car and attempting to pass behind the car across the track, was struck by a car moving in the opposite direction; and it was accordingly held that an instruction was properly refused to find for the defendant if the jury found that the boy had sufficient discretion and judgment to know and appreciate the danger of going on the track without stopping, looking, and listening for the approach of cars.

⁶⁴ *Bridger v. Asheville & S. R. Co.* (1887) 27 S. C. 456, 13 Am. St. Rep. 653, 3 S. E. 860.

⁶⁵ See, *Glover v. Gray* (1881) 9 Ill. App. 329, where, in an action for injuries to a twelve-year-old boy while employed in a factory, an instruction was held erroneous that if the jury believed from the evidence that the boy was near the machinery from which he might receive injury, and was careless or negligent in his conduct or work, that was a circumstance to be considered in arriving at the conclusion as to whether he was of an age capable of appreciating the danger of the position he occupied, or whether he was using such a degree of care as was usual among children of his age. The court said that the carelessness and negligence of the boy did not prove that he was exercising the degree of care that is usual with children of his age, nor did they tend to prove that he was not of an age capable of appreciating the danger of the position he occupied; and that proof of negligence is not proof of a want of capacity to appreciate danger.

⁶⁶ *Crosby v. Maine C. R. Co.* (1915) 113 Me. 270, L.R.A.1915E, 225, 93 Atl. 744

d. Particular instructions.

In discussing the various elements proper for consideration in determining whether a child has exercised due care, instructions bearing on that point have been noted.⁶⁶ There are, however, other instructions, the correctness of which has been challenged. Their consideration at this point will serve to point out more clearly the rule as to the care required of children, and its limitations. Thus, it has been held that since due care according to age and capacity is all the

law exacts of a child of tender years, and ordinary care, which is that of every prudent man, is not the standard for a child, it is error to charge the jury in effect that if a child had not the capacity to exercise the care of a prudent man it would not be chargeable with negligence.⁶⁷ Upon the other hand, although there is authority to the contrary,⁶⁸ in the majority of the cases considering the matter, instructions have been held not erroneous directly charging that the conduct of a child is not to be measured by the same standard as that of an adult,⁶⁹

⁶⁶ See II. c, *supra*.

⁶⁷ *Western & A. R. Co. v. Rogers* (1898) 104 Ga. 224, 30 S. E. 804, 4 Am. Neg. Rep. 606.

⁶⁸ It was held in *Chicago, R. I. & P. R. Co. v. Ohlsson* (1897) 70 Ill. App. 487, an action for injury to a six-year-old child by a train while attempting to cross the track, that an instruction was erroneous, that the law does not require of an infant six years of age the same degree of care and caution that it does of an adult, but only requires such care and caution as is ordinarily exercised by one of its age, capacity, and experience. The court said: "The instruction is erroneous because it invades the province of the jury. It is not proper for the court to tell the jury that the law does not require of an infant six years of age, or any other age, the same degree of care and caution that it does of an adult. It is always a question of fact to be determined by the jury whether a child is of sufficient age to exercise proper care for its safety under the circumstances. We do not feel warranted in reversing the judgment because of this instruction, however. The age of appellee was so tender that no serious harm was done appellant by the giving of it."

And in *Scott v. McMenamin* (1893) 51 Ill. App. 121, an action for injury to a sixteen-year-old boy while in the defendant's employ engaged in operating an elevator, it was held erroneous to instruct the jury, on the question of contributory negligence, that "the law does not require that a person of the age of . . . [the plaintiff] shall exercise the same degree of care and caution as a person of maturer years, but only such care and caution as a person of his age, intelligence, and discretion would naturally and ordinarily use under like circumstances." The court said that where the question of the negligence of an infant arises the circumstances in evidence are always to be taken into consideration, and the inquiry is whether the minor exercised such care as under the circumstances might be expected from one of his age and intelligence; and that the statement that the law does not require that a person of the age of the plaintiff shall exercise the same degree of care and caution as a person of maturer years, even in connection with

what followed, was, to say the least, misleading.

⁶⁹ In *Springfield Consol. R. Co. v. Welsch* (1895) 155 Ill. 511, 40 N. E. 1034, an instruction was approved, in an action for injury to a seven-year-old child by a street car while crossing the track, that "the law does not require of an infant seven years of age the same degree of care and caution which it does of an adult, but it only requires such care and caution as is ordinarily exercised by one of his age and capacity."

So, in an action for injury to a child who was riding on the running board of a street car, it was held in *Vessels v. Metropolitan Street R. Co.* (1908) 129 Mo. App. 708, 108 S. W. 578, not erroneous to instruct the jury that "due care on the part of an infant does not require the judgment and thoughtfulness that would be expected of an adult person under the same circumstances," and that if the jury believed from the evidence that the plaintiff was an infant under fourteen years of age and exercised that degree of care which under like circumstances would reasonably be expected of one of his years and capacity he would not be guilty of contributory negligence.

And an instruction was approved in *Mexican C. R. Co. v. Rodriguez* (1911) — Tex. Civ. App. —, 133 S. W. 690, in an action for injury to a five-year-old boy by a train backed along a public street, that "a child of such tender years is not held to the same degree of accountability as an adult man;" it being contended that this was a charge on the weight of evidence, argumentative, and took from the jury the right to determine the degree of accountability to which the child should be held.

Also in *Texas & P. R. Co. v. Ball* (1905) 38 Tex. Civ. App. 278, 85 S. W. 456, an action for injury to a boy eleven years old by a train while crossing a railroad track, the court approved an instruction that a child of tender years is not held to the same degree of accountability as an adult, but that the question of his intelligence and mental capacity is for the jury to determine from all the facts and circumstances in evidence; it being contended that this was a charge on the weight of the evidence and erroneous for the reason that the evi-

and even that it "must not" be so measured.⁷⁰

However, it seems that where experience and knowledge of the particular danger are shown, an instruction that a child is not required to exercise the care of an adult may be misleading, and it has been so held.^{70a}

It has been held erroneous, in an action for injury to a child seven years old, after charging that the degree of care exacted of an adult is not to be demanded or expected of children, to instruct the jury that if they believed the child possessed the intelligence of an adult they should hold him under obligation to care for himself to the extent required of persons of mature years.⁷¹ The action was for injury to a boy, while standing on a sidewalk, by being struck

by a cable which a street railway company was stringing; and it was said that the instruction was misleading, that ability to care for one's self is a product of experience, that in the nature of things no child of eight years has gathered conceptions enough of life to take such precautions for his own safety as a person of a greater number of years, although of a less degree of intelligence; and that it should be announced as a rule of law that no infant of tender years is to be judged in his conduct by the standard of care required of persons of maturity.

It has been held also that instructions are erroneous, or at least inaccurate, which define the care required of a child as such as one of his age, understanding, and experience "should have

dence showed the boy had been raised near the railroad, and was better educated and knew more about the danger from railroad cars than the average adult.

To a similar effect is *North Texas Constr. Co. v. Bostick* (1904) — *Tex. Civ. App.* —, 80 S. W. 109, holding, in an action for injury to an eight-year-old boy by the machinery in a ginhouse, that an instruction was not prejudicial to the defendant that the conduct of a child of tender years is not to be judged by the same rule which governs that of adults; that while it is the general rule that to entitle an adult to recover damages for an injury he must himself have been free from negligence, this rule when applied to a child of tender years will not prevent a recovery unless it has the intelligence, prudence, and caution to know, appreciate, and understand the dangers incident from its wrongful acts and omissions. The decision was reversed on other grounds in (1904) 98 *Tex.* 238, 83 S. W. 12.

And an instruction, in an action for injury to a boy eleven years old by the explosion of a dynamite cap with which he was playing, that the jury "should not apply to the plaintiff in the case the same rule you would apply to a grown man," was held in *Davis v. Wenatchee* (1915) 86 *Wash.* 13, 149 *Pac.* 337, not erroneous, where the court also instructed the jury that, in determining the question whether or not the plaintiff was guilty of contributory negligence, they should take into consideration his age, experience, knowledge, and the amount of prudence, care, and judgment which would ordinarily and reasonably be expected of a boy of that age under the circumstances, and that this was the rule by which the question as to whether or not he was guilty of contributory negligence should be measured.

⁷⁰ An instruction, in an action for injury to a girl thirteen years old in crossing a railroad in a sleigh driven by an adult, that L.R.A.1917F.

the degree of care and caution which she was required to exercise "must not be measured by a person of mature years" was held not erroneous as a direction to the jury, but as merely a suggestion that in considering the child's conduct it was the duty of the jury to consider and give proper weight to the fact of infancy. *Bennett v. New York C. & H. R. R. Co.* (1891) 40 *N. Y. S. R.* 948, 16 *N. Y. Supp.* 765, affirmed without opinion in (1892) 133 *N. Y.* 563, 30 *N. E.* 1149.

^{70a} In an action for injury to a boy about nine years old by an engine, while walking along the track, where it appeared that he was in the habit of riding on trains, and knew that the engine was taking coal and was likely to start at any moment, it was held that an instruction was erroneous that a child is not required to exercise the same degree of care as a person of mature years, and is bound to exercise only such care as children of his age, capacity, and intelligence are capable of exercising, since it tended to mislead the jury to infer that a child is never required to exercise the same degree of care as an adult. *Wabash R. Co. v. Jones* (1905) 121 *Ill. App.* 390. The instruction, it was said, was especially misleading in view of the averment in the declaration that the plaintiff was incapable of exercising care because of his "tender years." The court said that while it cannot be laid down as a general rule that all infants over seven years of age are required to exercise the care of an adult, they are required to exercise such care as a person of like age, intelligence, experience, and capacity for understanding and avoiding the danger might reasonably be expected to exercise under similar circumstances, and that if the child possesses the capacity of an adult the law requires him to exercise the same degree of care and prudence as an adult.

⁷¹ *Burckell v. Memphis Street R. Co.* (1911) 2 *Tenn. C. C. A.* 576.

used,"⁷³ or such as the jury "would expect"⁷³ a child of the particular age to use; although an instruction embodying the idea that the exercise of the care which might "reasonably be expected" of the child is sufficient has been upheld.⁷⁴

An instruction which requires the exercise of the highest degree of care of which the child is capable is, of course, erroneous.⁷⁵

⁷² An instruction, in an action for the negligent killing of a boy nearly fourteen years old by a street car, that the jury should determine whether the boy at the time was using such care as an ordinary and careful person of the same age, understanding, and experience "should have used," is erroneous, as leaving to the jury to fix the standard of care according to their own notions, instead of determining "what care ordinarily careful persons of similar age and experience do or would use. *Wills v. Ashland Light P. & Street R. Co.* (1900) 108 Wis. 255, 84 N. W. 998.

⁷³ An instruction involving the question whether the plaintiff used such care as "the jury would expect" of a boy of his age, is inaccurate, the test being, not the conjecture of the jury, but the care which a boy of ordinary caution would have used. *Lee v. St. Louis Hame Mfg. Co.* (1879) 6 Mo. App. 578.

⁷⁴ An instruction in an action for injury to a nine-year-old boy, who was run over by a wagon while crossing the street, that a child is required to act with the care and prudence which can reasonably be expected of its capacity and age, and when it manifests "as much care and prudence as can reasonably be expected from it" it is not guilty of negligence, was held not prejudicial to the defendant, in *Jennings v. Schwab* (1895) 64 Mo. App. 13.

⁷⁵ In an action for injury to a boy (age not stated) by reason of a defect in the sidewalk, an instruction that he was "bound to exercise such reasonable care and caution for his personal safety, while using the sidewalk, as a boy of his age, experience, and intelligence was individually capable of," was held erroneous as exacting the highest degree of care of which the boy was capable, whereas he was only required to exercise that ordinary care and prudence which under like circumstances could reasonably be expected of a boy of his years and capacity. *Stern v. Bensieck* (1901) 161 Mo. 146, 61 S. W. 594, 9 Am. Neg. Rep. 520.

⁷⁶ In an action for injury to a boy sixteen years old while employed in a mill, the court in *Anderson v. Chicago Brass Co.* (1906) 127 Wis. 273, 106 N. W. 1077, regarding an instruction which defined ordinary care on the part of the boy as "such care as boys of the age, intelligence, and experience of the plaintiff usually exercise under similar circumstances," said: "This instruction is complained of as erroneous because it does not carry the idea that the care must be the care ordinarily used by L.R.A.1917F.

Whether or not a child should exercise the care ordinarily exercised by the "great mass" of children,⁷⁶ or the "great mass of ordinarily prudent children,"⁷⁷ has been considered in several Wisconsin cases. And the question has arisen in various cases as to whether certain instructions on the care required of a child were erroneous as argumentative or a charge on the weight of the evidence,⁷⁸

the great mass of boys, or by the class of ordinarily careful boys. The instruction would have been more exact had it contained some words of this import, but under the decisions of this court we think it must be held that it fairly conveys that idea, and hence is not erroneous." Attention is called in this connection to *Briese v. Maechtle* (1911) 146 Wis. 89, 35 L.R.A.(N.S.) 574, 130 N. W. 893, Ann. Cas. 1912C, 176, 1 N. C. C. A. 760, in which, regarding the degree of care required of the defendant, a ten-year-old boy who collided with the plaintiff while at play, the court said: "The rule is that a child is only required to exercise that degree of care which the great mass of children of the same age ordinarily exercise under the same circumstances, taking into account the experience, capacity, and understanding of the child."

⁷⁷ In an action for injury to a thirteen-year-old girl by reason of a defective sidewalk, an instruction was held erroneous, in *Collins v. Janesville* (1900) 107 Wis. 436, 83 N. W. 695, which defined ordinary care as such care "as the great mass of ordinarily prudent children of her age and capacity exercise under like circumstances." The court called attention to this as a minor defect in view of the fact that the case for other reasons was remanded for a new trial, stating that the instruction "seems clearly incorrect, because it subdivides the class of ordinarily prudent children, and makes the action of one division of the class the test of ordinary care. The test is such care as would be exercised by ordinarily prudent and careful children, or the great mass of children of her age, under similar circumstances."

⁷⁸ An instruction, in an action for injury to a boy ten or twelve years old caused by his voluntarily touching a live electric wire attached to a street lamp which had fallen, that, in determining the question of contributory negligence, the jury must consider the fact that the boy had lived all his life in a city where they had electric lights and electric wires, and the fact that he had opportunities to learn and appreciate the dangers of such agencies, was erroneous as argumentative, a charge on the weight of the evidence, and as singling out and giving undue prominence to certain portions of the evidence, to the exclusion of the remainder. *Potera v. Brookhaven* (1909) 95 Miss. 774, 49 So. 617.

On the other hand, an instruction, in an action for injury to a boy sixteen years old because of an excessive voltage in an elec-

or as leading the jury possibly to believe that the same degree of care was required of a child as of an adult,⁷⁹ or as excluding consideration of unusual intelligence on the part of the particular child,⁸⁰ or as assuming that the child was of "imperfect discretion,"⁸¹ or as

submitting to the jury whether the care was "deemed adequate" by the child,⁸² or as using the term "immature" in defining the class of persons whose conduct is not to be measured by the standard applied to adults.⁸³

tric wire which he was helping to remove, that on the question of contributory negligence the jury should consider, "among other things," the boy's age, his knowledge of electricity, knowledge of the particular wire, the general circumstances, and the conduct of other persons just before the accident, was held in *Bice v. Wheeling Electrical Co.* (1907) 62 W. Va. 685, 59 S. E. 626, not erroneous as tending to give undue prominence to the particular facts named, leading the jury to consider them to the exclusion of other circumstances. The court said that the age and general information of an infant in such cases are prominent facts which may be specially given in a charge to the jury, although not to the exclusion of all other facts and circumstances.

See also *Texas & P. R. Co. v. Ball*, in note 69, *supra*.

⁷⁹ An instruction, in an action for the negligent killing of a thirteen-year-old girl, that her conduct should be measured by what "an ordinarily cautious, careful, and prudent person would have done under the same circumstances," was held objectionable as possibly misleading the jury to believe that the same degree of care was required of the girl as of an adult, instead only of such care as is ordinarily exercised by children of the same age and capacity. *Quill v. Southern P. Co.* (1903) 140 Cal. 268, 73 Pac. 991.

⁸⁰ Where an instruction submitted to the jury the question whether the plaintiff exercised such care as boys of his "age and discretion" usually exercise, it was held that the defendant could not complain that by the instructions evidence of unusual intelligence on the part of the plaintiff was excluded from consideration of the jury in determining whether he exercised due care. *Beaudin v. Bay City* (1904) 136 Mich. 334, 99 N. W. 285, 4 Ann. Cas. 248, 16 Am. Neg. Rep. 108.

⁸¹ In an action for the killing of a ten-year-old boy by a street car, on instruction that he was required to exercise only such care as might reasonably be expected of a boy of his age and capacity under similar circumstances, and that the same degree of care and prudence in avoiding danger is not required from a person of tender years and imperfect discretion as from a person of mature years and greater discretion under similar circumstances, was held erroneous as assuming that the boy was of imperfect discretion. *Lynch v. Metropolitan Street R. Co.* (1892) 112 Mo. 420, 20 S. W. 642. The court said: "While this boy was only required to use the discretion that might reasonably have been expected of one of his age and capacity, it was clearly the province of the jury to determine what his age and

capacity were, and whether he used that discretion in this case. It was for the jury to determine whether he was of imperfect discretion with respect to the danger from this car. The jury must have understood that the boy, in the opinion of the trial judge, was of imperfect discretion; and the whole tenor of the instruction was to excuse his negligence for this reason." To a similar effect is *Day v. Citizens R. Co.* (1899) 81 Mo. App. 471, an action for injury to a fifteen-year-old boy by a street car while crossing the track.

However, in an action for injury to a boy thirteen years old while in the employ of the defendant, it was held in *Rogers v. Meyerson Printing Co.* (1903) 103 Mo. App. 683, 78 S. W. 79, that it was not erroneous to instruct the jury that the deceased was bound to exercise only such care and prudence as might reasonably be expected of a boy of his age and capacity under the circumstances, and that the law does not require as high care from a person of tender years and imperfect discretion as from one of mature years and discretion.

⁸² In an action for the negligent killing of a boy twelve years old, it was held in *McDonald v. Metropolitan Street R. Co.* (1902) 75 App. Div. 559, 78 N. Y. Supp. 284, that an instruction was erroneous that it was the duty of the boy "to exercise such care and prudence to avoid an accident as a boy of his age and of good intelligence would exercise under the circumstances and deem adequate thereto," as it left to the jury to determine whether the degree of care which the boy exercised was such as he deemed adequate, and might be construed as meaning that if he deemed the care adequate it met the requirements of the law. On motion for reargument, however, in (1903) 80 App. Div. 233, 80 N. Y. Supp. 577, the court, two of the judges dissenting, reversed its holding on this point, and took the position that the instruction was not open to the above construction, but that the words "deem adequate thereto" referred to the mental process of those persons exercising reasonable care, to whose standard the boy must measure.

⁸³ In an action for the death of a boy nearly fourteen years old while playing on a turntable, an instruction that the conduct of a person of "immature" years is not to be judged by the same rule which governs adults, that a person of "immature" years must exercise that degree of care and caution that one of the same age, intelligence, and experience would reasonably be expected to exercise under similar circumstances, and that therefore the care required of the boy was such as a person of the same age, intelligence, and experience would reason-

Other cases involving various instructions are set out in the footnote.⁸⁴

ably be expected to use, and would naturally and ordinarily use, under the same circumstances, was held not misleading as tending to cause the jury to believe that a person of any age under twenty-one years necessarily was not held to the same degree of care as an adult, or as prejudicial to the defendant in using the term "immature years," instead of the words "tender years." *Stephen-ville, N. & S. T. R. Co. v. Voas* (1913) — *Tex. Civ. App.* —, 159 S. W. 64.

⁸⁴ Where the court, in an action for the death of a nine-year-old child by a wagon in the street, properly instructed the jury that the care required of the child was only such as a child of its age, intelligence, experience, and capacity would ordinarily exercise, and there was nothing in any other instruction which negatived this rule, it was held that the plaintiff could not complain of the fact that other instructions touching the question of contributory negligence did not contain the full statement of the rule, and omitted reference to the child's age, intelligence, experience, and capacity. *Sutton v. Arrow Transfer Co.* (1914) 186 Ill. App. 188.

In *Shaw v. Corrington* (1912) 171 Ill. App. 232, an action for injury to a ten-year-old boy by an automobile in a street, the court instructed the jury that the conduct of a child of tender years is not to be judged by the same rule which governs that of adults—that while it is the general rule in regard to an adult that to entitle him to recover damages for an injury resulting to him from the fault or negligence of another he must himself have been free from negligence and fault, this rule when applied to a child of tender years will not prevent recovery unless such child is possessed of that degree of intelligence, prudence, and caution which will cause it to know and appreciate and to understand the dangers incident to itself from its wrongful acts and omissions. In holding this instruction erroneous, the court said: "This instruction in its direction of what is to be considered in determining the question of what is due care on the part of a child leaves out the element of experience, and minimizes the degree of care required of a child. . . . It is so worded as to be liable to mislead the jury by giving them to understand that the burden is on the defendant of proving that the plaintiff did not have the intelligence, capacity, and experience to appreciate danger. The instruction should have been refused also because of its argumentative nature."

An instruction, in an action for injury to a seventeen-year-old boy, while attempting to cross a train which blocked a street, that if he were old enough and had mental capacity enough to realize that he was going into a dangerous place, and understood the danger of climbing across the cars, and chose to take the chances of being injured in his endeavor, he could not recover, was held in *Maglinchey v. Southern P. Co.* (1896) L.R.A.1917F.

5 Cal. Unrep. 363, 44 Pac. 1021. not inconsistent with an instruction which defined the degree of care required of the boy as such as, under like circumstances, a person of his age and capacity would exercise.

In affirming a judgment for the plaintiff in an action for injury to a boy eleven years old while exploding a dynamite cap with an electric battery, it was held in *Akin v. Bradley Engineering & Mach. Co.* (1909) 51 Wash. 658, 99 Pac. 1038, that an instruction that, in determining the question of contributory negligence, it was the duty of the jury to take into consideration his age, experience, and knowledge, and the prudence, care, and judgment which would ordinarily and reasonably be expected of a boy of that age under the circumstances, was not subject to the objection that it failed to instruct the jury as to the degree of knowledge the boy must possess in order to render him responsible for his acts. It was said: "This would be impossible for the court to do. There is no particular degree of intelligence that can be stated as an abstract proposition. The court did all that it could do in this regard when it stated to the jury that they should take into consideration the amount of prudence and care and judgment which would ordinarily and reasonably be expected from a boy of that age, under the circumstances and conditions shown by the testimony in this case."

In an action for the killing of a boy by a train at a street crossing while he was coasting in the street, an instruction was held erroneous which merely directed the jury in determining the question of contributory negligence to take into consideration the boy's age and discretion, and, if they found that he was eleven years old and did not "possess" the discretion of an adult, to consider that fact in determining the question of contributory negligence. *Eswin v. St. Louis, I. M. & S. R. Co.* (1888) 96 Mo. 290, 9 S. W. 577. It was said: "Beyond all doubt it was the duty of the jury to consider the age of the boy, and the fact that he did not have the discretion of an adult person; but this does not go far enough. It furnishes no guide for the jurors at all. The question is not only one of the age and capacity of the boy, but it is equally important to know how he used that capacity, and as to this the instruction gives no direction. While the instruction does not, in terms, say that, being a boy but eleven and a half years old, and not having the discretion of an adult person, he could not be guilty of contributory negligence, yet it comes very near to it. The instruction is misleading, and does not present a fair statement of the law. This question of negligence on the part of the boy, contributing to his death, is one of vital importance in this case, and it ought to be fairly presented. Under the undisputed facts in the case, the plaintiff ought not to recover until there is a clear finding that

e. Statutory provisions.

In a Georgia case,⁸⁵ the court held that due care on the part of a child depended on its age and capacity; and stated that it so held with knowledge that the Code, in general language, exacted ordinary care, with no express exception as to children; but that as ordinary care meant, under the law of the state, the care of every prudent man, there must be an implied exception as to children, for it would be absurd to require the same degree of diligence from a child as from a man. And this rule, it appears, was subsequently embodied in a provision of the Civil Code.⁸⁶

The New Jersey statute making it unlawful for any person other than those connected with or employed on a railroad to walk on the tracks, except when the same shall be laid on a highway, and providing that if any person is injured by an engine or car while walking, standing, or playing on a railroad, or by jumping on or off a car while in motion, such

this boy at the time of the accident was using the care and caution which might be expected of one of his age and capacity."

An instruction, in an action for the death of a ten-year-old boy who while crossing a street was killed by an automobile, that the burden is on the plaintiff to show that the decedent was incapable of taking care of himself in the street, in order to warrant the jury in finding that he was not guilty of contributory negligence, was held erroneous in *Ackerman v. Stacey* (1913) 157 App. Div. 835, 143 N. Y. Supp. 227, as requiring the plaintiff to establish that the decedent, without reference to his age, intelligence, or the circumstances, was actually incapable of taking care of himself in the street.

An instruction, in an action for injury to a nine-year-old girl by a street car, while crossing the track, that an adult could not have recovered under the circumstances, and that if the jury found that the child's mind was "reasonably mature" there was no further question for them to consider, was held not prejudicial to the plaintiff when considered in connection with other instructions which in effect directed further consideration if the child was not of that mature mental development to know and appreciate the dangers from street cars, or if she was not so developed that she knew what mature people understood in regard to such dangers, or if her mind, like those of a great many children, was not fully matured. *Hine v. Bay Cities Consol. R. Co.* (1897) 115 Mich. 204, 73 N. W. 116.

In an action for injury to a fourteen-year-old boy who, in preparing to alight from a street car, stepped to the footboard, fell, and was run over by the car, it was held that an instruction was not erroneous L.R.A.1917F.

person shall be deemed to have contributed to the injuries sustained, and shall not recover therefor, was held in a Federal case⁸⁷ not to apply to a child of such an age that at common law it would not be chargeable with contributory negligence.

*III. Age at which doctrine of contributory negligence may be applied to child.**a. Conclusive presumption of incapacity.*

If the care required of a child is to be measured by such considerations as its capacity, discretion, knowledge, and appreciation of the probability and extent of the danger, there is, of course, an age at which no care can be required of a child; in other words, an age at which the doctrine of contributory negligence has no application. And in many cases, in actions for injuries to children of ages ranging from a few months to seven years, the courts have held that, as mat-

that a boy of fourteen years of age is "only" required to exercise that degree of care which boys of his age, capacity, intelligence, and experience may reasonably be expected to use under like circumstances, the contention being that the use of the word "only" tended to belittle the degree of care which the boy was required to exercise. *Peterson v. Chicago Consol. Traction Co.* (1907) 231 Ill. 324, 83 N. E. 159.

An instruction, in an action for injury to a six-year-old boy, that the tender years and want of intelligence of a boy of this age "will excuse him from being visited with the severe penalty of contributory negligence in case of injury." but that there may be cases when a child of that age would be guilty of negligence, was held in *Rummele v. Allegheny Heating Co.* (1888) 2 Monaghan (Pa.) 98, 16 Atl. 78, not prejudicial to the plaintiff, on an appeal on the ground of the insufficiency of the judgment in his favor, where the court further instructed the jury that it found nothing in the evidence to charge the boy in that instance with contributory negligence, and also that in all cases where the injured party is guilty of negligence which contributes, however slightly, to the injury, he cannot recover.

⁸⁵ *Western & A. R. Co. v. Young* (1899) 83 Ga. 512, 10 S. E. 197.

⁸⁶ *Western & A. R. Co. v. Rogers* (1898) 104 Ga. 224, 30 S. E. 804, 4 Am. Neg. Rep. 606.

⁸⁷ *Erie R. Co. v. Swiderski* (1912) 117 C. C. A. 17, 197 Fed. 521. The action was for injury to a child seven or eight years old while playing about a freight car in a street, it being apparently assumed that a child of this age is incapable of contributory negligence.

ter of law, the child was not chargeable with personal contributory negligence, not apparently because negligence could not be inferred from the partic-

ular circumstances, but because the age of the child created a conclusive presumption that it was incapable of personal contributory negligence.⁸⁸

⁸⁸ In the following cases, as stated above, the court apparently considered that the age of the child, which is indicated, precluded, as matter of law, any inquiry whether it was personally negligent. The circumstances of the injury are indicated, however, in some cases, especially where the child was of an age to render it doubtful whether the rule of conclusive presumption should apply, because in some instances the court may have intended simply to hold that negligence on the part of the child could not be inferred under the particular circumstances. From the language used, however, the courts generally, in the cases cited below, apparently regarded the doctrine of personal contributory negligence inapplicable because of the age of the child, irrespective of the particular facts involved.

U. S.—*Shellabarger v. Fisher* (1906) 5 L.R.A. (N.S.) 250, 75 C. C. A. 9, 143 Fed. 937 (five—injury on passenger elevator); *Snare & T. Co. v. Friedman* (1909) 40 L.R.A. (N.S.) 367, 94 C. C. A. 369, 169 Fed. 11, 21 Am. Neg. Rep. 311 (four and one half—playing on building material in street); *Northern P. R. Co. v. Chervenak* (1913) 122 C. C. A. 178, 203 Fed. 884 (a boy five years and three months old attempted to pass under the coupling between cars detached and blocking a roadway); *Erie R. Co. v. Swiderski* (1912) 117 C. C. A. 17, 197 Fed. 521 (assuming child seven or eight years old incapable of negligence in playing about a freight car in a street); *Central Trust Co. v. Wabash, St. L. & P. R. Co.* (1887) 31 Fed. 246 (six); *Morgan v. Illinois & St. L. Bridge Co.* (1878) 5 Dill. 96, Fed. Cas. No. 9,802 (three—unguarded tunnel). See also *McDermott v. Severe* (1905) 202 U. S. 600, 50 L. ed. 1162, 26 Sup. Ct. Rep. 709 (where the court affirmed a judgment for the plaintiff in an action for injury to a boy six years and ten months old by an electric car, while his foot was caught in a crossing, without discussing, however, the question of contributory negligence, although the trial court instructed the jury in effect that as the boy was under seven years of age contributory negligence could not be attributed to him).

Ala.—*Government Street R. Co. v. Hanlon* (1875) 53 Ala. 70 (three); *Alabama G. S. R. Co. v. Burgess* (1897) 116 Ala. 509, 22 So. 913 (three); *Nashville, C. & St. L. R. Co. v. Harris* (1904) 142 Ala. 249, 110 Am. St. Rep. 29, 37 So. 794 (nineteen months); *Birmingham R. Light & P. Co. v. Jones* (1907) 153 Ala. 157, 45 So. 177 (sixteen months); *Southern R. Co. v. Forrister* (1908) 158 Ala. 477, 48 So. 69 (fifteen months); *Sheffield Co. v. Harris* (1912) 183 Ala. 357, 61 So. 88 (five).

Ariz.—*De Amado v. Friedman* (1907) 11 Ariz. 56, 89 Pac. 588 (four—falling wall).

Ark.—*St. Louis, I. M. & S. R. Co. v. Denty* (1896) 63 Ark. 177, 37 S. W. 719 L.R.A. 1917F.

(where four-year-old child attempted to run across track in front of approaching train); *Miles v. St. Louis, I. M. & S. R. Co.* (1909) 90 Ark. 485, 119 S. W. 837 (three and one half).

Ga.—*Crawford v. Southern R. Co.* (1899) 106 Ga. 870, 33 S. E. 826, 6 Am. Neg. Rep. 459 (four and one half); *Louisville & N. R. Co. v. Arp* (1911) 136 Ga. 489, 71 S. E. 867 (four—crossing railroad track).

Idaho.—See *Anderson v. Great Northern R. Co.* (1908) 15 Idaho, 513, 99 Pac. 91 (child four years old injured on railroad track considered apparently not chargeable with contributory negligence).

Ill.—*Chicago & A. R. Co. v. Gregory* (1871) 58 Ill. 226 (contributory negligence cannot be charged to a child five years old, especially to one of less than ordinary mental capacity); *Chicago v. Hesing* (1876) 83 Ill. 204, 25 Am. Rep. 378 (under four—falling into ditch filled with water in street); *Toledo, W. & W. R. Co. v. Grable* (1878) 88 Ill. 441 (two); *Gavin v. Chicago* (1880) 97 Ill. 66, 37 Am. Rep. 99 (injury by swing bridge—the court saying that the plaintiff was only four years old and of course too young to exercise any care for his personal safety; *Chicago, St. L. & P. R. Co. v. Welsh* (1886) 118 Ill. 572, 9 N. E. 197 (seven years and three months—the court saying that it was obvious the child was too young to observe any care for her personal safety; injury by backing cars over end of track); *Chicago West Div. R. Co. v. Ryan* (1890) 131 Ill. 474, 23 N. E. 385 (seventeen months); *Chicago City R. Co. v. Tuohy* (1902) 196 Ill. 410, 58 L.R.A. 270, 63 N. E. 997, affirming (1901) 95 Ill. App. 314 (child under six years of age at least presumptively incapable of negligence); *Illinois C. R. Co. v. Fernigan* (1902) 198 Ill. 297, 65 N. E. 88, affirming (1902) 101 Ill. App. 1 (under seven); *True & T. Co. v. Woda* (1903) 201 Ill. 315, 66 N. E. 369 (three years and ten months—lumber piled in street); *Richardson v. Nelson* (1906) 221 Ill. 254, 77 N. E. 583, 20 Am. Neg. Rep. 297, affirming (1905) 123 Ill. App. 550 (under two—the court saying that prior to the age of seven years a child is incapable of such conduct as will constitute contributory negligence); *Metropolitan West Side Elev. R. Co. v. Kersey* (1898) 80 Ill. App. 301 (five—injury to passenger on platform by negligent manner of starting street car); *North Kankakee Street R. Co. v. Blatchford* (1898) 81 Ill. App. 609 (three); *Hebard v. Mabie* (1901) 98 Ill. App. 543 (five and one half—jumping from moving bus on threat of driver); *Chicago City R. Co. v. Biederman* (1902) 102 Ill. App. 617 (the court stating, in an action by a boy six years old for injury by a street car, that contributory negligence could not be imputed to the plaintiff, but that he was chargeable only with such care and discretion as is to be expected of a boy six years

It has been said: "The rule which denies relief to one who is guilty of negli-

of age); *Chicago & N. W. R. Co. v. Jamieson* (1904) 112 Ill. App. 89 (six years and ten months); *Chicago & E. I. R. Co. v. Eganolf* (1904) 112 Ill. App. 323 (under six); *United States Brewing Co. v. Stoltenberg* (1904) 113 Ill. App. 435, affirmed in (1904) 211 Ill. 531, 71 N. E. 1081, 17 Am. Neg. Rep. 193 (four-year-old child playing in street run over by team); *Chicago & J. Electric R. Co. v. Freeman* (1906) 125 Ill. App. 318 (five); *Chicago City R. Co. v. Hackett* (1907) 136 Ill. App. 594, reversed on other grounds but affirmed on this point in (1908) 235 Ill. 116, 85 N. E. 320 (child under seven years old not chargeable with contributory negligence); *Johnson v. N. K. Fairbank Co.* (1910) 156 Ill. App. 381 (four and one half—*injury by team in street*); *O'Malley v. Marquardt* (1912) 170 Ill. App. 278 (four—*unguarded excavation*); *Casper v. Geck* (1914) 185 Ill. App. 155 (child under seven years of age cannot be guilty of contributory negligence—*injury by fall of iron door on sidewalk in front of defendant's premises*); *Fowler v. Crilly* (1914) 187 Ill. App. 309 (three and one half); *Devine v. Chicago R. Co.* (1914) 189 Ill. App. 435 (approving doctrine that a child under seven years of age is deemed incapable of contributory negligence).

Ind.—*Indianapolis Street R. Co. v. Schomberg* (1904) 164 Ind. 111, 72 N. E. 1041 (inconsistently stating, in an action for the negligent killing of a child two years and eight months old by a street car, that the child by reason of its tender age was non sui juris and incapable of contributory negligence, and would be required to exercise only such care and discretion as could reasonably be expected of a child of its age and intelligence); *Citizens' Street R. Co. v. Stoddard* (1894) 10 Ind. App. 278, 37 N. E. 723 (presumption at least that a five-year-old child killed by street car is non sui juris); *Jeffersonville v. McHenry* (1898) 22 Ind. App. 10, 53 N. E. 183 (two); *Elwood Electric Street R. Co. v. Ross* (1900) 26 Ind. App. 258, 58 N. E. 535 (four years and nine months—*crossing street car track*); *Indianapolis Street R. Co. v. Bordenchecker* (1904) 33 Ind. App. 138, 70 N. E. 905 (two); *Indianapolis Street R. Co. v. Schomberg* (1904) — Ind. App. —, 71 N. E. 237 (three).

Iowa.—*Walters v. Chicago, R. I. & P. R. Co.* (1875) 41 Iowa, 71 (two); *Thomas v. Chicago, M. & St. P. R. Co.* (1895) 93 Iowa, 248, 61 N. W. 967, see also later appeals in (1897) 103 Iowa, 649, 39 L.R.A. 399, 72 N. W. 783, and (1901) 114 Iowa, 169, 86 N. W. 259 (three years and ten months—*playing on railroad track*); *Fink v. Des Moines* (1902) 115 Iowa, 641, 89 N. W. 28 (under four—*injury by pulling over coal chute*).

Kan.—*Smith v. Atchison, T. & S. F. R. Co.* (1881) 25 Kan. 738 (two); *Missouri P. R. Co. v. Prewitt* (1898) 7 Kan. App. 556, 51 Pac. 923, reversed on other grounds in (1898) 59 Kan. 734, 54 Pac. 1067, 5 Am. Neg. Rep. 29 (two); *Kansas City Suburban Belt R. Co. v. Herman* (1900) — Kan. App. L.R.A.1917F.

—, 62 Pac. 543 (*injury to child four and one half years old on railroad track*).

Ky.—*Louisville & P. Canal Co. v. Murphy* (1872) 9 Bush, 522 (where five-year-old child fell through broken railing of canal bridge); *South Covington & C. Street R. Co. v. Herrklotz* (1898) 104 Ky. 400, 47 S. W. 265 (under four); *Louisville R. Co. v. Gaar* (1908) — Ky. —, 112 S. W. 1130 (four and one half); *Cincinnati, N. O. & T. P. R. Co.* (1909) — Ky. —, 119 S. W. 203 (six—the court saying that a simple-minded child of this age, unacquainted with railroads and ignorant of the danger of trains, is not chargeable with contributory negligence); *Covington v. Bollwinkle* (1909) — Ky. —, 121 S. W. 664 (twenty months—*falling from sidewalk into gutter and catch basin*); *Illinois C. R. Co. v. Dupree* (1910) 138 Ky. 459, 463, 34 L.R.A.(N.S.) 645, 128 S. W. 334 (incapacity of five-year-old girl, injured while crossing railroad track, assumed); *Newport v. Lewis* (1913) 155 Ky. 832, 160 S. W. 507 (five); *Allegheny Coke Co. v. Massey* (1915) 163 Ky. 792, 174 S. W. 499 (*injury to child four years old who stood by window to watch blasting operations near by*); *Reliance Textile & Dye Works v. Michell* (1903) 24 Ky. L. Rep. 1286, 71 S. W. 425 (four); *Hoff v. Hahn* (1903) 24 Ky. L. Rep. 2267, 73 S. W. 1015 (five—*obiter*).

La.—*Hamilton v. Morgan's L. & T. R. & S. S. Co.* (1890) 42 La. Ann. 824, 8 So. 586 (three—the court stating that it did not think the doctrine of contributory negligence applies to a child less than four years of age); *Barnes v. Shreveport City R. Co.* (1895) 47 La. Ann. 1218, 49 Am. St. Rep. 400, 17 So. 782, 11 Am. Neg. Cas. 636 (three—*injury by street car*); *Rice v. Crescent City R. Co.* (1899) 51 La. Ann. 108, 24 So. 791 (three and one half); *Danna v. Monroe* (1911) 129 La. 138, 55 So. 741 (twenty months); *Palermo v. Orleans Ice Mfg. Co.* (1912) 130 La. 833, 40 L.R.A.(N.S.) 671, 58 So. 589 (four-year-old child fell into street gutter containing hot water).

Me.—*Morgan v. Aroostook Valley R. Co.* (1916) — Me. —, 98 Atl. 628 (under two).

Mass.—*Callahan v. Bean* (1864) 9 Allen, 401 (two); *Gibbons v. Williams* (1883) 135 Mass. 333 (nineteen months); *Grant v. Fitchburg* (1893) 160 Mass. 16, 39 Am. St. Rep. 449, 35 N. E. 84 (twenty months); *Grella v. Lewis Wharf Co.* (1912) 211 Mass. 54, 97 N. E. 745, Ann. Cas. 1913A, 1136 (fourteen months); See also *Marsland v. Murray* (1888) 148 Mass. 91, 12 Am. St. Rep. 520, 18 N. E. 680 (action for injury to four-year-old child by being kicked by horse straying in highway, it being said that scarcely any act of the child would be inconsistent with such care as children of that age are accustomed to use).

Mich.—*Keyser v. Chicago & G. T. R. Co.* (1885) 56 Mich. 559, 56 Am. Rep. 405, 23 N. W. 311 (two and one half); *Battishill v. Humphreys* (1887) 64 Mich. 494, 31 N.

gence contributing to the injury is based more upon considerations of public pol-

W. 894 (three); *Shippy v. Au Sable* (1891) 85 Mich. 280, 48 N. W. 584 (three); *Johnson v. Bay City* (1910) 164 Mich. 261, 129 N. W. 29, Ann. Cas. 1912B, 866 (five years and four months—injury by contact with broken electric wire in street); *Love v. Detroit, J. & C. R. Co.* (1912) 170 Mich. 1, 135 N. W. 963 (five and one half—crossing railroad track); *Huggett v. Erb* (1914) 182 Mich. 524, 148 N. W. 805, Ann. Cas. 1916B, 352 (two); *Hoover v. Detroit, G. H. & M. R. Co.* (1915) 188 Mich. 313, 154 N. W. 94 (two).

Miss.—*Pascagoula Street R. & P. Co. v. Brondum* (1909) 96 Miss. 28, 50 So. 97 (where a six-year-old child playing in the street, as she attempted to cross a street car track, stumbled and fell in front of a car and was killed); *Pass Christian v. Fernandez* (1911) 100 Miss. 76, 39 L.R.A. (N.S.) 649, 56 So. 329 (injury by vehicle to four-year-old boy playing in street).

Mo.—*O'Flaherty v. Union R. Co.* (1869) 45 Mo. 70, 100 Am. Dec. 343 (two); *Frick v. St. Louis, K. C. & N. R. Co.* (1882) 75 Mo. 595 (two); *Farris v. Cass Avenue & F. G. R. Co.* (1883) 80 Mo. 325 (under two); *Donahoe v. Wabash, St. L. & P. R. Co.* (1884) 83 Mo. 560, 53 Am. Rep. 594 (two); *Cornovski v. St. Louis Transit Co.* (1907) 207 Mo. 283, 106 S. W. 51 (child three years and ten months old killed by street car—it being said that it was not contended that the child was of an age to be guilty of contributory negligence); *Berry v. St. Louis, M. & S. E. R. Co.* (1908) 214 Mo. 593, 114 S. W. 27 (four—playing on turntable); *Mascheck v. St. Louis R. Co.* (1877) 3 Mo. App. 600 (three); *Farris v. Cass Ave. & F. G. R. Co.* (1880) 8 Mo. App. 589 (two); *Fink v. Missouri Furnace Co.* (1881) 10 Mo. App. 61, reversed on other grounds in (1884) 82 Mo. 276, 52 Am. Rep. 376 (four); *Buck v. People's Street R. Electric Light & P. Co.* (1891) 46 Mo. App. 555, 4 Am. Neg. Cas. 396 (six-year-old child injured by sudden jerking of street car while attempting to alight from front platform); *Hillerbrand v. May Mercantile Co.* (1909) 141 Mo. App. 122, 121 S. W. 326 (three—hand caught in opening in store escalator); *Wagner v. Metropolitan Street R. Co.* (1912) 160 Mo. App. 334, 142 S. W. 463 (two); *Greer v. St. Louis, I. M. & S. R. Co.* (1913) 173 Mo. App. 276, 158 S. W. 740 (two).

N. H.—*Bisaillon v. Blood* (1888) 64 N. H. 565, 15 Atl. 147 (injury to five-year-old boy by vehicle in street); *Warren v. Manchester Street R. Co.* (1900) 70 N. H. 352, 47 Atl. 735 (three—street car); *Carney v. Concord Street R. Co.* (1903) 72 N. H. 364, 57 Atl. 218 (twenty-one months); *Dorr v. Atlantic Shore Line R. Co.* (1911) 76 N. H. 160, 80 Atl. 336 (five and one half—crossing street car track); *Copeland v. Exeter, H. & A. Street R. Co.* (1915) 77 N. H. 447, 92 Atl. 924 (two).

N. J.—*Newman v. Philadelphia Horse Car R. Co.* (1890) 52 N. J. L. 446, 8 L.R.A. L.R.A.1917F.

842, 19 Atl. 1102 (two); *Bergen County Traction Co. v. Heitman* (1898) 61 N. J. L. 682, 40 Atl. 651, 4 Am. Neg. Rep. 511 (two); *Schneider v. Winkler* (1906) 74 N. J. L. 71, 70 Atl. 731 (six—falling into uncovered area way in sidewalk); *Napurana v. Young* (1907) 74 N. J. L. 627, 65 Atl. 1052 (six-year-old child following mother across street injured by team); *Carleo v. Delaware, L. & W. R. Co.* (1908) 77 N. J. L. 607, 72 Atl. 89 (nearly three).

N. Y.—*Mangam v. Brooklyn R. Co.* (1868) 38 N. Y. 455, 98 Am. Dec. 66, affirming (1862) 36 Barb. 230 (three years and seven months—injury by street car; but if in a particular case there is doubt whether a child of this age is sui juris the question is for the jury); *Ihl v. Forty-Second Street & G. Street Ferry R. Co.* (1872) 47 N. Y. 317, 7 Am. Rep. 460 (three years and two months—injury by street car); *Prendergast v. New York C. & H. R. R. Co.* (1874) 58 N. Y. 652 (two); *McGarry v. Loomis* (1875) 63 N. Y. 104, 20 Am. Rep. 510 (four); *Birkett v. Knickerbocker Ice Co.* (1888) 110 N. Y. 504, 18 N. E. 108, affirming (1886) 41 Hun, 404 (child four and one half years old run over by team while crossing street); *Healey v. Ehret* (1899) 42 App. Div. 27, 58 N. Y. Supp. 917 (three and one half); *Adams v. Metropolitan Street R. Co.* (1901) 60 App. Div. 188, 69 N. Y. Supp. 1117 (two years and three months); *Dehmann v. Beck* (1901) 61 App. Div. 505, 70 N. Y. Supp. 29 (child four and one-half years old riding tricycle in street run over by team); *Lifschitz v. Dry Dock, E. B. & B. R. Co.* (1902) 67 App. Div. 602, 73 N. Y. Supp. 888 (it being conceded that a four-year-old child who while crossing a street was struck by a street car was non sui juris); *Carr v. Merchants' Union Ice Co.* (1904) 91 App. Div. 162, 86 N. Y. Supp. 368 (two years and two months); *Schwier v. New York C. & H. R. R. Co.* (1878) 15 Hun, 572 (under four—injury by backing engine); *Rosenberg v. Zeitchik* (1906) 52 Misc. 153, 101 N. Y. Supp. 591 (four-year-old boy passing through barber shop in front part of tenement in which he lived injured by contact with a hook projecting from portable charcoal furnace); *Barth v. Borden's Condensed Milk Co.* (1907) 52 Misc. 487, 102 N. Y. Supp. 498 (it being said, in an action for injury to a child five years and nine months old by being run over by a wagon in the street, that the child was concededly non sui juris); *Pastore v. Livingston* (1911) 72 Misc. 555, 131 N. Y. Supp. 971 (five-year-old child crossing street run over by team); *Smith v. City Realty Co.* (1903) 79 App. Div. 441, 79 N. Y. Supp. 1116 (three); *Lehman v. Brooklyn* (1859) 29 Barb. 234 (where four-year-old child fell into a well; principle implied); *McLain v. Van Zandt* (1875) 7 Jones & S. 347 (three years and eight months); *Fiselmayer v. Third Ave. R. Co.* (1886) 2 N. Y. S. R. 75 (sixteen months—injury by street car); see also *Levine v. Metropolitan*

icy, which require that everyone should guard his person against injury, than

Street R. Co. (1903) 78 App. Div. 426, 80 N. Y. Supp. 48, affirmed without opinion in (1903) 177 N. Y. 523, 69 N. E. 1125 (where it was said regarding a boy six and one half years old, who was attempting to cross a street car track holding the hand of his twelve-year-old brother when killed by a car, that it was not disputed that the decedent was too young to be chargeable with personal negligence).

N. C.—Bottoms v. Seaboard & R. R. Co. (1894) 114 N. C. 699, 25 L.R.A. 784, 41 Am. St. Rep. 799, 19 S. E. 730 (twenty-two months).

N. D.—Ruehl v. Lidgerwood Rural Teleph. Co. (1912) 23 N. D. 6, L.R.A.—, 135 N. W. 793, Ann. Cas. 1914C, 680 (three and one half).

Ohio.—Toledo Real Estate & Invest. Co. v. Putney (1900) 20 Ohio C. C. 486, 10 Ohio C. D. 698 (twenty-six months); see also Ludden v. Columbus & C. M. R. Co. (1900) 7 Ohio N. P. 106, 9 Ohio S. & C. P. Dec. 793 (jury instructed, in action for injury to child apparently about two years old, on railroad track, that if she was so young as to be incapable of exercising judgment and discretion, or of apprehending her danger, she could not be charged with contributory negligence).

Or.—Macdonald v. O'Reilly (1904) 45 Or. 589, 78 Pac. 753 (four and one half—child playing on lumber negligently piled in street)

Pa.—North Pennsylvania R. Co. v. Mahoney (1868) 57 Pa. 187, 12 Am. Neg. Cas. 517 (four); Kay v. Pennsylvania R. Co. (1870) 65 Pa. 269, 3 Am. Rep. 628 (nineteen months); Pittsburg, A. & M. Pass. R. Co. v. Caldwell (1873) 74 Pa. 421 (five—jumping from moving street car); Hestonville Pass. R. Co. v. Connell (1879) 88 Pa. 520, 32 Am. Rep. 472 (boy six years and nine months old attempting to board front platform of moving street car); Philadelphia, B. & W. R. Co. v. Laver (1886) 112 Pa. 414, 3 Atl. 874 (6 or 7 year old boy crossing train obstructing crossing); Erie City Pass. R. Co. v. Schuster (1886) 113 Pa. 412, 57 Am. Rep. 471, 6 Atl. 269 (four—crossing street car track); Summers v. Bergner Brewing Co. (1891) 143 Pa. 114, 24 Am. St. Rep. 518, 22 Atl. 707 (four-year-old run over by team in street); Chilton v. Central Traction Co. (1893) 152 Pa. 425, 25 Atl. 606 (five—crossing street car track); Schnur v. Citizens' Traction Co. (1893) 153 Pa. 29, 34 Am. St. Rep. 680, 25 Atl. 650 (under six—injury by street car); Evers v. Philadelphia Traction Co. (1896) 176 Pa. 376, 53 Am. St. Rep. 674, 35 Atl. 140 (four and one half—crossing street car track); Woekner v. Erie Electric Motor Co. (1896) 176 Pa. 451, 35 Atl. 182 (three years and ten months—crossing street car tracks); Smeltz v. Pennsylvania R. Co. (1898) 186 Pa. 364, 40 Atl. 479 (five—crossing railroad track); Satinsky v. Mutual Brewing Co. (1898) 187 Pa. 57, 40 Atl. 821 (two); Walbridge v. Schuykill Electric R. L.R.A.1917F.

Co. (1899) 190 Pa. 274, 42 Atl. 689 (six—crossing street car track); Kroesen v. New Castle Electric Street R. Co. (1901) 198 Pa. 26, 47 Atl. 850 (four—crossing street car track); Jones v. Union Traction Co. (1902) 201 Pa. 344, 50 Atl. 826, 11 Am. Neg. Rep. 151 (two); Hoon v. Beaver Valley Traction Co. (1903) 204 Pa. 369, 54 Atl. 270 (six and one half—crossing street car track); Reichle v. Philadelphia Rapid Transit Co. (1913) 241 Pa. 1, 88 Atl. 79 (under six—crossing street car track); Counizzarri v. Philadelphia & R. R. Co. (1915) 248 Pa. 474, 94 Atl. 134 (child seven years old while playing near opening between cars on siding struck by overhang of car moved without warning); Brown v. Schellenberg (1902) 19 Pa. Super. Ct. 286; Addis v. Hess (1905) 29 Pa. Super. Ct. 506 (four-year-old child killed by the fall of lumber piled in street while he was playing on sidewalk); Sullenberger v. Chester Traction Co. (1907) 33 Pa. Super. Ct. 12 (under seven); McDermott v. Consolidated Ice Co. (1910) 44 Pa. Super. Ct. 445 (seven-year-old child burned while playing on uninclosed lot on which defendant was burning papers—the court stating that the tender years of the child removed from the case any question of contributory negligence, and that no such question was raised); Drenberg v. Mahoning & S. R. & Light Co. (1913) 55 Pa. Super. Ct. 218 (five—crossing street car track).

S. C.—Mason v. Southern R. Co. (1900) 58 S. C. 70, 53 L.R.A. 913, 79 Am. St. Rep. 826, 36 S. E. 440 (sixteen months); Dodd v. Spartanburg R. Gas & E. Co. (1913) 95 S. C. 9, 78 S. E. 525 (under seven—crossing street car track).

Tenn.—Wise v. Morgan (1898) 101 Tenn. 273, 44 L.R.A. 548, 48 S. W. 971 (three—poison not properly labeled); Atkin v. Shenker (1913) 4 Tenn. C. C. A. 298 (three-year-old child killed by team in street).

Tex.—San Antonio & A. P. R. Co. v. Vaughn (1893) 5 Tex. Civ. App. 195, 23 S. W. 745 (nineteen months); Galveston, H. & S. A. R. Co. v. Clark (1899) 21 Tex. Civ. App. 167, 51 S. W. 276 (seventeen months); Ollis v. Houston E. & W. T. R. Co. (1903) 31 Tex. Civ. App. 601, 73 S. W. 30 (child six years old while playing on car in railroad yard thrown off and injured by the striking of the car by other cars); Missouri, K. & T. R. Co. v. Nesbit (1906) 43 Tex. Civ. App. 630, 97 S. W. 825 (four—crossing railroad track); Texas & N. O. R. Co. v. Brouillette (1910) 61 Tex. Civ. App. 619, 130 S. W. 886 (two years and seven months—injury by backing train); Galveston, H. & N. R. Co. v. Olds (1908) — Tex. Civ. App. —, 112 S. W. 787 (twenty-five months).

Utah.—Smalley v. Rio Grande Western R. Co. (1908) 34 Utah, 423, 98 Pac. 311 (obiter—five-year-old child injured in attempting to ride on car in railroad yard).

Va.—Norfolk & P. R. Co. v. Ormsby (1876) 27 Gratt. 455 (two years and

upon what is just to the defendant. It is quite clear that a rule which has its foundations in such considerations cannot, with any propriety, apply in the case of an infant of such tender years as not to have reached the age of discretion."⁸⁹

There can be no question but that at a very early age, for instance, one or two years, a child is incapable of personal contributory negligence. There is a presumption of incapacity, and this presumption is conclusive. However, on progressing much beyond these ages, decisions are encountered which render futile any attempt to fix an age at which it can be said that the conclusive presumption of incapacity ceases. There is much difference of opinion among the authorities on this question. The discussion of the point in an Illinois case⁹⁰ is interesting. Thus, it was held that an

instruction that a child about seven years of age cannot be guilty of negligence was erroneous, and that the question was for the jury. But on rehearing, the court, without deciding the above question as an abstract proposition, held that the instruction was not prejudicial, as the child under the circumstances could not be charged with negligence. In the first opinion it was said: "We think the true rule is that a child is to be held to the exercise of care for its personal safety according to its age, experience, and intelligence, and the circumstances by which it was surrounded at the time of the alleged injury; that it cannot be arbitrarily said that negligence may be imputed to a child seven and a half years of age, but not to one of six or seven. Many children of six years of age by their intelligence and experience are far more capable of taking care of them-

ten months—the court saying that it had not been and could not be contended that the child himself was old enough to be guilty of any negligence, or, at all events, that he was guilty of any in this case); *Norfolk & W. R. Co. v. Groseclose* (1891) 88 Va. 267, 29 Am. St. Rep. 718, 13 S. E. 454, 7 Am. Neg. Cas. 51 (it being conceded that a boy five years and one month old who was killed by the sudden backing of a train at a station was because of his tender years non sui juris, and therefore incapable of contributory negligence); *American Tobacco Co. v. Polisco* (1906) 104 Va. 777, 52 S. E. 563 (girl a little over five years old run over by wagon while crossing street).

Wash.—*Eskildsen v. Seattle* (1902) 29 Wash. 583, 70 Pac. 64, 12 Am. Neg. Rep. 366 (four years and three months—it being said that it is almost universally held that a child under five years of age cannot be guilty of contributory negligence in any event).

W. Va.—*Dicken v. Liverpool Salt & Coal Co.* (1895) 41 W. Va. 511, 23 S. E. 582 (two years and ten months); *Gunn v. Ohio River R. Co.* (1896) 42 W. Va. 676, 36 L.R.A. 575, 26 S. E. 546 (nearly five); *Parrish v. Huntington* (1905) 57 W. Va. 286, 50 S. E. 416 (five—defective sidewalk). See also *Gibson v. Huntington* (1893) 38 W. Va. 177, 22 L.R.A. 561, 45 Am. St. Rep. 853, 18 S. E. 447 (where the court said that a child four years and five months old, who, while playing on a highway, was killed by the fall of an embankment, was not old enough to realize the danger and could not possibly be charged with contributory negligence).

Wis.—*Schmidt v. Milwaukee & St. P. R. Co.* (1868) 23 Wis. 186, 99 Am. Dec. 158 (eighteen months); *O'Brien v. Wisconsin C. R. Co.* (1903) 119 Wis. 7, 96 N. W. 424 (twenty-five months).

Can.—*Sangster v. Eaton Co.* (1894) 25 L.R.A. 1917F.

Ont. Rep. 78, affirmed in (1894) 21 Ont. App. Rep. 624, which is affirmed in (1895) 24 Can. S. C. 708 (action for injury to child two and one half years old—rule recognized); *Merritt v. Hepenstal* (1895) 25 Can. S. C. 150 (child of "tender years" run over by team in street—from reference to this case in the case next cited herein, it appears the child was three years old); see also *Wald v. Winnipeg Electric R. Co.* (1908) 18 Manitoba L. R. 134, affirmed in (1909) 41 Can. S. C. 431 (in which the question is discussed but not decided whether contributory negligence can be imputed to a child nearly six years old in a case of injury by a street car while crossing the track).

Eng.—*Gardner v. Grace* (1858) 1 Fost. F. 359 (three—injury by vehicle in highway); *McGregor v. Ross* (1883) 10 Rettie, 725, 20 Scot. L. R. 462, cited in *Scots Dig.* 1873-1904, col. 1414 (four); *Gibson v. Glasgow Police Comrs.* (1893) 20 Rettie, 466, 30 Scot. L. R. 469 (cited in *Scots Dig.* 1873-1904, col. 1414 (quære, whether five-year-old child can be guilty of contributory negligence). See also *Cooke v. Midland Great Western R. Co.* [1909] A. C. 229, [1909] 2 Ir. R. 490, 78 L. J. P. C. N. S. 76, 100 L. T. N. S. 628, 25 Times L. R. 375, 15 Ann. Cas. 557 (where it is assumed that a four-year-old child who was injured while playing on a turntable was incapable of contributory negligence).

Porto Rico.—*Zanabria Y. Garcia v. Ponce R. & Light Co.* (1907) 4 Porto Rico Fed. Rep. 4 (four or five).

⁸⁹ *Walters v. Chicago, R. I. & P. R. Co.* (1875) 41 Iowa, 71, holding that the doctrine of contributory negligence is inapplicable to a child two years old.

⁹⁰ *Chicago City R. Co. v. Wilcox* (1890) — Ill. —, 8 L.R.A. 494, 24 N. E. 419, rehearing in (1891) 138 Ill. 370, 21 L.R.A. 76, 27 N. E. 899, 11 Am. Neg. Cas. 402.

selves and avoiding danger than others much older. Certainly no great degree of care for its personal safety is to be expected of a child six or even eight years of age; but we think it safe in each case to submit the question as to whether negligence shall be imputed to a child to the jury, as one of fact, to be determined from the particular circumstances in evidence." And in the opinion on the rehearing the court stated what it considered the two views, as follows: "The application of the doctrine of contributory negligence to the conduct of young children is a difficult one, and very naturally had led to a considerable difference of opinion. The two opposing views most commonly met with are, first, that up to a certain age, the precise limit of which is not and perhaps cannot be well-defined, a child is incapable of such conduct as will constitute contributory negligence, and that the court may so declare as a matter of law. The rule thus contended for is sometimes said to be analogous to the rule of the common law which exempts children under seven years of age from criminal responsibility. It has accordingly been held that children of eighteen months, of two years, of two years and ten months, of four years, under five years, of five years, of six years, under seven years, and even seven years of age, are incapable of such

negligence. . . . The other view is that young children are bound to use such care, and such care only, as is usually exercised by children of the same age and degree of intelligence, and that it is always, therefore, a question of fact to be determined by the jury whether in a given case the child is in the exercise of proper care, his tender years, his intelligence or the want of it, and all the circumstances by which he was surrounded, being taken into account. Under this rule, as is claimed, it can never be laid down as a matter of law that any child, however young, is incapable of contributory negligence, it being always a question of fact for the jury." The latter view does not appear to be in accord with the weight of authority.⁹¹ But accepting the former view, the decisions do not establish definitely the period during which it may be declared as matter of law that a child is incapable of contributory negligence. In Illinois, for example, some of the decisions, particularly the later ones, lay down the proposition that a child under seven years of age cannot be charged with personal contributory negligence.⁹² But there are some decisions in that state which are not altogether in harmony with this view.⁹³

No case has been found which clearly holds that the rule of conclusive pre-

⁹¹ See cases in note 88, *supra*.

⁹² See Illinois cases cited in note 88, *supra*.

In an action for injury to a girl a few months under seven years old, who was injured by a car while crossing a street car track on her return from school, the court stated that as the plaintiff was under seven years of age no question of contributory negligence on her part was involved. *Chicago City R. Co. v. Hackett* (1907) 136 Ill. App. 594. The decision was reversed on other grounds in (1908) 235 Ill. 116, 85 N. E. 320, the court in this opinion stating, however, that if the plaintiff was less than seven years of age no contributory negligence could be imputed to her.

The doctrine that a child under seven years of age should be regarded, as matter of law, incapable of such conduct as will constitute contributory negligence was recognized in *Illinois C. R. Co. v. Jernigan* (1902) 198 Ill. 297, 65 N. E. 88, although it was only necessary to the decision to hold that the injured child, who was under seven, was not chargeable with negligence as matter of law. The court cited *Chicago City R. Co. v. Tuohy* (1902) 196 Ill. 410, 58 L.R.A. 270, 63 N. E. 997, as holding, in analogy to the rule of the common law exempting children under the age of seven years from criminal responsibility, that up to the age of seven years a child should be regarded, as matter of law, as incapable of

such conduct as will constitute contributory negligence.

Also in *Cleveland, C. C. & St. L. R. Co. v. Scott* (1903) 111 Ill. App. 234, the court, although holding that the question of contributory negligence was for the jury, as the child was seven years old, said that under that age a child is incapable of such conduct as will constitute contributory negligence.

⁹³ It is apparently assumed in *Chicago, R. I. & P. R. Co. v. Ohlsson* (1896) 70 Ill. App. 487, that a six-year-old girl may not be entirely excused because of her age from exercising some degree of care in crossing a railroad track, the court stating that in view of her tender years it did not think there was such want of ordinary care on her part as would preclude a recovery, and that she was only required to exercise that degree of care which children of like age, capacity, and experience might reasonably be expected to use under the circumstances.

In an action for the death of a boy between six and seven years old by a train while attempting to cross the track, the court in *Chicago & A. R. Co. v. Becker* (1875) 76 Ill. 25, said: "If the child from its age and experience be found to have capacity and discretion to observe and avoid danger, it should be held responsible for the exercise of such measure of capacity and discretion as it possesses. The ques-

sumption of incapacity applies, without regard to the particular circumstances of the injury, in the case of a child eight years of age or over, although the language used in several cases might admit of such a construction.⁹⁴

There seems to be considerable ground for the position that as matter of law a child under seven years of age is incapable of contributory negligence, not especially because of any analogy to the criminal law that a child under that age cannot commit a crime, although this reason is frequently given, but because, in the case of a child under seven years of age, there is lacking that discretion and judgment, and that appreciation of the probability and extent of the danger, which, as has been shown above, are the essential elements in determining whether a child has exercised due care. And if these elements, are not merely knowledge, receive proper consideration in determining the question of the age at which the rule of conclusive presumption of incapacity ceases to be applicable, it seems that in some cases a higher age limit should have been adopted. It was said on this point in an Alabama case,⁹⁵ in which the court was of the opinion that the doctrine of contributory negligence was not applicable to a child under seven years of age (the child in this instance, however, being only three and one-half years old): "It would seem to follow that a child under the age of seven years should be absolutely exempt from the operation of the principle. Thought, discretion, judgment, or will cannot be legally imputable to him,—he cannot be adjudged guilty and punished for crime. . . . Not having an 'independent will,'—incapable of choosing between the right and the wrong, between care and rashness, the creature

of instinct and impulse,—there is no ground on which to base negligence. From him duties to others are not exacted, while duties to him are recognized and compulsorily enforced. Negligence has the same significance, whether applied to a defendant as creating a cause of action, or to a plaintiff in bar of an action for a redress of injuries. . . . A child below the age of seven years, irresponsible, incapable of discretion, could as well be subjected to liability for negligence as to permit one fully sui juris by the imputation of negligence to escape the responsibility of his own wrongful act. The child owes to him no duty, because incapable of performing it." And in a Michigan case,⁹⁶ in an action for injury to a child by contact with a broken electric wire in the street, the court said: "At the time of the injury plaintiff was five years and four months old. We are of opinion that an infant of this extremely tender age cannot be charged with contributory negligence. There comes a time in the life of every child when the doing of an act which results in injury to itself may be said to be negligent as a matter of law, and there is a period between that time and extreme youth when the question of whether or not the child had sufficient intelligence to appreciate the dangerous consequences liable to flow from its act becomes one for the jury. We believe, however, that all reasonable minds would agree that an infant but little more than five years of age could not have sufficient intelligence to be charged with negligence either as a matter of law or as a matter of fact. It may be difficult, perhaps impossible, to point out the exact age at which the question becomes one for the jury; but it is, we think, clear that it

tion is similar, and to be determined by the jury in the same way, from facts and circumstances in evidence, as where the capability of an infant under the age of fourteen years to commit crime, is involved, in a criminal prosecution at common law against such infant. . . . There is no inflexible rule which governs where the question arises in civil cases whether contributory negligence is imputable. As stated above, it is in each case a question for the jury, to be determined upon the particular circumstances in evidence. . . . The age, the capacity, and discretion of the deceased to observe and avoid danger were questions of fact to be determined by the jury, and his responsibility was to be measured by the degree of capacity he was found to possess." On a later appeal, however, in (1877) 84 Ill. 483, the court, in affirming a judgment L.R.A.1917F.

for the plaintiff, intimates that a child of the age of the one in question cannot be charged with negligence.

⁹⁴ See *Ashby v. Norfolk Southern R. Co.* (N. C.) post, 116.

In an action for injury to an eight-year old girl by a train while crossing the track along a commonly-used foot path, the court in *Taylor v. Delaware & H. Canal Co.* (1886) 113 Pa. 162, 57 Am. Rep. 446, 8 Atl. 43, in reversing a judgment of nonsuit, stated that the question of contributory negligence did not arise in the case; that the age of the plaintiff at the time of the accident precluded that.

⁹⁵ *Government Street R. Co. v. Hanlon* (1875) 53 Ala. 70.

⁹⁶ *Johnson v. Bay City* (1910) 164 Mich. 251, 129 N. W. 29, Ann. Cas. 1912B, 866.

has not arrived at five years and four months."

Other decisions are to a similar effect.⁹⁷

As will be seen later,⁹⁸ some authorities hold that there is a presumption that a child under the age of twelve or fourteen lacks the judgment and discretion necessary to charge it with contributory negligence; and the logic which holds that until such an age there is a *prima facie* presumption of incapacity would seem to require that the presumption should be regarded as conclusive; at

least in the case of a child under seven years of age.

b. Prima facie presumption of incapacity, in general.

It has already been shown that in some cases the position is taken that a child under seven years of age will be conclusively presumed incapable of personal contributory negligence. And in a few states⁹⁹ it is held that between the ages of seven and fourteen there is *prima facie* presumption of incapacity. This is true of the states of Alabama,¹⁰⁰ Ken-

⁹⁷ "The rule respecting contributory negligence presupposes sufficient intelligence to know the existence of danger. . . . The law does not fix, nor does it need, any certain age at which children are of sufficient intelligence to have imposed upon them the full degree of care incumbent upon persons of mature age. . . . It is an ancient rule, sustained by the great weight of authority, that contributory negligence cannot be imputed to a child when of such tender years that it is, by legal presumption, incapable of judgment or discretion. . . . Up to a certain age, the precise limit of which cannot well be defined, a child is incapable of contributory negligence, and the court may so declare as a matter of law. Children ranging in age from eighteen months to six years, and even under seven, have been declared as a matter of law, to be incapable of such negligence." *Elwood Electric Street R. Co. v. Ross* (1900) 26 Ind. App. 258, 58 N. E. 535, holding that, as matter of law, a child four years and nine months old who was struck by a street car in crossing a street was *non sui juris*.

In *Reichle v. Philadelphia Rapid Transit Co.* (1913) 241 Pa. 1, 88 Atl. 79, where a child was injured by a street car while she was attempting to cross the track, the court said: "At the time of the accident the injured child was less than six years of age. Contributory negligence cannot be imputed to a child of such tender years, and therefore the whole case turns on the question of the negligence of the defendant."

And *Shawnee v. Cheek* (1913) 41 Okla. 227, 51 L.R.A.(N.S.) 672, 137 Pac. 724, Ann. Cas. 1915C, 200, and *Chicago, R. I. & P. R. Co. v. Wright* (1916) — Okla. —, 161 Pac. 1070, the court (obiter, the child in each instance being over seven years of age) recognized the rule as being that a child under seven years of age is incapable, as a matter of law, of contributory negligence.

In holding that a four-year-old child was not chargeable with contributory negligence in playing on a turntable, the court in *Berry v. St. Louis, M. & S. E. R. Co.* (1908) 214 Mo. 593, 114 S. W. 27, said: "A child may be of such an age that whether he is or can be guilty of negligence under the circumstances of a given case is a question of fact for the jury, and such is the L.R.A.1917F.

usual case. He may have arrived at such degree of maturity in age and judgment that the court might say as a matter of law he could be guilty of contributory negligence. On the other hand, he may be so tender in age and infantile in judgment that the court as a matter of law might rule he could not be guilty of contributory negligence in the circumstances of a given case. This child, under the facts here, came within the latter class. He was *non sui juris*."

No inflexible rule can be established as to the age at which a child is chargeable with contributory negligence, but when it is old enough to know the difference between danger and safety, and is of sufficient age and intelligence to realize and appreciate that a certain course of conduct is attended with great danger, then it may be safely said that it is chargeable with contributory negligence. *Dull v. Cleveland, C. C. & St. L. R. Co.* (1899) 21 Ind. App. 571, 52 N. E. 1013.

⁹⁸ See III. b, *infra*.

⁹⁹ For other cases which recognize or apply this doctrine, see the cases cited under III. c, *infra*.

¹⁰⁰ Ala.—"It is well settled that a minor between seven and fourteen years of age is *prima facie* incapable of exercising judgment and discretion, but evidence may be received to show capacity." *Birmingham R. Light & P. Co. v. Landrum* (1907) 153 Ala. 192, 127 Am. St. Rep. 25, 45 So. 198 (action for injury to a boy eleven years old in crossing a street car track). To the same effect, see *Pratt Coal & I. Co. v. Brawley* (1888) 83 Ala. 371, 3 Am. St. Rep. 751, 3 So. 555 (where a child a few months over seven years of age was injured on railroad); *Tutwiler Coal, Coke & I. Co. v. Enslin* (1901) 129 Ala. 336, 30 So. 600 (minor servant killed in mine); *Jefferson v. Birmingham R. & Electric Co.* (1897) 116 Ala. 299, 38 L.R.A. 458, 67 Am. St. Rep. 116, 22 So. 546; *Birmingham R. Light & P. Co. v. Jones* (1906) 146 Ala. 277, 41 So. 146 (nine-year-old boy killed by street car); *Birmingham & A. R. Co. v. Mattison* (1909) 166 Ala. 602, 52 So. 49.

In an action for injury to a boy between ten and twelve years old by an automobile, the court in *Cedar Creek Store Co. v. Stedham* (1914) 187 Ala. 622, 65 So. 984, stated the rule as simply declaring that between

tucky,¹⁰¹ Pennsylvania,¹⁰² South Carolina,¹⁰³ Virginia,¹⁰⁴ and West Vir-

ginia.¹⁰⁵ There are also decisions in Missouri,¹⁰⁶ Ohio,¹⁰⁷ and Iowa¹⁰⁸ which

the ages of seven and fourteen years children who are compos mentis are presumed to be incapable of contributory negligence, but that a child between those ages may be shown to be capable of contributory negligence by evidence that he possesses that discretion, intelligence, and sensitiveness to danger which the ordinary child possesses when he is fourteen years of age.

And in *Lovell v. De Bar delaben Coal & I. Co.* (1889) 90 Ala. 15, 7 So. 756, 13 Am. Neg. Cas. 174, the court, in considering the sufficiency of a complaint in an action for the death of the plaintiff's son while in the employ of the defendant, said: "The complaint is silent as to the age of the son, further than that he was a minor. Hence it does not appear but that he was over the age of fourteen years, from and after which period the prima facie presumption that he was capable of the exercise of judgment and discretion is indulged. Had he been under that age the opposite presumption would be indulged. . . . The proper observance of the rule adverted to above imposes on us the duty of reading the complaint as if it had averred the minor to be over the age of fourteen."

¹⁰¹ Ky.—*United States Natural Gas Co. v. Hicks* (1909) 134 Ky. 12, 23 L.R.A. (N.S.) 249, 135 Am. St. Rep. 407, 119 S. W. 166 (injury to eight-year-old child by gas explosion).

¹⁰² See, for instance, cases cited in notes 175-178, *infra*.

¹⁰³ S. C.—In an action for injury to a boy about eight years old while employed in the defendant's mill, it was held not prejudicial to the defendant for the court to instruct the jury that between the ages of seven and fourteen years there is a prima facie presumption of incapacity to commit contributory negligence, but that this can be overcome by evidence that the child was capable of exercising care to avoid danger. *Tucker v. Buffalo Cotton Mills* (1906) 76 S. C. 539, 121 Am. St. Rep. 957, 57 S. E. 626. It was said the instruction was based on the well-known rule in reference to the capacity of infants to commit crime, a rule founded in deep knowledge and experience with reference to the power of infants to discern between right and wrong.

¹⁰⁴ Va.—*Trumbo v. City Street Car Co.* (1893) 89 Va. 780, 17 S. E. 124 (recognizing rule, although the action was for death of a child under six years old); *Roanoke v. Shull* (1899) 97 Va. 419, 75 Am. St. Rep. 791, 34 S. E. 34 (injury to a girl eleven years old by falling through a hole in the sidewalk); *Richmond Traction Co. v. Wilkinson* (1903) 101 Va. 394, 43 S. E. 622 (injury to a seven-year-old boy by jumping from the running board of a moving street car on command of the conductor); *Lynchburg Cotton Mills v. Stanley* (1894) 102 Va. 590, 46 S. E. 908 (injury to a boy nearly twelve years old while playing with L.R.A.1917F.

a belt on machine in the defendant's mill in which he was employed); *Lynchburg Teleph. Co. v. Booker* (1905) 103 Va. 594, 50 S. E. 148 (where eight-year-old boy grasped live electric wire within his reach from sidewalk, mistaking it for a string); *Norfolk R. & Light Co. v. Higgins* (1908) 108 Va. 324, 61 S. E. 766 (injury to a boy eleven years old by a street car while attempting to cross the track. See this case note 113, *infra*); *Southern R. Co. v. Daves* (1908) 108 Va. 378, 61 S. E. 748 (injury to an eight-year-old negro girl by backing engine while crossing the track); *Virginia-Carolina R. Co. v. Clawson* (1910) 111 Va. 313, 68 S. E. 1003.

¹⁰⁵ W. Va.—*Ewing v. Lanark Fuel Co.* (1909) 65 W. Va. 726, 29 L.R.A. (N.S.) 487, 65 S. E. 200.

¹⁰⁶ Mo.—*Frauenthal v. Laclede Gaslight Co.* (1896) 67 Mo. App. 1 (obiter).

¹⁰⁷ Ohio.—*Lake Erie & W. R. Co. v. Mackey* (1895) 53 Ohio St. 370, 20 L.R.A. 757, 53 Am. St. Rep. 640, 41 N. E. 980.

¹⁰⁸ Iowa.—The view that until a child reaches the age of fourteen there is a presumption that he is incapable of contributory negligence, while recognized in some of the Iowa decisions as perhaps existing in that state, appears to be founded principally on obiter statements. In *Doggett v. Chicago, B. & Q. R. Co.* (1907) 134 Iowa, 690, 13 L.R.A. (N.S.) 364, 112 N. W. 171, 13 Ann. Cas. 588, an action for injury to a boy seventeen years old, the court stated that an examination of a large number of cases relating to the liability of children for contributory negligence led to the conclusion that while in many of them no definite rule is announced, they substantially without conflict hold that the presumption of responsibility attaches at the age of fourteen years, and that prior to that age there is a presumed incapacity.

In *McEldon v. Drew* (1908) 138 Iowa, 390, 128 Am. St. Rep. 203, 116 N. W. 147, an action for injury to a twelve-year-old boy while attempting to explode gunpowder purchased from the defendant, the court, citing *Doggett v. Chicago, B. & Q. R. Co.* (Iowa) *supra*, said: "Assimilating the rule which applies in criminal cases to civil ones, it has been held that children under seven years of age are incapable of contributory negligence as a matter of law, and that children between seven and fourteen are presumed incapable of contributory negligence, although the contrary may be shown. We seem to be committed to this rule, at least to a limited extent."

The court applied the rule of presumption above indicated as to a child under fourteen years of age in *Hazelrigg v. Dobbins* (1909) 145 Iowa, 495, 123 N. W. 196, an action for injury to a boy twelve years old while in the employ of the defendant, citing *Doggett v. Chicago, B. & Q. R. Co.* (Iowa) *supra*.

In holding that the question of contribu-

recognize the doctrine. And in New York the presumption has in some decisions been regarded as continuing until the age of twelve,¹⁰⁹ in analogy to the criminal law in that state, although other decisions do not recognize the presumption.

The doctrine that the presumption of incapacity continues until the age of fourteen, but may be rebutted by evidence of unusual capacity or experience, is thus stated in an Alabama case:¹¹⁰ "A child too young to exercise any care or discretion is clearly as incapable of negligence as it is of crime or sin, and is therefore not answerable to the doctrine of self-defense. There are ages so young (usually under seven) that there is a conclusive presumption of law, and hence evidence is not admissible to refute the presumption; while there are other ages, usually seven, after reaching which it becomes a *prima facie* presumption only, and may then be rebutted by evidence of unusual natural capacity, physical condition, training, habits of life, experience, surroundings, and the like. This *prima facie* presumption continues in favor till it reaches another age, usually fourteen, after which the presumption changes, and the burden is then on the infant to show want of capacity. . . .

tory negligence of a nine-year-old boy who was run over by a street car in attempting to cross the track was for the jury, the court, however, in *Long v. Ottumwa R. & Light Co.* (1913) 162 Iowa, 11, 142 N. W. 1008, said: "While courts have sometimes sought to fix an age at which the presumption of capacity of a child to negligently contribute to its own injury begins, it has been better said that 'the law fixes no arbitrary period when immunity of childhood ceases and the responsibility of life begins.' . . . Generally speaking, maturity of mind and judgment, capacity to act promptly, intelligently, and efficiently in caring for one's self in the presence of danger, and ability to recognize the imminence of threatened peril in time to avoid injury therefrom is a question of fact, depending upon arguments, inferences, and conclusions to be drawn from all the circumstances of the case. It is a question upon which the man on the bench holds no advantage over the average man in the jury box. The varying capacities of children are matters coming under the daily and hourly observation of jurors no less than of lawyers and courts. It requires no scholastic training or study of legal precedents to qualify them to make fair and intelligent findings upon an issue of this character."

¹⁰⁹ N. Y.—Under twelve years of age a child is presumptively non *sui juris*. *Grealish v. Brooklyn, Q. C. & S. R. Co.* (1909) 130 App. Div. 238, 114 N. Y. Supp. 582, L.R.A.1917F.

At fourteen the law presumes the infant to have sufficient discretion to select its own guardian, to contract a lawful marriage, and to be capable of malice. It is therefore very reasonable to fix this age as that at which it becomes, and will be presumed to be, sensible of and responsible for danger. . . . We cannot say that one day a child is wholly immune, and the next day responsible; that one day his responsibility is that of a child, and the next, that of a man. The law only fixes the dates of seven, fourteen, and twenty-one as to the presumptions." And in this connection attention may properly be called to the reasons for the presumption, which are well stated in another Alabama decision, as follows:¹¹¹ "Between the ages of seven and fourteen children are presumed to be wanting in that care, judgment, discretion, and sensitiveness to danger which belong to the average child who is fourteen years of age, and there is a rebuttable legal presumption that children between the ages of seven and fourteen years are incapable of committing what in law amounts to contributory negligence. Every well-balanced child of eight, nine, or ten, or eleven years of age knows that fire will burn, and that if he falls into the fire, or if his clothing catches on fire, he

affirmed without opinion in (1910) 197 N. Y. 540, 91 N. E. 1114. The action was for injury to an eight-year-old girl by a street car, and the court apparently incorrectly regarded a child who is *sui juris* as chargeable with the care required of an adult.

However, in holding that a five-year-old child was not negligent as matter of law in passing behind a train in a street, so as to preclude recovery for an injury by the sudden backing of the train, the court in *Batchelor v. Degnon Realty & Terminal Improv. Co.* (1909) 131 App. Div. 136, 115 N. Y. Supp. 93, said that the age at which a child is so young and immature that no rule of care can be applied to it, and the jury may properly be so instructed, is not fixed in years in that state, even as a presumption of fact capable of being modified or rebutted by evidence, but is variable, and that the question is generally for the jury; although there might be cases so obvious and indisputable that it would not be error for the trial judge to decide them as a matter of law. A later appeal will be found in (1910) 141 App. Div. 879, 126 N. Y. Supp. 433.

See notes 167, 168, 187 and 188, *infra*.

¹¹⁰ *Birmingham & A. R. Co. v. Mattison* (1909) 166 Ala. 602, 52 So. 49.

¹¹¹ *Cedar Creek Store Co. v. Stedham* (1914) 187 Ala. 622, 65 So. 984 (action for injury to a boy between nine and twelve years old by an automobile).

will not only be burned, but he also probably knows that his life will thereby be endangered. Such a child may not, however,—and he is rebuttably presumed by the law not to,—possess that maturity of discretion which dictates those precautions against the dangers of fire that are conclusively presumed by the law to belong to normal children who are fourteen years of age. A child above seven and under fourteen years of age may know that if he is struck by an automobile he will probably be killed or suffer great bodily injury. He may know that if he remains out of public thoroughfares and other places in which automobiles are wont to go he will be in no danger from automobiles. He may, however, not possess that maturity of discretion which belongs to adults of ordinary prudence, and which normal children of fourteen years of age and above that age are conclusively presumed by law to possess, and for that reason may heedlessly play in the highways, and may heedlessly go across them without exercising such ordinary prudence."

The rule of presumption of incapacity on the part of a child under twelve or fourteen years of age so to conduct itself as to be chargeable with contributory negligence appears to be only a rule of evidence or pleading, and may be overcome by proof of such facts as will charge the child with contributory negligence as matter of law.¹¹² It has been held, however, upon exception by defendant, that an instruction is erroneous, that the presumption of incapacity on the part of a child between seven and fourteen years of age to be guilty of such conduct as amounts to contributory

negligence may be overcome by evidence that the child has "more than the average capacity of children of his age."¹¹³

The question as to the age at which a child's responsibility for negligence is presumed to begin is a question of law, and not of fact.¹¹⁴ On this point it was said, in a leading Pennsylvania decision:¹¹⁵ "The law fixes no arbitrary period when the immunity of childhood ceases and the responsibilities of life begin. For some purposes majority is the rule. It is not so here. It would be irrational to hold that a man was responsible for his negligence at twenty-one years of age, and not responsible a day or a week prior thereto. At what age, then, must an infant's responsibility for negligence be presumed to commence? This question cannot be answered by referring it to the jury. That would furnish us with no rule whatever. It would give us a mere shifting standard, affected by the sympathies or prejudices of the jury in each particular case. One jury would fix the period of responsibility at fourteen, another at twenty or twenty-one. This is not a question of fact for the jury. It is a question of law for the court."

The states which have adopted the rule of prima facie presumption of incapacity on the part of a child under twelve or fourteen years of age to be guilty of contributory negligence appear incorrectly to have reasoned from analogy to the criminal law, by which an infant under that age is presumptively incapable of committing a crime. The situations in criminal and civil proceedings seem by no means analogous.¹¹⁶ And the presumption, considered in the ab-

¹¹² *Ewing v. Lanark Fuel Co.* (1909) 65 W. Va. 726, 29 L.R.A. (N.S.) 487, 65 S. E. 200; *Virginia-Carolina R. Co. v. Clawson* (1910) 111 Va. 313, 68 S. E. 1003. And see notes 244 and 245, *infra*.

It was said in *Cleveland Terminal & Valley R. Co. v. Heiman* (1898) 16 Ohio C. C. 487, 9 Ohio C. D. 222, in holding that a twelve-year-old boy who was killed by an engine while playing on the track was negligent as matter of law, that the allegation of age in the petition, that the child was under fourteen years old, has the effect of removing the imputation of neglect; or, in other words, that the effect of the presumption of negligence which would otherwise arise is avoided, but that the removal of this presumption by allegation of age is limited to pleading only, and cannot be held to supply proof so far as a recovery is concerned.

¹¹³ *Norfolk R. & Light Co. v. Higgins* (1908) 108 Va. 324, 61 S. E. 766.

¹¹⁴ *Birmingham & A. R. Co. v. Mattison* L.R.A. 1917F.

(1909) 168 Ala. 602, 52 So. 49; *Friess v. New York C. & H. R. R. Co.* (1893) 67 Hun, 205, 22 N. Y. Supp. 104, affirmed without opinion in (1893) 55 N. Y. S. R. 931; *Dempsey v. Brooklyn Heights R. Co.* (1904) 98 App. Div. 182, 90 N. Y. Supp. 639; *Nagle v. Allegheny Valley R. Co.* (1878) 88 Pa. 35, 32 Am. Rep. 413.

¹¹⁵ *Nagle v. Allegheny Valley R. Co.* (Pa.) *supra*.

¹¹⁶ The statement appears sound which is made in *Moore v. Moore* (1902) 4 Ont. L. Rep. 167, in holding that the question of contributory negligence on the part of a boy between fourteen and fifteen years of age injured while employed in the defendant's factory was for the jury, that "a hard and fast line has been drawn in the criminal law at the age of fourteen as the limit of incompetence to commit crime, but this rule is inapplicable to civil proceedings, and in cases of this kind the age, capacity, and experience of the infant must be taken into consideration by the jury in ascertain-

stract, that a child until twelve or fourteen years of age does not have sufficient judgment and discretion to know and avoid danger, so as to be chargeable with negligence, seems contrary to ordinary experience. Indeed, it seems probable that the fallacy of some of the courts in adopting this presumption lies in a failure to recognize the principle that the standard of care required of children is not that of the ordinarily prudent adult, but only that which other children of the same age, capacity, discretion, knowledge, and experience ordinarily exercise under the same or similar circumstances. And the language of the courts in some of the cases which have adopted the rule that presumption of incapacity continues until a child is fourteen years of age is such that it might be construed, though not necessarily so, as meaning that if the child had capacity to be chargeable with negligence its conduct should be measured by the same standard as that of an adult. Thus, the language of the court in the Pennsylvania decision last cited¹¹⁷ is obscure in this respect, although subsequent decisions in that state¹¹⁸ have made it plain that a child over fourteen years of age is not necessarily bound to exercise the care required of an ordinary adult.

The courts of most of the states have not recognized the doctrine of prima facie presumption of incapacity on the part of a child to contribute negligently to an injury as continuing beyond the age of seven or eight years, and in some cases have distinctly repudiated the proposition that such incapacity should continue to the age of fourteen.¹¹⁹ Thus, it is said in a Massachusetts case:¹²⁰ "There is no hard and fast rule that at

any particular age a minor is presumed to be able to comprehend risks, or to be capable of negligence. Extreme cases can be stated which obviously fall on one side or the other of the line. In some jurisdictions it has been held that prima facie a child under fourteen years of age is presumed not to be capable of contributory negligence. . . . But the sounder doctrine seems to be that age is an important though not decisive factor in determining capacities, and that the decision of that question is not helped or hampered by any legal presumption. This is the law of this commonwealth." And the better rule, it was said in the Georgia case,¹²¹ is for the jury to deal with each case on its own facts, unhampered by presumptions of law either for or against the competency of the child, although, in ruling on a demurrer where contributory negligence by an infant is involved, the court may properly invoke the analogies of the criminal law touching presumptions as to the age of discretion.

c. Particular ages.

1. In general.

Cases cited in III. a, *supra*, which on account of his tender years apply the doctrine of conclusive presumption of incapacity on the part of a child to conduct himself so as to be guilty of contributory negligence are not here repeated. The same is true in general as to cases cited in III. b, *supra*, which discuss the rule of prima facie presumption. But it is the purpose at this point to show more in detail the position taken by the courts as regards children of various ages, and to indicate the conclu-

ing what measure of reasonable care must be exacted from him."

¹¹⁷ *Nagle v. Allegheny Valley R. Co.* (1878) 88 Pa. 85, 32 Am. Rep. 413.

¹¹⁸ See notes 197 and 202, *infra*.

¹¹⁹ There is no presumption that a child over seven years old is incapable of exercising care for his own safety and therefore not chargeable with contributory negligence. *Wabash R. Co. v. Jones* (1905) 121 Ill. App. 390.

So "there is no fixed age limit . . . within which a child is sui juris, or at which it will be presumed that it has not judgment and discretion." *Dudley v. Hawkins* (1916) — Tex. Civ. App. —, 183 S. W. 776 (boy nearly fourteen years old injured while playing with blasting powder).

And it was said in *Hepfel v. St. Paul, M. & M. R. Co.* (1892) 49 Minn. 263, 51 N. W. 1049, in holding that the question of contributory negligence on the part of a girl eleven years old in climbing upon the side

of a slowly moving car was for the jury. that a child between seven and fourteen years of age must be reasonably expected to exercise some degree of care, but the measure of it must depend upon its capacity and intelligence, and is ordinarily a question for the jury.

¹²⁰ *Berdos v. Tremont & S. Mills* (1911) 209 Mass. 489, 95 N. E. 876, Ann. Cas. 1912B, 797 (boy under fourteen employed in the defendant's factory) The court cited, as upholding its statement of the rule in that state, *Sullivan v. India Mfg. Co.* (1873) 113 Mass. 396, 15 Am. Neg. Cas. 527, and *Ciriack v. Merchants' Woolen Co.* (1890) 151 Mass. 152, 6 L.R.A. 733, 21 Am. St. Rep. 438, 23 N. E. 826, 15 Am. Neg. Cas. 536.

¹²¹ *Central R. & Bkg. Co. v. Rylee* (1891) 87 Ga. 491, 13 L.R.A. 634, 13 S. E. 584 (where a child under nine years old was injured while attempting to pass under cars standing in railroad yards).

sions reached in the different jurisdictions, which are often irreconcilable, and cannot be fully shown without a somewhat minute analysis.

In several cases where the age of the child did not appear, the question arose as to the inferences which might be drawn by the appellate court. Thus, where the age of a child injured in attempting to cross a railroad track was not shown, but it appeared that she approached the track accompanied by her mother, who was leading her by the hand, and that she broke away from her mother and ran across the track, it was held that from these facts and the references to her by the witnesses as a "little child," it would be inferred that she was non sui juris, and therefore not chargeable with contributory negligence.¹²³ And where a nonsuit was granted on the ground of contributory negligence, in an action for injuries on a defective sidewalk, and it appeared that the plaintiff was an infant, but her age was not proved, it was held that in view of the facts that she was a school girl, was referred to in the testimony as a "little girl," and that one of her playmates was nine years old at the time of the trial, it would be assumed on appeal that the plaintiff may have been of such tender years at the time of the accident as to require the question of her status

within the law of negligence to be submitted to the jury; in which event, the court said, if she was found non sui juris, in the absence of negligence on the part of her parents, the doctrine of contributory negligence would have no application.¹²³

And in several other cases assumptions by the trial court as to the age of the child, which did not directly appear in evidence, have been held erroneous.¹²⁴

2. Under three.

The general rule is well settled that a child under three years of age is incapable of personal contributory negligence, and that the presumption of incapacity is conclusive.¹²⁵ It has, however, been apparently assumed in one case at least that such a child may be required to exercise some care.¹²⁶

3. Three.

As regards a child between three and four years of age, the weight of authority appears to be in favor of a conclusive presumption of incapacity,¹²⁷ and yet it has been assumed apparently in one case that such a child may be required to exercise some care to avoid vehicles in the street.¹²⁸

4. Four.

Although in a majority of the cases it

¹²³ *Wiley v. Long Island R. Co.* (1894) 76 Hun. 29, 27 N. Y. Supp. 722. affirmed without opinion in (1895) 144 N. Y. 717, 39 N. E. 859.

¹²³ *Morrissey v. Smith* (1901) 67 App. Div. 189, 73 N. Y. Supp. 673.

¹²⁴ In an action for the negligent killing of a boy by a street car, where there was no evidence that the deceased was under seven years of age, several witnesses merely referring to him as a "little boy," it was held error to make an assumption as to the age of the boy and charge the jury that if he was a child between six and seven years old he could not, because of his tender years, be charged with contributory negligence. *Devine v. Chicago R. Co.* (1914) 189 Ill. App. 435.

And where there was no evidence as to the age of the plaintiff, in an action for injury by a train, but the plaintiff was present at the trial, and it appeared that he was of such an age and had such ability to care for himself as to be trusted by his parents to go alone to and from school in a large city, at a considerable distance from home, and there was nothing in the case tending to show that negligence was not imputable to him by reason of his incapacity to exercise care, it was held erroneous to instruct the jury that if they believed that the plaintiff at the time of the injury was of such tender age and so immature L.R.A.1917F.

that the requisite capacity to exercise proper care was wanting, the law would not impute negligence to him. *Chicago, R. I. & P. R. Co. v. Eininger* (1885) 114 Ill. 79, 29 N. E. 196.

¹²⁵ See cases cited in note 88, supra.

¹²⁶ It is apparently assumed in *United R. & Electric Co. v. Carneal* (1909) 110 Md. 211, 72 Atl. 771, that a child not quite three years old may be guilty of contributory negligence in running in front of a street car approaching in plain sight. But in this case, the court affirmed a judgment for the plaintiff in an action for the injuries so sustained, holding that the question of the child's negligence was for the jury. It was said that she could only be held to such a degree of care as might be expected from one of her age and intelligence.

¹²⁷ See cases cited in note 88, supra.

¹²⁸ It is assumed apparently, in *Dowd v. Tighe* (1911) 209 Mass. 464, 95 N. E. 853, that a child three years and eight months old, who was playing in the street when run over by a team, may be guilty of contributory negligence, the question being for the jury whether, if they were satisfied that she was capable of going upon the street unattended, she exercised the care required of a reasonably careful and prudent child of her age.

seems that the courts have regarded a child between the ages of four and five years old incapable of personal negligence, the rule of conclusive presumption of incapacity applying to a child of such an age,¹²⁹ there are a few decisions in which the courts have taken the position that the question of capacity was for the jury.¹³⁰

It is important to observe, however, that while, on the one hand, some cases held that a four-year-old child has passed

that age at which it can be declared non sui juris as matter of law,¹³¹ yet, on the other hand, other cases in the same state hold that a child of this age cannot be declared sui juris as matter of law.¹³²

And even if the question of capacity on the part of a child of this age may be regarded as for the jury, it seems that there should be at least a prima facie presumption of incapacity, and it has been so held,¹³³ although in at least one

¹²⁹ See cases cited in note 88, supra.

¹³⁰ Whether a four-year-old child who was injured by a machine left unguarded in a public place could be guilty of contributory negligence was held a question for the jury, and properly answered by the jury in the negative, in *Campbell v. Ord* (1873) 1 Ret. 149, 11 Scot. L. R. 54, cited in *Scots Dig.* 1873-1904, Col. 1420.

In an action for the negligent killing of a four-year-old child by a street car, the question was submitted to the jury, in *McKeown v. Toronto R. Co.* (1908) 10 Ont. L. Rep. 361, whether the child by the exercise of reasonable care could have avoided the accident, and the jury found that "children of that age are not responsible." The question of contributory negligence was not, however, considered in the appellate courts.

Whether a boy four years and three months old was capable of exercising care in crossing a street car track behind another boy, who was slightly older, in such close proximity to a rapidly approaching car that he was struck by the fender on the nearer side of the car, was held a question for the jury, in *Sullivan v. Boston Elev. R. Co.* (1906) 192 Mass. 37, 78 N. E. 382, 20 Am. Neg. Rep. 561.

And the question whether or not a boy four years and eleven months old, who, while crossing a railroad track with his brother, nine year old, was run over by a train while his foot was caught between the rail and the planks of the crossing, was of sufficient age to be capable of exercising care, so as to be chargeable with personal contributory negligence, was held properly submitted to the jury, in *O'Connor v. Boston & L. R. Corp.* (1883) 135 Mass. 352, and a verdict for the plaintiff for the resulting injuries was sustained.

It was held that the question whether a child between four and five years old was sui juris was for the jury, in *Ryder v. New York* (1884) 18 Jones & S. (N. Y.) 220, where the child was injured by falling into an excavation while playing in the street, although she was exceptionally bright and had been repeatedly cautioned not to go near the excavation.

¹³¹ In *Goldstein v. Dry Dock, E. B. & B. R. Co.* (1901) 35 Misc. 200, 71 N. Y. Supp. 477, the court stated, in an action for injury to a four-year-old child caused by running in front of a rapidly approaching street car, that whether she was sui juris

was for the jury to determine; that her years were not so tender that a court could decide that question as a matter of law.

And it has been held that a child four and a half years old playing in the street is not as matter of law exempt from any degree of care to avoid passing vehicles. *Ardolino v. Reinhardt* (1909) 130 App. Div. 119, 114 N. Y. Supp. 508. The court said that although a child may lack judgment to act with care and circumspection in regard to avoiding danger, yet it may be quite sensible of the necessity of avoiding contact with many objects which experience has taught will inflict harm; that from their surroundings and experience certain children might very easily learn to avoid passing vehicles.

¹³² A four-year-old child cannot be held sui juris as matter of law, so as to be chargeable with personal contributory negligence in failing to avoid a street car while attempting to cross the track, the question whether such a child is sui juris being at least for the jury. *Jones v. Brooklyn Heights R. Co.* (1894) 10 Misc. 543, 31 N. Y. Supp. 445.

An intelligent child four and a half years old cannot be held sui juris as matter of law. *Mullaney v. Spence* (1874) 15 Abb. Pr. N. S. (N. Y.) 319, where the child, having entered a coal yard through an open door separating an elevator shaft from the sidewalk, was killed by the descending elevator.

In holding that the question whether a child between four and five years old, who was injured by a street car while attempting to cross the track, was of sufficient age, and discretion to be capable of caring for his own safety was for the jury, the court in *Markey v. Consolidated Traction Co.* (1900) 65 N. J. L. 82, 46 Atl. 573, affirmed in (1901) 65 N. J. L. 682, 48 Atl. 1117, said: "Nor can it be said as a matter of law that the act of the plaintiff in walking backward toward the moving car was negligence in one of his age. Many decided cases hold that children of so tender an age are non sui juris. But even if this be not invariably true, it must at least be always questionable whether a child between four and five years old is of sufficient age and discretion to be capable of caring for his own safety, and the question of his capacity, and its degree, is for the jury."

¹³³ In *Westbrook v. Mobile & O. R. Co.* (1889) 68 Miss. 560, 14 Am. St. Rep. 537,

case the court, erroneously it seems, took a different view of the matter.¹³⁴

In several cases the courts have intimated that children between four and five years of age were incapable of negligence,¹³⁵ or have considered that at least the particular child was incapable thereof.¹³⁶

5. Five.

In cases of injury to children between five and six years of age, the correct rule would seem to be that the doctrine of conclusive presumption of incapacity should apply. This is true not so much because the child is lacking in knowledge as because it is lacking in judgment and discretion. It may know, for example, that if run over by a street car or team injury will probably result, but the probability of such accidents if it fails to exercise care, and the possible extent of the injury, in case a collision occurs, are not

to any considerable degree appreciated. And especially when the nature of the defense of contributory negligence and the reasons therefor are taken into consideration, and due regard is given to the fact that before there can be a recovery for the injury it must, apart from the question of contributory negligence, be shown to be the result of the defendant's negligence, it seems that the doctrine of personal contributory negligence should be regarded as having no application in the case of injury to a child under six years of age. Many courts have taken this view, as will be observed from the cases cited in III. a, *supra*, but the decisions are by no means uniform.

In some cases, it has apparently been assumed that a child between five and six years of age may be found to have such capacity as to be guilty of contributory negligence.¹³⁷

In other cases, it has been held that

6 So. 321, an action by a child four or five years of age for injuries by a train, the court said: "We are unable to subscribe to the doctrine that a minor four or five years of age shall, as matter of law, be charged with contributory negligence."

... The rule which exempts a child of tender years from responsibility, while it may not operate justly in every possible case, on the whole promotes the ends of justice, and we follow the authorities which hold that a child of the age of appellant is *prima facie* exempt from responsibility, but that testimony is admissible to show the contrary, and that the question of capacity in such case is one of fact for the jury, and not one of law, to be determined by the court." And it was held that a plea charging the child with contributory negligence, but failing to allege that he was of exceptional maturity and capacity for one of his age, or capable of taking care of himself under the circumstances, was subject to demurrer.

The doctrine that a child between four and five years old is presumptively not chargeable with contributory negligence is apparently supported by the case of *Gunn v. Ohio River R. Co.* (1892) 36 W. Va. 165, 32 Am. St. Rep. 842, 14 S. E. 465, the principal question considered being, however, the negligence of the railroad company in running over and killing the child, which was seated on the track in plain view. This decision was followed in *Gunn v. Ohio River R. Co.* (1892) 37 W. Va. 421, 16 S. E. 628, an action for the death of a child a year or more older, who was killed under the same circumstances. In this state, however, the presumption of incapacity is regarded as continuing until fourteen years of age.

¹³⁴ In an action for injury to a child four and a half years old by falling from a defective sidewalk, the court in *St. Paul v. Kuby* (1863) 8 Minn. 154, Gil. 125, stated L.R.A.1917F.

that the presumption of law that a child is incapable of exercising care only obtained in regard to very young children,—younger at least than the child in question; and regarded the question of capacity as for the jury in the particular case.

¹³⁵ Where a boy four years and eight months old climbed on a flat car, loosened the brake, and, when the car by its own weight moved down a grade, fell or jumped from it, and was injured, the court in *Central Branch Union P. R. Co. v. Henigh* (1880) 23 Kan. 347, 33 Am. Rep. 167, in holding that negligence was not shown on the part of the defendant, said that it would hardly be claimed that a child so young as the one in question could be guilty of negligence.

¹³⁶ In an action for injury to a boy four or five years old by a car in crossing a street car track, the court instructed the jury in *Zanabria v. Garcia v. Ponce R. & Light Co.* (1907) 4 Porto Rico Fed. Rep. 4, that the evidence in the case and the child's appearance showed him to have been of such tender years that he could not in law be guilty of contributory negligence.

¹³⁷ It was apparently assumed in *Serano v. New York C. & H. R. R. Co.* (1907) 188 N. Y. 156, 117 Am. St. Rep. 833, 80 N. E. 1025, that a child five years and ten months old, who was intelligent, had attended school for about a year, was accustomed to crossing railroad tracks, and had been cautioned in that regard, may be found by the jury to be *sui juris*, so as to be negligent if she failed to exercise care commensurate with her age and intelligence in crossing a railroad track.

So, in *Van Salvellergh v. Green Bay Traction Co.* (1907) 132 Wis. 166, 111 N. W. 1120, the court apparently assumed that a child five years and ten months old might be guilty of contributory negligence in crossing a street car track, holding, how-

children between the ages of five and six were not, as matter of law, relieved from the exercise of any care to avoid street cars or other dangers.¹³⁸

But, on the other hand, it has been held that a child between five and six years of age cannot be held *sui juris* as

matter of law, so as to be chargeable with contributory negligence;¹³⁹ also that a finding, in an action for injury to a child by a street car while attempting to cross the track, that the child was five years and eight months old and of average intelligence is not equivalent to

ever, that under the circumstances she was not guilty of contributory negligence as matter of law.

And in *Linthicum v. Truitt* (1911) 2 Boyce (Del.) 338, 80 Atl. 245, the court apparently assumed that a child five and a half years old might be guilty of contributory negligence in attempting to board a moving merry-go-round, and instructed the jury that it is the duty of an infant to exercise ordinary care to avoid injury, and that ordinary care for a child is that degree of care which children of the same age, of ordinary care and prudence, are accustomed to exercise under like circumstances.

It is apparently assumed in *Philadelphia & R. R. Co. v. Spearn* (1864) 47 Pa. 300, 86 Am. Dec. 544, that a five-year-old girl may be guilty of contributory negligence in running across the track in front of an approaching engine.

¹³⁸ In an action for the death of a child five years and four months old, from being struck by a street car while running across the track, it was held in *Paducah Street R. Co. v. Adkins* (1892) 14 Ky. L. Rep. 425, that an instruction was erroneous which assumed that, as matter of law, the child was too young to be capable of exercising care for its own protection, and could not be charged with contributory negligence. The court regarded the question whether the child was capable of exercising any degree of care as one of fact for the jury.

The rule was laid down in *Wabnick v. Dry Dock, E. B. & B. R. Co.* (1906) 112 App. Div. 4, 98 N. Y. Supp. 38, that a bright child five years old who is allowed by her parents to play in the street is not as a matter of law relieved from the obligation of exercising any care to avoid vehicles properly in the street. The action was for injury to a five-year-old child who was run over by a street car, it being held erroneous for the court to withdraw from the jury all consideration of contributory negligence of the child or her parents.

And in a Minnesota case, where a boy five years and three months old was run over by an engine while, as it appears, he was riding on the footboard of the tender, it was held on appeal by the plaintiff, in an action for the injury so sustained, that the submission to the jury of the question of contributory negligence was not erroneous. *Hannula v. Duluth & I. Range R. Co.* (1915) 130 Minn. 3, 153 N. W. 250. The court cited *Decker v. Itasca Paper Co.* (1910) 111 Minn. 439, 127 N. Y. 183, as holding that a boy five years and three months old was, as matter of law, not chargeable with negligence; but said that the court in that case did not adopt, nor

reject, the rule sometimes held, that a child under the age of seven years cannot be held guilty of contributory negligence; that the conclusion of the former case was that the question was not one free of doubt, and that there was merit in both the arbitrary determination by age and the method which made mental capacity the test. In regard to the case before it, the court said that "the boy, if some of the testimony be true, knew how the train was to move out, debated where he would ride, and insisted upon riding the footboard, instead of the cowcatcher, though warned of the danger, and was capable to some extent of exercising judgment, care, and discretion."

¹³⁹ In *Fallon v. Central Park, N. & E. River R. Co.* (1876) 64 N. Y. 13, it was held that the defendants could not complain of an instruction submitting to the jury the question whether a boy five years old, who sought to recover damages for injury by a street car, was *sui juris*.

The question whether a boy under six years of age was *sui juris*, in an action for his death by being struck by a street car while attempting to cross the track, was held properly submitted to the jury and a judgment for the plaintiff affirmed in *Keenan v. Brooklyn City R. Co.* (1894) 8 Misc. 601, 29 N. Y. Supp. 325. The decision was reversed on other grounds in (1895) 145 N. Y. 348, 40 N. E. 15.

It was held that the question whether the child was *sui juris* was for the jury and a judgment for the plaintiff affirmed, in an action for injury to a child between five and six years old by a street car, while attempting to cross the track, in *Muller v. Brooklyn Heights R. Co.* (1897) 18 App. Div. 177, 45 N. Y. Supp. 954.

And the same conclusion was reached in an action for the death of a five-year-old boy by being struck by a street car while playing in the street, in *Howell v. Rochester R. Co.* (1897) 24 App. Div. 502, 49 N. Y. Supp. 17.

In an action for an injury to a boy five years and one month old, who, on his way from school, was run over by a street car, it was held in *Travers v. Boston Elev. R. Co.* (1914) 217 Mass. 188, 104 N. E. 383, in sustaining a judgment for the plaintiff, that the court correctly submitted to the jury the question whether he was of sufficient intelligence properly to be allowed to be on the street alone, and charged that if so he was responsible for such conduct as would reasonably be expected of a child of his age.

It was said in *Hammond, W. & E. C. Electric Street R. Co. v. Blockie* (1907) 40 Ind. App. 497, 82 N. E. 541, that there is a time in the life of a child when the courts

a finding that she was capable of exercising some care for her own safety.¹⁴⁰

However, a few cases have taken the apparently extreme position that children under six years of age may be guilty of contributory negligence as matter of law.¹⁴¹

It seems that, in any event, if the doctrine of conclusive presumption of in-

capacity on the part of children of this age is not adopted the question should be submitted to the jury, with the presumption in favor of the proposition that the child was lacking in the capacity, experience, knowledge, and discretion necessary to charge it with contributory negligence. And in some cases the latter view has been adopted, it being held that there is

refuse to say whether such child is conclusively presumed to be *sui juris*, or non *sui juris*, and that during this period the courts all agree that the question of capacity is one of fact, to be determined by the jury. The action was for injury to a child five years and eight months old by a car in crossing a street car track; and in affirming a judgment for the plaintiff the court said that whether the child had passed the age at which it could affirm that she was non *sui juris* was immaterial, that certainly she had not attained the age at which it could affirm that she was *sui juris*, and that it was a question of fact for the jury.

¹⁴⁰ *Hammond, W. & E. C. Electric Street R. Co. v. Blockie (Ind.) supra*. The court was of the opinion also that if the two statements might be presumed to be equivalent, yet such a finding was not in conflict necessarily with allegations in the complaint that the child was too young to be capable of appreciating danger or to have caution and discretion. It was said: "To appreciate the danger of coming in contact with a car means more than to know that such contact will injure. . . . So, to be able to appreciate the danger of crossing a street car track in front of a moving car, a person must be capable of having at least some idea of the speed at which the car is moving, the distance it is likely to travel in a given time, and the distance such person may travel either running or walking, as the case may be, in the same time. We do not mean to say that this comprehension must be exact, but there must be sufficient mental capacity to form some idea of these matters; and we cannot say, as a matter of law, that a child five years and ten months old, of average intelligence, whatever that may mean, has such mental capacity."

¹⁴¹ A boy five years and nine months old may be guilty of contributory negligence as matter of law in attempting to pass under railroad cars while in motion, *McMahon v. Northern C. R. Co. (1873) 39 Md. 438*.

For a case in which a child five and a half years old was held guilty of contributory negligence as matter of law in crossing the street in front of an approaching vehicle, see *Hayes v. Norcross (1895) 162 Mass. 546, 39 N. E. 282*, set out in note in 19 L.R.A. (N.S.) pp. 162, 163. See also *Murphy v. Boston Elev. R. Co. (1905) 188 Mass. 8, 73 N. E. 1019, 18 Am. Neg. Rep. 129*, set out in the note in 11 L.R.A. (N.S.) pp. 170, 171, where it was held that a boy five years and four months old who was killed by a street car was chargeable with contributory negligence. L.R.A.1917F

gence as matter of law. The decision, however, appears to assume that the boy was capable of exercising some degree of care, this assumption being indulged to avoid the imputation of negligence on the part of those having him in charge, in sending him unattended on an errand which required him to cross the street.

See also *Kyle v. Boston Elev. R. Co. (Mass.) post, 164*, holding, in an action for the death of a boy five years and eleven months old by a street car, that a verdict for the defendant was properly directed on the ground that the boy was not in the exercise of due care, where it appeared that he followed other children across the track, at a place other than a crossing, and there was no evidence that he took any precautions to ascertain whether or not a car was approaching.

The proposition that a five-year-old child may be guilty of contributory negligence as matter of law is supported by the case of *Plantza v. Glasgow (1910) 47 Scot. L. R. 688*, in which, although the decision might properly rest on the ground that the defendant was not negligent, it was said that, had this been otherwise, the child was guilty of contributory negligence in running against a T-shaped water key projecting about 2 feet above the ground, from a hydrant, the lid of which had been removed by a workman repairing the street. The observations of one of the judges in this case are interesting, although not to be accepted as a rule of law because not in accord with many of the decisions. It was said: "I reject altogether the idea that a boy of five cannot be guilty of contributory negligence, and I do not think any judges have ever said that that was the law without regard to the particular circumstances being dealt with. What judges have said (and I agree with them) is that on the facts of a particular case it may be difficult to hold that a boy of five has been guilty of negligence. They did not say that he could not be held guilty of negligence if the circumstances showed that he had not taken that care of himself which is expected of a child of that age. A child of five knows perfectly well not to run up against obstructions. This was not a case of a boy running up against an obstruction which he had not noticed. It is the case of a boy who knew that the obstacle was there, and, without taking any care of himself, runs against the obstacle. I am of opinion that the boy was negligent of his own safety in a matter which was quite within his capacity for self-care."

at least a *prima facie* presumption of incapacity.¹⁴²

6. Six.

It is stated in an Iowa case¹⁴³ that no court of modern times has gone to the extent of saying that, under any state of circumstances, a child of six years may be held guilty of negligence as matter of law. This statement, however, is not in accord with all of the authorities, it being held, as has been seen above,¹⁴⁴ that a child under six years of age may be

chargeable with negligence as matter of law; and the same conclusion has been reached in the case of injury to a six-year-old child who fails to exercise any care in approaching a place of danger.¹⁴⁵

In some cases it has been apparently assumed that a six-year-old child may be guilty of contributory negligence;¹⁴⁶ and in the majority of the cases it has been held that the question of contributory negligence of a six-year-old child is at least for the jury, and that the court cannot hold as matter of law that

¹⁴² A child under six years old is at least *prima facie* incapable of such conduct as will constitute contributory negligence, and the burden of showing his capacity is on the one alleging it. *Chicago City R. Co. v. Tuohy* (1902) 196 Ill. 410, 58 L.R.A. 270, 63 N. E. 997, affirming (1901) 95 Ill. App. 314. And it was held that the fact that the child who was nearly six years old, was permitted to go to a school less than two blocks from home, requiring the crossing of street car tracks, did not show that he had sufficient capacity to be chargeable with contributory negligence in attempting to cross tracks at another point after school hours.

A child of the age of five years and seven months is *prima facie* incapable of contributory negligence. *Westerfield v. Levis Bros.* (1891) 43 La. Ann. 63, 9 So. 52 (where child was killed while playing on iron roller left unattended in street).

A five-year-old child is presumably incapable of negligence. *Stone v. Florence* (1913) 94 S. C. 375, 78 S. E. 23 (where child, while playing in street, was burned by falling into a drain in which there was smoldering trash).

In an action for injury to a child by a train negligently backed along a public street, it was said in *Mexican C. R. Co. v. Rodriguez* (1911) — *Tex. Civ. App.* —, 133 S. W. 690, in affirming a judgment for the plaintiff: "The boy was five years of age, and we doubt that in any case a child of that age can be charged with contributory negligence . . . and certainly not unless there is testimony of such intelligence and realization of danger as would indicate that the child was conscious of the consequences of its conduct."

In an action for injury to a child five years and eight months old while attempting to pass between cars in a railroad yard, the burden of proof that the child had sufficient discretion to appreciate the danger, so as to be capable of contributory negligence, was held to be on the defendant, where the child had never attended school, was too small to do so, and had never except once or twice gone alone from her home to town. *Ft. Worth & D. C. R. Co. v. Wininger* (1912) — *Tex. Civ. App.* —, 151 S. W. 586.

¹⁴³ *Fishburn v. Burlington & N. W. R. Co.* (1905) 127 Iowa, 483, 103 N. W. 481.

¹⁴⁴ See cases cited in note 141, *supra*. L.R.A.1917F.

¹⁴⁵ Attention is called to the case of *Godfrey v. Boston Elev. R. Co.* (1913) 215 Mass. 432, 102 N. E. 652, where a boy six years and eight months old was held negligent as matter of law in running across a street car track, while chasing a companion, without taking any precautions to avoid street cars.

See also *Adams v. Boston Elev. R. Co.* (Mass.) post, 165, holding that a child six and one-half years old is negligent as matter of law in crossing street car tracks behind a passing car in such a manner as to come into contact with the side of a car moving on the other track.

¹⁴⁶ In *Cecchi v. Lindsay* (1910) 1 *Boyce* (Del.) 185, 75 Atl. 376, where a child six years old was struck by an automobile in a street, the court apparently assumed that the child was capable of exercising some degree of care, and instructed the jury that while it was the duty of children to exercise ordinary care to avoid injuries such care was for them that degree of care which children of the same age, of ordinary care and prudence, are accustomed to exercise under like circumstances, and that it was for the jury to say whether under the circumstances the plaintiff exercised reasonable care.

It is apparently assumed in *Ruschenberg v. Southern Electric R. Co.* (1901) 161 Mo. 70, 61 S. W. 626, that a boy six years and three months old, although he had never attended school and was not an especially bright child, might be guilty of contributory negligence in crossing a street car track, an instruction being held not prejudicial to the plaintiff that it was his duty to exercise such degree of care and prudence in crossing the track "and in looking and listening for the car" as an ordinarily careful and prudent boy of like age and intelligence would have exercised under the circumstances.

The court apparently considered in *Ritscher v. Orange & P. Valley R. Co.* (1910) 79 N. J. L. 462, 75 Atl. 209, that a school boy six years and ten months old might be guilty of contributory negligence in running in front of a street car while fleeing from another boy who was threatening him with a stone, so as to preclude recovery for an injury sustained by being struck by the car; it being held, however, that contributory negligence was not shown as matter of law.

the child has such capacity as to charge it with negligence in failing to appreciate and avoid danger.¹⁴⁷

It has been held also, that in the absence of evidence to the contrary there

is a presumption that a six-year-old child is non sui juris, and therefore not capable of contributory negligence,¹⁴⁸ or that at least capacity will not be presumed, even if it might be proved as a

¹⁴⁷ In the following cases it was held that it could not be determined as matter of law that a child between six and seven years of age was sui juris, i. e., capable of personal negligence but that the question of its capacity was for the jury. *Huntington v. Bartrom* (1911) 48 Ind. App. 117, 95 N. E. 544 (almost seven-defective sidewalk); *Finn v. Delaware, L. & W. R. Co.* (1899) 42 App. Div. 524, 59 N. Y. Supp. 771, 6 Am. Neg. Rep. 611 (child diagonally crossing track struck by train backed from rear without warning); *Dwyer v. McLaughlin* (1900) 31 Misc. 510, 64 N. Y. Supp. 380 (child while playing on sidewalk jumped into excavation adjacent to walk and was injured by fall of plank guarding the excavation); *Thies v. Thomas* (1902) 77 N. Y. Supp. 276 (child killed by automobile in street); *Lafferty v. Third Ave. R. Co.* (1903) 85 App. Div. 592, 83 N. Y. Supp. 405, affirmed without opinion in (1903) 176 N. Y. 594, 68 N. E. 1118 (child injured by a street car while attempting to cross the track); *Pittel v. Burkhard* (1907) 121 App. Div. 571, 106 N. Y. Supp. 245 (child run over by truck in street); *Specht v. Waterbury Co.* (1911) 70 Misc. 404, 127 N. Y. Supp. 137, affirmed in (1911) 144 App. Div. 938, 129 N. Y. Supp. 1147 (child burned while playing near fire on vacant lot); *Edwards v. Chicago, M. & St. P. R. Co.* (1907) 21 S. D. 544, 110 N. W. 832 (child almost seven, walking on railroad track, struck by train approaching from rear.)

It was held not prejudicial to the defendant to submit to the jury the question whether a six-year-old child who was run over by a truck in a street was sui juris or non sui juris, where, although the child was not called as a witness, or, so far as appeared, was not present in court or seen by the jury, her parents testified as to instructions given her and their observation of her conduct while playing in the street; it being said that this evidence, in addition to the presumption arising from her age that she was non sui juris, required the submission of that question to the jury as one of fact. *Pittel v. Burkhard* (1907) 121 App. Div. 571, 106 N. Y. Supp. 245. The contention of the defendant was that it was error to submit the question of sui juris to the jury because of lack of evidence on that point, and that the jury's determination of the question was the result of mere speculation.

Whether a child six years old has sufficient discretion, knowledge, and experience to appreciate the nature and extent of the danger in attempting to cross a railroad track under the drawheads of cars, so as to be guilty of contributory negligence, was held to be a question for the jury in *Gulf, C. & S. F. R. Co. v. Garrett* (1906) — Tex. Civ. App. —, 99 S. W. 162. L.R.A.1917F.

In sustaining a judgment for the plaintiff, in an action for injury to a six-year-old boy, who, while walking with an adult across a private driveway forming a part of the sidewalk, was run over by an automobile, the court in *J. F. Darmody Co. v. Reed* (1916) 60 Ind. App. 662, 111 N. E. 317, stated that under the circumstances of the case it need not consider the question whether the boy was guilty of contributory negligence, that the jury by its verdict had found that he had not reached the age of accountability, and, in the eyes of the law, he was non sui juris.

In *Neun v. Rochester R. Co.* (1900) 165 N. Y. 146, 58 N. E. 876, the court approved an instruction, in an action for the negligent killing of a six-year-old child by a street car, that if the jury found that the child was non sui juris any negligence on its part could not be considered.

In *Birge v. Gardiner* (1849) 19 Conn. 507, 50 Am. Dec. 261, a child under seven years of age was injured by the fall of a heavy gate erected by the defendant on his own lands, and it was contended in an action for the injury that it was caused by the negligence of the child in shaking and pulling the gate. In affirming a judgment for the plaintiff it was said. "The plaintiff was a child, without judgment or discretion; and it was submitted to the jury to say whether such a child ought to be chargeable with fault so as to defeat his recovery; or whether or not the acts done by him were not rather the result of childish instinct, which the defendant might easily have foreseen. It might perhaps have been going too far for the court to have said, as a matter of law, that a child of this age could not be so blameworthy as to excuse the defendant. We will not say that such cases may not be imagined, or may not sometimes occur. But it was favorable to the defendant, and he cannot complain of it, that the age and condition of the plaintiff, connected with the circumstances of the case, were put to the jury, for them to determine what degree of fault, if any, was imputable to the plaintiff."

¹⁴⁸ *Kaplan v. Metropolitan Street R. Co.* (1904) 98 App. Div. 133, 90 N. Y. Supp. 585 (where a six-year-old boy was struck by a street car while attempting to cross the track); *Gregg v. King County* (1914) 80 Wash. 198, 141 Pac. 340, Ann. Cas. 1916C, 135 (where a boy between six and seven years old was injured by his hand being crushed between protection piles and a dock).

In *Pittel v. Burkhard* (1907) 121 App. Div. 571, 106 N. Y. Supp. 245, the court recognized the existence of a presumption that a six-year-old child is non sui juris, in holding that that question was for the jury, in an action for injury to a six-year

matter of fact.¹⁴⁹ On this point the rule was laid down in a New Jersey case,¹⁵⁰ in an action for injury to a child about six years old by a street car, that there is a presumption that a child under seven years of age is incapable of contributory negligence, and that if such presumption may be overcome by proof on the part of the defendant, in the absence thereof it is not erroneous for the court to withdraw from the jury the question of contributory negligence. And the court said: "It would be convenient if the court could adopt the rule which seems to have been adopted by the more recent cases in Illinois, and hold, in analogy to the rule which exempts children under seven from criminal responsibility, that they are not to be charged with contributory negligence until they have reached at least that age. . . . This rule, however, has never been adopted in this state, and is opposed by a decision of so eminent a court as that of Massachusetts.¹⁵¹ Without adopting the Illinois rule, we think, however, it is safe to say that there is a presumption that a child under seven years of age is not guilty of contributory negligence, and while we do not undertake to say that this presumption may not be overcome by proof on the part of a defendant, such proof was absent in this case, and the judge was therefore justified in taking the question of contributory negligence from the jury."

But it should be observed that it has been held that evidence that a child is

old child by being run over by a truck in a street.

While the presumption that a child of tender years is incapable of negligence is not always an irrebuttable one, before the plea of contributory negligence will be allowed as against a child of apparently tender years it must be shown that the precocity of the child gave to it such understanding as to enable it to exercise a reasonable degree of care for its protection under the circumstances. *Harper v. Kopp* (1903) 24 Ky. L. Rep. 2342, 73 S. W. 1127. This rule was applied as to a child six years old who was injured by falling from lumber piled in a street.

¹⁴⁹ *Mackey v. Vicksburg* (1887) 64 Miss. 777, 2 So. 178. The action was against a municipality for injury to a six-year-old child by falling into an unprotected excavation, the question arising on demurrer to the declaration, which the lower court had sustained. On appeal, it was said that it cannot be inferred as matter of law that a child six years old is capable of contributory negligence; that there is no presumption of law that an infant of this age is capable of even that slight degree of care and prudence the absence of which in an adult would be the grossest negligence; and that whether, L.R.A.1917F.

about six or seven years of age and that he attends school is sufficient, in connection with inferences as to his capacity which may be drawn by the jury from his appearance, to warrant submission to the jury of the question whether he was sui juris, so as to be permitted properly to go upon the streets unattended, and to sustain a finding in the affirmative on that issue.¹⁵² And it has been held, in an action for injury to a child under seven years of age by a street car while crossing the street, that the question whether the child was non sui juris was not in issue, where the complaint did not allege that it was non sui juris, the court taking the position that incapacity is a matter of fact, not a conclusion of law, and should be averred if relied upon.¹⁵³

On the question whether a child between six and seven years of age should be held capable of contributory negligence, it is apparent from the cases above cited that there is a considerable difference of opinion among the authorities. In many of the decisions¹⁵⁴ the doctrine of conclusive presumption of incapacity has apparently been applied. And, as stated in connection with the consideration of that doctrine, there seems to be considerable ground for this rule. But it cannot be said to be generally adopted as a uniform rule, to be applied under all circumstances. The weight of authority appears to be that a child between six and seven years of age should not be declared negligent as

notwithstanding his tender years, precocity of judgment may be shown as matter of fact sufficient to impute to the child appreciation of the danger into which he entered, and the obligation to avoid it, could not be determined on demurrer.

In sustaining a judgment for the plaintiff in an action for injury to a six-year-old child by the sudden jerking of a street car while he was in the act of alighting from the front platform, the court in *Buck v. People's Street R. Electric Light & P. Co.* (1891) 46 Mo. App. 555, 4 Am. Neg. Cas. 396, said that negligence cannot ordinarily be imputed to a child of the age of six years, for it would not be presumed to have sufficient capacity or discretion to understand the danger of getting on and off street cars, and to guard against it.

¹⁵⁰ *Baker v. Public Service R. Co.* (1910) 79 N. J. L. 249, 75 Atl. 441.

¹⁵¹ [Citing] *Hayes v. Norcross* (1895) 162 Mass. 546, 39 N. E. 282.

¹⁵² *Lhowe v. Third Ave. R. Co.* (1895) 14 Misc. 612, 36 N. Y. Supp. 463 (crossing street car track).

¹⁵³ *Indianapolis Street R. Co. v. Antrobus* (1904) 33 Ind. App. 663, 71 N. E. 971.

See also notes 163 and 192, *infra*.

¹⁵⁴ See cases cited in note 88, *supra*.

matter of law, but that it is at least for the jury to determine whether the child has sufficient capacity and discretion to charge it with negligence under the circumstances, and that there is a *prima facie* presumption of incapacity.

7. Seven.

Whether a child seven years old has such capacity, knowledge, discretion, and experience as to be capable of contributory negligence under the particular circumstances has generally been held to be a question for the jury. Thus, on the one hand, it was held in a New York case¹⁵⁵ that a bright boy seven years old who has attended school for two summers and is accustomed to crossing railroad tracks is not of such tender years that he can be declared, as matter of law, to be non sui juris. And in such a case the

burden of proof that the child is non sui juris, if that fact is deemed material, is on the plaintiff, who must prove it as other facts upon which he relies for recovery.¹⁵⁶ And the mere fact that a child is only seven years and three months old, does not justify an inference that it is incapable of exercising any degree of care in crossing a street car track.¹⁵⁷

In other cases it has been held that children between seven and eight years of age are not, as matter of law, incapable of contributory negligence.¹⁵⁸

On the other hand, it has been held that the court cannot declare a seven-year-old child sui juris as matter of law, so as to charge it with contributory negligence, but that the question is for the jury;¹⁵⁹ and that the jury may find a child seven and one half years old incap-

¹⁵⁵ *Simkoff v. Lehigh Valley R. Co.* (1907) 190 N. Y. 256, 83 N. E. 215.

¹⁵⁶ *Simkoff v. Lehigh Valley R. Co.* (N. Y.) supra.

So, in holding that a girl seven years and three months old who was run over by a street car while attempting to cross the street could not be declared sui juris as matter of law, but that this was a question for the jury, the court in *Stone v. Dry Dock, E. B. & B. R. Co.* (1889) 115 N. Y. 104, 21 N. E. 712, said: "We are inclined to the opinion that in an action for an injury to a child of tender years, based on negligence, who may or may not have been sui juris when the injury happened, and the fact is material as bearing upon the question of contributory negligence, the burden is upon the plaintiff to give some evidence that the party injured was not capable, as matter of fact, of exercising judgment and discretion. This rule would seem to be consistent with the principle, now well settled in this state, that in an action for a personal injury based on negligence, freedom from contributory negligence on the part of the party injured is an element of the cause of action."

¹⁵⁷ *Stone v. Dry Dock, E. B. & B. R. Co.* (N. Y.) supra.

¹⁵⁸ *Cleveland, C. C. & St. L. R. Co. v. Scott* (1903) 111 Ill. App. 234, where a seven-year-old child was injured by the fall of a window on a train on which she was a passenger, the court stating that whether in touching the window catch the child was guilty of contributory negligence should have been submitted to the jury.

Although unnecessary to the decision, the court in *Covington v. Bramlage* (1892) 14 Ky. L. Rep. 395, was of the opinion that a bright child seven years old, which was able to find its way from one part of the city to another, and was trusted alone by its parents, could not be said, at least as matter of law, to be non sui juris.

A seven-year-old boy of ordinary intelligence, and capable of testifying in court, L.R.A.1917F.

is not, as matter of law, exempt from the exercise of any care to avoid automobiles in the street. *Verdon v. Crescent Automobile Co.* (1910) 80 N. J. L. 199, 76 Atl. 346.

In *Louisville, N. A. & C. R. Co. v. Sears* (1894) 11 Ind. App. 654, 38 N. E. 837, in holding that the question whether a boy seven years and ten months old, who while playing in a street was injured by stepping on a pile of dirt negligently left beside its tracks by a railroad company and falling under a moving train, was sui juris, was for the jury, the court said: "All infants are not held, as a matter of law, to be non sui juris. It has been held in several cases in this state that children ranging in age from two years to seven years and two months are non sui juris. . . . In no case, so far as our attention has been called thereto, in this state has the court held that a child in excess of seven years and two months old was, as a matter of law, non sui juris."

¹⁵⁹ *Hyland v. Burns* (1896) 10 App. Div. 386, 41 N. Y. Supp. 873 (injury by fall of stones piled in street); *Finkelstein v. Brooklyn Heights R. Co.* (1900) 51 App. Div. 237, 64 N. Y. Supp. 915 (injury by street car while attempting to cross track); *Evansich v. Gulf, C. & S. F. R. Co.* (1882) 57 Tex. 126, 44 Am. Rep. 586 (injury on turntable); *McVoy v. Oakes* (1895) 91 Wis. 214, 64 N. W. 748 (injury by sudden increase in the speed of a train along which child was walking holding to a brake rod).

Where a girl seven years and three months old, in attempting to cross the street, was run over by a street car, the court in *Stone v. Dry Dock, E. B. & B. R. Co.* (1889) 115 N. Y. 104, 21 N. E. 712, held that it was error to grant a nonsuit on the ground that the child was sui juris and that its act in crossing the street in front of the approaching car was negligence which contributed to the death of the child and barred a recovery therefor. It was said: "It cannot be asserted as a proposition of law that a child just passed seven years of age is sui juris, so as to be chargeable with

able of being charged with contributory negligence.¹⁶⁰

In some cases it has been held that in the absence of evidence to the contrary a child between seven and eight years of

age is presumptively incapable of personal contributory negligence.¹⁶¹ But in other cases it has been assumed that a child seven years old has such capacity that it may be precluded from recovery

negligence. The law does not define when a child becomes *sui juris*. . . . Infants under seven years of age are deemed incapable of committing crime, and by the common law such incapacity presumptively continues until the age of fourteen. An infant between those ages was regarded as within the age of possible discretion, but on a criminal charge against an infant between those years the burden was upon the prosecutor to show that the defendant had intelligence and maturity of judgment sufficient to render him capable of harboring a criminal intent. . . . The Penal Code preserves the rule of the common law, except that it fixes the age of twelve instead of fourteen as the time when the presumption of incapacity ceases. . . . In administering civil remedies the law does not fix any arbitrary period when an infant is deemed capable of exercising judgment and discretion. . . . From the nature of the case it is impossible to prescribe a fixed period when a child becomes *sui juris*. Some children reach the point earlier than others. It depends upon many things, such as natural capacity, physical conditions, training, habits of life, and surroundings. These and other circumstances may enter into the question. It becomes, therefore, a question of fact for the jury where the inquiry is material, unless the child is of so very tender years that the court can safely decide the fact."

It was held in *Nashville Lumber Co. v. Busbee* (1911) 100 Ark. 76, 38 L.R.A. (N.S.) 754, 139 S. W. 301, in affirming a judgment for the plaintiff, that it is for the jury to determine whether or not a child between seven and eight years old who is injured by attractive machinery on another's property has sufficient mental capacity to be guilty of contributory negligence in coming in contact with it.

So in *Vogel v. North Jersey Street R. Co.* (1903) 69 N. J. L. 219, 54 Atl. 563, it was held that the question whether a child seven years old who was run over by a street car was *sui juris* was for the jury, and a judgment for the plaintiff in an action for the injuries so sustained was affirmed.

In *Penny v. Rochester R. Co.* (1896) 7 App. Div. 595, 40 N. Y. Supp. 172, affirmed without opinion in (1897) 154 N. Y. 770, 49 N. E. 1101, it was held, in an action for injury to a boy seven years and two months old who was struck by a street car while attempting to cross the track, that it was not error to submit to the jury the question whether the boy was non *sui juris*, and to refuse to charge that from the evidence the jury could not find that at the time of the accident he was non *sui juris*, although it appeared that he had attended school for a year before the accident, and L.R.A.1917F.

crossed the tracks in going to and from the school.

Whether a seven-year-old boy who in crossing a street car track fell and was run over by a horse car was capable of contributory negligence was held a question for the jury in *Block v. Harlem Bridge, H. & F. R. Co.* (1890) 55 Hun, 607, 28 N. Y. S. R. 495, 9 N. Y. Supp. 164, and a judgment dismissing the complaint, in an action for the injury so sustained, was reversed.

It was held in *Kitchell v. Brooklyn Heights R. Co.* (1896) 6 App. Div. 99, 39 N. Y. Supp. 741, that it was not error for the trial court to refuse to hold as matter of law that a child seven years and one month old, who, after alighting from a street car, was injured by a car moving in the opposite direction, was *sui juris*, and to submit that question to the jury, although it was shown that she was bright and intelligent and accustomed to being in the street.

¹⁶⁰ *Fritsch v. New York & Q. C. R. Co.* (1904) 93 App. Div. 554, 87 N. Y. Supp. 942, 16 Am. Neg. Rep. 195 (injury by street car at crossing).

¹⁶¹ *New York, N. H. & H. R. Co. v. Kmetz* (1912) 113 C. C. A. 471, 193 Fed. 603 (crossing railroad track); *Watson v. Southern R. Co.* (1903) 66 S. C. 47, 44 S. E. 375 (action for negligent killing of a child seven or eight years old by a train while he was crossing a railroad trestle).

A presumption was indulged in *Parker v. Washington Electric Street R. Co.* (1904) 207 Pa. 438, 56 Atl. 1001, 15 Am. Neg. Rep. 681, that a boy seven years and eight months old was incapable of contributory negligence, where he was permitted by the motorman to ride on the front platform, attempted to alight from the moving car, and was injured. The trial court declined to submit the question of contributory negligence to the jury, stating that it did not think the evidence in the case sufficient to rebut the presumption that a boy of this age is incapable of contributory negligence. And in affirming the judgment the appellate court said: "The measure of a child's responsibility for contributory negligence is his capacity to understand and avoid danger. In analogy to the common-law rule of responsibility for crimes committed, a child under seven years of age has been conclusively presumed to be incapable of appreciating and guarding against danger; and after seven the presumption of incapacity, although not irrebuttable, and growing less strong with each year, continues until fourteen, when the presumption of capacity arises. But these are only convenient points in the uncertain line between capacity and incapacity, at which the law changes the presumption. The standard of

for a personal injury on that ground.¹⁶³ In the case of injury to a seven-year-old child by a street car, it has been held that incapacity must be alleged, if relied upon to defeat the application of the doctrine of contributory negligence.¹⁶³

S. Eight.

In the case of injuries to a child run over, eight years of age, it seems that care proportionate to knowledge, capacity, discretion, and experience should be required, and that, as an abstract proposition, there should be no presumption

that the child is incapable of contributory negligence. This is the position taken by some of the courts.¹⁶⁴ An eight-year-old child is not, as matter of law, incapable of contributory negligence,¹⁶⁵ and a court should not assume that he is.¹⁶⁶

It is impossible in some instances to reconcile all the decisions on this question even in the same state. Thus, in New York it has been held that a child eight years old is presumably non sui juris.¹⁶⁷ But in another case in that state, although it was only necessary to

responsibility is the average capacity of others of the same age and experience, and to this standard a child should be held, in the absence of evidence on the subject."

¹⁶² In *Chicago & A. R. Co. v. Murray* (1872) 62 Ill. 326, the court apparently assumed that a child seven and a half years old may be guilty of contributory negligence in crossing a railroad track, and held that instructions were erroneous which, without reference to the question of contributory negligence of the child, predicated a right to recover solely on a finding of negligence on the part of the defendant.

In an action for injury to a girl seven years and two months old while attempting to cross a railroad track, it was assumed in *McCarthy v. New York C. & H. R. Co.* (1899) 37 App. Div. 187, 55 N. Y. Supp. 1013, that the child was sui juris, and therefore capable of exercising some degree of care for its own safety; and on this assumption the appellate court held that a nonsuit was properly granted on the ground of contributory negligence. But the appellate court, although stating that it did not determine that question, intimated that the court might have properly decided under the circumstances that the child was sui juris as matter of law.

¹⁶³ In an action for injury to a boy seven years and one month old by a street car, while he was attempting to cross the track, the court in *Citizens' Street R. Co. v. Hamer* (1902) 29 Ind. App. 426, 62 N. E. 658, 63 N. E. 778, stated that the complaint did not proceed upon the theory that the boy was non sui juris; that incapacity is a matter of fact, not a conclusion of law, and should be averred if relied upon; and that the question, therefore, was whether or not the boy exercised such reasonable care as should have been exercised by one of his age and capacity.

See also notes 153, supra, and 192, infra.

¹⁶⁴ A bright boy eight years and seven months old is prima facie chargeable with contributory negligence for a failure to exercise ordinary care, having regard to his age and intelligence and the circumstances in which he was placed. *Cleveland, C. C. & St. L. R. Co. v. Tarrt* (1894) 12 C. C. A. 625, 24 U. S. App. 504, 64 Fed. 830 (walking on railroad track).

An eight-year-old child who is bright and

intelligent is sui juris as respects the rule of contributory negligence, applied to her conduct in playing on a pile of lumber in a public landing place on the bank of a canal, with the result that she is injured by its fall. *Lynch v. Knoop* (1907) 118 La. 618, 8 L.R.A.(N.S.) 480, 118 Am. St. Rep. 391, 43 So. 252, 10 Ann. Cas. 807. In this case negligence of the defendant was not shown. But the court was also of the opinion, apparently, that the imprudent conduct of the child would also prevent recovery.

A court should not assume that an eight-year-old boy who is killed by a train while walking on a railroad trestle is too young to be guilty of contributory negligence. *St. Louis & S. F. R. Co. v. Christian* (1894) 8 Tex. Civ. App. 246, 27 S. W. 932. There was in the case, however, evidence as to the boy's capacity to appreciate and avoid danger.

The jury was instructed in *Correa v. American R. Co.* (1909) 5 Porto Rico Fed. Rep. 251, that while a child of very tender years cannot be guilty of contributory negligence, a child eight years old who possesses ordinary intelligence is presumably able to avoid danger. The action was for injury to a child about eight years old who was jerked under a train by taking hold of sugar cane extending from the side of a moving car.

See *Buch v. Amory Mfg. Co.* cited in note 264, infra, to the effect that there is no presumption of incapacity on the part of an eight-year-old child to know and avoid dangerous machinery in a mill.

¹⁶⁵ *Rohloff v. Fair Haven & W. R. Co.* (1903) 76 Conn. 689, 58 Atl. 5, 16 Am. Neg. Rep. 299, holding, in an action for the negligent killing of a boy eight and one half years old by a street car, that an instruction was properly refused that a child eight and one-half years old is as matter of law incapable of contributory negligence.

¹⁶⁶ *St. Louis & S. F. R. Co. v. Christian* (Tex.) supra (boy killed by train while walking on railroad trestle).

¹⁶⁷ *Kennedy v. Hills Bros. Co.* (1900) 54 App. Div. 23, 66 N. Y. Supp. 286, 8 Am. Neg. Rep. 520; *Hebert v. Hudson River Electric Co.* (1909) 136 App. Div. 107, 120 N. Y. Supp. 672 (injury by contact with live electric wire which had broken and fallen in the yard of the child's home); *Costello*

the decision to hold that an eight-year-old child could not be declared *sui juris* as matter of law, the court said that whether the child was *sui juris* or non *sui juris* was a question of fact to be determined by the evidence, in view of all of the existing circumstances and the child's capacity and ability to take care of himself, and that the law indulged no presumption one way or the other on the subject.¹⁶⁸

In several other jurisdictions it has been held that an eight-year-old child will be presumed incapable of contributory negligence.¹⁶⁹

The question of the competency of an

eight-year-old child to appreciate and avoid danger has been considered as especially within the province of the jury, rather than of the court.¹⁷⁰

9. Nine to thirteen, inclusive.

In many cases cited in the present note, and in other notes herein referred to, children between the ages of nine and thirteen have been held guilty of contributory negligence as matter of law.¹⁷¹ And, of course, a child between these ages is not as matter of law incapable of exercising any care, so as to be relieved from the application of the doctrine of contributory negligence.¹⁷²

v. Third Ave. R. Co. (1900) 161 N. Y. 317, 55 N. E. 897, concurring opinion of Parker, Ch. J. (crossing street car track). See also *Grealish v. Brooklyn, Q. C. & S. R. Co.*, cited in note 231, *infra*.

¹⁶⁸ *Corsale v. Facini* (1908) 60 Misc. 100, 111 N. Y. Supp. 779 (injury by wagon while crossing street). See also notes 187 and 188, *infra*.

¹⁶⁹ *In Vicksburg v. McLain* (1889) 67 Miss. 4, 6 So. 774, the doctrine that a child of tender years is *prima facie* incapable of exercising judgment and discretion was applied in the case of injury to an eight-year-old boy who while playing in the street near a school, during a recess, was killed by the fall of an embankment.

In *Delage v. Delisle* (1901) Rap. Jud. Quebec, 10 B. R. 481, it was held that an eight-year-old child who was injured while playing in the defendant's factory by coming in contact with dangerous machinery was presumptively incapable of appreciating the consequences of his conduct, and therefore not chargeable with contributory negligence.

See III. b, *supra*, for states recognizing doctrine of *prima facie* presumption of incapacity as continuing until a child is fourteen years of age.

¹⁷⁰ It was held in *East St. Louis Electric R. Co. v. Burns* (1898) 77 Ill. App. 529, an action for the death of an eight-year-old boy, who, while playing in the street, was killed by a street car, that the court properly refused to direct a verdict for the defendant on the ground of contributory negligence; as the question whether the boy was competent to determine for himself what, if any, acts or omissions on his part were negligence was one which the court could not determine, but was for the determination of the jury from all the evidence, taking into consideration their own experience as to what could reasonably be expected of a boy of this age.

Whether a boy eight years and eight months old, who, while riding in a wagon near the driver, was killed while crossing a railroad track by collision with an engine, was *sui juris* was considered a question for the jury in *Foley v. New York C. & H. R. R. Co.* (1909) 132 App. Div. 506, 117 N. Y. L.R.A. 1917F.

Supp. 956, reversed on other grounds in (1910) 197 N. Y. 430, 90 N. E. 1116, 18 Ann. Cas. 631.

And it was held in *Bennett v. Brooklyn Heights R. Co.* (1896) 1 App. Div. 205, 37 N. Y. Supp. 447, that the question whether a child eight years old who was run over by a street car was *sui juris* was for the jury.

So, whether an eight-year-old boy was *sui juris*, so as to be chargeable with personal contributory negligence in crossing a street railway track, was held a question for the jury in *Nowakowski v. New York & N. S. Traction Co.* (1917) 220 N. Y. 51, 114 N. E. 1042.

¹⁷¹ See particularly, cases cited in note in 11 L.R.A. (N.S.) 166, and the supplemental note appended to *Bothwell v. Boston Elev. R. Co.* post, 172, on the subject of contributory negligence of children in crossing street car tracks.

As particularly recognizing the rule that a child ten years old may be guilty of such contributory negligence as matter of law as will bar recovery for personal injuries, see *Chicago Union Traction Co. v. McGinnis* (1903) 112 Ill. App. 177; *Koehler v. Chicago City R. Co.* (1911) 166 Ill. App. 571; *Cusimano v. New Orleans* (1909) 123 La. 565, 49 So. 195.

Contributory negligence in crossing street car tracks may be imputed as matter of law to a bright boy nine years old who has had experience in crossing such tracks and has been instructed and warned in that regard. *Weitzel v. Detroit United R. Co.* (1915) 186 Mich. 7, 152 N. W. 931, 9 N. O. C. A. 407, rehearing denied in (1915) 186 Mich. 17, 153 N. W. 831.

¹⁷² A boy nine years old will not be conclusively presumed, as matter of law, to be incapable of contributory negligence. *Terre Haute Street R. Co. v. Tappenbeck* (1893) 9 Ind. App. 422, 36 N. E. 915; *Ridenhour v. Kansas City Cable R. Co.* (1890) 102 Mo. 270, 13 S. W. 889, 14 S. W. 760, 4 Am. Neg. Cas. 634 (alighting from street car).

It cannot be held as matter of law that a bright, active girl nine and a half years old, who assists her mother at home and sometimes goes on errands for her in the

The capacity of children of the ages indicated has been considered, especially a question for the jury.¹⁷³

On the question of contributory negli-

gence of children between the ages of nine and thirteen, inclusive, the principal conflict in the cases is in respect to the question of presumption of capacity

city, is non sui juris. *McGrell v. Buffalo Office Bldg. Co.* (1897) 153 N. Y. 265, 47 N. E. 305, 2 Am. Neg. Rep. 598 (injured on passenger elevator).

In an action for injury to boys from nine to thirteen years of age while playing with dynamite caps which they had found, the contention was overruled in *Tibbits v. Spokane* (1911) 64 Wash. 570, 117 Pac. 397, that the court should have instructed the jury that the boys were incapable of contributory negligence as matter of law because they were under the age of fourteen years.

¹⁷³ In an action for injury to a ten-year-old boy by being knocked off a freight car on which he was playing, when an engine came in contact with the car, it was held error to instruct the jury that he was not chargeable with negligence, and to fail to submit this question to the jury; the court stating that the boy "had not arrived at the age when he was presumed to have sufficient capacity and understanding to be sensible of danger and to avoid it, and had passed beyond the age when it could be declared by the court that he was immune from a charge of negligence. His negligence, therefore, was clearly a question of fact for the jury under proper instructions." *Di Meglio v. Philadelphia & R. R. Co.* (1916) 252 Pa. 391, 97 Atl. 476.

And in *Davis v. Pennsylvania R. Co.* (1907) 34 Pa. Super. Ct. 388, an action for the killing of a boy thirteen years old by a train at a crossing, the court apparently regarded the question whether the boy had sufficient intelligence and discretion to be guilty of contributory negligence as for the jury, at least in the absence of special circumstances showing his capacity to appreciate the danger.

It was held in *Avey v. Galveston, H. & S. A. R. Co.* (1891) 81 Tex. 243, 28 Am. St. Rep. 809, 16 S. W. 1015, 6 Am. Neg. Cas. 602, that allegations in a petition in an action for injury to a ten-year-old boy by jumping from a moving train, when it failed to stop at his destination, that the boy knew that the train stopped at his destination when signaled to do so and entered into a contract with the conductor to carry him to that point, did not render the petition subject to demurrer as showing that the boy had sufficient intelligence and discretion to make him responsible for his conduct in jumping from the train. The court indicated that it regarded the question generally whether a child of this age had sufficient capacity to be capable of contributory negligence as for the jury, stating that "whether the mind of a boy ten years old is sufficiently mature to make him responsible for his own contributory negligence is a question of fact for the jury, and should not be decided by the court on demurrer to the petition. . . . We are L.R.A.1917F.

not prepared to say that the facts alleged in the petition in this case, admitting sufficient intelligence on the part of the boy to engage for his passage on the train and to know of the movements of the train, would authorize the court to take the case from the jury." To a similar effect is *Avery v. Galveston, H. & S. A. R. Co.* (1891) — Tex. —, 17 S. W. 31, an action by the parents of the injured boy.

And in *Bridger v. Asheville & S. R. Co.* (1886) 25 S. C. 24, an action for injury to a boy nearly eleven years old while playing on a turntable, in holding that the question of capacity was for the jury, and affirming a judgment for the plaintiff, the court said: "The appellant's counsel have earnestly pressed upon us the position, that it was the duty of the circuit judge to charge as matter of law under the evidence that the plaintiff from his age and sprightly character was sui juris and therefore subject to the general law, applicable to those of acknowledged capacity. Where it is admitted that the party injured was of sufficient age, or had sufficient intelligence, to be responsible for his acts, we do not say but that the judge might properly charge in such case that he could contribute to his injury in such way as to exempt the defendant. So, too, where it is admitted that from his tender years or other infirmities he had not sufficient capacity, the judge might charge that he could not contribute. But where these matters are matters of doubt, and are points in the issue, depending upon facts to be proved, then they become questions for the jury. In accordance with these principles, we find cases in some of the states, cited by appellant, where the courts have ruled as matter of law, in cases of children one, two, and three years of age, that the doctrine of contributory negligence could not be applied; in other cases, where they were eleven, twelve, thirteen, and fourteen, that it could be applied; and in others, between these ages, that the jury should first determine the question of capacity, before considering the question of contributory negligence. In the case before the court the incapacity of the plaintiff from age and undeveloped intellect was alleged in the complaint, and denied in the answer. It thus became one of the facts in issue, and in our opinion it properly belonged to the jury, as it was not so clear, or admitted either way, to such extent as to warrant the judge, even under the cases relied on by appellant, to charge upon it as matter of law."

In a subsequent action arising out of the same circumstances, it was held in *Bridger v. Asheville & S. R. Co.* (1887) 27 S. C. 456, 13 Am. St. Rep. 653, 3 S. E. 860, that an infant of this age was not as matter of law incapable of contributory negligence.

It is said in *Cook v. Houston Direct Nav. Co.* (1890) 76 Tex. 353, 18 Am. St. Rep. 52,

or incapacity. As already shown,¹⁷⁴ such a presumption is held in some states to obtain until the child reaches the age of fourteen. Thus, the doctrine of *prima facie* presumption of incapacity on the part of a child to contribute negligently to an injury has been recognized in Pennsylvania in cases of injury to children of nine,¹⁷⁵ eleven,¹⁷⁶ twelve,¹⁷⁷ and thirteen years of age.¹⁷⁸ And the same doctrine has been recognized in Mississippi in the case of injury to a child ten or twelve years old.¹⁷⁹ On this point, in an action for the death of a thirteen-year-old boy who was killed while employed in the defendant's mine, the court in an Alabama case,¹⁸⁰ in holding that the question of contributory negligence had been properly left to the jury, said: "It may be true that contributory negligence may under some conditions be imputed to an infant under fourteen years of age as a matter of law, as where the evidence of his care and prudence and

his capacity to exercise judgment and discretion is not in conflict, and different inferences cannot be drawn therefrom. The fact, however, that the infant was shown to be 'bright, smart, and industrious,' without more, is not sufficient to overcome the presumption of that want of discretion which his age *prima facie* implies, for an infant may be all this, and yet be so wanting in judgment and discretion as to make him rash and imprudent."

In most jurisdictions, however, the doctrine of *prima facie* presumption that children of from nine to thirteen years of age are incapable of contributory negligence does not appear to be applied, but such children are required to exercise care proportionate to capacity, discretion, knowledge, and experience, and if there is any presumption in the matter it is that they are capable of exercising some degree of care. This has been the view apparently taken in actions for in-

jury. 13 S. W. 475, that when the age of the minor is between thirteen and fourteen years the question of capacity and intelligence to appreciate the dangers of the situation and avoid them is for the jury. The action was for the death of a thirteen-year-old girl who was drowned by falling from a boat.

See also *Denver City Tramway Co. v. Nicholas*, cited in note 230, *infra*, holding apparently that the question whether a thirteen-year-old boy, injured while playing in a street car standing in a street, was *sui juris* was for the jury.

¹⁷⁴ See III. b, *supra*.

¹⁷⁵ *Phillips v. Duquesne Traction Co.* (1898) 8 Pa. Super. Ct. 210 (injury by a street car while attempting to cross the track on a tricycle).

There being no evidence as to the capacity or intelligence of a nine-year-old boy who was killed by a train while he was attempting to cross the track at a crossing, the court in *Metzler v. Philadelphia & R. R. Co.* (1905) 28 Pa. Super. Ct. 180, was apparently of the opinion that because of his age the question of his contributory negligence did not arise in the case.

¹⁷⁶ In *Schilling v. Abernethy* (1886) 112 Pa. 437, 56 Am. Rep. 320, 3 Atl. 792, an action for injury to a boy eleven years old who while passing along an alley was injured by the fall of a wall, the court said that negligence on the part of the plaintiff could not be successfully alleged, for he was not of sufficient age to warrant an assumption of this kind.

¹⁷⁷ In *Byron v. Central R. Co.* (1906) 215 Pa. 82, 64 Atl. 328, the court recognized a presumption of incapacity on the part of a twelve-year-old boy, who in crossing a railroad track was struck by a train backed in the dark without warning or lights over L.R.A.1917F.

a crossing, to contribute negligently to an injury, in holding that the question of negligence on his part was for the jury.

¹⁷⁸ In *West Philadelphia Pass. R. Co. v. Gallagher* (1885) 108 Pa. 524, an action for injury to a thirteen-year-old boy while riding on the step of a crowded street car, the court, in holding that the questions of negligence and of contributory negligence were for the jury, said that the law does not presume that an infant is responsible for negligence until after he arrives at fourteen years of age.

In *Strawbridge v. Bradford* (1880) 128 Pa. 200, 15 Am. St. Rep. 670, 18 Atl. 346, an action for injury on a freight elevator by a thirteen-year-old boy in the defendant's employ, the court, in holding that the question of contributory negligence was for the jury, said that it must be borne in mind that the boy had not attained the age when sufficient capacity to be sensible of danger, and to avoid it, is presumed. And the same rule was quoted and applied in *Kelly v. Pittsburg & B. Traction Co.* (1903) 204 Pa. 623, 54 Atl. 482, in an action for injury to a twelve-year-old boy on a railroad track.

¹⁷⁹ A boy ten or twelve years old is *prima facie* presumed not to have sufficient discretion to render him guilty of contributory negligence for failure to exercise due care for his safety, but this presumption may be overcome by proof. *Potera v. Brookhaven* (1909) 95 Miss. 774, 49 So. 617 (injury to a boy ten or twelve years old who voluntarily touched an electric wire which was attached to a lamp which had fallen in the street).

¹⁸⁰ *Tutwiler Coal, Coke & I. Co. v. Enslen* (1900) 129 Ala. 336, 30 So. 600. The above is quoted in *Birmingham R. Light & P. Co. v. Landrum* (1907) 153 Ala. 192, 127 Am. St. Rep. 25, 45 So. 198.

juries to children of nine,¹⁸¹ ten,¹⁸² eleven,¹⁸³ twelve,¹⁸⁴ and thirteen years of age.¹⁸⁵

¹⁸¹ There is no presumption that a child nine years old is non sui juris. *Cleveland, C. C. & St. L. R. Co. v. Klee* (1900) 154 Ind. 430, 56 N. E. 234. And it was held that an averment of incapacity on the part of a nine-year-old boy to contribute to his injury is an averment of fact, since the law does not conclusively presume that a child of this age is or is not sui juris; and that a complaint so averring states an action for injury to one who is non sui juris, and need not, therefore, allege freedom from contributory negligence.

¹⁸² In an action for injury to a ten-year-old boy by a street car, the court in *Colehour v. Rockford & Interurban R. Co.* (1907) 132 Ill. App. 558, although holding an instruction erroneous which required as much care on the part of the child as on the part of one of mature years, stated that under the decisions of the supreme court of that state the plaintiff, being ten years of age, was of the class known as sui juris, and as such capable of contributory negligence.

In an action for the killing, by a train at a crossing, of a ten-year-old boy, of average intelligence and familiar with the crossing, the court in *Plummer v. Indianapolis Union R. Co.* (1914) 56 Ind. App. 615, 104 N. E. 601, approved an instruction that the boy was required to exercise such care as accorded with his maturity, experience, and capacity as he approached the crossing, that the amount of care to be exercised by him was to be determined by the jury under all the circumstances, but that there was no presumption that such a boy had not the ability to exercise some degree of care as he approached a railroad crossing.

¹⁸³ There is no presumption that a bright boy eleven years old, who has attended school four years, has a newspaper route, and is accustomed to crossing street car tracks, is incapable of contributory negligence which will prevent recovery for his death, caused by running in front of a street car while playing in the street. *Jollimore v. Connecticut Co.* (1912) 86 Conn. 314, 85 Atl. 373.

Where a newsboy eleven years old was injured while riding on the rear of a wagon, by the pole of the defendant's wagon, which was following, the court in *Illinois Iron & Metal Co. v. Weber* (1902) 196 Ill. 526, 63 N. E. 1008, stated that it could not be said as matter of law that the plaintiff was too young to exercise any care for his personal safety, or was incapable of negligence; that unquestionably he was capable of exercising some degree of judgment and discretion and some degree of care.

In the absence of incapacity, it will be presumed that a boy eleven years old has sufficient capacity to be chargeable with negligence in jumping from a moving train. *Chicago & G. T. R. Co. v. Hoffman* (1899) 82 Ill. App. 458.

In *Cincinnati Traction Co. v. Blackson* (1905) 27 Ohio C. C. 191, it was held erroneous, in an action for injury to a boy L.R.A.1917F.

eleven years old by a street car, to instruct the jury in effect that, in the absence of evidence of unusual intelligence and capacity for his age, the law presumed a boy of that age incapable of being charged with contributory negligence. The court said there was no presumption in the matter, but it was a question to be left entirely to the jury under proper instructions.

¹⁸⁴ In an action for injury to a twelve-year-old boy while attempting to climb upon a moving freight train, the court in *Central R. & Bkg. Co. v. Golden* (1893) 93 Ga. 510, 21 S. E. 68, laid down the rule: "There is no presumption of law that a boy between ten and fourteen years of age is not capable of exercising such care as may be requisite for avoiding injury by a railroad train in motion, whether the train be run negligently or not. In each case the question is for the jury, in the light of all the facts and circumstances which go to manifest or illustrate the capacity of the particular boy in question."

In *Hepfel v. St. Paul, M. & M. R. Co.* (1892) 49 Minn. 263, 51 N. W. 1049, in an action for injury to a girl twelve years old from climbing on the side of a freight car, it was said that a child between seven and fourteen years of age must be reasonably expected to exercise some degree of care, although the measure of such care must depend upon its capacity and intelligence, and is ordinarily a question for the jury.

In *Moran v. Burroughs* (1912) — Ont. —, 10 D. L. R. 181, reversing (1912) — Ont. —, 3 D. L. R. 392, an action for injury to a twelve-year-old boy by firearms, the court considered the rule to be that a child above the age of criminal responsibility, which was indicated as being fixed by the Code at seven years, is chargeable with contributory negligence if it fails to exercise that degree of care which an ordinarily careful child of the same age and capacity would have exercised under the circumstances.

In *Crosby v. Maine C. R. Co.* (1915) 113 Me. 270, L.R.A.1915E, 225, 93 Atl. 744, an action for injury to a twelve-year-old boy while crossing a railroad track, the court stated that the boy was sui juris, and held that his conduct was negligent, and prevented recovery.

While the law presumes that a child twelve years old is not capable of exercising the same degree of care for his own safety as one of more mature years, nevertheless it must be assumed that a child of that age is capable of appreciating that it is dangerous to cross a railroad track in front of a moving train, and that care must be used to avoid being struck by it. *Shirk v. Wabash R. Co.* (1895) 14 Ind. App. 126, 42 N. E. 656.

In *St. Louis Southwestern R. Co. v. Shiflet* (1900) 84 Tex. 131, 58 S. W. 948, the court, in determining the question of contributory negligence of a boy nearly twelve years old who fell asleep on a railroad track

In New York, as in the cases of younger children already cited,¹⁸⁶ the decisions on the question of presumption of incapacity on the part of children from nine to eleven years of age, inclusive, are irreconcilable. The doctrine that a child under twelve years of age is presumptively non sui juris has been recognized

in cases of injuries to children of these ages,¹⁸⁷ but other decisions do not appear to adopt this rule.¹⁸⁸ And if the child is twelve years of age or over, there is no presumption, according to the New York decisions, that it is non sui juris,¹⁸⁹ a child at twelve years of age being in that state presumably capable of commit-

and was killed by a train, stated that, if there was no evidence on the subject, the issue of contributory negligence should not have been submitted to the jury, or, having been submitted, the jury ought to have found for the defendant, because it devolved on the plaintiff to show that, for want of discretion the negligent act of the deceased was not imputable to him.

¹⁸⁶ In an action for injury to a thirteen-year-old boy by voluntarily touching a telephone guy wire, which he knew was probably charged with electricity, after being warned not to do so, it was held not erroneous to instruct the jury in effect that, on the issue of the boy's experience and ability to understand the danger of coming in contact with the wire, and the warning not to touch it, the burden of proof was on the plaintiff to show by a preponderance of the evidence that the boy did not have sufficient intelligence and experience to understand the danger of touching the wire and to understand the warning, and that unless they believed that a preponderance of the evidence established these facts they should find that he was guilty of contributory negligence. *Dowlen v. Texas Power & Light Co.* (1915) — *Tex. Civ. App.* —, 174 S. W. 674. The court said that the general rule in cases of this kind, where the minor has attained an age at which he may be charged with contributory negligence, is that the burden is upon him to prove that he did not have sufficient discretion and intelligence to appreciate fully the conditions surrounding him.

And in *Dudley v. Hawkins* (1916) — *Tex. Civ. App.* —, 183 S. W. 776, the court stated that there is no fixed age limit within which a child is sui juris, or at which it will be presumed that it has not judgment and discretion; and the burden of proof that a boy nearly fourteen years old did not know and appreciate the danger in playing with gunpowder was considered as resting on the plaintiff in an action for an injury so sustained.

¹⁸⁶ See notes 167 and 168, *supra*.

¹⁸⁷ An infant under twelve years of age is presumed to be non sui juris, and the question in a particular case whether he is sui juris is for the jury. *Hill v. Baltimore & N. Y. R. Co.* (1902) 75 App. Div. 325, 78 N. Y. Supp. 134, 12 Am. Neg. Rep. 338, holding, in an action for injury to a boy eleven years and nine months old, sustained while attempting to board a moving freight train by losing his hold and falling under the car when a brakeman threw coal at him, that it was error for the court to hold L.R.A.1917F.

as matter of law that the boy was sui juris and to dismiss the complaint on the ground of contributory negligence.

A nine-year-old boy is presumptively non sui juris, so as not to be chargeable with negligence in playing on a street car track. *Dempsey v. Brooklyn Heights R. Co.* (1904) 98 App. Div. 182, 90 N. Y. Supp. 639.

In *Gerber v. Boorstein* (1906) 118 App. Div. 808, 90 N. Y. Supp. 1091, the court, in holding that the question of contributory negligence was for the jury in an action for injury to a nine-year-old boy by a team in the street, said that in the case of an infant who has reached the age of twelve the law presumes him sui juris, but that the contrary may be proved and found as a matter of fact, the burden of proof being on the party asserting it; and that in the case of a child under twelve the law does not presume him sui juris, and whether he is sui juris is a question of fact, the burden of proof in this instance also being on the one asserting it.

¹⁸⁸ A bright girl nine years old is sui juris. *Robertson v. New York* (1894) 7 Misc. 645, 28 N. Y. Supp. 13, affirmed without opinion in (1896) 149 N. Y. 609, 44 N. E. 1126, holding, in an action for the death of a nine-year-old girl by falling from an embankment upon a railroad track, where she was killed by the cars, that, negligence on the part of the defendant being assumed, the complaint was properly dismissed for insufficient proof of the absence of contributory negligence.

In *Byrnes v. Brooklyn Heights R. Co.* (1912) 148 App. Div. 794, 133 N. Y. Supp. 243, the court, in holding that contributory negligence was shown as matter of law on the part of a boy between ten and eleven years old in crossing a street car track, said that a boy of this age who is not shown to be mentally deficient, must be presumed to know the danger to be anticipated from crossing in front of a moving car, and that where the evidence shows that, without looking at any time when the obligation was upon him to look and when the exercise of any degree of care would have obviated the accident, he deliberately walked into a position of danger, it is not proper to submit to the jury the question either of the defendant's negligence or that of the plaintiff's lack of contributory negligence, for there is no evidence to support a verdict in his favor.

¹⁸⁹ A twelve-year-old girl of ordinary intelligence is sui juris as matter of law. *Noonan v. Obermeyer & L. Brewing Co.* (1900) 50 App. Div. 377, 63 N. Y. Supp.

ting crime. It was held in a New York case,¹⁹⁰ in an action for injury to a nine-year-old girl by a street car while attempting to cross the track, that it was not erroneous to instruct the jury that the child was *sui juris*, where it appeared from her testimony that she was aware of the danger of being run over by street cars unless she looked before crossing the track, and that she did look and saw the car approaching, but thought she could cross in front of it.

An unusual decision is that in a Georgia case,¹⁹¹ in which the court, in view of the provisions of the Code in that state, held that sufficient discretion on the part of a thirteen-year-old boy to be chargeable with contributory negligence would

not be presumed; and indicated that the test in determining whether a child of this age has sufficient capacity to be chargeable with negligence is his ability to distinguish between "good" and "evil" in the particular case.

A finding that a twelve-year-old girl who was struck by a train in crossing a track was a "child of immature years" is not necessarily the equivalent of a finding that she was non *sui juris*.^{191a} And in the case of injury to a twelve-year-old child, as in the case of injury to younger children,¹⁹² it has been held that incapacity to appreciate the danger must be alleged in the complaint, if relied upon by the plaintiff to avoid the imputation of negligence.¹⁹³

1066, 7 Am. Neg. Rep. 556 (where a girl twelve years old was run over by a team while she was crossing the street).

And in *Turell v. Erie R. Co.* (1900) 49 App. Div. 94, 63 N. Y. Supp. 462, an action for injury by a train at a street crossing, the court stated that the plaintiff was in his thirteenth year, and undoubtedly *sui juris*.

So, in *Lee v. Sterling Silk Mfg. Co.* (1909) 134 App. Div. 123, 118 N. Y. Supp. 852, an action for injury to a servant thirteen years old, the court laid down the rule that there was no presumption that he was non *sui juris*.

¹⁹⁰ *Hicks v. Nassau Electric R. Co.* (1900) 47 App. Div. 479, 62 N. Y. Supp. 597.

¹⁹¹ *Rhodes v. Georgia R. & Bkg. Co.* (1889) 84 Ga. 320, 20 Am. St. Rep. 362, 10 S. E. 992. The action was for an injury sustained while assisting, at the request of an employee of a railroad company, to move a car. The court, after citing Code provisions that "a person shall be considered of sound mind who is neither an idiot, a lunatic, or afflicted by insanity, or who hath arrived at the age of fourteen years, or before that age, if such person know the distinction between good and evil," and that "an infant under the age of ten years, whose tender age renders it improbable that he or she should be impressed with a proper sense of moral obligation, or be possessed of sufficient capacity deliberately to have committed the offense, shall not be considered or found guilty of any crime or misdemeanor,"—said: "It is insisted by counsel for the defendant in error that the court should declare as a matter of law that a person thirteen years of age had sufficient discretion and knowledge to render him responsible for his acts. We do not think that the court is authorized so to declare; but in view of our Code, the court could declare that an infant who had arrived at the age of fourteen years *prima facie* had sufficient capacity and knowledge of right and wrong to make him responsible for his conduct and acts; that an infant under the age of ten years *prima facie* did not have such discretion and capacity, and could

not be charged with a knowledge of right and wrong so as to make him responsible for his acts or conduct, unless it was clearly shown he had such capacity and discretion. Between the ages of ten and fourteen years, if a person knew the distinction between good and evil in the particular instance, he would be liable for his acts and conduct. But in a case like the present, where the infant is under the age of fourteen, before he could be held responsible for his acts and conduct it would have to be shown by proof that he knew the distinction between good and evil and had capacity to comprehend the danger and avoid the same. The court cannot of itself determine these questions so as to fix the responsibility upon him for his act."

^{191a} *Shirk v. Wabash R. Co.* (1895) 14 Ind. App. 126, 42 N. E. 656. In this case, a finding that a girl twelve years old was "a child of immature years" was held not to require the court to assume, in determining whether she was negligent in crossing a railroad track, that she was non *sui juris*, where it was also found that she was a girl of ordinary size and intelligence for one of her age, had been trusted by her parents to go to and from school and other places in a city by herself, and had been in the habit of crossing the track four times daily during school terms for eighteen months.

¹⁹² See notes 153 and 163 *supra*.

¹⁹³ See *Lebanon Light, Heat & P. Co. v. Griffin* (1894) 139 Ind. 476, 39 N. E. 92, where, in an action for injury to a twelve-year-old boy by an explosion of natural gas in a defective pipe while he was standing near the pipe watching the gas, which it was alleged was escaping and burning in a flame five or six feet high, it was held that the issue of incapacity to appreciate the danger in standing near by and raising the pipe was not raised by allegations that the boy was young and inexperienced, with but a limited knowledge and imperfect comprehension of the dangers attending the handling, using, and transporting of natural gas, and that he was ignorant of the defective construction of the pipe,—especially in view of other allegations consistent

10. *Fourteen and over.*

The authorities appear to agree that after an infant has reached the age of fourteen there is no presumption that he is incapable of contributory negligence.¹⁹⁴ The proposition supported by some of the cases is that at fourteen years of age an infant is presumed to have sufficient capacity and understanding to be sensible of danger and to have the power to avoid it.¹⁹⁵ And this presumption, it is said, ought to stand, until it is overthrown by clear proof of the absence of such discretion and intelligence as is usual with infants at fourteen years of age.¹⁹⁶

only with the theory that he was of superior judgment and discretion.

¹⁹⁴ In the absence of proof to the contrary, the legal presumption is that a boy fourteen years old is *sui juris*. *Fortune v. Hall* (1907) 122 App. Div. 250, 106 N. Y. Supp. 787, affirmed without opinion in (1909) 195 N. Y. 578, 89 N. E. 1100 (action for injury to fourteen-year-old boy employed by the defendant in operating a sausage machine); *Murphy v. Perlstein* (1902) 73 App. Div. 256, 76 N. Y. Supp. 657 (where a girl fourteen years old fell into an excavation adjacent to a sidewalk); *Zlotovsky v. Twenty-third Street R. Co.* (1894) 8 Misc. 463, 28 N. Y. Supp. 661 (injury by a street car); *Columbus R. Co. v. Connor* (1905) 27 Ohio C. C. 229 (same); *Force v. Standard Silk Co.* (1908) 160 Fed. 992 (injury to a fourteen-year-old boy while employed in defendant's mill); *Frauenthal v. Laclede Gaslight Co.* (1896) 67 Mo. App. 1 (holding a boy about seventeen years old negligent as matter of law in voluntarily touching a live electric wire which had fallen in the street, although warned of the danger); *Central R. Co. v. Brinson* (1883) 70 Ga. 207, per Hall, J. (action for injury to a boy fifteen years old by being struck by a projecting plank on a passing car).

A seventeen-year-old boy will be presumed to be of sufficient discretion to be chargeable with contributory negligence as matter of law. *Griffin v. Dickerson* (1913) 4 Tenn. C. C. A. 409 (action for injury to seventeen-year old boy by being permitted to play billiards, pool, and other games without the written consent of his parents, as required by statute, the declaration being held subject to demurrer as showing contributory negligence).

It was said in *Galveston, H. & H. R. Co. v. Anderson* (1916) — Tex. Civ. App. —, 187 S. W. 491, that a child of very tender years may be presumed as a matter of law not to have sufficient discretion to appreciate dangers that would be obvious and apparent to one of mature age, but that no such presumption can be indulged in favor of a boy fourteen years of age. The question, however, was as to whether a boy fourteen years old who was employed as a call boy in railroad yards would be pre-

Whether or not in the cases which support the above proposition the courts regarded the infant as bound to exercise the care of an ordinarily prudent adult is not always clear from the opinion in the particular case. It seems, however, that most of the authorities holding that at fourteen years of age an infant will be presumed to have sufficient capacity and understanding to be sensible of danger, and to have the power to avoid it, mean simply that at this age the presumption that the infant is incapable of contributory negligence ceases, and that the contrary presumption begins; and not necessarily that the standard for measuring

assumed to have appreciation of the danger of moving trains, so as to excuse the employer from warning him of the danger.

¹⁹⁵ *Nagle v. Allegheny Valley R. Co.* (1878) 88 Pa. 35, 32 Am. Rep. 413; *Wilkinson v. Kanawha & H. Coal & Coke Co.* (1908) 64 W. Va. 93, 20 L.R.A.(N.S.) 331, 61 S. E. 856; and *Hairston v. United States Coal & Coke Co.* (1909) 66 W. Va. 324, 66 S. E. 473. (The above actions were for injuries to servants).

The same doctrine is approved in *Baker v. Seaboard Air Line R. Co.* (1909) 150 N. C. 562, 29 L.R.A.(N.S.) 846, 64 S. E. 506, 17 Ann. Cas. 351, where a boy nearly fifteen years old was held negligent in jumping from a rapidly moving train; and in *Hunt v. Graham* (1900) 15 Pa. Super. Ct. 42, where a boy fifteen years old, who knew of the presence of such holes, was held negligent in stepping into a hole made by a sand dredge in a river in which he was bathing, so that there could be no recovery for his death by drowning.

In an action for injury to a boy fifteen years old, while riding a bicycle on the street, through collision with an automobile, the court in *Travers v. Hartman* (1914) 5 Boyce (Del.) 302, 92 Atl. 855, instructed the jury that "the law presumes, as a general rule, that an infant after reaching the age of fourteen years has sufficient discretion and understanding to be responsible for his wrongs, to be sensible of danger and have power to avoid it, and this presumption exists until it is rebutted by evidence to the satisfaction of the jury." Apparently this means only that the infant is presumptively chargeable with contributory negligence; because the court also instructed the jury that in determining the question of contributory negligence they should consider whether the boy was exercising that degree of care which a reasonably prudent person of his age and maturity would exercise under like circumstances, and that the maturity and capacity of the infant, his ability to understand and appreciate the danger, were to be taken into consideration.

¹⁹⁶ *Nagle v. Allegheny Valley R. Co.* (Pa.) and *Baker v. Seaboard Air Line R. Co.* (N. C.) *supra*.

the conduct of infants over this age is the same as in the case of adults.¹⁹⁷ This will appear more clearly in the discussion in the following subdivision on the question as to the age at which an infant's conduct is to be measured by the same standard as that of an adult.

IV. Age at which infant's conduct is to be measured by the same standard as that of an adult.

a. In general.

From the discussion which has preceded, it will be observed that the standard of care by which the conduct of an infant is to be measured is constantly advancing as the child increases in capacity, discretion, knowledge, and experience. It makes no sudden leap at any particular age. If there is a presumption that between the ages of seven and fourteen an infant does not have the capacity to appreciate and avoid danger, it is apparent that the strength of this presumption is constantly diminishing with each year, and ceases altogether at the age of fourteen. In jurisdictions which recognize the existence of such a presumption, it would seem to be a far step from the position that an infant just below the age of fourteen presumably has not the knowledge and discretion to be chargeable with negligence, to the position that an infant just over that

age must exercise the same degree of care as an ordinarily prudent man. And in those jurisdictions which do not recognize the existence of such a presumption, but hold that a child of any age above that at which the doctrine of conclusive presumption of incapacity applies must exercise care proportionate to its capacity, discretion, knowledge, and experience, that seems no sufficient reason for fixing arbitrarily an age beyond which the standard of the adult must necessarily apply.

The weight of authority is that the conduct of an infant fourteen years of age is not necessarily to be measured by the same standard as that of an adult, but that beyond this age the elements of capacity, discretion, knowledge, and experience may be taken into consideration in determining whether an infant exercised due care, unless it clearly appears that he possesses these elements to the same extent as an ordinary adult.¹⁹⁸

The same considerations which lead the courts to hold that a younger child is not bound to exercise the same degree of care as an adult have been held to apply in the case of injury to an infant fourteen years old.¹⁹⁹ Thus, in a Washington decision,²⁰⁰ in holding that the question of contributory negligence was for the jury, where a fourteen-year-old boy while crossing the track was struck and injured

¹⁹⁷ The case of *Nagle v. Allegheny Valley R. Co.* (Pa.) supra, which is one of the ambiguous decisions in this respect, was construed by the same court in *Kehler v. Schwenk* (1891) 144 Pa. 348, 13 L.R.A. 374, 27 Am. St. Rep. 633, 22 Atl. 910, as in harmony with the rule that a boy over fourteen years of age is not required to exercise the same degree of care as an adult, but only such care as is usual in those of his age and experience, it being said that in the *Nagle* Case the court held that it was negligence per se for a boy of fourteen to run across a railroad track without looking, and therefore sustained a nonsuit.

¹⁹⁸ See, in addition to the cases cited, *infra*, this subdivision, cases cited in IV. b, *infra*, and other subdivisions of the present annotation there referred to.

¹⁹⁹ Pertinent to the question here considered are the remarks of the court in a Wisconsin case, in dealing with the question of liability under the statute in that state making railroad companies liable, on failure to fence the tracks, for all damages to domestic animals and persons "occasioned in any manner in whole or in part" by the want of a fence. The action was for the killing of a boy fifteen years old on a railroad track, and the court, after citing an earlier decision by it in which it was held that even though the lack of a fence

might not be the cause in any degree of an adult entering on the track, nevertheless the railroad company might be liable for injury to a child, who might be more likely to enter on the track if unfenced, said: "Recovery was allowed because it is said that young boys lack the pertinacity of purpose and the soundness of judgment of the adult, and their conduct is often controlled by propensities, temptations, curiosities, and obstacles which would not materially affect the adult. For these reasons it is held that recovery should be permitted in the case of a ten-year-old boy, even though it might be denied in the case of an adult. The reasons stated are applicable to a boy fifteen years of age as well as to one five years younger. One can appreciate the danger quite as well as the other, while the younger boy may be more timid, and consequently less reckless, than the older. Boys of fifteen are quite as apt to be daring and thoughtless, and to be actuated by a spirit of bravado, and to court danger and run chances, as are younger boys. At this age they have not accumulated a sufficient fund of common sense to overcome their propensities to recklessness." *Ulicke v. Chicago & N. W. R. Co.* (1912) 162 Wis. 236, 139 N. W. 189.

²⁰⁰ *Steele v. Northern P. R. Co.* (1899) 21 Wash. 287, 57 Pac. 620.

by detached cars, the court, after citing an earlier decision in the same state which considered the question of contributory negligence of a nine-year-old boy, said: "It is true that in that case the boy injured was only nine years old, and in this case he is fourteen; but a boy fourteen years old is a boy still, and while he might be held to a greater degree of care and prudence, and doubtless would be, than a boy nine years old, yet it would certainly be barbarous, and to a degree inhuman, for the court to hold a heedless, thoughtless, fourteen-year-old boy as high a degree of circumspection as it would an adult, whose judgment and caution had been cultivated and matured by years of observation and experience. This is a circumstance to be viewed by the jury, and to be given such weight as the jury, under the circumstances, think it is entitled to." And in an Oregon case,²⁰¹ in an action for injury to a fifteen-year-old boy by a street car while he was driving a delivery wagon across the track, although it appeared that he had been delivering goods in the city for more than a year, it was held that an instruction was not erroneous that, in determining whether he was guilty of contributory negligence, the jury might take into consideration his age and character, and that a child is not expected to use the same degree of care and prudence as an older person, since the court could not say, as matter of law, that a boy of this age had arrived at man's estate in judgment and prudence. And the court overruled the contention that the instruction should not have been given because the boy was fully acquainted with the business in which he was engaged and knew the danger of crossing the track as well as an adult. It was said: "Now it may be true that a lad of twelve or fourteen has sufficient capacity and understanding to be sensible of danger, and to have the discretion and foresight to avoid it, and yet, as compared with an adult of mature judgment, he may not be governed by the same degree of prudence and foresight as

the adult, and therefore he could only be expected to exercise that degree of care and circumspection that a lad of his years is wont to exercise. There is a time when a child is wholly incapacitated to exercise judgment. Then comes a time when he is to be deemed *sui juris*, as the New York and Pennsylvania courts term it, and is responsible for crime, and may be capacitated to contribute to his own injury, or, in other words, may be deemed guilty of contributory negligence, and yet not have the mature discretion and judgment of an adult. Later comes a time when he is held to all the duties and responsibilities of an adult, or person of mature years. While yet he has not arrived at the period when his judgment is mature and negligence is imputed to him he ought not to be held to the full accountability of an adult, but only to the accountability of a person of his years of prudence and discretion; and in determining whether he is guilty of negligence as a matter of law this feature must be taken into account: that for a person of his years and discretion he has been guilty of such a departure from that degree of judgment that one of his years is wont to exercise as to make him absolutely responsible for the injury which he has brought upon himself."

Where the doctrine of *prima facie* presumption of incapacity on the part of a child under fourteen years of age to contribute negligently to an injury is recognized, it has been held that while an infant fourteen years old or over will be presumed capable of contributory negligence, the standard of conduct after that age is not necessarily the same as that of an adult. On this point it was said in a Pennsylvania case:²⁰² "All the cases agree that the measure of a child's responsibility is his capacity to see and appreciate danger, and the rule is that in the absence of clear evidence of lack of it he will be held to such measure of discretion as is usual in those of his age and experience. This measure varies, of course, with each additional year, and the

²⁰¹ *Dubiver v. City & Suburban R. Co.* (1904) 44 Or. 227, 74 Pac. 915, 75 Pac. 693, 1 Ann. Cas. 839.

²⁰² *Kehler v. Schwenk* (1891) 144 Pa. 348, 13 L.R.A. 374, 27 Am. St. Rep. 633, 22 Atl. 910, holding, in an action for injury to a fourteen-year-old boy while in the defendant's employ, engaged in the task of detaching a mule from a dump car while the car was in motion, that it was not erroneous to instruct the jury that while the law presumes that a boy of fourteen is L.R.A.1917F.

capable of appreciating danger and is therefore responsible for his own negligence, yet he is not to be held to the same degree of prudence as a man of mature years. The above was quoted with approval in *Greenway v. Conroy* (1894) 160 Pa. 185, 40 Am. St. Rep. 715, 26 Atl. 692 (injury to a fourteen-year-old boy while employed in the defendant's machine shop) and *Rachmel v. Clark* (1903) 205 Pa. 314, 62 L.R.A. 959, 54 Atl. 1027, 14 Am. Neg. Rep. 208.

increase of responsibility is gradual. It makes no sudden leap at the age of fourteen. That is simply the convenient point at which the law, founded upon experience, changes the presumption of capacity, and puts upon the infant the burden of showing his personal want of the intelligence, prudence, foresight, or strength usual in those of such age. The standard remains the same; to wit, the average capacity of others in his condition." Other decisions to a similar effect in those jurisdictions which recognize the doctrine of *prima facie* presumption of incapacity as continuing until the age of fourteen are cited in IV. b, *infra*, and in preceding subdivisions.²⁰³

Since an infant must exercise care proportionate to age, capacity, discretion,

knowledge, and experience, there seems to be no reason why, if it possesses these elements to the same extent as an ordinary adult, its conduct should not be measured by the same standard as that of an adult. And it has been so held in cases where, notwithstanding the fact of infancy, evidence of unusual capacity, judgment, knowledge, and experience, considered in connection with the circumstances of the injury, required that the standard of care of the ordinary adult be applied.²⁰⁴ On this point, in an action for injury to a bright boy eleven years old, while attempting to cross the track, by a train which he knew was due, and which was approaching in plain sight, the court in a Missouri case,²⁰⁵ in holding that contributory negligence was

²⁰³ See III. b, *supra*, and cases cited in notes 13 to 43, *supra*.

²⁰⁴ It was held in *Binder v. Chicago City R. Co.* (1912) 175 Ill. App. 503, that a boy slightly over sixteen years of age, who had been born and reared in Chicago and resided for years on a street on which street cars were operated, had graduated from the grammar school and attended a manual training high school for a year, and was employed as an apprentice at the plumbing trade while pursuing a course of study in a night school, was chargeable with the same degree of care and caution for his own safety in crossing street car tracks as might reasonably be expected of an adult.

Where a sixteen-year-old boy, of unusual intelligence, although warned of the danger, attempted to pick up a live electric wire which had fallen in the street, after wrapping a handkerchief about his hand, the court in *Frauenthal v. Laclede Gaslight Co.* (1896) 67 Mo. App. 1, regarded the standard of care required of him as the same as that of an adult, and held that he was negligent as matter of law.

In *Gress v. Philadelphia & R. R. Co.* (1910) 228 Pa. 482, 32 L.R.A. (N.S.) 409, 77 Atl. 810, 21 Ann. Cas. 142, where a girl lacking only ten days of being fourteen years old was run over by a train while she was attempting to cross the track, and it appeared that she had been attending school for five or six years and during that time crossed the track four times daily, that she had been repeatedly warned to observe care at the crossing, that she was a bright girl, strong, and capable beyond her years, the court, in holding that she was guilty, under the circumstances, of contributory negligence as matter of law, said: "If it would have been negligence in an adult to attempt to cross over the tracks under the conditions we have here, it was negligence in the girl to make the attempt. The legal presumption of her incapacity to appreciate and avoid injury had reached that point in the diminishing scale when it was almost a negligible quantity. She was within ten days of being fourteen years old, L.R.A.1917F.

when the presumption would have been just the opposite. Against this feeblest presumption in her case is the testimony as to her years of experience in connection with the very danger which she here risked, and her unusual capacity in general affairs."

Where, in an action for injury to a sixteen-year-old boy, who while standing beside the track at a station was injured by a passing freight train, the evidence showed that he was a man in size, had been in the sixth grade in school, and had worked for more than a year about town, had frequently been at the depot, and for years had lived near a railroad station, and there was nothing to indicate that he did not have sufficient discretion and judgment to be aware of the danger from a moving train, it was held not erroneous to refuse an instruction for the plaintiff that in order to prevent a recovery on account of contributory negligence the jury must believe that he failed to exercise that degree of care and prudence for his safety that persons of his age, maturity, judgment, and discretion would have exercised under the circumstances. *Heflin v. Eastern R. Co.* (1913) — Tex. Civ. App. —, 159 S. W. 499.

See also, among possibly other cases of the kind, *National Biscuit Co. v. Scott* (1911) — Tex. Civ. App. —, 142 S. W. 65, where, in an action for injury to a boy seventeen years old by a paper cutter while in the defendant's employ, it was held error to instruct the jury to consider, on the issue of contributory negligence, the age and experience of the boy, in view of the fact that he had been instructed in the use of the machine and had operated it for two months, and other evidence tending to show that he understood the method of its operation, knew its dangers, and had had other experience in previous employments.

See also *Wabash R. Co. v. Jones*, in note 702, *supra*.

²⁰⁵ *Payne v. Chicago & A. R. Co.* (1896) 135 Mo. 562, 38 S. W. 308. See also, to a similar effect, *Spillane v. Missouri P. R. Co.* (1896) 135 Mo. 414, 58 Am. St. Rep. 580, 37 S. W. 198.

shown as matter of law, said: "The testimony of plaintiff and of his mother abundantly establish that his judgment and discretion, his ability to take care of himself, were adequate to that task; indeed, were equal to the judgment and discretion of the average man of mature years. This being the case, it is difficult to see why the same rule as to contributory negligence should not apply to a boy equal in capacity and intelligence to the average man, as to the danger to be apprehended and guarded against in crossing a railroad track, as should apply to such man. The reason of the law of contributory negligence being founded upon knowledge of the danger to be apprehended, and capacity and discretion to avoid it, whenever you prove the existence, in equal degree, of those elements and ingredients in an infant which go to make up the responsibility of an adult, you thereby necessarily determine the responsibility of the infant, and his amenability to the same law. In a word, as absence of capacity and intelligence exonerates or exempts an infant from the operation of that law, so the proven presence and established existence of such qualities and attributes in an infant clothes and casts upon him the same responsibility as is possessed by, and recognized in, an adult."

It is generally held that no arbitrary age can be fixed at which an infant is bound to exercise the same care as an

ordinarily prudent adult; that it depends on the maturity, capacity, and experience of the particular child, and the circumstances of the injury; and that ordinarily the question is for the jury.²⁰⁶ As was said on this point in a California case:²⁰⁷ "The proposition is not controverted that the degree of care and prudence, to avoid danger, when applied to children, is that which may reasonably be expected of children of like age, experience, and capacity; but as childhood precedes maturity, and grows into it, the standard by which due care is measured also changes, and each year becomes less marked, until it becomes merged in that by which the care and prudence of men are measured, such change being accelerated or retarded by natural or acquired capacity."

b. Particular ages; presumption.

It is seen from the discussion in IV: a, *supra*, that there is no definite age at which the law holds an infant bound to exercise the same degree of care as an ordinary adult, but that the difference in the standard of care by which the conduct of an infant and that of an adult is measured gradually diminishes, until, in the more mature years of infancy, it entirely disappears, as the infant's judgment, and its knowledge and appreciation of the particular danger, approximate those of the ordinary adult. Many cases have already been cited in which children

²⁰⁶ There is no precise age at which, as a matter of law, a child is to be held accountable for all his actions to the same extent as one of full age. *Cahill v. E. B. & A. L. Stone & Co.* (1908) 153 Cal. 571, 19 L.R.A.(N.S.) 1094, 96 Pac. 84; see later appeal, in which the rule is quoted, in (1914) 167 Cal. 126, 138 Pac. 712.

"Just at what period in a child's advancement in years he is to be considered to have arrived at maturity, and to have assumed all the responsibilities of a man, as distinguished from a child, is an indeterminate quantity." *Dubiver v. City & Suburban R. Co.* (1904) 44 Or. 227, 74 Pac. 915, 1 Ann. Cas. 889.

No arbitrary rule can be established to fix the time at which a child, during its minority, may be declared wholly capable or incapable of understanding and avoiding dangers to be encountered on railroad tracks; the question being ordinarily one of fact for the jury. *Chicago, B. & Q. R. Co. v. Russell* (1904) 72 Neb. 114, 100 N. W. 156, 16 Am. Neg. Rep. 483, where a twelve-year-old boy was injured while attempting to pass through an opening two feet wide between cars, the question of contributory negligence being held to be for the jury.

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In holding that a boy fifteen years old was guilty of contributory negligence as matter of law, in view of the evidence of his capacity, in attempting to explode a dynamite cap, of the explosive nature of which he was aware, the court, in *Taylor v. Manila Electric R. & Light Co.* (1910) 16 Philippine, 8, said: "The law fixes no arbitrary age at which a minor can be said to have the necessary capacity to understand and appreciate the nature and consequences of his own acts, so as to make it negligence on his part to fail to exercise due care and precaution in the commission of such acts; and indeed it would be impracticable and perhaps impossible so to do, for in the very nature of things the question of negligence necessarily depends on the ability of the minor to understand the character of his own acts and their consequences; and the age at which a minor can be said to have such ability will necessarily vary in accordance with the varying nature of the infinite variety of acts which may be done by him."

²⁰⁷ *Maglinchey v. Southern P. Co.* (1896) 5 Cal. Unrep. 363, 44 Pac. 1021 (seventeen-year-old boy attempting to cross train which blocked street).

twelve or fourteen years old or over have been held bound to exercise only that degree of care ordinarily exercised by other children of the same age, capacity, discretion, knowledge, and experience. It is the purpose at this point to consider more in detail the question as to the particular ages, as the infant approaches maturity, at which the courts have held that his conduct should or should not be measured by the same standard as that of an adult. Other cases which have not discussed particularly this question, although applying the standard of care required of children generally to infants fourteen years of age and over, will be found in notes 13 to 43, *supra*. Attention is called also to II. d, *supra*, dealing

with the matter of instructions, which in some instances have involved the question of the care required of children over fourteen years of age.

The proposition that the standard of care applied to adult conduct is not necessarily to be applied to the conduct of children, unless the capacity, discretion, knowledge, and experience of the child, as respects the particular danger, is approximately that of the ordinary adult, and that, if this is not the case, these elements are to be considered in determining whether due care was exercised, is supported by cases where actions were brought for injuries to children of eleven,²⁰⁸ twelve,²⁰⁹ thirteen,²¹⁰ four-

²⁰⁸ See cases cited in notes 13 to 43, *supra*. It was held in *Texas & P. R. Co. v. Ball* (1905) 38 Tex. Civ. App. 279, 85 S. W. 456, that a bright boy eleven years and eight months old, who was in the fourth grade in school and was accustomed to railroad tracks, was not, as matter of law, bound to exercise the same degree of care as an adult to avoid injury from trains in crossing the track.

²⁰⁹ See cases cited in notes 13 to 43, *supra*. As illustrating application of the rule in New York, in which state the *prima facie* presumption of incapacity is considered in some of the cases as continuing only until twelve years of age, in analogy to the criminal law, see *Reynolds v. New York C. & H. R. R. Co.* (1874) 2 Thomp. & C. (N. Y.) 644, an action for the killing of a twelve-year-old boy by a train at a crossing. The judgment was reversed on appeal in (1874) 58 N. Y. 248, on the ground of insufficiency of the evidence to sustain a finding of the absence of contributory negligence.

²¹⁰ As illustrative of this class of cases, see *Quill v. Southern P. Co.* (1903) 140 Cal. 268, 73 Pac. 901; *Goodrich v. Burlington, C. R. & N. R. Co.* (1897) 103 Iowa, 412, 72 N. W. 653 (where boy caught his foot in an opening between rails in a track laid in a street and was run over by a car); *Glynn v. New York City R. Co.* (1908) 110 N. Y. Supp. 836 (injury by a street car while attempting to cross the track); *Russell v. Oregon R. & Nav. Co.* (1909) 54 Or. 128, 102 Pac. 619 (crossing railroad track).

It is error to apply to a thirteen-year-old boy the tests of ordinary care to avoid vehicles in the street which are applied to adults. *Quinn v. Ross Motor Car Co.* (1914) 157 Wis. 543, 147 N. W. 1000.

An instruction, in an action for injury to a thirteen-year-old girl by falling from a merry-go-round, that if the plaintiff, notwithstanding her age, was of ordinary intelligence, and capable of understanding the danger she would incur by leaping or falling from the machine while in motion, she would be chargeable with the same care and prudence required of a grown person, and any negligence on her part, even of L.R.A.1917F.

the slightest, which contributed to her injury, would relieve the defendant from liability, was held in *Harris v. Crawley* (1912) 170 Mich. 381, 136 N. W. 356, not erroneous, in view of other instructions on the question of contributory negligence, to consider the age, intelligence, and experience of the plaintiff.

For other cases in which the rule was applied as to infants thirteen years of age, see notes 13 to 43, *supra*.

²¹¹ *JACOBS v. H. J. KOEHLER SPORTING GOODS Co.* ante, 7; *Force v. Standard Silk Co.* (1908) 160 Fed. 992 (servant); *Illinois C. R. Co. v. Johnson* (1905) 123 Ill. App. 300, reversed on this point in (1906) 221 Ill. 42, 77 N. E. 592 (passenger on alighting at a station from a train was struck by an engine moving in the opposite direction); *Anderson v. Pierce* (1903) 68 Kan. 57, 74 Pac. 638, 15 Am. Neg. Rep. 303 (injury by fall of heavy vault door insecurely placed on a public street); *Milliken v. Fenderson* (1913) 110 Me. 306, 86 Atl. 174 (boy bitten by a dog with which he was playing); *Ittner Brick Co. v. Killian* (1903) 67 Neb. 589, 93 N. Y. 951, 13 Am. Neg. Rep. 552 (servant); *Hoehmann v. Moss Engraving Co.* (1893) 4 Misc. 160, 23 N. Y. Supp. 787 (recognizing the principle in action for injury to employee injured on elevator); *Columbus R. Co. v. Connor* (1905) 27 Ohio C. C. 229 (injury by a street car); *Kehler v. Schwenk* (1891) 144 Pa. 348, 13 L.R.A. 374, 27 Am. St. Rep. 633, 22 Atl. 910 (servant); *Greenway v. Conroy* (1894) 160 Pa. 185, 40 Am. St. Rep. 715, 26 Atl. 692 (servant); *Wertz v. Girardville* (1906) 30 Pa. Super. Ct. 260 (defective sidewalk); *Steele v. Northern P. R. Co.* (1899) 21 Wash. 287, 57 Pac. 820 (injury by cars making a flying switch in street); *Williams v. Northern P. R. Co.* (1911) 63 Wash. 57, 114 Pac. 888, Ann. Cas. 1912D, 340 (flying switch); *Moore v. Moore* (1902) 4 Ont. L. Rep. 167 (servant).

In the absence of evidence of special intelligence, a fourteen-year-old boy is bound to exercise no higher degree of care for his personal safety than other boys of his age are accustomed to use under similar circum-

teen,³¹¹ fifteen,³¹² sixteen,³¹³ and seventeen years of age.³¹⁴ It has been held,

stances. *Cincinnati Street R. Co. v. Wright* (1896) 54 Ohio St. 181, 32 L.R.A. 340, 43 N. E. 688.

A boy fourteen years old who boards a moving street car is bound to exercise the care and caution which may be expected from a person of his age, discretion, and experience under the circumstances. *Sly v. Union Depot R. Co.* (1896) 134 Mo. 681, 36 S. W. 235.

A fourteen-year-old boy is required in crossing a railroad track to exercise only that degree of care ordinarily exercised under similar circumstances by boys of his age, experience, and maturity. *Atchison, T. & S. F. R. Co. v. Hardy* (1899) 37 C. C. A. 359, 94 Fed. 294.

In an action for the negligent killing of a fourteen-year-old boy by a train at a crossing, the court in *Erie R. Co. v. Weinstein* (1909) 92 C. C. A. 189, 166 Fed. 271, instructed the jury that in determining the question of contributory negligence they should consider the boy's age, intelligence, and experience, and that ordinary care, as applied to him, is that care which boys of his age and intelligence, of ordinary prudence, are accustomed to exercise under similar circumstances. In determining the correctness of the instruction, the court on appeal said: "But it is said the court should have treated him as of full responsibility, and so instructed the jury. Doubtless there is a period in the life of a minor when the full care due from an adult may be exacted as a matter of law. There are cases to that effect. . . . The question of contributory negligence by the deceased was one to be established affirmatively as a defense, and in the case of a minor must be determined with reference to his age, his experience, and the particular situation. Although a child may have reached an age when responsible in law for his conduct, yet no higher degree of care should be expected than is usually exercised by persons of similar age, judgment, and experience. Undoubtedly the degree of care which should be required of a boy fourteen years of age is much greater than from one of half his age. So the experience of a boy of fourteen may be such as to exact from him the care of an adult. . . . In the absence of a request for more specific instructions bearing upon the experience and maturity of the deceased, we cannot say that the court erred in its reference to his immaturity."

And in *Casey v. New York C. & H. R. R. Co.* (1879) 6 Abb. N. C. (N. Y.) 104, affirmed in (1879) 78 N. Y. 518, 12 Am. Neg. Cas. 309, where a bright girl fourteen years old was struck at a street crossing by a train suddenly backing out of a railroad yard, the view of the track being obstructed by buildings, an instruction was approved that she was bound to exercise the care and judgment which a bright girl fourteen years of age ought to have exercised under the circumstances. L.R.A.1917F.

In an action for injuries to a boy between fourteen and fifteen years of age by a train at a crossing, the court in *Wade v. Chicago & N. W. R. Co.* (1911) 146 Wis. 99, 130 N. W. 890, stated that the duty which the law imposed on him independently of statute was the exercise of such care as the great mass of boys of his age, intelligence, experience, and knowledge usually and ordinarily exercised under the same or similar circumstances.

It was said in *Cox v. New York C. & H. R. R. Co.* (1902) 69 App. Div. 451, 74 N. Y. Supp. 1011, an action for the killing of a girl fourteen years old by an engine while she was attempting to cross the track at a crossing, that she was only "expected and required to exercise the measure of care and caution that is common and usual in one of her age."

And in *Thompson v. Buffalo R. Co.* (1895) 145 N. Y. 196, 39 N. E. 709, 12 Am. Neg. Cas. 322, the court, in holding that a fourteen-year-old girl who was injured by a street car in attempting to cross the track was negligent, as matter of law, said that, although a minor, no claim was made that she was not sui juris, and that while she may not have possessed the judgment, caution, and prudence of persons of more mature years, she was expected and required to exercise the measure of care and caution that is common and usual in one of her age.

So, in an action for damages caused by a collision between a street car and a wagon in which the plaintiff, a fourteen-year-old boy, was riding, the court in *Igle v. People's R. Co.* (1915) 5 Boyce (Del.) 376, 93 Atl. 666, instructed the jury that in determining the question whether the plaintiff was guilty of contributory negligence they should consider whether he was exercising that degree of care and caution which a reasonably prudent person of his age, development, and maturity would exercise under like circumstances; that, while the rule as to contributory negligence is modified as to children, it is their duty to exercise that degree of care to avoid injuries which children of the same age are accustomed to exercise under like circumstances, and that the maturity and capacity of the infant, his ability to understand and appreciate danger, and his familiarity with the surroundings in each particular case are matters to be taken into consideration.

³¹¹ *Warble v. Sulzberger Co.* (1914) 185 Ala. 605, 64 So. 361 (injury to a boy fifteen years old by a revolving fan); *Rastetter v. Peoria R. Co.* (1908) 142 Ill. App. 417 (crossing street car track); *Murphy v. Ludowici Gas & Oil Co.* (1916) 96 Kan. 321, 150 Pac. 581, 11 N. C. C. A. 561 (injury while driving traction engine by collision with concealed gas pipe laid along highway); *Dubiver v. City & Suburban R. Co.* (1904) 44 Or. 227, 74 Pac. 815, 75 Pac. 693, 1 Ann. Cas. 889 (injury by street car); *Rose v. Northern P. R. Co.* (1914) 81 Wash. 684,

however, that to entitle the jury to take into consideration the age of a person

L.R.A.1915B, 166, 143 Pac. 145, 7 N. C. C. A. 1029 (recognizing rule where a boy about fifteen years old rode on step of rapidly moving railroad car, engaged in exercises which caused his body to project beyond the side of the car).

A fifteen-year-old boy is not required to exercise the same degree of care as an ordinarily prudent man of mature years, to avoid injury in crossing a railroad track, but is required to exercise only such care and caution as a reasonably prudent person of his age, capacity, and experience would reasonably be expected to exercise under the same or similar circumstances. *McNamara v. Chicago, R. I. & P. R. Co.* (1907) 126 Mo. App. 152, 103 S. W. 1093.

So, in *Obermeyer v. F. H. Logeman Chair Mfg. Co.* (1906) 120 Mo. App. 59, 96 S. W. 673, it was held that the standard of care required of a fifteen-year-old boy, who, while employed in a factory was injured by permitting his foot to project over the platform of an unprotected elevator, with the result that it was crushed between the ascending elevator and one of the floors, was the care ordinarily used by persons of his age, capacity, and intelligence under like circumstances, and not that required of an adult.

And it was held in *Swift v. Staten Island Rapid Transit R. Co.* (1890) 123 N. Y. 645, 25 N. E. 378, that a girl fifteen years old, who in crossing a railroad track was struck by a train, was not guilty of contributory negligence if she exercised the degree of care and caution reasonably to be expected of one of her age and capacity, and not the care required of an adult.

So, in an action for injury to a boy fifteen years old, while riding a bicycle on the street, by collision with an automobile, the court in *Travers v. Hartmann* (1914) 5 Boyce (Del.) 302, 92 Atl. 855, instructed the jury that in determining the question of contributory negligence they should consider whether the boy was exercising that degree of care and caution which a reasonably prudent person of his age, general development, and maturity would exercise under like circumstances; and that the maturity and capacity of the infant, his ability to understand and appreciate the danger, and his familiarity with the surroundings in the particular case, were matters to be taken into consideration.

And that a boy fifteen years old is not necessarily required to exercise the same degree of care as an adult in order to avoid being charged with contributory negligence in an action for personal injury is apparently implied in such statements as that in *Peerless Mfg. Co. v. Denham* (1893) 15 Ky. L. Rep. 95 (abstract) that a boy nearly fifteen years of age, active and intelligent, must exercise reasonable precaution for one of his years for his own safety. The action was for injury to a servant.

Also in *Coble v. Searfoss* (1912) 49 Ind. App. 334, 97 N. E. 345, in an action by a L.R.A.1917F.

fifteen-year-old boy for injuries sustained while intoxicated, against a person furnishing the liquor, the question whether the boy was guilty of contributory negligence in drinking to excess was considered as depending on whether he exercised the care which the law required of one of his age, knowledge, and experience, and not the care required of an adult.

In *Stegmann v. Gerber* (1909) 146 Mo. App. 104, 123 S. W. 1041, an action for injury to a fifteen-year-old servant by a sausage mill, the court, although holding that under the circumstances the servant was guilty of negligence as matter of law in inserting his fingers in the mill, considered apparently that he was bound only to exercise that degree of care reasonably to be expected from an ordinarily careful boy of his age, and not the care required of an adult.

And it was held in *Marshall v. United R. Co.* (1916) — Mo. App. —, 184 S. W. 159, an action for injury to a boy fifteen years old employed by the defendant, by falling into an elevator shaft, that the boy's conduct was not to be measured by that required of an ordinary prudent man, but that his age and capacity might be considered in determining the question of contributory negligence.

Also in *Dowd v. Chicopee* (1874) 116 Mass. 93, an action for injury to a fifteen-year-old boy due to a defective highway, it was held that an instruction was properly refused, on the question of due care on the part of the boy, that the same rule is to be applied to children as to adults, the rule being that the boy was required to exercise that degree of care which might fairly and reasonably be expected from boys of his age and capacity.

²¹⁸ The care required of a sixteen-year-old boy in crossing street car tracks is that reasonably to be expected of an ordinarily prudent boy of that age, and not the care required of an ordinarily prudent man of mature years. *Campbell v. St. Louis & Suburban R. Co.* (1903) 175 Mo. 161, 75 S. W. 86.

In an action for injury to a sixteen-year-old boy by being thrown from a bicycle by reason of a defect in the street, an instruction was held not prejudicial to the defendant that ordinary care as applied to the plaintiff was that degree of care which might be usually expected of boys of his age, capacity, and experience under the same or similar circumstances. *Louisville v. Lee* (1914) 157 Ky. 285, 162 S. W. 1141. The court stated, however, that perhaps the failure so to instruct the jury would not have been substantial error to the prejudice of the plaintiff if he were the complaining party on the appeal.

And in *Otis Elevator Co. v. Mann* (1911) 112 C. C. A. 306, 191 Fed. 716, the court, in affirming a judgment for the plaintiff, in an action for injury to a sixteen-year-old boy, who, while in the defendant's employ, engaged in running an elevator, was in-

seventeen years old on the question of his contributory negligence, it must be shown that by reason of immaturity he was less capable than an ordinarily pru-

jured by his foot being caught between the car and a floor as the elevator ascended, said: "The only other exception which need be considered is to the charge of the court that the plaintiff was to be held to the degree of care appropriate to his years, and to the refusal to charge that he was to be held to the same degree of care as a person of maturer years. There is no absolute rule in either case. The jury are to find in the case of an infant *sui juris*, as well as in the case of an adult, whether reasonable care under the circumstances was exercised. The age of a minor is one of the circumstances to be considered. The degree of care to be required of a man who is lame, blind, or deaf may be different from that required of a man who is not so, and the degree of care required of a boy of sixteen may not be the same as that required of an adult. The question was one for the jury to determine on all the circumstances of the case, of which the boy's age was one."

So, where a girl sixteen years old, while on her way to school, remained standing on a railroad track for ten minutes waiting for a train to pass on a parallel track, and while so waiting was struck by an engine which approached in plain sight without sounding the whistle or ringing the bell, it was held in *Haycroft v. Lake Shore & M. S. R. Co.* (1874) 2 Hun (N. Y.) 489, affirmed in (1876) 64 N. Y. 636, that the question of contributory negligence was for the jury in view of the allowance that should be made for her youth and inexperience, although if no such allowance were to be made her conduct would have amounted to contributory negligence as matter of law.

Also, in *Zalotuchin v. Metropolitan Street R. Co.* (1908) 127 Mo. App. 577, 106 S. W. 548, an action for injury to a sixteen-year-old girl while riding in a wagon driven by an adult across a street car track, by collision with a car, the court, in holding that the question of contributory negligence was for the jury, said that on account of her age her conduct should not be measured in law by the standard to be applied to persons of mature years, and that it might be inferred that she acted in a manner to be expected of one of her age and apparent intelligence.

And in an action for injury to a sixteen-year-old girl while driving across a railroad track in company with her brother fifteen years old, it was held not erroneous to instruct the jury that a child is bound to exercise only the care of those of his own age and understanding, and that if they found that the plaintiff and her brother were children at the time of the injury, and exercised such care as reasonable persons of their respective ages would have exercised under the circumstances, they

were not guilty of contributory negligence which would prevent recovery. *Mason v. Northern P. R. Co.* (1912) 45 Mont. 474, 124 Pac. 271.

In an action for injury to a sixteen-year-old girl who had had comparatively no experience in riding on trains, and who was thrown from a train as she was preparing to alight at a station by a sudden increase in the speed of the train after the station had been announced and the train had slowed down, it was held in *Indianapolis Southern R. Co. v. Emmerson* (1912) 52 Ind. App. 403, 98 N. E. 895, that an instruction was not erroneous that if the girl acted as a reasonably prudent person, similarly situated, would have acted, considering her age and experience and all the surrounding circumstances, recovery could not be defeated on the ground of contributory negligence.

Although holding that the conduct of a boy sixteen years old, in permitting his hand to come in contact with the knives on a feed cutter on which he was working, was negligent, the court in *Wyman v. Berry* (1909) 106 Me. 43, 75 Atl. 123, 20 Ann. Cas. 439, apparently considered that the care required of the plaintiff was only that exercised by ordinarily prudent persons of his age and intelligence.

In an action for injury to a sixteen-year-old boy because of an excessive voltage in an electric wire which he was helping to remove, an instruction was approved in *Rice v. Wheeling Electrical Co.* (1907) 62 W. Va. 685, 59 S. E. 626, that, on the question of contributory negligence, the jury should consider, among other things, the boy's age, his knowledge of electricity, knowledge of the particular wire, and the general circumstances at the time of the accident.

²¹⁴ The proposition that a seventeen-year-old boy is required to exercise only such care as could reasonably be expected of boys of his age and capacity, in passing over the bumpers between freight cars in order to reach a passenger train which he intended to take, is recognized in the instructions to the jury in an action for an injury so sustained in *Maglinchey v. Southern P. Co.* (1896) 5 Cal. Unrep. 363, 44 Pac. 1021, although the question of the correctness of the proposition was directly presented on appeal.

In an action for injury to a seventeen-year-old boy by collision with a post near a railroad track through the negligent starting of a coal car which he was unloading, it was held not error to instruct the jury that in actions by infants their conduct should not be judged by the same rule which governs that of adults, but that they are required to exercise only such care and prudence as children of the same age are accustomed to exercise under simi-

dent person of exercising care and discretion for his own safety.⁵¹⁵ And a similar conclusion has been reached where the action was for injury or death of an infant eighteen years of age.⁵¹⁶

In a Massachusetts case⁵¹⁷ it was held, in an action by a girl nearly nineteen years old for injury sustained, while passing along a highway with which she was familiar, by stepping off an unguarded embankment in order to avoid a cart which obstructed the highway, and which was backed as she was passing, that an instruction was not erroneous, that ordinary care is such a degree of attention and caution as a person of ordinary prudence of the plaintiff's sex and age would commonly exercise, and might reasonably be expected to exercise, under

like circumstances. And in a Missouri case,⁵¹⁸ where a young man twenty years old, employed in railroad construction work, was injured by falling from a moving hand car, it was held, in an action for the injury so sustained, that it was not erroneous to instruct the jury that before they could find against the plaintiff on the ground of contributory negligence they must believe that he did not use such care and caution as a person of his age and experience would ordinarily have used under the circumstances, the court apparently assuming that the youth of the plaintiff was a proper element for consideration, and discussing only the question whether the elements of capacity and knowledge should also have been included in the instruction.

Whether or not an infant twelve or

lar circumstances. *New York, C. & St. L. R. Co. v. Gulla* (1911) 34 Ohio C. C. 101, affirmed without opinion in (1912) 86 Ohio St. 341, 99 N. E. 1130. The court stated the rule to be that an infant over fourteen years of age is presumed to be sui juris in the sense that he is chargeable with negligence, but the measure of his responsibility in that regard is a question for the jury.

In *Jackson v. Butler* (1913) 249 Mo. 342, 155 S. W. 1071, an action for injury to a servant seventeen years old, the court, although stating that it was reasonably clear upon the facts that if the plaintiff's conduct were to be measured by the same rule as that of an adult he was guilty of such contributory negligence as would prevent recovery, held that the question of contributory negligence was for the jury, in view of his age, capacity, judgment, and experience.

So, in an action for injury to a boy seventeen years old while in the employ of the defendant, the court in *Keller v. Gas-kill* (1894) 9 Ind. App. 676, 36 N. E. 903, approved the rule that the degree of care required of the plaintiff was such care as boys of his age of ordinary care and prudence would use under like circumstances.

In an action for injury to a boy seventeen years old while attempting to cross between the cars of a train which was blocking the street, the court in *Chicago, R. I. & G. R. Co. v. Johnson* (1908) — Tex. Civ. App. —, 111 S. W. 758, held that an instruction was properly refused which, without regard to his age, would have required of the boy the exercise of the same degree of care as of a person of ordinary prudence.

And in *Ludwig v. Williams Cooperage Co.* (1911) 156 Mo. App. 117, 136 S. W. 749, an action for injury to an employee seventeen years old, it was held not erroneous to permit the jury to take into consideration his age, intelligence, and discretion, in determining whether he was guilty of contributory negligence. L.R.A.1917F.

⁵¹⁵ *Doggett v. Chicago, B. & Q. R. Co.* (1907) 134 Iowa, 690, 13 L.R.A.(N.S.) 364, 112 N. W. 171, 13 Ann. Cas. 588.

⁵¹⁶ It was held in *Coleman v. Himmelsberger-Harrison Land & Lumber Co.* (1904) 105 Mo. App. 254, 79 S. W. 981, that while there is no arbitrary rule fixing the age at which a youth may be declared wholly capable of understanding and avoiding danger, yet a boy eighteen years old should show some incapacity, in addition to his minority, to warrant a court in instructing, as a matter of law, that he was not required to exercise the same care as an adult. The action was for death of the plaintiff's son while employed as a brakeman on a train.

It was contended in *Shelley v. Austin* (1889) 74 Tex. 608, 12 S. W. 753, that the rule of law as to contributory negligence which would govern adults should not be applied to the plaintiff, who was injured while riding over a defective bridge, because she was only eighteen years old. But the court dismissed the point with the observation that the charge as to contributory negligence was correct as applicable to ordinary persons, and it saw no reason why it should not apply to the plaintiff.

It is intimated, however, in *Gray v. Wabash R. Co.* (1913) 179 Mo. App. 541, 162 S. W. 672, that the care required of an eighteen-year-old boy might perhaps be that reasonably to be expected of an ordinarily prudent boy of his age, and not that of an ordinarily prudent man. Decision of the point was, however, unnecessary, as, measured by the former standard, it was held that the boy's conduct amounted to contributory negligence as matter of law. The action was for the death of a boy employed as a messenger at a railroad station, caused by his being run over by a train.

⁵¹⁷ *Snow v. Provincetown* (1876) 120 Mass. 580.

⁵¹⁸ *Stanley v. Chicago, M. & St. P. R. Co.* (1905) 112 Mo. App. 601, 87 S. W. 112.

fourteen years of age or over should be presumed to have such judgment and capacity that his conduct ought to be measured by the standard applied in the case of an ordinary adult is a question upon which the authorities are not altogether in accord. The better rule seems to be that no such presumption should obtain as to infants, at least under seventeen or eighteen years of age, at which ages, as is seen above, some cases have held that *prima facie* the infant must exercise the same care as an ordinarily prudent adult. There are decisions, however, which apply the rule of presumption of adult capacity and dis-

cretion at a younger age;²¹⁹ and it has been held error to instruct the jury, in an action for injury to a fourteen-year-old boy, where no question is made either in the pleadings or proof as to his discretion, that he is not required to exercise the same care and prudence as an adult.²²⁰

But on the other hand, the majority of the cases do not appear to recognize a presumption of adult capacity on the part of infants who have attained the age of fourteen years,²²¹ and the proposition that there is such a presumption has been expressly repudiated.²²²

And it has been held that the fact that

²¹⁹ The case of *Tucker v. New York C. & H. R. R. Co.* (1891) 124 N. Y. 308, 21 Am. St. Rep. 692, 26 N. E. 916, is sufficiently set out in *JACOBS v. H. J. KOEHLER SPORTING GOODS Co.* ante, 7. It seems, however, that in the absence of the explanation in the latter case the *Tucker Case* might logically be construed as holding that a boy twelve years old is presumably chargeable with the same degree of care, in crossing railroad tracks, as an adult. The *Tucker Case* was apparently so construed in *Koehler v. Syracuse Specialty Mfg. Co.* (1896) 12 App. Div. 50, 42 N. Y. Supp. 182, 1105, an action for injury to a sixteen-year-old boy while employed in the defendant's factory, where the court stated that as the boy was upwards of sixteen years of age he was *sui juris*, and in the absence of evidence tending to show that he was not qualified to understand and appreciate the situation in which he was placed, and the possible danger arising therefrom, was chargeable with the same care as an adult.

Also, in *Friess v. New York C. & H. R. R. Co.* (1893) 67 Hun, 205, 22 N. Y. Supp. 104, affirmed without opinion in (1893) 55 N. Y. S. R. 931, the court was of the opinion, and cited *Tucker v. New York C. & H. R. R. Co.* (N. Y.) *supra*, to sustain its view, that an infant twelve years old, who was injured by a train while his foot was caught in a defective crossing, was *sui juris*, and in the absence of evidence tending to show that he was not qualified to understand the danger and appreciate the necessity for observing that degree of caution in crossing the track that an adult would exercise, was bound to use the same care as an adult. It was held, however, not erroneous to refuse to instruct the jury that there was no evidence that the child was of less judgment or discretion than an adult, where there was evidence as to his experience and knowledge of railroads, that he had never noticed the angle the tracks made when they met and did not know the nature of frog, and that he had no such knowledge of switches and frogs as would induce him to believe that it was dangerous to walk over them.

And in *McDonald v. Metropolitan Street R. Co.* (1903) 80 App. Div. 233, 80 N. Y. L.R.A.1917F.

Supp. 577, an action for the negligent killing of a twelve-year-old boy by a street car, an instruction was held erroneous which required a lower degree of care of the deceased than of an adult, the court taking the position that in the absence of evidence to the contrary a boy of this age will be presumed to be chargeable with the same degree of care as an adult. To a similar effect is *Charlton v. Forty-second Street, M. & St. N. Ave. R. Co.* (1903) 79 App. Div. 546, 80 N. Y. Supp. 174.

In an action for injury to a fifteen-year-old boy by collision with a street car while he was attempting to drive across the track, the court in *San Antonio Traction Co. v. Kumpf* (1907) — Tex. Civ. App. —, 99 S. W. 863, in reversing on other grounds a judgment for the plaintiff, stated, with reference to an instruction which directed the jury, on the issue of contributory negligence, to take into consideration the boy's age and intelligence: "There was no testimony tending to show that he did not have such intelligence as is ordinary to boys of his age, who would ordinarily be capable of exercising as much care in crossing a street railway as an adult; and we hardly think that the court should have called the attention of the jury to his age and intelligence, in considering whether he was guilty of contributory negligence in driving upon the track in front of a moving car."

²²⁰ *San Antonio & A. P. R. Co. v. Jazo* (1894) — Tex. Civ. App. —, 25 S. W. 712, where boy loading a car was injured by other cars striking the one he was loading. But see note 49, *supra*.

²²¹ See, for instance, *JACOBS v. H. J. KOEHLER SPORTING GOODS Co.* ante, 7.

²²² *Ittner Brick Co. v. Killian* (1903) 67 Neb. 589, 93 N. W. 951, 13 Am. Neg. Cas. 552. The action was for injury to a boy about fourteen years old who was injured while in the defendant's employ, assisting in the operation of a pressed brick machine; and in the absence of proof that he was possessed of more or less prudence and understanding than the average boy of his age, it was held not erroneous to instruct the jury that the same degree of care and prudence in avoiding danger is not required

a boy fourteen years old is accustomed to perform labor, earn wages, and to go to and from his work along the streets of a populous city unattended raises no presumption that he is more intelligent, or has greater capacity to discern and avoid danger not connected with his occupation, than is common to other boys of the same age.²²³ But to treat a boy fifteen years old, who has been doing the work of a man as a farm hand, and who is not shown to have less than ordinary capacity, as an infant of "tender years," in instructions to the jury in respect to the care required of him for his own safety, is inaccurate and misleading.²²⁴

o. Emergencies.

It has been seen above that in some cases the court uses language from which it might be inferred that it regarded an infant over fourteen years of age, who is presumptively capable of contributory negligence, bound to exercise the same degree of care as an ordinary adult.²²⁵ Assuming, apparently, the correctness of this rule in general, the court in a Georgia case was of the opinion that it does not apply in cases where the infant acts under the pressure of intimidation, and incurs the risk in attempting to escape a threatened and impending injury of another kind, as in jumping from a railway train in motion because of threats of the conductor; that in such a case he is to be treated neither as an adult nor as a child of tender years, but as one whose mental and physical immaturity may be taken into consideration, and who is chargeable with such diligence as under the circumstances might fairly be expected of one of his class and condition.²²⁶

V. The term "sui juris."

Because of the confusion which is

found in many of the cases in the use of the terms "sui juris" and "non sui juris," as applied to the doctrine of contributory negligence of infants, it seems proper to indicate what appears to be the sense in which those terms are generally used. The meaning attached to these terms in *JACOBS v. H. J. KOEHLER SPORTING GOODS Co.* ante, 7, is in accord with their use in the majority of the cases. It is there said that "an infant may be of such tender years as to be incapable of personal negligence. At such age the infant is termed non sui juris." "And the court states further that, although not responsible for its own negligence, the negligence of its parents or guardians in suffering it to incur danger may be imputed to it. In those states which have adopted the doctrine of imputed negligence it thus becomes important to determine when a child is sui juris, in order to decide not only the question whether it can be held responsible for its own conduct, but whether its parents or guardians were negligent in permitting it to incur the danger, and whether their negligence can be imputed to it. For it seems that the doctrine of implied negligence does not apply where the infant is of sufficient age and capacity to exercise discretion in its own behalf."²²⁷

The proper rule appears to be that, apart from negligence of parent or others which may be imputed to the child, the doctrine of contributory negligence has no application to infants who are non sui juris.²²⁸ As was said in a New York case:²²⁹ "The question, when it arises in a negligence case, of whether an infant was sui juris or non sui juris, is only important in determining whether the infant is to be held responsible for his own contributory negligence, in which case freedom from personal negligence on his part only must be shown, or only for the

from a child, with less prudence, discretion, and understanding, as from an adult, and that this principle would apply to the plaintiff if they found that he possessed less prudence, discretion, and understanding than an adult.

²²³ *Cincinnati Street R. Co. v. Wright* (1896) 54 Ohio St. 181, 32 L.R.A. 340, 43 N. E. 688, where a fourteen-year-old boy was injured by a street car colliding with a wagon in which he was riding without the driver's knowledge.

²²⁴ *Central R. Co. v. Phillips* (1893) 91 Ga. 526, 17 S. E. 912, 2 Am. Neg. Cas. 463, reversing, for this reason, a judgment for the plaintiff in an action for injury to a fifteen-year-old boy due to jumping from a rapidly moving train on threats of the conductor.
L.R.A.1917F.

²²⁵ See note 117, supra.

²²⁶ *Central R. Co. v. Phillips* (1893) 91 Ga. 526, 17 S. E. 952, 2 Am. Neg. Cas. 463.
²²⁷ 20 Cyc. 553.

²²⁸ *JACOBS v. H. J. KOEHLER SPORTING GOODS Co.* 7; *Kunz v. Troy* (1887) 104 N. Y. 344, 58 Am. Rep. 508, 10 N. E. 442; *Elze v. Baumann* (1893) 2 Misc. 72, 21 N. Y. Supp. 782; *Adams v. Nassau Electric R. Co.* (1899) 41 App. Div. 334, 58 N. Y. Supp. 543; *Pastore v. Livingston* (1911) 72 Misc. 555, 131 N. Y. Supp. 971; *Indianapolis Street R. Co. v. Antrobus* (1904) 33 Ind. App. 663, 71 N. E. 971.

²²⁹ *Lafferty v. Third Ave. R. Co.* (1903) 85 App. Div. 592, 83 N. Y. Supp. 405, affirmed without opinion in (1903) 176 N. Y. 504, 68 N. E. 1118, where six-year-old child was struck by street car in crossing track.

negligence of his parent or guardian, in which case freedom from negligence on their part only must be shown; and it depends upon whether he is of such age and intelligence that an ordinarily prudent parent or guardian would permit him to go about upon the public streets alone." The meaning of the term "sui juris" as used by the court is not always clear;²³⁰ and there are decisions in which it appears that the court erroneously regarded the term "sui juris" as applicable only to an infant who has arrived at years of adult discretion,²³¹ and mistook the meaning of the terms, in considering that, whether an infant is sui juris or non sui juris, it is not excused from exercising care commensurate with its age and intelligence.²³²

VI. Is contributory negligence of infant necessarily for jury.

It should be borne in mind, on the point here considered, that the question

of contributory negligence, whether of adults or infants, is generally for the jury, though in case of adults, at least, it very frequently becomes a question for the court. The point now under consideration is whether under any circumstances the question as regards an infant may be taken away from the jury.²³³ It was said generally, in a New York case, in an action for injury to a twelve-year-old boy by a train while his foot was caught in an unblocked frog: "Contributory negligence is a question of fact and should be left to the jury, unless it so clearly appears from the circumstances or uncontradicted evidence as to leave no inference of fact in doubt. It is only in very exceptional cases that it can be adjudged as a necessary legal conclusion from the facts found."²³⁴

The reason for the question being for the jury apply particularly in actions for personal injuries to infants;²³⁴ but even in this case the question is sometimes one

²³⁰ In *Denver City Tramway Co. v. Nicholas* (1906) 35 Colo. 462, 84 Pac. 813, 20 Am. Neg. Rep. 16, the court held that the question whether a thirteen-year-old boy, who was injured while playing in street cars standing in a street, was sui juris was for the jury, but does not make clear the sense in which the term is used. The trial court had directed the jury to find for the plaintiff if he was so inexperienced that he was unconscious of the danger, and instructed them that no greater measure of prudence and discretion could be required of the plaintiff than that reasonably to be expected of a child of the same age, capacity, and experience. On appeal, in affirming a judgment for the plaintiff, the court said: "It is asserted by defendant that this boy, being thirteen years of age, was sui juris. This is a question which was properly left to the jury, to say by their verdict whether he was or was not . . . , and was sufficiently presented to the jury by the instructions."

²³¹ *Grealish v. Brooklyn, Q. C. & S. R. Co.* (1909) 130 App. Div. 238, 114 N. Y. Supp. 582, affirmed without opinion in (1910) 197 N. Y. 540, 91 N. E. 1114 (eight-year-old girl injured by street car); the court said that children under twelve years of age are presumptively non sui juris, i. e., not yet arrived at what is called the age of adult discretion. See also note 232.

²³² *Atchason v. United Traction Co.* (1904) 90 App. Div. 571, 86 N. Y. Supp. 176 (action for death of child five and a half years old by a street car); *Buscher v. New York Transp. Co.* (1906) 114 App. Div. 85, 99 N. Y. Supp. 673 (eight-year-old boy run over by automobile).

In *West v. Metropolitan Street R. Co.* (1905) 105 App. Div. 373, 94 N. Y. Supp. 250, an action for the death of a ten-year-old boy by being struck by a street car L.R.A.1917F.

while attempting to cross the track, it was said: "The only evidence as to the deceased was that he was a bright and intelligent boy. . . . While it may be that in the case of a child ten years of age the question as to whether or not he is sui juris, and thus required to exercise the care of an adult, is a question of fact for the jury, . . . still the mere fact that a bright, intelligent boy, ten years of age, is non sui juris does not absolve him from all care in crossing railway tracks. He is still bound to exercise the care that can be reasonably expected of a child of his age and intelligence."

And in *Ardolino v. Reinhardt* (1909) 180 App. Div. 119, 114 N. Y. Supp. 508, it was said: "The true rule in all actions for personal injuries based on negligence, therefore, is that an infant, whether sui juris or non sui juris, must exercise such reasonable care in avoiding the injury of which he complains as can fairly be expected of a child of his age, natural capacity, intelligence, physical condition, training, experience, habits of life, and surroundings. All the later and better considered decisions so hold." However, in a concurring opinion one of the judges correctly pointed out that the term "non sui juris" means that the infant is not of sufficient age, intelligence, and discretion to know and appreciate the danger, and to exercise care in avoiding it.

²³³ See 29 Cyc. 640.

²³⁴ *Friess v. New York C. & H. R. R. Co.* (1893) 67 Hun, 205, 22 N. Y. Supp. 104, affirmed without opinion in (1893) 55 N. Y. S. R. 931.

²³⁴ The rule that where there is uncertainty as to contributory negligence the question is one of law, whether the uncertainty arises from the conflict in the testimony, or because of different conclusions which might be drawn therefrom, applies with greater force to children than to

for the court rather than for the jury. The special reasons which usually require submission of the question to the jury in the case of infants are that there is frequently presented the additional issue, not present in the case of injury of adults, as to whether the infant has such capacity as to be capable of negligence; and that, even if this issue can be affirmatively determined by the court, the question of capacity, knowledge, discretion, and experience of the individual child is usually a question of fact. As was said in a Federal case,²³⁵ in holding, in an action for injury to a ten-year old boy by a train at a crossing, that the question of contributory negligence was, under the circumstances, for the jury: "It will be recognized at once that the rule [that where there is uncertainty as to the existence of contributory negligence the question is one of fact, for the jury] applies with special force to the issue of

contributory negligence in a case like the one at bar, where, in addition to other elements, there is involved the question of sufficient mental capacity and judgment on the part of the child to properly understand and appreciate the character and extent of the danger, and to exercise for his own protection such care and watchfulness as may be commensurate with such a danger."

Cases treating the question as to the age at which a child has such capacity as to be within the rule of contributory negligence have been previously considered, and in many of them it will be observed the question of capacity was held to be for the jury.^{235a} Where there is a question whether the child is of sufficient age and discretion to be capable under the particular circumstances of some care for his own safety, the question of his capacity, and its degree, is for the jury.²³⁶ And so, in the case of injury to very

adults. *Barstow v. Capital Traction Co.* (1907) 29 App. D. C. 362.

In holding that a girl twelve years old was not, under the circumstances, guilty of contributory negligence as matter of law, so as to prevent recovery for injuries sustained by her while employed in the defendant's mill, the court in *LeFebore Lawton Spinning Co.* (1902) 24 R. I. 215, 52 Atl. 1025, said: "Moreover, the plaintiff in this case, owing to her tender years, could not be required to exercise that degree of care which a person of mature years and long experience could properly be called upon to exercise; and hence the degree of care which she was called upon to exercise under the circumstances was peculiarly a question for the jury."

In *Long v. Ottumwa R. & Light Co.* (1913) 162 Iowa, 11, 142 N. W. 1008, an action for injury to a nine-year-old boy by a street car, the court stated that whether in any instance a child has exercised due care depends on so many circumstances that it is difficult to imagine a case involving the conduct of a child nine years old where a court may properly withdraw the question from the jury and hold him chargeable with contributory negligence as a matter of law.

In holding that the question of contributory negligence of an eight-year-old child injured by cars while she was attempting to cross the track was for the jury, the court in *Wells v. New York, C. & H. R. R. Co.* (1902) 78 App. Div. 1, 78 N. Y. Supp. 991, 13 Am. Neg. Rep. 189, said that the rule which is generally applied to this class of cases is that the degree of care required of an infant is such as might reasonably be expected of a person of his age under the circumstances of the case, which almost of necessity makes the question one of fact.

²³⁵ *Illinois C. R. Co. v. Jones* (1899) 37 C. C. A. 106, 95 Fed. 370.

^{235a} See III. c. supra.
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²³⁶ *Consolidated Traction Co. v. Scott* (1896) 58 N. J. L. 682, 33 L.R.A. 122, 55 Am. St. Rep. 620, 34 Atl. 1094 (seven years and eight months old, killed in crossing street car tracks); *Elwood v. Addison* (1900) 26 Ind. App. 28, 59 N. E. 47 (where seven-year-old boy was drowned by falling into a pool of water beside a street).

In an action for the death of a five-year-old child by the fall upon him of a counter which was standing on a sidewalk, it was said in *Kunz v. Troy* (1887) 104 N. Y. 344, 58 Am. Rep. 508, 10 N. E. 442, in reversing a judgment of nonsuit, that if there was any question whether the child had sufficient discretion to understand the danger of the situation it should have been left to the jury, with proper instructions as to the degree of care exacted of a child of tender years, under the circumstances; and that the law does not define when a child becomes sui juris.

In *Citizens' Street R. Co. v. Stoddard* (1894) 10 Ind. App. 278, 27 N. E. 723, the court said in effect that it had been held in several cases in that state, as a matter of law, that children ranging from two years to seven years and two months are non sui juris; but that it might well be doubted whether the decisions referred to should be construed as holding that all children seven years of age are, under all circumstances, non sui juris; that ordinarily the question is one of capacity, and usually it should be left to the jury to determine the measure of care required of the particular child under the circumstances of the case.

It was said in *Birmingham & A. R. Co. v. Mattison* (1909) 166 Ala. 602, 52 So. 49, that the question as to whether a child's capacity is such that it may be chargeable with contributory negligence is one of fact for the jury, unless the child is so young and immature as to require the court to

young children, for instance, those of five, six, or seven years of age, it would seem that only in very exceptional cases, if at all, should the child be held charge-

able with contributory negligence as matter of law, the question of capacity to know and appreciate the particular danger being at least for the jury.²⁸⁷ And

know judicially that it could not contribute to its own injury or be responsible for its acts, or so old and mature that the court must know that, although an infant, yet it is responsible.

"From the nature of the case it is impossible to prescribe a fixed period when a child becomes sui juris. Some children reach the point earlier than others. It depends upon many things, such as natural capacity, training, habits of life, and surroundings. These and other circumstances may enter into the question. It becomes, therefore, a question of fact for the jury where the inquiry is material, unless the child is of so very tender years that the court can safely decide the fact." *Elze v. Baumann* (1893) 2 Misc. 72, 21 N. Y. Supp. 782, where a six-year-old boy was run over by a team, while attempting to cross the street.

In considering the question of contributory negligence of a twelve-year-old boy, who was killed by a train at a crossing while riding on a wagon driven by an adult, the court in *Bracken v. Pennsylvania R. Co.* (1906) 32 Pa. Super. Ct. 22, said that, as the boy was only twelve years old, it could not say as a matter of law that he had sufficient mental development and capacity to comprehend the danger so that he would be guilty of contributory negligence, but that the question of his capacity and understanding so as to be sensible of danger and to have the power to avoid it was one of fact, to be disposed of by the jury under proper instructions.

In *Gerber v. Boorstein* (1906) 113 App. Div. 808, 99 N. Y. Supp. 1091, an action for injury to a nine-year-old boy who was run over by a team while he was crossing the street, the court laid down the rule that the law does not presume that a child under twelve years of age is sui juris, that the question whether he is sui juris is one of fact, the burden of proof being on the one asserting it.

²⁸⁷ See III. c. supra.

It was said in *McVoy v. Oakes* (1895) 91 Wis. 214, 64 N. W. 748, that a seven-year-old boy, who was injured by the sudden increase in the speed of the train along which he was walking holding to a brake rod, was certainly too young to be held guilty of contributory negligence as matter of law.

And in *Holdridge v. Mendenhall* (1900) 108 Wis. 1, 81 Am. St. Rep. 871, 83 N. W. 1109, where a boy six years and nine months old was run over by a street car, and it appeared that he was playing in the street and had not noticed the car, the court stated that the contention that a nonsuit should have been granted on the ground of contributory negligence on the part of the boy or his parents could not be sustained; that, in case of an accident to a child of such tender years, it must be an extreme

case which would warrant a court in granting a nonsuit on the ground of the child's negligence, and that it is frequently said that such a child cannot be held guilty of contributory negligence as a matter of law, —citing *Johnson v. Chicago & N. W. R. Co.* (1880) 49 Wis. 529, 5 N. W. 886, and *McVoy v. Oakes* (Wis.) supra.

In an action for injury to a seven-year-old child by falling down an unguarded shaft, it was said in *Conway v. Monidah Trust* (1913) 47 Mont. 269, L.R.A.1915E, 500, 132 Pac. 26: "At what age a child becomes sui juris, so that negligence may be predicated of his acts, is a matter upon which authorities differ. By some it is held that a child of seven years of age is conclusively presumed incapable of contributory negligence. . . . However that may be, the rule in this state is that contributory negligence is not to be inferred as a matter of law, even in the case of a much older child."

In *Voegeli v. Pickel Marble & Granite Co.* (1892) 49 Mo. App. 643, an action for injury to a five-year-old child while playing with a fire in the street, the court observed that under any circumstances it would be error for a court to decide, as a matter of law, that a child of five years was guilty of contributory negligence.

Whether a six-year-old boy was negligent in going in front of a moving train at a street crossing was held a question for the jury, and a judgment for the plaintiff affirmed, in *Allen v. Ames College R. Co.* (1898) 106 Iowa, 602, 76 N. W. 848, the court stating that as the boy was a mere child it was a question for the jury to determine whether he exercised such care as might reasonably be expected from a child of his age under the circumstances.

In *Henderson v. Continental Ref. Co.* (1908) 219 Pa. 384, 123 Am. St. Rep. 668, 68 Atl. 968, an action for injury to a seven-year-old boy by coming in contact with pumping machinery left unguarded near a highway, the court said that the age of the boy precluded his being held guilty of contributory negligence as matter of law, and that whether or not he exercised under the circumstances a degree of care commensurate with his age was for the jury.

In an action for injury to a boy seven years old by a street car while he was attempting to cross the track, the court in *Names v. Chicago City R. Co.* (1913) 180 Ill. App. 483, in upholding a verdict for the plaintiff, stated that in view of the plaintiff's age the question whether he was guilty of contributory negligence was a question for the jury, on which their verdict must be conclusive.

And in *El Paso Electric R. Co. v. Kendall* (1904) — Tex. Civ. App. —, 78 S. W. 1081, an action for injury to a twelve-year-old boy by a car while crossing a street car

there are many cases to the effect that the question of contributory negligence of children is usually for the jury.²³⁸ In a number of cases the language used

is such that it might be inferred that the court considered the question of contributory negligence of children as always for the jury.²³⁹ But the decision

track, the court stated that it did not believe a twelve-year-old child, in any ordinary case, can be held guilty of contributory negligence as a matter of law.

In *Fishburn v. Burlington & N. W. R. Co.* (1905) 127 Iowa, 483, 103 N. W. 481, the court was of the opinion, apparently, that under no circumstances can a six-year-old child be held guilty of contributory negligence as matter of law.

And, in an action for injury to a child six years and seven months old, who while crossing the street was run over by an automobile, the court in *Barger v. Bissell* (1915) 188 Mich. 366, 164 N. W. 107, in reversing a judgment for the plaintiff on the ground that negligence was not proved on the part of the defendant, stated that it was manifest the child exercised no care at all, but that with a child of her age the question of contributory negligence precluding recovery, in case the defendant is shown guilty of negligence, is usually an issue of fact for the jury.

Attention is called, however, in this connection to the case of *ADAMS v. BOSTON ELEV. R. Co.* (Mass.) post, 165, in which it is held that it is negligence as matter of law for a child six and a half years old to cross street car tracks behind a passing car in such a manner as to come into contact with the side of a car moving on the other track; also to the case of *KYLE v. BOSTON ELEV. R. Co.* (Mass.) post, 164, holding that it is negligence for a boy five years and eleven months old to follow other children across street car tracks at a place other than a street crossing without exercising any care to ascertain whether or not a car is approaching.

²³⁸ The question whether a child exercised such judgment as he possessed must as a rule be left for the jury's determination; and it is an exceptional case in which the question is one of law for the determination of the court. *Foley v. California Horseshoe Co.* (1896) 115 Cal. 184, 56 Am. St. Rep. 87, 47 Pac. 42; *Cahill v. E. B. & A. L. Stone Co.* (1914) 167 Cal. 126, 138 Pac. 712.

"There has been a time in the life of every person of mature judgment, as all agree, when he was incapable of exercising the care and judgment necessary to avoid and avert danger, and was non sui juris. There is a time, also, when he is in law an adult, and responsible as such. Between these two periods is a transition stage, during which his responsibility depends upon matters of fact. . . . In this transition period he may or may not be guilty of contributory negligence. . . . And so, in order to determine whether a child in such transition period has been guilty of contributory negligence, it is necessary to take into consideration the age of the child, and its experience, and capacity to understand and avoid the danger to which it is exposed L.R.A.1917F.

in the actual circumstances and situation under investigation; and it is usually a question for the jury to determine whether the child has been guilty of contributory negligence. . . . No doubt, where it appears beyond dispute that the child acted in entire disregard of the degree of prudence which may reasonably be expected of one of his years, and thereby contributed to his injury, then the question, contrary to the usual rule, becomes one for the court to determine."

David v. West Jersey & S. R. Co. (1913) 84 N. J. L. 685, 87 Atl. 440.

The question whether a child who has reached the age of discretion and is considered sui juris as a matter of law has exercised that degree of care usually exercised by persons of similar age, judgment, and experience is usually, if not always, a question of fact for the jury. *Solomon v. Public Service R. Co.* (1915) 87 N. J. L. 284, 92 Atl. 942. To the same effect are *Consolidated Traction Co. v. Scott* (1896) 58 N. J. L. 683, 33 L.R.A. 122, 55 Am. St. Rep. 620, 34 Atl. 1094, and *Smith v. North Jersey Street R. Co.* (1906) 73 N. J. L. 295, 67 Atl. 753.

"Exceptional cases, in which the inquiry of whether or not injured minors were culpably negligent was held to be for the court's, instead of the jury's, decision, do not impugn the general rule that the question is for the jury when different inferences are fairly deducible from the evidence." *Fry v. St. Louis Transit Co.* (1905) 111 Mo. App. 324, 85 S. W. 960.

The doctrine that ordinarily the question of contributory negligence of children is for the jury is approved also in the following, among other, cases: *Pueblo Electric Street R. Co. v. Sherman* (1898) 25 Colo. 114, 71 Am. St. Rep. 116, 53 Pac. 322; *Kansas C. R. Co. v. Fitzsimmons* (1879) 22 Kan. 686, 31 Am. Rep. 203; *Atchison, T. & S. F. R. Co. v. Todd* (1895) 54 Kan. 551, 38 Pac. 804; *Chicago, R. I. & P. R. Co. v. Kennedy* (1896) 2 Kan. App. 693, 43 Pac. 802; *Berdos v. Tremont & S. Mills* (1911) 209 Mass. 489, 95 N. E. 876, Ann. Cas. 1912B. 797; *Hepfel v. St. Paul, M. & M. R. Co.* (1892) 49 Minn. 263, 51 N. W. 1049; *Mullin v. St. Louis Transit Co.* (1906) 196 Mo. 572, 94 S. W. 288; *Brady v. Consolidated Traction Co.* (1899) 63 N. J. L. 25, 42 Atl. 1054, later appeal (1900) 64 N. J. L. 373, 45 Atl. 805, 7 Am. Neg. Rep. 474; *Strawbridge v. Bradford* (1889) 128 Pa. 200, 15 Am. St. Rep. 670, 18 Atl. 346; *Kelly v. Pittsburgh & B. Traction Co.* (1903) 204 Pa. 623, 54 Atl. 482; *Gessas v. Oregon Short Line R. Co.* (1907) 33 Utah, 156, 13 L.R.A.(N.S.) 1074, 93 Pac. 274; *Carmer v. Chicago, St. P. M. & O. R. Co.* (1897) 95 Wis. 513, 70 N. W. 560, 2 Am. Neg. Rep. 94.

²³⁹ It is said in *Baltimore & O. S. W. R. Co. v. Hickman* (1907) 40 Ind. App. 315, 81 N. E. 1086, that the question whether in a

in these cases is not so broad, it being only necessary to the decision to hold that under the particular circumstances the question was for the jury.

On the other hand, many cases cited in the present annotation, and other annotation herein referred to, without special discussion of the question here considered, have held infants six years of age and over, under the particular cir-

cumstances, guilty of contributory negligence as matter of law; and there can be no doubt that the mere fact of infancy does not necessarily make the question of due care one for the jury. This is clearly pointed out in the cases of *SCHOONOVER v. BALTIMORE & O. R. Co.*, ante, 1, and *DERRINGER v. TATLEY*, post, 187. And other cases are to the same effect. Thus, in a California

particular case the measure of care required from a child has been exercised is universally held to be a question for the jury.

In affirming a judgment for the plaintiff, in an action for injury to a ten-year-old boy while playing on a turntable, the court in *Houston & T. C. R. Co. v. Simpson* (1883) 60 Tex. 103, said: "The law fixes no certain age at which children are of sufficient intelligence to have imposed upon them the full degree of care incumbent upon one of mature age, and in every case the question of intelligence of a child is one for the jury."

In *Dempsey v. Brooklyn Heights R. Co.* (1904) 98 App. Div. 182, 90 N. Y. Supp. 639, an action for the death of a nine-year-old boy by a street car while playing on the track, it was said: "There are many authorities which support the theory that the question of contributory negligence under the circumstances of this case would be for the jury to determine as a fact. But it is well settled that the question whether negligence may be imputed at all to a child as young as the deceased is one of fact and not of law, and it was, therefore, error in the learned trial court to solve it. . . . The plaintiff herein was therefore entitled to the benefit of the presumption that the deceased was non sui juris, and while it may be said that there was evidence sufficient to overcome that presumption it was clearly not within the province of the court to determine whether or not it was overcome, but the question should have been submitted to the jury."

And in *Riley v. Missouri P. R. Co.* (1896) 68 Mo. App. 652, an action for injury to a ten-year-old boy by an engine while walking on the track, it was said that the recognized rule is that a child is not negligent if he exercises the degree of care which under like circumstances would reasonably be expected of one of his years and capacity, and that whether he used such care in a particular case is a question for the jury.

In upholding a judgment for the plaintiff in an action for the killing of a ten-year-old boy by a street car while he was crossing the track, the court in *Consolidated City & C. P. R. Co. v. Carlson* (1897) 58 Kan. 62, 48 Pac. 635, 2 Am. Neg. Rep. 536, said: "We know of no precise age at which a child may be said as a matter of law to have acquired such knowledge and discretion as to be fully accountable for all his acts. As a matter of fact, we know that there is great difference in the capacity of different children at the same age, owing

as well to differences in education and surroundings as to natural capacity. The question as to the capacity of a particular child at a particular time to exercise care in avoiding a particular danger is one of fact, falling within the province of the jury to determine."

In holding that the question of contributory negligence of a twelve-year-old boy who accepted a dare to touch a live electric wire in the street, of the danger of which he had been warned, was for the jury, the court in *Owensboro v. York* (1904) 117 Ky. 294, 77 S. W. 1130, said: "If the child had been three years old it would not be maintained that his negligence or wilfulness in touching the wire would acquit the city of responsibility for having such an instrument of death negligently in the street; and when the child is older it is a question for the jury whether, considering his age, he exercised such care and discretion as might be reasonably expected of a child situated as he was."

"The true rule is, as deduced from the authorities and founded on reason, that an infant of tender years may be able to exercise some care for its personal safety, and the question whether in a given case it has exercised due care, so as to be free from the imputation of contributory negligence, is one of fact, to be submitted, under proper instructions, to the jury. The determination of this fact depends upon the age, physical condition, strength, and health of the child, its education, experience, capacity, training, idiosyncrasies, sex, and any other circumstances relevant thereto." *Citizens Street R. Co. v. Hamer* (1902) 29 Ind. App. 426, 62 N. E. 658, 63 N. E. 778 (seven-year-old boy crossing street car track).

In an action for the death of a boy nearly twelve years old who was run over by a train while he was asleep on the track, the court in *St. Louis Southwestern R. Co. v. Shiflet* (1900) 94 Tex. 131, 58 S. W. 945, stated that the boy was not within the age at which courts have held a child to be exempt as a matter of law from the charge of contributory negligence, nor of such an age that the court would as a matter of law hold that he was responsible for his act; that it was a question of fact for the jury.

The following cases also, among others, are to a similar effect, general statements being made which in themselves might lead to the inference that the court considered the question of contributory negligence of children as always for the jury, although

case,³⁰⁰ in holding that a twelve-year-old boy was guilty of contributory negligence as matter of law in attempting to cross between the ears of a freight train which obstructed a street, the court said: "The fact that the deceased was only about twelve years of age did not require the court to submit to the jury whether his attempt to cross the street between the cars constituted negligence. . . . When the facts are clear and undisputed, and when no other inference than that of negligence can be drawn from them, the court is not required to submit the question to the jury, but may itself make the inference. . . . The same act which would be negligence in an adult may not be such if done by a child, but a child is required to exercise the same degree of care that would be expected from children of his age, or which children of his age ordinarily exercise; and the court is as fully authorized as a jury to determine what this degree of care is. Children, as well as adults, should use the prudence and discretion which persons of their years ordinarily have, and they cannot be permitted with impunity to indulge in conduct which they know, or ought to know, to be careless. . . . In the present case the capacity and intelligence of the child are not controverted, and he must be presumed to have had all the qualities ordinarily belonging to a person of his age." And in a Missouri case,³⁴¹ where the question was whether an eight-year-old child was guilty of con-

tributory negligence as matter of law in attempting to cross a railroad track in front of a train approaching in plain sight, the court said: "The main question, therefore, in this case is, was this child of sufficient maturity to be held accountable for his imprudent act, as for contributory negligence? A question of this kind is sometimes one of fact and sometimes one of law. If the facts are such that reasonable men cannot differ in opinion about them, it is a question of law for the court to decide; but if reasonable men might reach different conclusions on the facts, then it becomes a question which the court should submit to the jury. In this case the court took it to be a question of law, and so decided it. We have said that it is sometimes a question of fact and sometimes a question of law; and such is the form of expression frequently used by law writers on this subject, and in a certain sense it is correct. Strictly speaking, however, the question of whether a child is old enough to be held responsible for his conduct as for contributory negligence is always a question of fact, appealing to common sense, rather than to the science of law, for an answer. But when the evidence is all one way, and such that there can be but one answer to the question, the court should decide it without submitting it to the jury."

Similar statements are found in many other decisions.³⁴²

In those states which hold that an in-

such a broad conclusion was unnecessary to the decision: *Chicago, R. I. & P. R. Co. v. Kennedy* (1896) 2 Kan. App. 693, 43 Pac. 802 (ten-year-old child crossing railroad track); *Potera v. Brookhaven* (1909) 95 Miss. 774, 49 So. 617 (injury to a boy ten or twelve years old by voluntarily touching a live electric wire); *Gass v. Missouri P. R. Co.* (1894) 57 Mo. App. 574 (thirteen-year-old boy crossing railroad track); *Riley v. Missouri P. R. Co.* (1896) 68 Mo. App. 652 (action for injuries to a boy ten years old by an engine in a railroad yard); *Day v. Citizens R. Co.* (1899) 81 Mo. App. 471 (fifteen-year-old boy crossing street car track); *Thompson v. Missouri, K. & T. R. Co.* (1902) 93 Mo. App. 548, 67 S. W. 693 (crossing train which obstructed street); *Buscher v. New York Transp. Co.* (1905) 106 App. Div. 493, 94 N. Y. Supp. 798, 18 Am. Neg. Rep. 575, see also later appeal in (1906) 114 App. Div. 85, 99 N. Y. Supp. 673 (eight-year-old boy killed by automobile); *Rolin v. R. J. Reynolds Tobacco Co.* (1906) 141 N. C. 300, 7 L.R.A.(N.S.) 335, 53 S. E. 891, 8 Ann. Cas. 638; *Lake Erie & W. R. Co. v. Mackey* (1895) 53 Ohio St. 370, 29 L.R.A. 757, 53 Am. St. Rep. 640, 41 N. E. 370; *Citizens' Electric R. Light & L.R.A.* 1917F.

P. Co. v. Bell (1903) 26 Ohio C. C. 691, affirmed without opinion in (1904) 70 Ohio St. 482, 72 N. E. 1155; *Rachmel v. Clark* (1903) 205 Pa. 314, 62 L.R.A. 959, 54 Atl. 1027, 14 Am. Neg. Rep. 208 (seven-year-old boy injured by the fall of stone slab standing on sidewalk); *Lorence v. Ellensburg* (1895) 13 Wash. 341, 52 Am. St. Rep. 42, 43 Pac. 20 (action for injury to an eight-year-old girl on defective sidewalk).

³⁴⁰ *Studer v. Southern P. R. Co.* (1898) 121 Cal. 400, 66 Am. St. Rep. 39, 53 Pac. 942, 4 Am. Neg. Rep. 361.

³⁴¹ *Holmes v. Missouri P. R. Co.* (1905) 190 Mo. 98, 88 S. W. 623.

³⁴² A clear statement, in accord with the authorities, is that in a Missouri case, in which, in holding that a thirteen-year-old boy was negligent as matter of law, under the circumstances, in attempting to cross a railroad track without looking or listening for a train, the court said: "When an issue of fact is framed and put to a jury on the question of the negligence of a minor, the general rule is to so frame the instruction as to graduate the degree of care demanded of a child to his age and capacity. That rule requires that a child should be judged as a child, and not as a man. But the rule

fant, under fourteen years of age is presumptively incapable of contributory

negligence, there are expressions in some of the cases to the effect that the ques-

does not mean that the question is always to be submitted to a jury. Children may be declared as a matter of law non sui juris at certain tender years and with certain infantile judgments. Then, again, they may be declared sui juris as a matter of law when their age, capacity, and the circumstances under which they act are all considered. It may be taken as the most enlightened and accepted doctrine in the case of infants that generally the question of their contributory negligence is one for the jury. But it is not the accepted doctrine that it may not under given circumstances be dealt with as a matter of law. If the facts are few and simple, devoid of confusion and complications, and if the danger to be avoided is so apparent as to be within the easy comprehension of a boy of thirteen years of age, if that boy is shown to be of bright intelligence and of a judgment training him to caution and care in the matter in hand,—we say, all these things being admitted, then there is no reason why the judge on the bench may not as a matter of law under the facts of the given case declare there could be no two opinions among reasonable men about the negligence of such a boy, measured by the standard of an ordinarily prudent boy." *McGee v. Wabash R. Co.* (1908) 214 Mo. 530, 114 S. W. 33.

And in *Collins v. South Boston R. Co.* (1886) 142 Mass. 301, 56 Am. Rep. 675, 7 N. E. 856, it was said: "This court, with more or less hesitation, in what it deems plain cases, according to common experience, has declared that the acts or conduct of an adult under the circumstances constituted, as matter of law, contributory negligence, and the question arises whether the court can make the same declaration concerning the acts of conduct of a child of tender years, who yet is so old that they cannot say, as matter of law, that he has not sufficient discretion to be permitted to act on his own judgment. We think it has been in effect decided that the same general principles govern courts in either case, although the degrees of care required are different."

"Courts must look at the capacity, natural and acquired, of him whose conduct is under scrutiny; and if it clearly appears from the evidence that the child had a capacity for self-protection which it culpably omitted to use in face of a danger which it knew and sufficiently appreciated, then no question is left for the jury to pass on concerning the contributory negligence of the person charged with it. The court ought not to be required to release its grasp on the facts presented to a jury, nor be hampered in applying its intelligence to their probative force, in a case where it manifestly appears that negligence contributing to an injury which is the subject of the action proceeds from a person, though under age, who has ample capabilities to make him apprehensive of threatened harm, L.R.A.1917F.

and who at the same time is possessed with sufficient physical strength to avoid it." *Bess v. Atchison, T. & S. F. R. Co.* (1900) 62 Kan. 299, 62 Pac. 996, 8 Am. Neg. Rep. 25, where a boy nearly sixteen years old, while walking in a position of safety between railroad tracks, suddenly stepped in front of a slowly backing train and was killed. The above is quoted in *Wilson v. Atchison, T. & S. F. R. Co.* (1903) 66 Kan. 183, 71 Pac. 282, in holding that a twelve-year-old boy was negligent as matter of law in climbing on a moving freight train.

To the extent that a child knows and understands the danger, or to the extent that the latter is of such a character that it must be perfectly obvious to one of his years, a legal duty rests upon the child to avoid it, and failing to do so he may be declared negligent as a matter of law. *Battles v. United R. Co.* (1913) 178 Mo. App. 596, 161 S. W. 614.

And, although holding that it could not declare as matter of law that a boy twelve years old was negligent in standing so near a passing train that he was drawn under it by a current of air, the court in *Graney v. St. Louis, I. M. & S. R. Co.* (1897) 140 Mo. 89, 38 L.R.A. 633, 41 S. W. 246, expressly recognized the rule that the court may under some circumstances declare as matter of law that a boy of such age has been guilty of contributory negligence, it being said: "Whether in a particular case his concurring negligence will defeat a recovery is generally, but not always, a question of fact, to be determined by the jury. Where it appears conclusively that a boy of such age has knowledge of the danger of doing an act and sufficient intelligence to avoid it, and nevertheless voluntarily does it, and is injured thereby, he will be chargeable with contributory negligence as a matter of law. The fact that he was reckless in the face of the danger should no more excuse him than the same characteristics would excuse an adult person."

The rule that an infant may be guilty of contributory negligence as matter of law, although not chargeable with the degree of care required of an adult, is recognized in *Dubiver v. City & Suburban R. Co.* (1904) 44 Or. 227, 74 Pac. 915, 75 Pac. 693, 1 Ann. Cas. 889.

So, in holding that a nine-year-old girl was guilty of contributory negligence as matter of law in rushing heedlessly in front of a street car, the court in *Fitzhenry v. Consolidated Traction Co.* (1900) 64 N. J. L. 674, 46 Atl. 698, 8 Am. Neg. Rep. 288, said: "The plaintiff was admittedly sui juris, and of an age when she was required to exercise reasonable care, to a degree that is usually exercised by children of that age who are ordinarily careful. . . . It is true that in such cases the question of contributory negligence is generally, if not always, a question for the jury. . . . The salutary rule of duty which requires the ordinary traveler in crossing a street rail-

tion of contributory negligence of a child under this age is always for the jury.²⁴³ But the correct rule appears to be that since the presumption of incapacity on the part of an infant under fourteen

years of age is merely a *prima facie* presumption and may be rebutted by evidence of unusual capacity and experience,²⁴⁴ contributory negligence may be shown as matter of law on the part of an

way to use his powers of observation to discover approaching vehicles, and his judgment how and when to cross without collision, is also binding upon the child that is *sui juris*; and if the facts are undisputed, and it appears clearly that he has acted in entire disregard of that degree of prudence which may be reasonably expected from one of his years, and he suffers injury thereby, he cannot recover, and in that case the question of contributory negligence becomes one for the court to determine."

And it was said in *Anderson v. Central R. Co.* (1902) 68 N. J. L. 269, 53 Atl. 391: "The degree of care exacted of minors differs from that exacted from adults, and whether minors have exercised the required care is frequently a jury question. But when the infant's act exposes him to peril which he must appreciate, and when his personal safety may be secured by means plain to the most immature judgment, his exposure of himself to peril without any precautions will leave no question for a jury." In this case it was held that a nine-year-old boy was guilty of contributory negligence as matter of law in failing to observe a train which was approaching in plain sight when he attempted to cross the track.

"When a court is in a position to say from the undisputed evidence that the child in question was of sufficient age, knowledge, and experience that it was capable of understanding and appreciating certain dangers and was capable of using certain precautions to avoid them, and when it can also say from the undisputed evidence that such child did not use ordinary care and caution for a child of its age and capacity, then such court is in a position to declare as a matter of law that such child did not use reasonable care." *Indianapolis Traction & Terminal Co. v. Croly* (1911) 54 Ind. App. 566, 96 N. E. 973, 98 N. E. 1091, holding that a girl eleven years old who was injured by a street car in crossing the track was negligent as matter of law.

So, in holding that an eight-year-old boy was guilty of contributory negligence as matter of law, so as to prevent recovery for injuries sustained by being struck by a street car, the court in *Ryan v. La Crosse City R. Co.* (1900) 108 Wis. 122, 83 N. W. 770, said: "It seems to be settled that where, as here, it appears from the undisputed evidence that the plaintiff, considering his age and intelligence, did not exercise proper care in crossing the track, the trial court may determine, as a proposition of law, that the plaintiff is guilty of contributory negligence and cannot recover."

The following cases also are to a similar effect, expressly recognizing the doctrine that contributory negligence on the part of an infant may, in a proper case, be declared as matter of law: *Spillane v. Missouri P. L.R.A.1917F.*

R. Co. (1896) 135 Mo. 414, 58 Am. St. Rep. 580, 37 S. W. 198 (nine-year-old boy injured while dragging a piece of ice across the track by train striking the string attached to his wrist); *Anderson v. Union Terminal R. Co.* (1900) 161 Mo. 411, 61 S. W. 874; *Mann v. Missouri, K. & T. R. Co.* (1907) 123 Mo. App. 486, 100 S. W. 566 (twelve-year-old boy injured by a passing train while asleep on a railroad platform); *Henry v. Missouri P. R. Co.* (1910) 141 Mo. App. 351, 125 S. W. 794 (turntable case); *Herd v. Koenig* (1909) 137 Mo. App. 589, 119 S. W. 56 (holding that a boy ten years old was negligent as matter of law in leaning upon a fence which he knew was decayed, and which gave way, precipitating him into a quarry); *Stegman v. Gerber* (1909) 146 Mo. App. 104, 123 S. W. 1041 (action for injury to a fifteen-year-old servant); *Lafferty v. Third Ave R. Co.* (1903) 85 App. Div. 592, 83 N. Y. Supp. 405, affirmed without opinion in (1903) 176 N. Y. 594, 68 N. E. 1118 (six-year-old child crossing street car track).

²⁴³ In holding that the question of contributory negligence on the part of an eight-year-old child was under the circumstances for the jury, the court in *United States Natural Gas Co. v. Hicks* (1909) 134 Ky. 12, 23 L.R.A.(N.S.) 249, 135 Am. St. Rep. 407, 119 S. W. 166, stated that the general rule is that between the ages of fourteen and seven years "the legal presumption is with the child, and to make it responsible it must be shown by testimony that it had sufficient intelligence and discretion to realize and to know what would be the result of its acts. Hence it is always proper to submit the question of contributory negligence in such cases to the jury."

It is said (*obiter*) in *Fraunthal v. Lae-lede Gaslight Co.* (1896) 67 Mo. App. 1, that there is a presumption that an infant under the age of fourteen years is *prima facie* incapable of exercising sufficient judgment so as to be chargeable with contributory negligence, and whether the evidence in a particular case is sufficient to rebut the presumption is always a question of fact for the jury, and not of law for the court.

²⁴⁴ See III. b, *supra*.

Attention is called in this connection to the statement of the rule in *Ewing v. Lanark Fuel Co.* (1909) 65 W. Va. 726, 29 L.R.A.(N.S.) 487, 65 S. E. 200, an action for injury to a boy thirteen years old, while employed in the defendant's mine: "Age is only an evidential fact, tending to prove constructive knowledge, or lack of knowledge. If over fourteen it tends to prove capacity and knowledge; if under fourteen it tends to prove the reverse of this. It is not conclusive. Capacity may be shown notwithstanding the infant is under four-

infant under fourteen years of age, even in those states which hold that infants under that age are presumptively incapable of contributory negligence.²⁴⁵

VII. Particular applications.

a. In general.

It is the purpose of the present annotation at this point to indicate the application of the foregoing principles in certain situations, in so far as these are not covered by other annotations. Questions relating to contributory negligence of children in actions for injuries by explosives,²⁴⁶ or for injuries on or about elevators,²⁴⁷ or railroad tracks,²⁴⁸ are discussed in other notes. Various other classes of cases involving contributory negligence of children are treated else-

where, and referred to in connection with the specific subjects considered below.

b. Injuries by animals.

1. Dogs.

As to the degree of care required of a child in actions for injuries by dogs, see note 34, *supra*.

The question whether the acts of a child in striking a dog with a stick,²⁴⁹ or otherwise striking or interfering with it in play,²⁵⁰ so that it attacks and injures the child, has generally been held to be for the jury. If the conduct of the child is such only as might reasonably be expected of ordinarily prudent children of its age, intelligence, discretion, and experience under the same circumstances, it

teen years of age, and incapacity may be shown notwithstanding the infant may be over fourteen years of age. The presumption of capacity at fourteen years, and of incapacity under that age, are both rebuttable presumptions. . . . It is a mere rule of evidence. . . . All infants of the same age have not the same capacity. If they had, the presumption would necessarily be conclusive, but it is a matter of common knowledge that all persons are not born equal in respect of mental capacity and physical power; and therefore the presumption in either case may be rebutted by other evidence."

²⁴⁵ In *Virginia-Carolina R. Co. v. Clawson* (1910) 111 Va. 313, 68 S. E. 1003, an action for injury to a twelve-year-old boy by a train while he was attempting to cross the track, the court said that the burden rested on the defendant to rebut the presumption, the boy being under fourteen years of age, that he was incapable of contributory negligence. Nevertheless, in view of evidence that he was very intelligent, had kept a candy stand and had frequently driven his father's wagon, had lived for more than a year in the vicinity of the railroad, and frequently crossed the track, it was held that as matter of law he was negligent, under the circumstances, in attempting to cross in front of the train.

In *Heim v. Philadelphia & R. R. Co.* (1908) 20 Pa. Dist. R. 769, in holding that the question of contributory negligence of a thirteen-year-old boy who fell from a car platform was for the jury, the court said that, as he was under the age of fourteen years, unless there were special circumstances shown, the question of contributory negligence on his part was for the jury.

²⁴⁶ As to liability for injury to children from explosives left accessible to them, see notes to *Akin v. Bradley Engineering & Machinery Co.* 14 L.R.A.(N.S.) 596; *Finkfeiner v. Solomon*, 24 L.R.A.(N.S.) 1257; *Juntti v. Oliver Iron Min. Co.* 42 L.R.A.(N.S.) 840; and *Folsom-Morris Coal Min. Co. v. DeVork*, L.R.A.1917A, 1295. L.R.A.1917F.

²⁴⁷ See annotation appended to *DERINGER v. TATLEY*, post, 195.

²⁴⁸ See annotation appended to *Mollica v. Michigan C. R. Co.* post, 123, also other notes therein referred to.

²⁴⁹ In *Plumley v. Birge* (1878) 124 Mass. 57, 26 Am. Rep. 645, 1 Am. Neg. Cas. 135, where a thirteen-year-old boy who struck a dog with a stick was bitten by the dog, the court, in upholding a verdict for the plaintiff in an action for the damages so sustained, held that it was not erroneous to instruct the jury that if the boy was old enough to know that striking the dog would be likely to incite it to bite, and did strike the dog, and thereby incited it to bite him, he might nevertheless recover, if the jury found he was in the exercise of such care as would be due care in a boy of his years. See this case in note 61, *supra*.

²⁵⁰ It was held in *Milliken v. Fenderson* (1913) 110 Me. 306, 86 Atl. 174, that the question of contributory negligence was for the jury, and a verdict for the plaintiff sustained, in an action for injury to a fourteen-year-old boy by being bitten by a dog, where it appeared that for several years the boy had lived near the premises on which the dog was kept and played with the owner's son, but not with the dog, that he had never been warned that the dog was vicious, or heard of his biting anyone, and that at the time of the injury he was talking to the dog, and perhaps patting him on the head.

And it was held in *Bernier v. G  n  r  ux* (1902) Rap. Jud. Quebec 12 B. R. 24, that contributory negligence as matter of law was not shown on the part of a thirteen-year-old boy who was bitten by a dog, where it appeared that his provocation of the dog was of a trifling nature, consisting in hitting with his hand or foot the partition of the room in which the dog was confined and calling the dog by his name, and that another person opened the door and permitted the animal to rush at him.

does not amount to negligence, even though the child might know, as an abstract proposition, that its actions might possibly cause the dog to bite.²⁵¹

Similar conclusions have been reached where the conduct of the child on previous occasions, in provoking the dog, may have caused the injury, although at that particular time he was not interfering with it.²⁵² And an instruction in an action for injury to a seven-year-old child by being bitten by a dog, which requires virtually the same degree of care of the child as of an adult, directing the jury, in effect, that if the child provoked the dog to bite him, by kicking it, there could be no recovery, is erroneous.²⁵³

It has been held that a seven-year-old child cannot be charged with negligence in pulling a stick from a sleigh standing near the sidewalk in a village street and guarded by a vicious dog, so as to relieve the owner of the dog from liability for damages for its attacking and biting

the child while so doing.²⁵⁴ But, on the other hand, evidence that a girl eleven years old, at the time she was bitten by a dog, was attempting to take from him meat which he was eating, or otherwise was teasing and annoying him, has been held sufficient to require submission to the jury of the issue of contributory negligence.²⁵⁵

2. Other animals.

As to the degree of care required of a child in actions for injuries by animals other than dogs, see note 35, *supra*.

In actions for injuries to children by other animals than dogs the question of contributory negligence has generally been held to be for the jury to determine, in view of the particular circumstances, and the age, intelligence, discretion, and experience of the child.²⁵⁶

In an action for injury to a twelve-year-old boy by being kicked by a horse straying on a highway it was held that

²⁵¹ In an action for injury to an eight-year-old boy by being bitten by a dog with which he was playing, the court in *Garland v. Hewes* (1906) 101 Me. 549, 64 Atl. 914, said that the mere fact that the boy was old enough to know that striking the dog over the head and pulling his ears might cause him to bite would not bar recovery, if the boy was in the exercise of such care as would be due care in a boy of his age and intelligence. In this case, however, a verdict for the defendant was sustained, based apparently on the ground that the boy failed to exercise due care for one of his age and intelligence in striking the dog, pulling his ears, and bringing his own face close to the face of the dog.

See *Plumley v. Birge*, cited in note 61, *supra*, as to the degree of care required of a thirteen-year-old boy in an action for injury by being bitten by a dog which he struck with a stick. And as to the standard for measuring the conduct of a boy fourteen years old who is bitten by a dog with which he is playing, see *Milliken v. Fenderson*, cited in note 211, *supra*.

²⁵² Where a twelve-year-old boy, of inferior intelligence, was bitten by a dog which he had previously, for a period extending over several months, been in the habit of tantalizing, while it was confined, and there was evidence that such conduct caused the injury, although the boy was not molesting the dog at the time, it was held that the prior conduct of the boy, even if it caused the dog to attack him, would not prevent recovery for the injury, if he did not know and appreciate the probable effect of his acts in provoking the dog. *Schilling v. Smith* (1902) 76 App. Div. 464, 78 N. Y. Supp. 586.

²⁵³ *Linck v. Scheffel* (1889) 32 Ill. App. 17, 1 Am. Neg. Cas. 87.

²⁵⁴ *Meibus v. Dodge* (1875) 38 Wis. 300, L.R.A.1917F.

20 Am. Rep. 6. An instruction that if the jury found that the boy, "hardly old enough to know whether it would be wrong to meddle with the sleigh," did meddle with it by taking out the whip, it would be no defense to the action, was held not erroneous as improperly taking from the jury the question of the boy's capacity in relation to the defense of contributory negligence.

²⁵⁵ *Wolff v. Lamann* (1900) 108 Ky. 343, 56 S. W. 408.

²⁵⁶ Whether a boy eleven years old who was kicked by a horse was negligent in attempting at the time of the injury to pass along the sidewalk within about three feet of the horse, which was standing with his hind feet on the walk while its driver was engaged in unloading coal, was held a question for the jury, and a judgment for the plaintiff in an action for the injury so sustained was affirmed, in *Gary v. Arnold* (1912) 175 Ill. App. 365.

And in *Kierkowsky v. Connell* (1916) 253 Pa. 566, 98 Atl. 766, it was held that the question of contributory negligence was for the jury, and a judgment for the plaintiff affirmed, in an action for injury to a twelve-year-old boy by being kicked by a mule, where there was evidence that, with the permission of the owner, he was at the time of the injury standing behind the mule in the stable trying to unharness it.

Where a thirteen-year-old boy, although forbidden by his mother to attend a museum on account of the fact that animals were permitted to run at large, went to the museum, and was bitten by a monkey which was running at large, while he was feeding peanuts to it, it was held that the question of contributory negligence was one of fact, and a judgment for the plaintiff was affirmed in *Copley v. Wills* (1913) — Tex. Civ. App. —, 152 S. W. 830.

See *Karr v. Parks* in note 295, *infra*.

negligence on his part might be inferred from evidence that at the time of the injury he was attempting to catch the horse by taking hold of a rope attached to its head, and that he was aware of the danger of getting too near the horse.²⁶⁷ But it seems that a four-year-old child cannot be charged with negligence in approaching so near a horse straying on the highway as to be kicked and injured by it.²⁶⁸

It has been held that a nine-year-old boy may be negligent in standing so near the cage of a bear, knowing of its presence therein, as to be seized and injured by it.²⁶⁹

c. Dangerous machinery and appliances in general.

The doctrine of attractive nuisance as applied to dangerous machinery and ap-

pliances in general is treated in other annotation,²⁶⁰ and reference is made to other parts of the present note for questions in general relating to the degree of care required of a child, and to the doctrine of conclusive presumption of incapacity, in actions for injury by contact with dangerous machinery and appliances.²⁶¹

In cases of injuries to children by coming in contact with dangerous machinery negligently left unguarded or unattended, the circumstances have usually been such that contributory negligence on the part of the child was not a necessary inference, but was a question for the jury.²⁶² Usually in cases of this kind the lack of experience and judgment on the part of the child make the question of negligence on its part peculiarly one of fact, although in cases of

²⁶⁷ *Flett v. Coulter* (1903) 5 Ont. L. Rep. 375.

²⁶⁸ Where a child between four and five years old was kicked by a horse, which was straying on the highway, the court in *Marsland v. Murray* (1888) 148 Mass. 91, 12 Am. St. Rep. 520, 81 N. E. 680, in upholding a verdict for the plaintiff in an action for the injury so sustained, stated that it was not necessary for the plaintiff to introduce affirmative testimony to show what he was doing at the moment of receiving the injury, that if he was on the highway without negligence on the part of his parents it would be rather difficult to suppose any act by him while there which would not be consistent with such care as children of that age are accustomed to use.

²⁶⁹ Where a nine-year-old boy went to a dock to see bears which had arrived, and while standing near the cage was seized and injured by one of the bears, the action for the injury being submitted to the jury as involving the issues of negligence and contributory negligence, it was held erroneous to refuse an instruction to the effect that if he was a bright boy and approached the cage containing bears knowing that there were bears therein, and stood within 18 inches of the grated front of the cage, and while standing there was seized by one of the bears and injured, he was guilty of contributory negligence and could not recover for the injury. *Malloy v. Starin* (1906) 113 App. Div. 852, 99 N. Y. Supp. 603.

²⁶⁰ See note to *Cahill v. E. B. & A. L. Stone Co.* 19 L.R.A.(N.S.) 1130.

²⁶¹ As to the doctrine that a child seven years old cannot be declared *sui juris* as matter of law, so as to be chargeable with contributory negligence, in an action for injury to a child by attractive machinery on another's property, see *Nashville Lumber Co. v. Busbee*, cited in note 159, *supra*.

As to whether a four-year-old child who is injured by unguarded machinery in a public place can be chargeable with contributory negligence, see *L.R.A.* 1917F.

tributory negligence, see *Campbell v. Ord*, cited in note 130, *supra*.

As to the standard by which the conduct of a child should be measured, in an action for injury by attractive machinery, see *North Texas Constr. Co. v. Bostick*, cited in note 69, *supra* (injury to eight-year-old boy by machinery in ginhouse).

It was held in *Westerfield v. Levis Bros.* (1891) 43 La. Ann. 63, 9 So. 52, that a child five years and seven months old, who was killed while playing on an iron roller left unattended in a street, was *prima facie* incapable of contributory negligence.

²⁶² In *Delage v. Delisle* (1901) Rap. Jud. Quebec 10 B. R. 481, the court applied the doctrine that between the ages of seven and fourteen years a child presumptively does not have the capacity to appreciate the consequences of his conduct so as to be chargeable with contributory negligence, in holding that there could be recovery for injury to a child eight years old by contact with dangerous machinery while playing in the defendant's factory.

And where a boy fourteen years old, while attempting to climb a ladder on the premises of a wire plant, was caught and killed by a projecting bolt which extended 4 or 5 inches from a power shaft and was invisible because of the rapid revolution of the shaft, it was held in *Biggs v. Consolidated Barb-Wire Co.* (1899) 60 Kan. 217, 44 L.R.A. 655, 56 Pac. 4, 5 Am. Neg. Rep. 335, that the question whether the boy was of sufficient intelligence, capacity, foresight, and judgment to be guilty, under the circumstances, of contributory negligence was for the jury. To a similar effect is a later appeal in (1901) 62 Kan. 492, 63 Pac. 740, 9 Am. Neg. Rep. 263.

A child four and a half years old which accompanies its mother to an oil mill cannot be charged with contributory negligence, at least as matter of law, in wandering about the dangerous machinery of the mill, with the result that she comes in contact with it and is injured. *Poteet v.*

injury by appliances with which the child is familiar, and the danger of which he knows and appreciates, a different rule would apply, and contributory negligence as matter of law may preclude recovery.²⁶³ And the circumstances may be such that incapacity on the part of a child, though only eight years old, to know and appreciate the danger of coming in contact with dangerous mill machinery will not be presumed.²⁶⁴

Blossom Oil & Cotton Co. (1909) 53 Tex. Civ. App. 187, 115 S. W. 289.

Where a seven-year-old boy was injured by coming in contact with pumping machinery on a vacant lot adjacent to a highway, and it was only a matter of inference whether the injury was due to his climbing on the machinery or standing too near it, it was held in *Henderson v. Continental Ref. Co. (1908) 219 Pa. 384, 123 Am. St. Rep. 668, 68 Atl. 968*, that the question whether he exercised under the circumstances the degree of care commensurate with his age was for the jury.

It was held that the question of contributory negligence was for the jury, where an eight-year-old boy, who a short time before the accident had been ordered away from a building in process of erection adjacent to a street, while passing along the street stopped at the call of a companion who was in the building, and placed his hand on a rope, which was used for hoisting purposes and which hung loosely within his reach as he stood on the sidewalk, with the result that he was injured on the starting of the rope by having his hand drawn into a wheel. *Moynihan v. Whidden (1887) 143 Mass. 287, 9 N. E. 645*. See, in this connection, *Ashbach v. Iowa Teleph. Co. and O'Leary v. Michigan State Teleph. Co.* cited in note 268, *infra*.

So, it was held in *Geibel v. Elwell (1897) 19 App. Div. 285, 46 N. Y. Supp. 76*, that a boy eleven years old, unaccustomed to docks or to the handling of vessels thereat, who, without warning of the danger, being called upon by those in charge of a boat which was about to leave the dock to cast off the stern line, attempted to do so, with his back to the bow, and was injured by being struck by an anchor, which, as the bow swung around, projected over the dock, was not guilty of contributory negligence as matter of law, so as to prevent recovery for the injury on that ground, although the accident happened in daylight, and he could have seen the danger had he looked behind him.

Where a seven-year-old child on a crowded emigrant ship put his foot on an exposed rudder chain which ran along the deck and was injured by his foot being drawn into a block through which the chain ran, it was held that his conduct was not necessarily negligent, even if he was *sui juris*, and put his foot on the chain in play. *Garoni v. L.R.A.1917F.*

The question has also been considered, whether or not a particular instruction was erroneous as assuming that the machinery in question was dangerous, or as misleading in respect to the standard by which the conduct of the child should be measured.²⁶⁵

d. Defects and obstructions in street or highway.

As to the degree of care required of a child in actions for injuries on defective

Compagnie Nationale de Navigation (1891) 14 N. Y. Supp. 797.

²⁶³ It was held contributory negligence as matter of law, which would prevent recovery for the injury, for a boy fifteen years old, while employed in cleaning a room, to permit his hand to come so near a revolving fan as to be drawn into it, where his testimony showed that he was aware of the dangerous nature of the fan, and of its effect to create a suction when in motion. *Warble v. Sulzberger Co. (1914) 185 Ala. 603, 64 So. 361.*

²⁶⁴ In an action by an eight-year-old boy who on the request of his older brother went to the defendant's mill, in which the older boy was employed, for the purpose of learning the work he was doing, for injury by coming in contact with the machinery in the mill after he had been there for more than a day, it was said in *Buch v. Amory Mfg. Co. (1897) 69 N. H. 257, 76 Am. St. Rep. 163, 44 Atl. 809*, that it did not appear that any evidence was offered tending to show that the plaintiff was incapable of knowing the danger of putting his hand in contact with the gearing, or of exercising a measure of care sufficient to avoid the danger, and such incapacity could not be presumed. The case was disposed of, however, on the ground that the child was a trespasser, and actionable negligence on the part of the defendant was not shown.

²⁶⁵ In an action for injury to an eight-year-old girl who was permitted by the defendant to ride on a pole or sweep drawn by a horse and used to propel machinery for pumping water, it was held in *Rosenberg v. Durfee (1891) 87 Cal. 545, 26 Pac. 793*, that an instruction, that "a child of such tender years and immature judgment as to be incapable of knowing, comprehending, and measuring the danger to which it is exposed, and of exercising the necessary precaution in guarding against it, cannot be charged with negligence in exposing itself to the threatened danger. In determining this proposition in connection with this case, you must consider the age, sex, and all the conditions surrounding the plaintiff at the date of the injury as disclosed to you by the evidence,"—was not erroneous as assuming that the machinery by which the child was injured was dangerous, or as misleading on the question of contributory negligence.

sidewalks, streets, and bridges, see notes 29, 30, and 31, *supra*; and as to the degree of care required of a child to avoid obstructions and other objects in a street or highway, see note 32, *supra*.

The questions of contributory negligence of children in actions against municipalities for injuries due to defects and obstructions in a street, and of the duty of municipalities toward children as to obstructions or defects in street, are

²⁶⁶ As to duty of municipality toward children as to obstructions or defects in street, see notes in 6 L.R.A.(N.S.) 905; 20 L.R.A.(N.S.) 753; 34 L.R.A.(N.S.) 118; and L.R.A.1916B, 947. And as to contributory negligence of children as affecting liability of municipal corporations for defects and obstructions in street, see notes in 21 L.R.A.(N.S.) 624, and 48 L.R.A.(N.S.) 631.

²⁶⁷ It was held that the question of contributory negligence was for the jury, and a judgment for the plaintiff affirmed, where an eight-year-old girl was injured by the catching of her foot under a rail while she was attempting to cross a street obstructed by rails and ties from a street car track which was being repaired. *Cincinnati, N. & C. R. Co. v. Cooke* (1909) — Ky. —, 121 S. W. 467.

And whether a ten-year-old girl, while waiting for a team to pass, was negligent in standing near heavy stones, so insecurely piled in the street as to be liable to be shaken down by passing vehicles, was held a question for the jury, in *Mahar v. Steuer* (1898) 170 Mass. 454, 49 N. E. 741.

So, in *Hyland v. Burns* (1896) 10 App. Div. 386, 41 N. Y. Supp. 873, it was held that the question of contributory negligence was for the jury where a child seven years old was injured by the fall of stones negligently piled in a street, the question whether the child was *sui juris*, so as to be chargeable with negligence, being at least for the jury.

The fact that a nine-year-old girl who was injured by stepping into a hole about 6 inches square in a board walk along a private way, while walking with her father in the dusk of the evening to see a fire, had for nearly every day during the preceding month and a half observed the hole was held in *Callahan v. Dickson* (1912) 210 Mass. 510, 96 N. E. 1029, not conclusive on the question whether she was in the exercise of due care, but was only a circumstance to be considered by the jury in determining that question.

In *Lay v. Midland R. Co.* (1875) 34 L. T. N. S. (Eng.) 30, it was held that contributory negligence was not shown as matter of law where a five-year-old child in passing over a footbridge placed his back against a wooden boarding which extended over a part of the bridge, and slid along until he came to the ornamental iron work, through the interstices of which he fell, and was injured.

And it was held in *Brinlson v. Chicago & L.R.A.1917F.*

considered in other notes.²⁶⁸ Cases within the scope of these notes are, in general, excluded at this point in the present note. In cases of injuries to children by reason of defects or obstructions in a street other than those within the scope of the notes above referred to, the question of contributory negligence has generally been a question of fact for the jury.²⁶⁷ It has been so held in actions for injuries by cables which were being

N. W. R. Co. (1911) 144 Wis. 614, 32 L.R.A.(N.S.) 369, 129 N. W. 664, that the failure of a boy five and a half years old, while walking along a plank walk which the public was accustomed to use, to observe and avoid a hole about a foot wide and from 6 to 7 feet long made by the removal of part of one of the planks above a steam pit, the opening being obscured from general observation by the steam emerging through the cracks, was not negligence as matter of law.

It was held also in *Crawford v. Wilson & B. Mfg. Co.* (1894) 8 Misc. 48, 28 N. Y. Supp. 514, affirmed without opinion in (1895) 144 N. Y. 708, 39 N. E. 857, that an eight-year-old child in playing on a sidewalk was not negligent as matter of law, so as to preclude recovery for his death by falling into an unprotected excavation in the walk while he was coasting in a toy wagon.

So, it was held that the question of contributory negligence was for the jury, and a judgment for the plaintiff affirmed, in an action for injury to a fourteen-year-old girl, who while playing with other children at "jumping the rope" fell into an open area in the sidewalk. *McGuire v. Spence* (1883) 91 N. Y. 303, 43 Am. Rep. 668. The court said that one passing along a sidewalk has a right to presume that it is safe, and is not required to anticipate danger; and held, therefore, that the facts that the danger was obvious to one who looked, and that the accident happened in the daytime, did not charge the girl with contributory negligence as matter of law, but that the judgment in her favor could be sustained even if the burden rested upon her to show freedom from contributory negligence.

It was held also that the question of contributory negligence was for the jury where a boy eleven years old was injured by the fall of a grating standing on edge beside an area hole on the street, while he was attempting to recover his hat, which had been blown into the hole. *Finnigan v. Biehl* (1899) 61 N. Y. Supp. 1116, reversed on other grounds in (1900) 80 Misc. 736, 63 N. Y. Supp. 147.

It was held that the question of contributory negligence was for the jury, and a verdict for the plaintiff sustained, in an action for injury to a seven-year-old boy, who, while walking along the sidewalk at a place where an iron girder was being moved on rollers drawn by horses, was injured by his foot being caught by the roller, which, on the starting of the horses without warning, was drawn across the walk. *Burns v.*

strung in a street,²⁶⁶ but under such circumstances evidence that the child has been warned of the danger and ordered to keep away may require submission to the jury of the question of the child's negligence.²⁶⁹

It should be observed that even in the case of an infant nineteen years old who, while passing along a highway, was injured in stepping off an unprotected em-

bankment, on the question of due care the element of age was given consideration.²⁷⁰

On the other hand, in an apparently extreme case, even a five-year-old child was considered negligent in failing to avoid an obvious obstruction while playing in a street.²⁷¹

The doctrine of attractive nuisance as applied to lumber, building material, etc.,

F. Knight & Son (1913) 213 Mass. 510, 100 N. E. 618.

In *Burns v. F. Knight & Son* (Mass.) supra, it was held that an instruction was not prejudicial to the defendant that if the child knew, or if an ordinary child of his age ought to have known, that the girder was being drawn over rollers by horses, he was not in the exercise of due care in placing himself in front of one of the rollers "if he appreciated the danger."

It was held also that the question of contributory negligence was for the jury, and a judgment for the plaintiff affirmed, in an action for the death of an eight-year-old boy, who, while coasting in a toy wagon along a sidewalk, ran into an unprotected hole in the walk, about 6 feet square and 7 feet deep, the accident occurring about six o'clock on a March evening. *Crawford v. Wilson & B. Mfg. Co.* (1894) 8 Misc. 48, 28 N. Y. Supp. 514, affirmed without opinion in (1895) 144 N. Y. 708, 39 N. E. 857.

And in *Cincinnati & H. Spring Co. v. Brown* (1903) 32 Ind. App. 58, 89 N. E. 197, it was held that the question of contributory negligence was for the jury, and a judgment for the plaintiff affirmed in an action for injury to a twelve-year-old girl, who while playing in a street in the twilight ran against a dilapidated wire fence, which, unknown to her, was among trees and bushes on the dividing line between the defendant's premises and the street.

And see *Ricketts v. Markdale*, cited in note 353, infra, in which it is apparently assumed that a seven-year-old boy was not negligent in playing on timbers piled in a street; also *Jewson v. Gatti*, cited in note 353, infra, apparently assuming that a child was not negligent in leaning against an insecure railing separating an open cellarway from a street.

²⁶⁶ Where a telephone company was stringing a cable in the street by means of a team attached to a rope which ran through a pulley, it was held that a seven-year-old child could not be held guilty of contributory negligence as matter of law in taking hold of the rope so near the pulley that by the sudden jerking of the rope its hand was drawn into the pulley and injured. *Ashbach v. Iowa Teleph. Co.* (1914) 165 Iowa, 473, 146 N. W. 441. See in this connection, *Moynihan v. Whidden*, cited in note 262, supra.

To the same effect is *O'Leary v. Michigan State Teleph. Co.* (1906) 146 Mich. 243, 109 N. W. 434, in which it was held that the question of contributory negligence was for L.R.A.1917F.

the jury, and a judgment for the plaintiff affirmed, where a seven-year-old boy, although he had been warned to keep away, while playing in a street along which a telephone cable was being strung by means of a rope which ran through a pulley attached to a post near the sidewalk, put his hand on the rope about 18 inches from the pulley, and, on the starting of the team attached to the rope, was injured by having his hand drawn into the pulley.

²⁶⁹ In overruling a contention, in an action for injury to a boy seven years old, who while on the sidewalk was struck by a cable which a street railway company was stringing in a street, that, on account of the immaturity of the boy there was no proof calling for an instruction on the subject of contributory negligence, the court in *Burckell v. Memphis Street R. Co.* (1911) 2 Tenn. C. C. A. 576, said: "An infant of some intelligence and discretion is chargeable with contributory negligence; that is, he is bound to exercise such care as a reasonably prudent child of his age and intelligence would exercise under the circumstances. . . . We find in this case some testimony to the effect that the boy was warned of the dangers and requested to keep away. If so, it was his duty, although an infant, to heed the suggestions of danger."

²⁷⁰ In *Snow v. Provincetown* (1876) 120 Mass. 580, it was held that the question of contributory negligence was for the jury, where a girl nearly nineteen years old, in passing along a highway with which she was familiar, was injured by stepping off an embankment not protected by a railing, in order to avoid a cart which obstructed the highway and was backed as she passed; and an obstruction was approved which permitted the jury in determining the question of contributory negligence to consider the plaintiff's age. See text at note 217, supra.

²⁷¹ Where a workman in repairing the street removed the lid of a hydrant and left protruding about 2 feet above the surface of the ground a T-shaped water key, and, on a call that the workman was coming, a five-year-old boy who was playing near by started to run and ran against it, injuring his eye, it was held in *Plantza v. Glasgow* (1910) 47 Scot. L. R. 688, that, assuming that the defendant was negligent, there could be no recovery because of the boy's contributory negligence, in view of the facts that he was aware of the key and that the danger was obvious.

in a street,²⁷² and the question of the right of a child to recover for injuries by obstructions or defects in a street, as affected by the fact that it is using the street for play,²⁷³ are discussed in other notes. As to whether a child playing in a street may be of such a tender age that the doctrine of personal contributory negligence is inapplicable, see other subdivisions of the present annotation.²⁷⁴ Generally, as to objects falling in street, see VII. J, *infra*; and as to excavations in street, see VII. i, *infra*.

c. Vehicles.

As to the degree of care required of a child to avoid teams and wagons or automobiles in a street, see notes 27 and 28, *supra*.

²⁷² See note in 19 L.R.A. (N.S.) 1129.

²⁷³ See note in 20 L.R.A. (N.S.) 753.

²⁷⁴ See III. *supra*.

As to the doctrine that a child of tender years is presumably incapable of negligence, as applied to a case where a child six years old was injured by falling from lumber piled in a street, see *Harper v. Kopp*, cited in note 148, *supra*.

²⁷⁵ See notes in 19 L.R.A. (N.S.) 161, and 39 L.R.A. (N.S.) 482.

²⁷⁶ See note to *Albert v. Munch*, L.R.A. —, —, on the question of the reciprocal duty of driver of automobile and children in street.

²⁷⁷ It was held that the question of contributory negligence was for the jury, and a verdict for the plaintiff sustained, where an eight-year-old girl on her way to school sat down on the curb, with one foot in the gutter, and, while leaning forward to sharpen a pencil, was struck and injured by a wagon, although she testified that she knew there was considerable traffic in the street, and did not look for vehicles. *O'Shaughnessy v. Suffolk Brewing Co.* (1888) 145 *Mass.* 569, 14 N. E. 779.

But in *Kuebler v. New York* (1891) 39 N. Y. S. R. 520, 15 N. Y. Supp. 187, it was held that the complaint was properly dismissed on the ground of insufficient evidence of negligence on the part of the defendant and also of freedom from contributory negligence, in an action for injury to a bright boy nine years old who was run over by a cart driven slowly along the street while he was sitting on the edge of the sidewalk in the dusk of the evening, with his legs extended across the gutter, trying to revive a fire in the gutter.

The law will not presume that a bright, active girl three and a half years old has sufficient capacity and experience to be guilty of contributory negligence in failing L.R.A.1917F.

The question of the duty of a child when crossing or traveling a public street to avoid passing teams,²⁷⁸ and the question of contributory negligence of children in actions for injuries by automobiles have been treated in other annotation.²⁷⁹

Cases within the scope of these notes are excluded in the present note. There are, however, a few cases in which the question of contributory negligence of children has arisen as regards injuries by vehicles in streets not within the scope of the earlier annotation, and which are cited at this point. Thus, in cases cited in the footnotes the question has been whether, when struck and injured by vehicles in the street, children were negligent in sitting on the curb,²⁷⁷ or playing in the street,²⁷⁸ or on the side-

to detect and avoid the danger from a wagon, which, while she is seated on the sidewalk with her legs projecting over the curb, approaches so near as to pass over her leg. *Barretto v. Moquin, O. W. Coal Co.* (1911) 142 App. Div. 504, 126 N. Y. Supp. 1009.

²⁷⁸ It was held that contributory negligence was not shown as matter of law where there was evidence that an eight-year-old girl, playing in the street near the curb in the dusk of the evening, was not entirely lacking in precaution to avoid vehicles, but was run over by a wagon moving on the wrong side of the street at such a rapid rate that, although she started to run as soon as she saw it, she was unable to get out of the way. *O'Brien v. Hudner* (1903) 182 *Mass.* 381, 65 N. E. 788, 13 *Am. Neg. Rep.* 325.

It was held that contributory negligence as matter of law was shown where an eight-year-old boy, who was engaged in the sport of riding on the runners of sleighs in a frequented street, without looking behind left the sleigh on which he was riding, while it was in motion, within 30 feet of the defendant's horse and sleigh, which were following, and which ran over him. *Messenger v. Dennie* (1884) 137 *Mass.* 197, 50 *Am. Rep.* 295. To a similar effect is the decision on a later appeal in (1886) 141 *Mass.* 335, 5 N. E. 283.

In *Star Brewery Co. v. Hauck* (1906) 222 Ill. 348, 113 *Am. St. Rep.* 420, 78 N. E. 827, an action for the death of a ten-year-old boy while playing "tag" in a street, caused by his being run over by a wagon belonging to the defendant, it was held that the question of contributory negligence was for the jury, and a judgment for the plaintiff affirmed, where there was evidence that the team was driven at a fast trot, that the boy was standing on the street a few feet from the sidewalk, with his face turned in the opposite direction to that from which the wagon was approaching, and that he

walk,²⁷⁹ or skating on roller skates in the street,²⁸⁰ or coasting in a street,²⁸¹ or riding on the rear of wagons,²⁸² or otherwise so conducting themselves about vehicles in a street that injury resulted.²⁸³

See preceding subdivisions of the present note for discussion generally as to the degree of care required of a child to avoid vehicles in a street and as to the age at which contributory negligence may be inferred.

was in plain view of the driver for a distance of 85 feet.

²⁷⁹ In *Ehrlich v. New York* (1912) 78 Misc. 373, 138 N. Y. Supp. 294, it was held that a twelve-year-old boy playing on the sidewalk, who saw a cart slowly approaching along the street half a block away, might assume that the driver would so direct its course as to avoid injuring him, and was not chargeable with contributory negligence as matter of law, in an action for an injury by being struck by the hub of one of the wheels of the cart, although he paid no further attention to it and continued his play.

²⁸⁰ It was held that the question of contributory negligence was for the jury where an eight-year-old boy, while skating on roller skates near the center of a street, was struck and killed by a team which approached rapidly from the rear. *Schaffer v. Baker Transfer Co.* (1898) 29 App. Div. 459, 51 N. Y. Supp. 1092.

²⁸¹ In an action for the death of a twelve-year-old boy while coasting on a frequented street leading from the business portion of a city to a suburb, due to collision with a sleigh approaching on the wrong side of the street, it was held that the question of contributory negligence was for the jury, and a judgment for the plaintiff affirmed where it appeared that the street was used by boys for coasting, that teams had not previously been encountered on the wrong side of the street, and that there was ample room to pass if the law of the road was obeyed, although the grade was steep, and the view was obstructed because of a curve in the street. *Terrill v. Virginia Brewing Co.* (1915) 130 Minn. 46, L.R.A.1915E, 1028, 153 N. W. 136.

Generally as to injury to one while coasting in street, see note to *Lynch v. Public Service R. Co.* 42 L.R.A.(N.S.) 865.

²⁸² As to the standard by which the conduct of an infant should be measured, in an action for injury by being struck by the pole of a wagon following that on the rear of which the child was riding, see *Illinois Iron & Metal Co. v. Weber*, cited in note 56, supra.

It has been held, in actions for injuries to children on the rear of wagons driven along a street, by contact with the pole of a wagon following, on the stopping or backing of the advance wagon, that the question of contributory negligence was for L.R.A.1917F.

f. Drawbridge.

As to the degree of care required in actions for injuries on drawbridges, see note 39, supra.

The danger of standing too near the open end of the draw as the bridge is being closed,²⁸⁴ or in attempting to step upon the bridge after it has begun to turn,²⁸⁵ is so obvious, especially to persons accustomed to this kind of bridges, that in the several cases in which the

the jury, and that the court could not say as matter of law that the position of the child constituted such negligence on its part as would prevent a recovery. *Gibbons v. Vanderhoogt* (1898) 75 Ill. App. 106 (boy fourteen years old seated on rear of wagon with legs hanging over the end); *Weick v. Lander* (1874) 75 Ill. 93 (boy twelve years old seated on projecting bottom of wagon, beyond, and with his back to, the tail-board).

²⁸³ It is contributory negligence as matter of law for a bright boy nearly ten years old to put his hand between the front and rear wheels of a moving wagon, in an effort to obtain a toy which has been thrown from the wagon and has fallen under it, with the result that his arm is run over and crushed. *Hight v. American Bakery Co.* (1912) 168 Mo. App. 431, 161 S. W. 776.

In *Lynch v. Nurdin* (1841) 1 Q. B. 29, 113 Eng. Reprint, 1041, 4 Perry & D. 672, 10 L. J. Q. B. N. S. 73, 5 Jur. 797, it was held that a six-year-old boy was not precluded as matter of law from recovery for an injury sustained by falling from the defendant's cart, on the ground that his negligent or wrongful act contributed to the injury, where it appeared that the cart was left standing unattended in a street for half an hour, and that during this time the plaintiff and other children played about it and climbed into the cart, and that the accident was due to the fact that while the plaintiff was getting down from the cart another boy started the horse.

²⁸⁴ It was held in *Ward v. New York* (1897) 19 App. Div. 48, 45 N. Y. Supp. 801, that a thirteen-year-old boy, who was familiar with the method of operating a drawbridge and knew that its closing would result in a considerable shock, was negligent as matter of law in standing on the draw, within 2½ feet of the open end, as it was being closed, with the result that he was thrown down by the concussion, and his leg caught and injured between the draw and the abutment.

²⁸⁵ It was held that contributory negligence was shown as matter of law which would prevent recovery for her death, where a girl ten years old attempted to jump or step onto a swing bridge after it had begun to turn, and was crushed between the bridge and the wall. *Cusimano v. New Orleans* (1909) 123 La. 565, 49 So. 195.

question of contributory negligence in that respect has arisen infants have been held negligent as matter of law.

But where a boy nine years old remained on a turn bridge at the request of the bridge tender, to assist in turning it, and on the collision of the bridge with a steamboat, attempted to jump upon the boat, as others with him did, and as told by a policeman to do, and was drowned, it was held that contributory negligence was not shown as matter of law.²⁸⁶

Attention is called in the footnote to several cases of this class, among possibly others, in which the decisions turn on the question of negligence on the part of the defendant, rather than of contrib-

utory negligence on the part of the child.²⁸⁷

g. Electricity.

As to the degree of care required of a child in actions for injuries by electricity, see note 41, *supra*.

Reference is made in the footnote to cases cited elsewhere in the present note which discuss general questions pertaining to contributory negligence of children, in actions for injuries by contact with electric wires.²⁸⁸

Usually the question of contributory negligence in actions for injuries to infants by coming in contact with wires charged with electricity has been held to be for the jury.²⁸⁹ The reasons for the

²⁸⁶ *Johnson v. Chicago* (1913) 178 Ill. App. 210.

²⁸⁷ The decisions in *Gavin v. Chicago* (1880) 97 Ill. 66, 37 Am. Rep. 99, and *Johnson v. Chicago* (1887) 24 Ill. App. 26, that there could be no recovery for injuries to children by being caught between a swing bridge, as it was being closed, and the abutment, rest on the ground that actionable negligence on the part of the defendant was not shown. In the former case the child was four years old, and was injured when attempting to jump off the bridge, as older boys with him had done; and the court said that of course the child was too young to exercise any care for his personal safety. In the latter case the child, who was seven years old, was injured in attempting to get upon the bridge, and the court did not discuss the question of contributory negligence.

²⁸⁸ As to the question of presumption to understand and appreciate the danger, as applied in the case of a thirteen-year-old boy who voluntarily touched a telephone guy wire, which he knew was probably charged with electricity, with the result that he was injured by an electric shock, see *Dowlen v. Texas Power & Light Co.* cited in note 185, *supra*.

And as recognizing the doctrine that a child ten or twelve years old is presumptively incapable of contributory negligence, as applied to an action for injury in voluntarily touching an electric wire attached to a street lamp which had fallen, see *Potera v. Brookhaven*, cited in note 179, *supra*.

As applying the same standard of care to a sixteen-year-old boy who was injured by attempting to pick up a live electric wire, which had fallen in the street, as in the case of an ordinarily prudent adult, see *Frauenthal v. Laclede Gaslight Co.* cited in note 204, *supra*.

As to the care required of a sixteen-year-old boy to avoid injury by contact with an electric wire, see *Rice v. Wheeling Electrical Co.* cited in note 213, *supra*.

And as to instructions directing the jury to consider, on the issue of contributory negligence in actions for injuries by elec-

tricity, certain facts, such as the infant's knowledge of electricity and of the particular wire, see note 78, *supra*.

²⁸⁹ In *Texarkana Gas & E. L. Co. v. Orr* (1894) 59 Ark. 215, 43 Am. St. Rep. 30, 27 S. W. 66, an action for the death of a boy by contact with electric wire in the street, it was held that the question of contributory negligence was for the jury, where it appeared that at the time of the accident he was engaged in dragging a dead electric wire across the street, and, apparently in obedience to the command of a policeman to put the wire down, swung it, when it came in contact with a live wire, and he was killed, although there was evidence that he was probably aware that some of the wires in the street were charged with electricity, and that he had been warned of the danger. The court stated that the age of the deceased was not shown, but that he appeared to have been of that indiscreet age which is between irresponsibility and the full responsibility of manhood, and at an age when it might fairly be left to the jury to say how far he should be held responsible.

And in *Macon v. Paducah Street R. Co.* (1901) 110 Ky. 680, 62 S. W. 496, an action against a street railway company for injury to a twelve-year-old boy by coming in contact with a live electric wire which was permitted to hang in a street, the court in regard to the question of contributory negligence said: "It was also the province of the jury to determine whether or not plaintiff had in fact been warned of the danger of taking hold of the wire, and if so, whether, considering his age and capacity and all the other circumstances as shown by the evidence at the time that he did take hold of it, he was guilty of such contributory negligence as barred his right to recover in this action."

It was held that the question of contributory negligence was for the jury where a boy sixteen years old, with knowledge that others had received slight shocks from touching various articles in a blacksmith shop, on request assisted in removing an electric wire therein which was sparking

rule that contributory negligence of infants is generally for the jury would appear to apply with special force in this class of cases, where the danger is not generally obvious, and its probable extent, even if it is in some measure

apparent, is not likely to be appreciated by inexperienced children. It will be observed that in many of the cases cited in the last footnote in which the question of contributory negligence was held to be for the jury, the contact with the

and causing the beam to which it was attached to smoke, when, because of the excessive voltage, the current broke through the insulation on the wire, causing the injury. *Rice v. Wheeling Electrical Co.* (1907) 62 W. Va. 685, 59 S. E. 626.

The question of contributory negligence was held to be for the jury where a girl eight years old was injured by coming in contact with a live electric wire which had broken and fallen in the yard of her home: *Hebert v. Hudson River Electric Co.* (1909) 136 App. Div. 107, 129 N. Y. Supp. 672. The circumstances of the accident do not appear, but the court considered that there was a presumption that a child of this age is non sui juris. See note 167, supra.

And it was held that contributory negligence was not shown as matter of law, where a boy ten or twelve years old was injured by contact with an electric wire attached to a lamp which had fallen in a street. *Potera v. Brookhaven* (1909) 95 Miss. 774, 49 So. 617. The evidence was conflicting as to the manner of the accident, the boy testifying that he was walking along the street and did not see the wire or know it was there until he came in contact with it; while the evidence for the defendant was that he voluntarily touched the wire. In a concurring opinion one of the judges took the position that the question of contributory negligence did not arise in the case, and that a boy of this age should not be charged with the knowledge and discretion necessary to avoid such a dangerous agency. See this case in notes 179, supra.

It was held that contributory negligence was not shown, at least as matter of law, where a fourteen-year-old boy while passing along a street took hold of a pulley wire, which was attached to a reel on a pole about 4½ feet above the sidewalk and used in raising and lowering an electric street lamp, and was killed by an electric shock, it not appearing that he knew of the danger, or that there was anything to warn him that the wire was charged with electricity. *Lexington R. Co. v. Fain* (1903) 24 Ky. L. Rep. 1443, 71 S. W. 628.

So it was held that the question of contributory negligence was for the jury, where a seventeen-year-old boy, while playing in the street, slipped on the edge of a drain between the sidewalk and the street, and in order to save himself from falling, caught hold of a loop 5 or 6 feet above the ground, in a chain which hung from an electric light pole and was used in raising and lowering the light, and was killed by an electric shock. *Irvine v. Greenwood* (1911) 89 S. C. 511, 36 L.R.A.(N.S.) 363, 72 S. E. 229. L.R.A.1917F.

Whether a nine-year-old boy, who while playing in an alley grasped the end of a wire hanging loose from an overhead electric wire and received an electric shock, was guilty of contributory negligence, was held to be a question for the jury in *Brubaker v. Kansas City Electric Light Co.* (1908) 130 Mo. App. 439, 110 S. W. 12, where there was evidence that shortly before the injury his playmates had received slight shocks from the wire, and that when the plaintiff approached it they told him not to touch it as it might shock him, and he replied that he was not afraid, and thereupon took hold of the wire.

In *Walters v. Denver Consol. Electric Light Co.* (1898) 12 Colo. App. 145, 54 Pac. 960, 5 Am. Neg. Rep. 5, it was held that contributory negligence was not shown as matter of law by allegations in a complaint that the plaintiff, a twelve-year-old boy, knowing nothing of the danger incident to coming in contact with the wires attached to an insulator directly under a window in his father's house, on looking out of the window and seeing the insulator removed from its support, took hold of it for the purpose of replacing it, and was injured by coming in contact with exposed electric wires attached to the insulator. See also subsequent appeal in (1902) 17 Colo. App. 192, 68 Pac. 117, 11 Am. Neg. Rep. 574, in which a similar conclusion is reached in regard to evidence supporting the above allegations.

And it was held in *Day v. Consolidated Light, Power & Ice Co.* (1909) 136 Mo. App. 274, 117 S. W. 81, that a six-year-old child was not chargeable with contributory negligence, at least as matter of law, in projecting his head over the edge of a roof on which he had been playing, in order to see a ball which had fallen to the alley below, with the result that he was killed by contact with a defectively insulated electric wire 6 inches from the edge of the roof.

Where a boy seven and a half years old, while passing along a street in which an electric light wire had fallen to within about 2 feet of the ground, took hold of the wire for the purpose of passing under it, as his younger brother who was with him had done without harm, and was injured by an electric shock, it was held in *Madison v. Thomas* (1908) 130 Ga. 153, 60 S. E. 461, that the question of contributory negligence was for the jury, and a judgment for the plaintiff in an action for the injury so sustained was affirmed.

And it was held also that the fact that the boy was unusually bright and intelligent for a child of his age, and testified that a few minutes before the accident he heard the whistle blow at the electric light

electric wire was accidental, or its nature was mistaken and no shock anticipated, or the circumstances were such as to lead the child to believe that no serious harm at least would result. And

generally, it seems that in playing with a live wire in a street, which to his knowledge others have handled without serious injury, an infant of ordinary experience and discretion should not be

plant and knew that this meant that the lights were coming on, and that he knew that electric light wires crossed the street and that it was dangerous to come in contact with them when the current was on, did not necessarily show negligence on his part in taking hold of the wire, where he further testified that he did not know it was an electric wire or he would not have taken hold of it, and that he was not thinking at the time about the electric wires. *Ibid.*

Where a fourteen-year-old boy, for the purpose of lighting an electric street lamp, shook a "hanger" wire used for raising and lowering the lamp and extending to within 6½ feet of the street, and received a charge of electricity which caused his death, it was held in *Charette v. L'Anse* (1908) 154 Mich. 304, 117 N. W. 737, that the question of contributory negligence was for the jury, and a judgment for the defendant affirmed. There was evidence that occasionally boys turned on the light by shaking the wire, and also that the deceased had been warned that it was dangerous to handle the wires. An instruction was approved that the decedent "was bound to exercise ordinary care for his own safety, taking into consideration his age and experience, and all of the other circumstances of the case. You have a right to consider in this regard the question of whether the hanger wire was such a contrivance and placed in such a situation that a boy of the age, knowledge, and experience of plaintiff's intestate would be liable to attempt to turn on said light in the manner in which it is claimed the plaintiff's intestate did at the time of his death; the usage or custom, if any, that existed among the public generally as to grasping the hanger wires on the lamps on the public streets, and shaking the same for the purpose of turning on said light; the distance of said hanger wire from the street; its proximity to the sidewalk; the fact that said pole upon which said wires were strung occupied a public street; the knowledge, if any, which the plaintiff's intestate had as to the danger of grasping said hanger wires; any warning which you may find he had received as to keeping away from the poles or wires of the defendant; the question of whether the danger of grasping the hanger wire as he did was an apparent danger or hidden danger; whether the hanger was supposed to be charged with electricity or not; and all of the other circumstances of the case which in your judgment have a bearing upon the question of whether he exercised that due and reasonable care for his own safety which a boy of his age and experience should have exercised under the same or similar circumstances."

It was held also in *Charette v. L'Anse* L.R.A.1917F.

(Mich.) supra, that it was not erroneous to refuse an instruction to the effect that the mere fact that the decedent grasped the hanger wire at the time he received the shock which resulted in his death was not sufficient to justify the jury in finding that he was guilty of contributory negligence, but that they must further find that in so doing he did not act as an ordinarily prudent person, of his knowledge of the danger, and of the same age, judgment, and experience, would have acted under the circumstances; as the instruction was misleading, in that it cast upon the defendant the burden of proof of contributory negligence, and implied that, as a matter of law, it could not be said that the fact of grasping the wire was not contributory negligence.

And in view of evidence that the decedent had been warned that it was dangerous to handle the wires, and that he should keep away from them, it was held not erroneous to refuse an instruction that he had a right to presume that the defendant had done its duty in protecting and safeguarding the wires so that they would be safe to handle, and that it was not negligence on his part not to look out for danger if under all the circumstances there was no reason to apprehend any. *Ibid.*

Negligence on the part of a twelve-year-old boy in failing to avoid an electric wire lying across his path, while walking along the sidewalk of a public street, was held not to be shown as a matter of law in *Rowe v. New York & N. J. Teleph. Co.* (1901) 86 N. J. L. 19, 48 Atl. 523, 9 Am. Neg. Rep. 528, an action for his death by contact with the wire, where there was evidence that the accident occurred in the dusk of the evening, that it was raining, and a man who was walking with the boy testified that he could not see the wire, although as they approached the place of the accident he saw a line of small electric lights in the grass between the walk and the curb.

It was held that the question of contributory negligence was for the jury, and a judgment for the plaintiff affirmed, where a twelve-year-old boy, although warned of the danger, on a dare of other boys who had discovered a live electric wire in the street, touched the wire, after first having attempted to insulate himself by standing on a board, with the result that he was instantly killed. *Owensboro v. York* (1904) 117 Ky. 294, 77 S. W. 1130. It should be observed, however, that there is a strong dissenting opinion in this case, on the ground that the boy was shown to have sufficient knowledge and appreciation of the danger to be chargeable with negligence as matter of law, and that three of the seven judges dissented.

And it was held that contributory negligence was not shown as matter of law

held negligent as matter of law. But the age, knowledge, and experience of the particular infant may be such that his conduct in voluntarily coming in con-

tact with a live electric wire can be declared negligent by the court;²⁹⁰ and this is true especially where the opportunity for contact with the electric

where a boy thirteen years old was killed by bringing a loose guy wire in contact with an electric wire above the street for the purpose of receiving a shock, on being dared to do so by his companions, several of whom to his knowledge had done so without receiving serious injury. *Pierce v. United Gas & E. Co.* (1911) 161 Cal. 176, 118 Pac. 700.

In *South Omaha Waterworks Co. v. Voseck* (1901) 62 Neb. 710, 87 N. W. 536, 10 Am. Neg. Rep. 580, it was held that evidence that a boy seventeen years old knew that a guy wire attached to an electric light post carried an electric current, that he voluntarily touched it; after being cautioned by a younger boy, and was killed, did not conclusively establish contributory negligence, where it also appeared that the current had been running over this wire for several days, during which time boys had been playing with it and receiving shocks, and that a few minutes before the accident the deceased, and others in his presence, handled it without harm.

It was held that the question of contributory negligence was for the jury, and a judgment for the plaintiff affirmed, where a boy eleven years old, who was sent on an errand along a public street, was injured by contact with a broken electric wire suspended from a post in the street, there being evidence that while on his way his cap blew off, and upon hastily replacing it he lowered his head to keep the wind from his face, and, passing rapidly along, came in contact with the wire, that he had no previous knowledge thereof, and no reason to believe it was there, unless it might be so inferred from the fact that on the previous evening he had seen a wire suspended at another pole 150 feet distant. *Boyd v. Portland General Electric Co.* (1902) 41 Or. 336, 68 Pac. 810.

So, in *Commonwealth Electric Co. v. Melville* (1904) 210 Ill. 70, 70 N. E. 1052, it was held that the question of contributory negligence was for the jury, and a judgment for the plaintiff affirmed, in an action for injury to a fourteen-year-old boy, who, attracted by a fire in the vicinity, due to the "grounding" of an electric wire which was fastened to the under part of a sidewalk 5 feet above the ground along a vacant lot, crawled to the ground from the walk, and, accidentally touching the wire, was injured by an electric shock, where it appeared that he did not know that the wire was under the walk and had no reason to anticipate the danger.

Where an eight-year-old boy while crossing a bridge pushed his arm through the lattice-work of the iron railing protecting the side, and touched a defectively insulated electric wire 14 to 20 inches from the railing, it was held in *Gloster v. Toronto Electric Light Co.* (1906) 38 Can. S. C. 27, L.R.A.1917F.

1 B. R. C. 786, 6 Ann. Cas. 529, that contributory negligence was not shown as matter of law.

In *Lynchburg Teleph. Co. v. Booker* (1905) 103 Va. 594, 50 S. E. 148, an action for injury to an eight-year-old boy, who, while on the sidewalk, seeing what he supposed to be a string dangling through the limbs of a tree in an adjacent yard, put out his hand and grasped it, and, the object being in fact a broken electric wire heavily charged, was injured, the court, in affirming a judgment for the plaintiff for the injuries so sustained, approved generally the instructions, one of which was to the effect that an eight-year-old boy is presumed to be incapable of contributory negligence, but that if he was of sufficient intelligence, capacity, and experience to know the probable danger from the wires upon or near the street, and his duty to avoid them, and negligently failed to do so, his contributory negligence would prevent recovery.

A ten-year-old-boy who while playing on a lawn is injured by coming in contact with a live electric wire, which has broken and fallen near the ground, is not guilty of contributory negligence if he exercises such care as is usually exercised by children of his age, maturity, and capacity. *Daltry v. Media Electric Light, Heat & P. Co.* (1904) 208 Pa. 403, 57 Atl. 833, affirming a judgment for the plaintiff in an action for the injury so sustained.

In affirming a judgment for the plaintiff, in an action for the death of a ten-year-old boy by coming in contact with defectively insulated electric wires strung along the outside of a viaduct constituting a part of a street, the court in *Consolidated Electric Light & P. Co. v. Healy* (1902) 65 Kan. 798, 70 Pac. 884, 13 Am. Neg. Rep. 71, although discussing only the question of negligence on the part of the defendant, apparently assumed that the boy was not negligent, at least as matter of law, in climbing over the viaduct railing, several feet high, as boys were in the habit of doing, and coming in contact with the wires, which were placed at distances of a foot or more on timbers projecting from the side of the viaduct.

²⁹⁰ It was held that contributory negligence was shown as matter of law by a sixteen-year-old boy, of unusual intelligence for one of his age, in voluntarily attempting, after wrapping a handkerchief about his hand, to pick up a live electric wire which had fallen in the street, although he had been warned of the danger. *Frauenthal v. Laclede Gaslight Co.* (1896) 67 Mo. App. 1. See note 204, supra.

And in *Johnston v. New Omaha Thomson-Houston Electric Light Co.* (1907) 78 Neb. 24, 17 L.R.A.(N.S.) 435, 110 N. W. 711, 113 N. W. 526, it was held that a bright boy twelve years old, living in a

wire is not presented to one using the premises or the street in an ordinary way.²⁹¹

Of course, there may be no evidence from which negligence on the part of the infant can be inferred,—if, for instance, the wire is not of a kind ordinarily charged with electricity, and there are no circumstances to incite suspicion in this regard.²⁹²

h. Emergencies, in general.

Cases of this kind apply principles not peculiar to actions for injuries to infants, and it is not the purpose of this annotation to exhaust the cases applying such principles; for instance, in cases where an injury is sustained in an effort to protect other persons from death or serious harm.²⁹³

The question of emergencies as affecting the age at which an infant's conduct is to be measured by the same standard

city in which electric light and power wires were in constant use on nearly all of the principal streets, who, having knowledge of the danger but not of its extent, took hold of an electric wire 18 inches or more from the railing along the side of a viaduct for the purpose of obtaining a shock, was guilty of contributory negligence as matter of law. There is a later appeal in (1910) 86 Neb. 165, 125 N. W. 153, 20 Ann. Cas. 1314, affirming, on the ground of lack of evidence of the defendant's negligence, a judgment entered on a directed verdict for the defendant.

²⁹¹ It was held in *Anderson v. Ft. Dodge, D. M. & S. R. Co.* (1911) 150 Iowa, 465, 130 N. W. 390, that a twelve-year-old boy, who knew that a railway was operated by electricity and that there was danger in coming in contact with electric wires, and appreciated the fact that under the circumstances he was a trespasser and if discovered would be ordered away, was negligent in climbing upon a box car, the roof of which was about on a level with the roof of an adjacent storage house of an electric railway company, and in jumping onto the roof of the building, with the result that he came in contact with electric wires, of which he was not aware, 4 feet above the building, and was injured. The case was decided principally on the ground that the boy was a trespasser and that negligence on the part of the defendant was not shown, but the court said that the same conclusion must be reached on the ground of contributory negligence, had negligence been shown on the part of the defendant.

So, where an eighteen-year-old boy climbed a bridge truss 16 feet high, and was injured by coming in contact with an electric wire more than 6 feet above the truss and 22 feet from the floor of the bridge, it was held in *Vannatta v. Lancaster Light & P. Co.* (1916) 164 Wis. 334, L.R.A.1917F.

as that of an adult has been already considered.²⁹⁴

It has been said: ²⁹⁴ "The rule is well established that when one is required to act suddenly and in the face of imminent danger he is not required to exercise the same degree of care as if he had time for deliberation and the full exercise of his judgment and reasoning faculties. And this is especially true where the peril has been caused by the fault of another. He will not be held guilty of contributory negligence merely because he failed to exercise the care a prudent person would have exercised, or because he fails to exercise the best judgment, or takes every precaution which he might have taken which from a careful review of the circumstances it appears he might have taken." Illustrative cases applying this rule in actions for injuries to children will be found in the footnote.²⁹⁵ But this rule, it seems, does not apply where

159 N. W. 940, that there was insufficient evidence of negligence on the part of the defendant, or of freedom from contributory negligence, and that the complaint in an action for the injury so sustained was properly dismissed.

²⁹² It was held in *Haynes v. Raleigh Gas Co.* (1894) 114 N. C. 203, 26 L.R.A. 810, 41 Am. St. Rep. 786, 19 S. E. 344, that there was no evidence of contributory negligence, and that the jury should have been so instructed, where a ten-year-old boy touched a loose guy wire which was hanging on or near the sidewalk from a pole carrying electric wires, and which was in fact charged with a deadly current by connection with the feed wire of a street railway company, there being no circumstances shown from which even an adult could have inferred that the wire was charged with electricity.

²⁹³ Generally as to contributory negligence in voluntarily incurring danger to save life of another, see notes in 49 L.R.A. 715, and 27 L.R.A.(N.S.) 1069.

See, for instance, *Doyle v. Chattanooga* (1913) 128 Tenn. 433, 161 S. W. 997, Ann. Cas. 1915C, 283, 4 N. C. C. A. 167, an action for death by drowning of a boy eleven years old who jumped into a pond in an effort to rescue his younger brother, who had fallen into the pond, where the court said that if contributory negligence could be attributed to a child of tender years in any event, still, the boy having acted in a sudden emergency to save the life of another in imminent danger, negligence could not be predicated on his conduct.

²⁹⁴ See IV. c. *supra*.

²⁹⁵ See 29 Cyc. 521.

Generally as to care required in sudden emergency, see note in 37 L.R.A.(N.S.) 43.

²⁹⁶ Whether a ten-year-old girl who while playing in the street saw a cow rapidly coming toward her in a threatening manner

the emergency is brought about by the fault of the person who is injured,²⁹⁶ and so, if the conduct of the infant creates the emergency, this must be considered, as in the case of adults, in determining whether he exercised due care.²⁹⁷

i. Excavations, shafts, and embankments.

In connection with the discussion of the principles underlying the question of contributory negligence of children, cases have been included which consider the question of the degree of care and the

doctrine of prima facie or conclusive presumption of incapacity on the part of the child, as applied in actions for injuries by excavations, shafts, and embankments. For convenience, a number of cases which have considered these questions in this kind of action are referred to in the footnote.²⁹⁸ As to the doctrine of attractive nuisance as applied to excavations, see note in 19 L.R.A.(N.S.) 1095.

The question of contributory negligence in cases where children were injured or killed by falling down mine

was guilty of contributory negligence in attempting unsuccessfully to escape into a corral, instead of into her home, which was nearer, was held a question for the jury, and a judgment for the plaintiff in an action for the injuries so sustained was affirmed, in *Karr v. Parks* (1870) 40 Cal. 188.

A boy on a bicycle, who is placed in a dangerous position by the negligence or carelessness of the driver of a wagon, will not be held to the same strict measure of care as under ordinary circumstances, in attempting to release himself from the perilous situation. *Foot v. American Product Co.* (1900) 195 Pa. 190, 49 L.R.A. 764, 78 Am. St. Rep. 806, 45 Atl. 934.

²⁹⁶ See note in 37 L.R.A.(N.S.) 54, on the question of emergency caused by negligence of person injured.

²⁹⁷ In an action for the negligent killing of a twelve-year-old girl by a motor truck while she was riding a bicycle across a street, it was held error to instruct the jury that if the automobile came upon her under circumstances calculated to produce fright, and such fright caused an error of judgment as a result of which the automobile struck her, she was not guilty of contributory negligence, and that if she was suddenly frightened she was not expected to exercise the same degree of care as she would in a moment of calmness,—since the doctrine of sudden peril applies only where the peril has not been due to the party's own contributory negligence; and the instruction should have been qualified to the effect that if, in the exercise of due care, the child found herself in a position of danger caused by the negligence of the defendant, and became suddenly frightened, she would not be chargeable with the exercise of what in a moment of calmness would be ordinary care. *Neumann v. Hudson County Consumers Brewing Co.* (1913) 155 App. Div. 271, 139 N. Y. Supp. 1028.

See also *BOTHWELL v. BOSTON ELEV. R. Co.* (Mass.) post, 167, holding that the fact that a nine-year-old boy was fleeing in fear from a Chinaman whom he had been tormenting when he ran in front of a street car which killed him did not eliminate the necessity of care on his part to sustain a recovery against the street car company for L.R.A.1917F.

his death, under a statute authorizing a recovery for death negligently caused to a person not a passenger "in the exercise of due care."

²⁹⁸ As to whether a child between four and five years old is sui juris so as to be chargeable with contributory negligence in falling into an excavation while playing in the street, see *Ryder v. New York*, cited in note 130, supra.

As to whether a seven-year-old child who was injured by falling down an unguarded shaft was sui juris, see *Conway v. Monidah Trust*, cited in note 237, supra.

As to the doctrine that a child under twelve years of age is presumptively non sui juris, as applied in an action for the death of a nine-year-old child by falling from an embankment upon a railroad track, see *Robertson v. New York*, cited in note 188, supra.

And as to the doctrine of presumption that a six-year-old child is non sui juris, as applied in an action against a municipality for injury to a child by falling into an unprotected excavation, see *Mackey v. Vicksburg*, cited in note 149, supra.

The doctrine that a child of tender years is prima facie incapable of exercising judgment and discretion was applied in *Vicksburg v. McLain* (1889) 67 Miss. 4, 6 So. 774, in a case of injury to an eight-year-old child, who while playing in a street near a school, during a recess, was killed by the fall of an embankment.

In an action for the death of a child four years and five months old who, while playing on a highway, was killed by the fall of an embankment, it was said in *Gibson v. Huntington* (1893) 38 W. Va. 177, 22 L.R.A. 561, 45 Am. St. Rep. 853, 18 S. E. 447, that the child was not old enough to realize the danger, and could not possibly be charged with contributory negligence.

Where a six-year-old child while playing on a sidewalk jumped into an excavation adjacent to the walk and was injured by the fall of a plank guarding the excavation, it was held in *Dwyer v. McLaughlin* (1900) 31 Misc. 510, 64 N. Y. Supp. 380, that it could not be ruled as matter of law that the child was sui juris, so as to be capable of personal contributory negligence, but that this question was at least for the jury.

shafts,²⁹⁹ or into excavations in a street,³⁰⁰ has been held to be for the jury, and this is true although the child has been warned of the danger.³⁰¹

But where a six-year-old boy, although warned by his parents of the danger, went to a sand pit on the defendant's land and was killed by the fall of an overhanging bank under which he was playing, the dangerous character of the place being evident, it was held in a New York case³⁰² that the complaint in an action for the death was properly dismissed, on the ground of failure to show freedom of the child or his parents from contributory negligence, as well as on the ground of insufficient evidence of negligence on the part of the defendants.

Attention is called also in this connection to a Montana case of the class under consideration, presenting the question of the sufficiency of the complaint as negating contributory negligence.³⁰³

²⁹⁹ Whether a nine-year-old boy who met his death by falling down an abandoned mine shaft was negligent in stepping on an insecure or decayed board in the cover of the shaft was held a question for the jury in *Richardson v. El Paso Consol. Gold Min. Co.* (1911) 51 Colo. 440, 118 Pac. 982.

³⁰⁰ Whether a four-year-old child was sui juris and guilty of contributory negligence in playing near an excavation in the street into which she fell, to her injury, although she had been warned of the danger, was held a question for the jury in *Ryder v. New York* (1884) 18 Jones & S. (N. Y.) 220.

³⁰¹ *Ryer v. New York* (N. Y.) supra.

In *Secard v. Rhinelander Lighting Co.* (1911) 147 Wis. 614, 133 N. W. 45, it was held that the question of contributory negligence was for the jury, in an action for the death of a nine-year-old girl by falling into an unguarded excavation in the street, where it appeared that she had been warned to keep away on account of the danger of falling in, but that the accident might have occurred by the caving in of the earth on which she was standing near the excavation.

³⁰² *Newdell v. Young* (1894) 80 Hun, 364, 30 N. Y. Supp. 84.

³⁰³ It was held in *Conway v. Monidah Trust* (1913) 47 Mont. 269, L.R.A.1915E, 500, 132 Pac. 26, that contributory negligence on the part of a seven-year-old child who fell down an unguarded shaft, to his injury, was sufficiently negated by alleging his age, and that he did not know of the shaft, and was engrossed in a childish pursuit in the dark, while using due care and prudence, and without contributory fault and carelessness on his part.

³⁰⁴ In an action for injury to a boy ten or eleven years old by the fall upon him of a partially burned wall, it was held in *Freeman v. Carter* (1904) — Tex. Civ. App., 81 S. W. 81, that it was error to refuse

J. Falling objects, in general.

As to doctrine of attractive nuisance as applied to walls, fences, etc., see note to *Coon v. Kentucky & I. Terminal R. Co.* L.R.A.1915D, 160.

Where the dangerous condition of a wall which falls and produces injury to an infant is obvious, exemption from the doctrine of contributory negligence as matter of law has been held erroneous.³⁰⁴ But, as in the case of an adult, an infant may be exonerated as matter of law from the charge of contributory negligence in passing along a street which he had a right to assume was safe, when injured by falling objects.³⁰⁵ In other cases, the question of contributory negligence of children injured by falling objects has generally been held to be for the jury, where the injury occurred by reason of the fall of a dilapidated fence adjacent to a street,³⁰⁶ or of an iron from a truck standing in a street,³⁰⁷ or

to submit to the jury the issue of contributory negligence, as it could not be held as matter of law that the boy on account of his age was exempt therefrom, where there was evidence that he was one of the brightest boys in his school, and that the dangerous condition of the wall was obvious.

³⁰⁵ Where a fifteen-year-old boy while walking along a street, was injured by the fall from one of the upper stories of a large stone out of the wall of a building damaged by fire several weeks previous, it was held in *Frankie v. St. Louis* (1892) 110 Mo. 516, 19 S. W. 938, that there was no evidence upon which to base an instruction as to contributory negligence, since, without warning of any kind, he had a right to assume that he could use the street in safety.

³⁰⁶ That a child while passing along a street stopped beside a dilapidated fence for the purpose of looking at some object on the opposite side of the street, and the injury by the falling of the fence would not have occurred had she not stopped, does not necessarily show contributory negligence, so as to prevent recovery for the injury. *Hussey v. Ryan* (1886) 64 Md. 426, 54 Am. Rep. 772, 2 Atl. 729.

See *Harrold v. Watney*, cited in note 353, infra, apparently assuming that four-year-old child who climbed upon rotten fence beside highway, and was injured by its fall, was not negligent.

³⁰⁷ In an action for injury to a seven-year-old boy by a heavy iron rolling off a truck and striking him, it was held that the question of contributory negligence was for the jury, where it appeared that he had gone, on the invitation of an older boy, to the truck, which was standing in a street, and stood near by while the older boy moved the tongue of the truck, with the result that the iron rolled off. *Lane v. Atlantic Works* (1871) 107 Mass. 104, later appeal in (1872) 111 Mass. 136.

of other objects, the nature of which is indicated in the footnote.³⁰⁸

The decisions in some of the cases of this class are to the effect that negligence cannot be inferred from the particular facts shown,³⁰⁹ especially if the child is of very tender years.³¹⁰

³⁰⁸ It was held in *Anderson v. Pierce* (1903) 68 Kan. 57, 74 Pac. 638, 15 Am. Neg. Rep. 303, that contributory negligence was not shown as matter of law on the part of a fourteen-year-old boy, in placing his hand in play behind a heavy vault door standing in an insecure position on a public street, in an effort to turn the knob, with the result that it fell upon and injured him, in the absence of evidence that he was aware of the danger.

Where a ten-year-old girl, while "playing piano" by drumming on a large flat stone standing on edge against the fence in the back yard of a tenement in which she lived, was injured by the fall of the stone upon her, and she testified, in an action for the injury so sustained, that no one had ever warned her about the stone, and that she did not pull it over, it was held that the evidence was sufficient to sustain a finding that she was free from contributory negligence. *Schmidt v. Cook* (1895) 12 Misc. 449, 33 N. Y. Supp. 624. The question of contributory negligence was held to be for the jury also on an earlier appeal in (1893) 4 Misc. 85, 23 N. Y. Supp. 799.

And it was held that the question of contributory negligence was for the jury, and a judgment for the plaintiff affirmed, in an action for injury to a child six years old, who, while playing on the sidewalk, jumped or climbed on a counter standing in an insecure position on the walk, and was injured by the fall of the counter. *Straub v. St. Louis* (1903) 175 Mo. 413, 75 S. W. 100, 14 Am. Neg. Rep. 384.

It was held that the question of contributory negligence was for the jury, and a judgment for the plaintiff affirmed, where a seven-year-old boy, in his haste to reach a school building when the bell rang, stumbled against a derrick left in an insecure position in the street near the school building, causing it to fall upon and injure him. *Denver v. Murray* (1902) 18 Colo. App. 142, 70 Pac. 440.

In *Dollard v. Roberts* (1891) 130 N. Y. 269, 14 L.R.A. 238, 29 N. E. 104, it was held that a thirteen-year-old girl is not necessarily chargeable with negligence in failing to keep in mind the danger of the fall of plaster from the ceiling of a hallway in a tenement, under which she must pass in going to her apartments.

And in *Dwyer v. McLaughlin* (1900) 31 Misc. 510, 64 N. Y. Supp. 380, it was held that a six-year-old boy, who, while playing near an excavation which extended to within a foot of the sidewalk and was guarded by a heavy plank placed on the top of barrels, jumped into the excavation and was injured by the fall upon him of the

Attention is called in the footnote to cases which have considered various general questions discussed in other parts of the present note, in actions for injuries to children from falling objects.³¹¹ And attention is called also to the fact that the ground of the decision excludes some

plank, was held not guilty of contributory negligence as matter of law.

It was held that the question of contributory negligence was for the jury, and a judgment for the plaintiff affirmed, in an action for injury to a nine-year-old girl by the falling upon her of a barrel from the rear of a wagon standing in a street, when she attempted to climb upon it to reach a younger sister who had climbed on the wagon. *Zuponic v. Val Blatz Brewing Co.* (1915) 131 Minn. 112, 154 N. W. 790, 11 N. C. C. A. 255.

So, in *Linderman v. Hershberger* (1911) 47 Pa. Super. Ct. 308, it was held that the question of contributory negligence was for the jury, and a judgment for the plaintiff affirmed, in an action for injury to an eight-year-old boy who, while running along a sidewalk, was struck by a beer keg thrown by the defendant's servant, who was engaged in unloading empty kegs onto a vacant lot from a wagon beside the curb.

See *Mahar v. Steuer* and *Finnigan v. Biehl*, in note 267, *supra*.

³⁰⁹ It was held in *Viek v. Morin* (1915) — B. C. —, 22 D. L. R. 29, that contributory negligence could not be inferred from the mere fact that a nine-year-old boy, while playing in the basement of a school building, was injured by the fall of a heavy iron negligently allowed to stand on edge against the wall.

³¹⁰ In affirming a judgment for the defendant on the ground of failure to establish negligence on its part, in an action for injury to a child less than four years old by pulling over a coal chute leaning against an engine house, the court in *Fink v. Des Moines* (1902) 115 Iowa, 641, 89 N. W. 28, said that doubtless, as contended by the appellant, the child because of its tender years could not be charged with contributory negligence, though repeatedly warned about playing near the house.

³¹¹ As applying the doctrine of *prima facie* presumption of incapacity on the part of a child to contribute negligently to an injury to the case of injury to a boy eleven years old, who, while passing along an alley, was injured by the fall of a wall, see *Schilling v. Abernethy*, cited in note 176, *supra*.

As to whether child under seven years of age may be chargeable with negligence in an action for injury by the fall of a gate erected by the defendant on his own land, see *Birge v. Gardiner*, cited in note 147, *supra*.

As applying the doctrine that a child seven years old cannot be declared *sui juris* as matter of law in an action for injury to a child by the fall of stones piled in a

cases of a more or less similar nature to those herein cited.³¹²

k. Fires.

As to the degree of care required of a child in actions for injuries by fire, see note 36, *supra*.

The doctrine that there is a presumption that children of certain ages are incapable of contributory negligence has been applied in case of a five-year-old child who while playing in a street was burned by falling into a drain in which there was smouldering trash.³¹³ And it has been said, in an action for injury to a five-year-old child while playing with a fire in a street, that, under any circumstances, it would be error for a court to decide, as a matter of law, that a child of five years is guilty of contributory

negligence.³¹³ So, in a Pennsylvania case,³¹⁴ where a seven-year-old girl, while playing on a vacant lot on which the defendant was burning papers, was burned, the wind blowing the papers so that they set fire to her clothing, the court, in affirming a judgment for the plaintiff, stated that the tender years of the child removed from the case any question of contributory negligence, and that no such question was raised.

And in other cases the question of contributory negligence of children, in actions for injuries by fire, has been held under the circumstances to be one of fact for the jury.³¹⁵

It seems that, in playing near a fire, childish instincts ordinarily should excuse from the charge of contributory negligence at least as matter of law. But

street, see *Hyland v. Burns*, cited in note 159, *supra*.

As applying the doctrine that the capacity of a child to understand and appreciate the danger of the particular situation, so as to be chargeable with negligence, is for the jury, to an action for the death of a five-year-old child by the fall of a counter which was standing on a sidewalk, see *Kunz v. Troy*, cited in note 236, *supra*.

As to whether an eight-year-old child is *sui juris*, so as to be chargeable with negligence in playing on lumber piled on a canal bank, with the result that she is injured by its fall, see *Lynch v. Knoop*, cited in note 164, *supra*.

And as to the care required of a fourteen-year-old child, in an action for injury caused by the fall of a door insecurely placed on a public street, see *Anderson v. Pierce*, cited in note 211, *supra*.

³¹² The decision in *McGuiness v. Butler* (1893) 159 Mass. 233, 38 Am. St. Rep. 412, 34 N. E. 259, that there could be no recovery for injury to a boy nearly nine years old due to the fall of a marble slab resting on private property adjacent to a street, is evidently placed on the ground that the boy was a trespasser and wrongdoer and because of his wrongful participation in causing the slab to fall could not recover, even though his action might have been such as should be expected of a child of his age. See note 9, *supra*.

³¹³ *Stone v. Florence* (1913) 94 S. C. 375, 78 S. E. 23.

³¹⁴ *Voegeli v. Pickel Marble & Granite Co.* (1892) 40 Mo. App. 643.

³¹⁵ *McDermott v. Consolidated Ice Co.* (1910) 44 Pa. Super. Ct. 445.

³¹⁶ It was held that the question of contributory negligence was for the jury, and a judgment for the plaintiff affirmed, where a boy twelve years old became frightened at the threats of other boys and ran along a narrow path bordering a slack pit, and, while attempting to pass persons on the path, fell into it and was burned, the sur-
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face of the pit being covered with ashes and the boy being ignorant of the concealed danger. *Union P. R. Co. v. McDonald* (1893) 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619.

And it was held that negligence on the part of a six-year-old girl, who was burned by a fire kindled by the defendant on a vacant lot, was not shown as matter of law, where there was evidence that the child's dress caught fire from burning paper carried about by the wind, while she was playing near the fire. *Specht v. Waterbury Co.* (1911) 70 Misc. 404, 127 N. Y. Supp. 137, affirmed in (1911) 144 App. Div. 938, 129 N. Y. Supp. 1147. And the court was of the opinion that the child could not be held negligent as matter of law, even if, as there was evidence tending to show, she was at the time of the injury endeavoring to pick wire out of the fire by means of a stick. See note 147, *supra*, citing this case and others to the point that the question of capacity generally, on the part of a child of this age, to contribute negligently to an injury is for the jury.

Whether a nine-year-old boy who, finding a bottle of denatured alcohol in a highway, attempted to set fire to it, and was burned, was guilty of contributory negligence, where he testified that he did not know what was in the bottle or that it would burn, was held a question for the jury, and a judgment for the plaintiff in an action for the injury so sustained was affirmed, in *Hall v. New York Teleph. Co.* (1913) 159 App. Div. 53, 144 N. Y. Supp. 322. The judgment was reversed on other grounds in (1915) 214 N. Y. 49, L.R.A.1915E, 191, 108 N. E. 182.

See also *Smith v. Martin*, cited in note 353, *infra*, implying that a fourteen-year-old girl was not negligent in complying with the teacher's request to poke the fire.

And as to injury by gas explosion, see *United States Natural Gas Co. v. Hicks*, cited in note 347, *infra*.

on the other hand, evidence that a ten-year-old boy, although warned of the danger and ordered away, stood near a fire with gasoline on his clothers, or played with the fire, and was burned, has been held sufficient to require submission to the jury of the issue of contributory negligence.³¹⁶

1. Ponds, reservoirs, and waters generally.

As to the degree of care required of a child in actions for injuries or death by falling into ponds, reservoirs, etc., see note 33, *supra*.

Other annotation has considered the doctrine of attractive nuisance as applied to ponds, reservoirs, waterways, etc.³¹⁷

³¹⁶ *Standard Oil Co. v. Marlow* (1912) 150 Ky. 647, 150 S. W. 832. The court said, however, that it could not be held as matter of law that the boy was guilty of such contributory negligence as to prevent a recovery for the injury.

³¹⁷ See notes in 19 L.R.A.(N.S.) 1143, and 47 L.R.A.(N.S.) 1101.

³¹⁸ *Soens v. Chicago, W. & V. Coal Co.* (1911) 160 Ill. App. 467.

³¹⁹ The question of contributory negligence, in an action by a mother for the death of her eight-year-old boy who went into a dark, unguarded, underground water conduit for a distance of 600 feet in order to play, and there met his death, was held one of fact for the jury, in *Brown v. Salt Lake City* (1908) 33 Utah, 222, 14 L.R.A.(N.S.) 619, 126 Am. St. Rep. 828, 93 Pac. 570, 14 Ann. Cas. 1004.

³²⁰ It was held that contributory negligence was not shown as matter of law in an action for the death of a bright boy eleven years old who, although often warned of the danger of a reservoir frequented by children, went there to fish and play, and, in crossing from one part of the wall to another, ventured upon a projecting "apron," designed to break the force of the water as it was discharged into the reservoir, and, because of the sinking of the end which extended over the water was drowned. *Price v. Atchison Water Co.* (1897) 58 Kan. 551, 62 Am. St. Rep. 625, 50 Pac. 450, 3 Am. Neg. Rep. 392.

³²¹ A boy eleven years old is not negligent as matter of law in wading in a stream within the limits of a populous city, at a place attractive to children and used by them as a playground, so as to preclude recovery for his death by drowning, due to falling into a hole, of which he was ignorant, produced in the bed of the stream by the emptying into it of a sewer. *Indianapolis v. Williams* (1915) 58 Ind. App. 447, 108 N. E. 387.

³²² In *Kansas City v. Siese* (1905) 71 Kan. 283, 80 Pac. 626, it was held that the question of contributory negligence was for the jury, and a judgment for the plaintiff affirmed, in an action for the death of a

It has been held that a boy eleven years old is not as matter of law incapable of contributory negligence in playing with a raft on a pond.³¹⁸ And in actions for death of infants by drowning, or for injuries sustained by falling into water, the question of contributory negligence has been held to be for the jury, where the child went into a dark, underground water conduit to play,³¹⁹ or to a dangerous reservoir to fish and play;³²⁰ or fell into a hole while wading in a stream;³²¹ or slipped into deep water while bathing in a dangerous pond in a city;³²² or played on a raft on a pond beside a street,³²³ or on a foot log across a canal,³²⁴ or on the sidewalk beside a pool of water;³²⁵ or scuffed in the

twelve-year-old boy by drowning in a pond with which he was not familiar, but to which boys were accustomed to resort to swim and fish, where it appeared that he went to the pond, which was in a thickly settled residence part of a city, in company with other boys, that he could not swim, and was warned not to go out too far as the water was deep, but it did not appear whether he jumped into the deep water, or whether, while playing in the shallow water, he came too near the precipitous and slippery edge of the deeper water.

³²³ It was held that the question of contributory negligence was for the jury, and a judgment for the plaintiff affirmed, where a ten-year-old boy was drowned while using a detached portion of a sidewalk as a raft on a pond which a municipality had negligently permitted to accumulate on, and adjacent to, a street. *Omaha v. Richards* (1896) 49 Neb. 244, 68 N. W. 528.

³²⁴ It was held that contributory negligence as matter of law was shown, which would prevent recovery for the drowning of a boy nine years old in crossing a canal on a foot log, near the intersection of a street, which was used by the public as a means of crossing, where it appeared that the boy had been warned of the danger, and fell into the water while playing on the log, throwing rocks into the water. *Indianapolis Water Co. v. Harold* (1908) 170 Ind. 170, 83 N. E. 993, reversing (1906) — Ind. App. —, 79 N. E. 542.

³²⁵ In an action against a municipality for the death of a seven-year-old child due to falling into a pool of water beside a street, it was held that the complaint was not insufficient as failing to aver facts from which it could be determined that the child did not comprehend the danger and was not therefore guilty of contributory negligence, where it alleged that he was of ordinary intelligence, and in passing along the street on his way to school stopped to throw sticks into the water, but slipped from the edge of the sidewalk into the water and was drowned, all of which occurred without his fault. *Elwood v. Adison* (1900) 26 Ind. App. 28, 59 N. E. 47.

street beside a pool of hot water;³²⁶ or stepped on an insecure cover of a steam-exhaust barrel to warm himself;³²⁷ or fell from a boat to which she had gone on an errand,³²⁸ or from a platform of a toboggan slide at a bathing resort.³²⁹

It was said: "There is nothing averred in the complaint from which we can say as matter of law that the child was sui juris. Even if we cannot go to the extent of saying that a child of seven years is not necessarily incapacitated from acting for his own safety, yet the facts specifically averred do not show him to have been guilty of contributory negligence, and there is the general averment that he was free from fault." See this case in note 236, supra.

³²⁶ It was held that the question of contributory negligence was for the jury, and a judgment for the plaintiff affirmed, in an action for injury to a thirteen-year-old boy who, while scuffling with his brother in a street, fell into a pool of hot water, of the presence of which he was aware, discharged into the street from the defendant's shop. *Curtis v. Grand Trunk R. Co.* (1914) 178 Mich. 383, 144 N. W. 824.

³²⁷ It was held that contributory negligence was not shown as matter of law, in an action for injury to a ten-year-old boy, who, for the purpose of warming himself, stepped on the cover, which was nearly level with the ground, of a steam-exhaust barrel, and, the cover tipping, fell into the barrel and was scalded. *Kinchlow v. Midland Elevator Co.* (1896) 57 Kan. 374, 46 Pac. 703.

³²⁸ The question of contributory negligence was held to be for the jury where a thirteen-year-old girl who had gone on an errand to a boat accepted an invitation to come on board, when she fell from the boat and was drowned, the accident being due to the fact that while passing along the side of the boat she placed her hand upon a pile of wood, which fell, precipitating her into the water. *Cook v. Houston Direct Nav. Co.* (1890) 76 Tex. 353, 18 Am. St. Rep. 52, 13 S. W. 475. See this case in note 173, supra.

³²⁹ Where a boy fifteen years old was killed by falling from the platform of a toboggan slide at a bathing resort, because of the insufficiency of the railing, and it did not clearly appear whether he slipped, or lost his balance from some other cause, it was held that the question whether he was free from contributory negligence was for the jury. *Barrett v. Lake Ontario Beach Improv. Co.* (1903) 174 N. Y. 310, 61 L.R.A. 829, 86 N. E. 968, 14 Am. Neg. Rep. 144, reversing (1902) 68 App. Div. 601, 74 N. Y. Supp. 301.

³³⁰ An average boy thirteen years old is guilty of negligence as matter of law, which will prevent recovery for his death, who, knowing the characteristics of a clay hole partly filled with water and going to it to see if the ice is strong, jumps across

On the other hand, there are a few cases in this class of actions in which the conduct of infants has properly been held negligent as matter of law, in view of their age and knowledge of the particular danger.³³⁰

a strip of water along the edge onto ice rotten and partly covered with water, slides out to a point where he knows the water is over his head, and is drowned because the ice will not bear his weight. *Heimann v. Kinnare* (1901) 190 Ill. 156, 52 L.R.A. 652, 83 Am. St. Rep. 123, 60 N. E. 215, reversing (1900) 92 Ill. App. 232.

And it is contributory negligence as matter of law, which will bar recovery for his death, for a bright boy thirteen years old, who is a good skater and familiar with the cutting of ice on the river, to disregard the plainly visible signs of the boundaries of an ice field from which the ice, to his knowledge, had been cut only three days previous, and to skate out upon the newly formed ice, with the result that he is drowned. *Sickles v. New Jersey Ice Co.* (1897) 153 N. Y. 83, 46 N. E. 1042, 2 Am. Neg. Rep. 410, reversing (1894) 80 Hun. 213, 30 N. Y. Supp. 10.

It is contributory negligence precluding recovery for his death for a boy sixteen years old, who is an experienced swimmer and diver, notwithstanding the fact that notices are posted in each room of the bathing house at a public resort, and in conspicuous places about the swimming pool, that swimmers who go outside the pool do so at their own risk, to dive from a board walk surrounding the pool upon invisible logs in a river, where his attention has been called to other obstructions, although he does not know of the particular obstructions which cause his death. *Bass v. Reisdorf* (1900) 25 Ind. App. 650, 58 N. E. 95.

So, in *Hunt v. Graham* (1900) 15 Pa. Super. Ct. 42, it was held that contributory negligence was shown as matter of law, which would prevent recovery for his death, where a boy fifteen years old, although unable to swim, and with knowledge that sand holes made by a steam dredge were in the vicinity, walked over a river bottom which he could not see, at a place not generally used for bathing purposes, with the result that he fell into one of the holes and was drowned.

In an action for the death of a girl eleven years old who fell from a railroad embankment into a stream and was drowned, it was held that the plaintiff had failed to show that the deceased was free from contributory negligence, where the cause of the girl's fall was not shown, but there was evidence that she unnecessarily crossed to that side of the track on her way to school, and was last seen alive walking along a path about 2 feet wide between the track and the embankment, tossing and catching a ball. *Hooper v. Johnstown, G. & K. H. R. Co.* (1891) 59 Hun. 121, 13 N. Y. Supp. 151, affirmed without opinion in (1891) 128 N. Y. 613, 28 N. E. 252.

Whether an infant may be charged with negligence in attempting to rescue another child from drowning is considered elsewhere.³³¹

m. Turntables.

Other notes have treated the question of liability of a railroad company for injury to a child playing on a turntable.³³²

Whether children were guilty of contributory negligence in playing on turntables, so as to be precluded from recovery for an injury so sustained, has

generally been held a question for the jury. The question depends, however, on the age, capacity, and experience of the child, on the elements of warning and appreciation of the danger, and cases are not lacking in which the circumstances were such that it was held contributory negligence was shown as matter of law. In cases cited in the footnote the question of contributory negligence on the part of children between the ages of seven and fourteen in playing on turntables has been held to be for the jury.³³³

Although a child who was killed while

³³¹ See *Doyle v. Chattanooga*, cited in note 293, *supra*.

³³² See notes to *Ft. Worth & D. C. R. Co. v. Robertson*, 14 L.R.A. 781; *Pannill v. Potomac F. & P. R. Co.* 4 L.R.A. (N.S.) 80; and *Conrad v. Baltimore & O. R. Co.* 16 L.R.A. (N.S.) 1129.

³³³ A child seven years and eight months old cannot be held to be negligent as matter of law in playing on an unfastened turntable. *Edgington v. Burlington, C. R. & N. R. Co.* (1902) 116 Iowa, 410, 57 L.R.A. 561, 90 N. W. 95.

The question of contributory negligence was held to be for the jury, and a judgment for the plaintiff affirmed, in an action for injury to a boy ten years and eleven months old while playing on a turntable, in *Bridger v. Asheville & S. R. Co.* (1886) 25 S. C. 24. See this case in note 63, *supra*, where it is cited to the point as to the elements of the child's character proper for consideration in determining whether it exercised due care. See also this case in note 173, *supra*, on the point as to when contributory negligence of child is for the jury.

But in *Bridger v. Asheville & S. R. Co.* (1887) 27 S. C. 456, 13 Am. St. Rep. 653, 3 S. E. 960, an action for injuries arising out of the same circumstances, it was held that the boy was not of such an age that it could be held as matter of law that he could not contribute to the injury, and that a judgment for the defendant should be affirmed.

And the question of contributory negligence was held for the jury in *Dampf v. Yazoo & M. Valley R. Co.* (1909) 95 Miss. 85, 48 So. 612, where a twelve-year-old boy was injured while playing on a turntable, his foot being caught and crushed as the table revolved.

So it was held that the question of contributory negligence was for the jury, where a bright girl thirteen years old, who had lived for years near a railroad yard, had been at a turntable, had been cautioned to be careful, and had been ordered away by employees of the railroad company, while playing with other children of about her age on a partially completed turntable, sat upon it while it was in motion, with one leg over the edge, with the result that her leg was caught between the table and the wall and crushed. *Lake Erie & W. R. L.R.A.* 1917F.

Co. v. Klinkrath (1907) 227 Ill. 439, 81 N. E. 377.

And whether a ten-year-old boy who was injured while playing on a turntable was guilty of contributory negligence was held to be a question for the jury, in *Houston & T. O. R. Co. v. Simpson* (1883) 60 Tex. 103. It was held also that an instruction was not prejudicial to the defendant that if the jury believed that the boy had intelligence enough to know and appreciate the peril of getting on the table in the manner in which he did, or if they believed that he was warned by defendant's employee not to get on the table and that it was dangerous to do so, and understood and appreciated such warning, but nevertheless got on the table, and was thereby the direct cause of his injury, they should find for the defendant.

And it was held not erroneous to refuse an instruction that if the jury believed that the boy, when he moved the turntable and started to jump upon it, knew that if his limb was caught between the table and the wall of the pit it would be crushed, and that his foot slipped and his limb was caught in this way, then he was guilty of contributory negligence, since the instruction excluded the idea that the absence of knowledge or intelligence to know and understand the peril of the limb being so caught was a material inquiry.

It was held also, that the question of contributory negligence was for the jury, and a judgment for the plaintiff affirmed, in an action for injury to an eight-year-old boy who attempted to jump on a turntable while it was in motion. *Berg v. Minneapolis & St. L. R. Co.* (1905) 95 Minn. 404, 104 N. W. 293, 5 Ann. Cas. 375.

So, it was held that the question of contributory negligence was for the jury, where a dull boy twelve years old, who had never before seen a turntable, but had been warned to keep away from the railroad and railroad cars, was injured on a turntable, and it appeared that he had been sent on an errand which took him near the table, and that he went to it to play with other boys about his own age, but the evidence was conflicting as to the position he was in when the accident occurred. *Kansas C. R. Co. v. Fitzsimmons* (1879) 22 Kan. 686, 31 Am. Rep. 203.

playing on a turntable had sufficient intelligence to know that it was wrong to trespass thereon, yet, if he did not have knowledge that playing upon it is unsafe or dangerous, it cannot be said that he was guilty of contributory negligence.³³⁴

On the other hand, it was held in a Minnesota case³³⁵ that a ten-year-old boy familiar with a turntable, who went upon it, after having been repeatedly warned of the danger, with knowledge that he had no right to go there and that the table was dangerous, was guilty of contributory negligence as matter of law, which would preclude recovery for injuries received while playing on the table, although he might not have been of sufficient age and discretion to understand and comprehend the full extent of the danger to which his conduct exposed

him. And the question of contributory negligence was held to be for the jury, and a judgment for the plaintiff affirmed, in an action for the death of a boy nearly fourteen years old while playing on a turntable, where it appeared that he was lying under the table and permitting his companions to revolve it above him, that the accident occurred as a result of his raising his head or limbs so as to come in contact with the revolving table, and that immediately prior to the accident he had been warned of the danger of getting under the table, but had replied that it was not dangerous. *Stephenville, N. & S. T. R. Co. v. Voss* (1913) — *Tex. Civ. App.* —, 159 S. W. 64.

See also *Coley v. Canadian P. R. Co.* cited in note 353, *infra*, in which it is apparently implied that a ten-year-old girl was not negligent in playing on a turntable.

³³⁴ *Union P. R. Co. v. Dunden* (1887) 37 Kan. 1, 14 Pac. 501 (child eleven years old).

³³⁵ *Twist v. Winona & St. P. R. Co.* (1888) 39 Minn. 164, 12 Am. St. Rep. 626, 39 N. W. 402, where the boy engaged, with other boys, in swinging upon the table while in motion, and was injured by his foot being caught between the arm of the table and the stationary abutments.

³³⁶ It was held that contributory negligence was shown as matter of law, where a bright boy fourteen years old, who had had experience in working about a turntable and had seen it in operation, while helping to turn the table, seated himself upon it with his leg hanging over the edge, and, seeing that there was not sufficient room for his legs between the timbers at the place of meeting of the table track and the spur track, attempted to draw up his legs, when one of them was caught and crushed. *Henry v. Missouri P. R. Co.* (1910) 141 Mo. App. 351, 125 S. W. 794.

And it was held in *Merryman v. Chicago, R. I. & P. R. Co.* (1892) 85 Iowa, 634, 52 N. W. 545, that on the ground of contributory negligence a verdict for the defendant L.R.A.1917F.

him. And in several other cases infants thirteen or fourteen years old were, it appears, properly held negligent as matter of law, in view of their experience and comprehension of the danger, and the circumstances under which the injury occurred.³³⁶

Other decisions have considered whether a child was too young to be chargeable with negligence in playing on a turntable, or whether the proper standard for measuring his conduct was applied.³³⁷

n. Street railways.

As to the degree of care required of a child in actions for injuries by street cars, see notes 25 and 26, *supra*.

Other notes have treated questions relating to contributory negligence and lia-

was properly directed, in an action for injury to a boy thirteen years old on a turntable, where it appeared that he had the intelligence usually possessed by boys of his age and comprehended the danger of projecting his legs beyond the turntable, yet, while the table was in motion, lay down upon it, with his head towards the center and his legs projecting over the edge, and was injured by one of his legs being caught between the table and the embankment.

And the fact that the boy's attention was diverted by the play in which he was engaged with other boys was held not to excuse his failure to exercise at least the slight degree of care needed for his protection. *Ibid*.

To a similar effect is *Carson v. Chicago, R. I. & P. R. Co.* (1896) 96 Iowa, 583, 65 N. W. 831, where it was held that a boy twelve years old, having usual intelligence and information for one of his age, was chargeable with contributory negligence as matter of law in stepping from a turntable in the dark, while it was in motion, in such a way that his foot was caught between the edge of the table and the side of the pit.

³³⁷ It is assumed in *Cooke v. Midland Great Western R. Co.* [1909] A. C. (Eng.) 229, [1909] 2 Ir. R. 499, 78 L. J. P. C. N. S. 76, 100 L. T. N. S. 626, 25 Times L. R. 375, 15 Ann. Cas. 557, that a four-year-old child, injured while playing on a turntable, was incapable of contributory negligence.

As applying the doctrine that a child seven years old cannot be declared *sui juris* as matter of law, so as to be chargeable with contributory negligence in an action for injury to a child on a turntable, see *Evansch v. Gulf, C. & S. F. R. Co.* cited in note 159, *supra*.

As to the degree of care required of children in actions for injuries on turntables, see cases cited in note 37, *supra*; see also *Stephenville, N. & S. T. R. Co. v. Voss*, cited in note 83, *supra*.

bility of a street railway company in actions for injuries to children by street cars under various circumstances.³³⁸ Cases within the scope of these notes are excluded from consideration at this point in the present note. And it is the purpose here to consider the comparatively few cases in which the question of contributory negligence of children has arisen in actions for injuries or death by street cars under circumstances other

than those covered in the notes referred to.

The question of contributory negligence of children has been held to be for the jury where, at the time of the injury by a street car, they were walking along the track;³³⁹ or were beside the track, and slipped or stumbled upon it;³⁴⁰ or were riding on the rear of a wagon in front of the car.³⁴¹

The same conclusion has been reached

³³⁸ As to what acts of a child in attempting to cross street car tracks are negligence as matter of law, see notes to *Holian v. Boston Elev. R. Co.* 11 L.R.A.(N.S.) 166, and *Bothwell v. Boston Elev. R. Co.* post, 167. Cases where the child was playing in the street and attempted to cross the track are included in these notes.

As to negligence in getting on or off a moving street car, including cases of injuries to children, see notes in 38 L.R.A. 786, and 30 L.R.A.(N.S.) 270.

And as to negligence in riding on the platform or running board of a street car, see notes in 2 L.R.A.(N.S.) 1191; 10 L.R.A.(N.S.) 352; 12 L.R.A.(N.S.) 831; 21 L.R.A.(N.S.) 972; and 49 L.R.A.(N.S.) 135.

Generally, as to duty imposed on street railway companies to avoid injuring children on the track, see note to *Wallace v. City & Suburban R. Co.* 25 L.R.A. 663.

As to liability for injury to children catching rides on street car, see note to *Elie v. Leviston, A. & W. Street R. Co.* L.R.A.1916C, 106.

As to duty of motorman to anticipate that child may leave place of safety, see note to *Cloud v. Alexander Electric R. Co.* 18 L.R.A.(N.S.) 371.

As to right of motorman to assume that child on track will get out of the way, see note in 21 L.R.A.(N.S.) 882.

And as to duty of motorman on perceiving vehicle near track occupied by child only, see note to *Louisville R. Co. v. Flannery*, 24 L.R.A.(N.S.) 560.

³³⁹ It was held that a boy eleven years old, who was struck by a street car approaching from the rear as he walked along the track in order to avoid obstructions on the sidewalk, was not negligent as matter of law, where there was evidence that the car approached without ringing the bell, that he looked for a car and saw none before he started around the obstructions, which extended for about 125 feet, that others were walking behind him, and that he had reached the farther end of the obstruction when struck by the car. *Hennessey v. Boston Elev. R. Co.* (1912) 211 Mass. 524, 98 N. E. 578.

So, it was held that the question of contributory negligence was for the jury, and a judgment for the plaintiff affirmed, in an action for injury to a twelve-year-old boy by a street car, where there was evidence that the track was laid on an embankment along an unimproved street, that people were accustomed to walk along the embank-

ment to and from a spring in that vicinity, that the boy was returning from the spring and could not see the car until on the embankment, that he was struck as he turned to walk along the track, and had not seen or heard the car, which gave no signal of its approach, and was running at a rapid rate of speed. *Louisville R. Co. v. Hofgesand* (1907) 31 Ky. L. Rep. 976, 104 S. W. 361.

And it was held that the question of contributory negligence was for the jury, and a judgment for the plaintiff affirmed, in an action for injury to a boy twelve years old by being run over by a street car approaching from the rear, where there was evidence that at the time of the injury he was walking along the track beside a noisy ice cart, endeavoring to attract the attention of the driver of the cart in order to obtain ice, for which he had been sent, that he had so walked for eighty or ninety feet without looking for a car, that he did not hear it, or have any warning of its approach, and that it was five or ten minutes late, and another car was not yet due. *Howland v. Union Street R. Co.* (1889) 150 Mass. 86, 22 N. E. 434.

³⁴⁰ It was held that contributory negligence on the part of a six-year-old boy, who was run over by a street car, was not shown as matter of law, whether the accident resulted from his slipping and falling while attempting to climb a snow bank beside the track, after crossing the track when the car was stopped about twenty feet away, or while playing on the bank and attempting to touch the car as it passed. *Fogarty v. Jersey City, H. & P. Street R. Co.* (1908) 76 N. J. L. 459, 69 Atl. 964.

And it was held that contributory negligence was not shown as matter of law in an action for injury to a nine-year-old boy by a street car, where there was evidence that the motorman called to the boy as the car passed, and the latter ran along beside the car, looking at the motorman, who continued to talk to him until he stumbled and fell under the car. *Barstow v. Capital Traction Co.* (1907) 29 App. D. C. 362.

³⁴¹ It was held that the question of contributory negligence was for the jury, and a judgment for the plaintiff affirmed, where a fifteen-year-old boy, while riding on the rear of a truck with his legs hanging over the end, was injured, his leg being struck, by a street car which was following the

in actions for injuries by street cars under other circumstances.³⁴² A child, it has been held, cannot be required as matter of law to appreciate the danger from the overhang of a passing street car to one standing beside the track, as would an ordinarily prudent adult.³⁴³ But an infant walking along a street railway track may be precluded from recovery for injury by a street car on the ground of contributory negligence as matter of law, where the injury is due to his rashness or haste in leaving a place of safety and trying to pass ahead of the

car through an open space between the track and objects on the right of way.³⁴⁴

Questions generally, as to whether a child is *sui juris*, so as to be chargeable with negligence, as to the presumption of capacity, and the standard by which the conduct of the child should be measured, in actions for injuries by street cars, are treated elsewhere in the present note.³⁴⁵

o. Miscellaneous.

The question of contributory negligence has been held to be one of fact

truck, there being evidence that he was watching its approach and attempted to lift his leg, but could not do so in time because of the speed of the car. *Seletskey v. Third Ave. R. Co.* (1902) 69 App. Div. 27, 74 N. Y. Supp. 518, affirmed without opinion in (1903) 173 N. Y. 645, 66 N. E. 1116.

³⁴² It was held that the question of contributory negligence was for the jury, and a judgment for the plaintiff affirmed, in an action for injury to a newsboy eleven years old, who, while standing on the step of a street car endeavoring to sell papers to passengers in the car, with the consent of the street car company, was knocked off and injured by a wagon belonging to the defendant. *Mills v. Woolverton* (1896) 9 App. Div. 82, 41 N. Y. Supp. 90.

So, in *Connolly v. Knickerbocker* (1889) 114 N. Y. 104, 11 Am. St. Rep. 617, 21 N. E. 101, 12 Am. Neg. Cas. 305, it was held that a seven-year-old boy who got upon a street car at the request of the conductor, to get a penny for turning a switch, and while standing on the platform was injured by collision with the defendant's wagon, was held not guilty of contributory negligence as matter of law.

And it was held that the question of contributory negligence was for the jury, and a judgment for the plaintiff affirmed, where a boy eleven years old stood about a foot from a street car for the purpose of handing change to another boy on the front platform of the car, and was seen in this position by the motorman, who, nevertheless, started the car around a curve, with the result that the boy was struck by the overhang of the car. *Wechsler v. Pittsburgh R. Co.* (1915) 247 Pa. 96, 93 Atl. 19, 9 N. C. C. A. 514.

Generally as to liability of street railway company to one hit by swing of car at curve, see notes in 16 L.R.A.(N.S.) 890; 40 L.R.A.(N.S.) 133; and L.R.A.1915C, 604.

³⁴³ *Angelay v. Springfield Street R. Co.* (1912) 213 Mass. 110, 99 N. E. 970. In this case, where there was evidence that the plaintiff, a boy eleven years old, was riding in a wagon along a highway within from 4 to 7 feet of a street car track, and when the wagon stopped, passed from the rear to the side next to the track, and stood facing the wagon while he helped a person L.R.A.1917F.

to alight, when he was struck by the running board of a street car which approached without warning, it was held that contributory negligence was not shown as matter of law, although the view was unobstructed.

³⁴⁴ It was held that contributory negligence on the part of a boy eleven years old who was struck by a street car approaching from the rear was shown as matter of law where it appeared that he was a bright boy, accustomed to cars, and while walking along the track in a place of safety, on discovering the car rapidly approaching and only about 14 feet away, attempted to pass between the track and a pile of ties on the right of way, there being no evidence that his conduct was due to fright. *Foard v. Tidewater Power Co.* (1915) 170 N. C. 48, 86 S. E. 804. See note 339, *supra*, for other cases of injury by street car while walking along track.

³⁴⁵ As to whether a thirteen-year-old child, who was injured while playing in a street car standing in the street, is *sui juris*, so as to be chargeable with contributory negligence, see *Denver City Tramway Co. v. Nicholas*, cited in note 230, *supra*.

As to the doctrine that a nine-year-old child is presumptively non *sui juris*, as applied in an action for injury to a child while playing on a street car track, see *Demsey v. Brooklyn Heights R. Co.* cited in note 187, *supra*.

See *Holdridge v. Mendenhall*, cited in note 237, *supra*, on the question whether a six-year-old child, who is injured by a street car while playing in a street, can be declared as matter of law to have such capacity as to be chargeable with contributory negligence.

See also *East St. Louis Electric R. Co. v. Burns*, cited in note 170, *supra*, in which the question of capacity of an eight-year-old boy, who was killed by a street car while playing in a street, was held to be for the jury.

As to the standard by which the conduct of an infant should be measured in actions for injuries or death by street cars, see cases cited in notes 25 and 26, *supra*.

Attention is called also to the cases cited in note 88, *supra*, applying the doctrine of conclusive presumption of incapacity to children of tender years.

for the jury, in actions for injuries to infants by falling over obstructions in an unlighted hallway,³⁴⁶ or playing near a leaky gas main, although warned to keep away,³⁴⁷ or chasing an iron ball with which men were playing in a street,³⁴⁸ or drinking to excess liquor furnished by an adult,³⁴⁹ or failing to call a physician to treat a personal injury,³⁵⁰ or falling through defective banisters.³⁵¹ In sev-

eral cases, in actions for injuries to children on merry-go-rounds, questions have arisen as to the degree of care required of the child, and whether it was old enough to be chargeable with negligence.^{350a}

But, under the circumstances indicated, in cases cited in the footnote contributory negligence of children has been declared as matter of law.³⁵¹ In each

³⁴⁶ The question of contributory negligence was held in *Crane Elevator Co. v. Lippert* (1894) 11 C. C. A. 521, 24 U. S. App. 176, 63 Fed. 942, to be for the jury, and a judgment for the plaintiff affirmed, in an action for injury to a fifteen-year-old boy who, while walking through an unlighted hallway in the nighttime, fell over obstructions which he knew were there, and which he tried to avoid, but misjudged the distance.

³⁴⁷ The question of the contributory negligence of an eight-year-old child in playing near a leaky gate valve in a gas main cannot be decided by the court as matter of law, although he had been warned by his parents to keep away from it. *United States Natural Gas Co. v. Hicks* (1909) 134 Ky. 12, 23 L.R.A.(N.S.) 249, 135 Am. St. Rep. 407, 119 S. W. 166 (child burned by another child's striking a match).

³⁴⁸ It was held by the trial court in *Coburn v. Hardwick* (1902) 1 Ont. Week. Rep. 733, that a ten-year-old boy in running for and trying to stop a heavy iron ball, after it struck the ground, for the purpose of returning it to men who were playing with it in a street, was not guilty of such negligence as would preclude recovery for an injury sustained while trying to stop the ball by the crushing of his finger between it and a hydrant.

³⁴⁹ It is not contributory negligence as matter of law for a fifteen-year-old boy to drink to excess liquor furnished him by an adult in violation of statute, at the latter's solicitation, so as to prevent recovery from the one furnishing the liquor for an injury sustained while intoxicated, if it does not appear that he had drunk liquor before, or had any special knowledge of its effect. *Cole v. Searfoss* (1912) 49 Ind. App. 334, 97 N. E. 345.

It was held, however, that an instruction was erroneous, that it was immaterial, as affecting the right of recovery for the injury, whether the boy had drunk liquor before, or had been intoxicated, or drank the liquor willingly or otherwise, since these were proper matters for consideration of the jury in determining whether he was guilty of contributory negligence. *Ibid.*

The mere fact, however, that he had drunk liquor before, it was held, would not necessarily show negligence in drinking to excess under the above circumstances. *Ibid.*

³⁵⁰ In an action against a telegraph company for failure to deliver a message summoning a physician to treat a boy fifteen years old who had dislocated his arm at the L.R.A.1917F.

elbow, it was held in *Western U. Teleg. Co. v. Hoffman* (1891) 80 Tex. 420, 26 Am. St. Rep. 759, 15 S. W. 1048, that it could not be held as matter of law that the boy had sufficient experience and discretion to estimate the consequences of the failure to receive proper treatment, so as to charge him with contributory negligence in failing, for nine days after sending the telegram, to make any further effort to procure the aid of a physician. It was held, however, that the negligence of the parents would prevent recovery in so far as it was brought for their own benefit.

³⁵⁰ The fact that a four-year-old boy swung his body through a third-story banister, while holding to the rail, and thereby came to his death by falling to the ground, will not preclude recovery for his death, as matter of law, on the ground of contributory negligence on the part of the child. *Karp v. Barton* (1912) 164 Mo. App. 389, 144 S. W. 1111.

^{350a} As to the degree of care required of a thirteen-year-old girl in an action for injury on a merry-go-round, see *Harris v. Crawley*, cited in note 210, *supra*.

And as assuming that a child five and a half years old may be guilty of contributory negligence in attempting to board a moving merry-go-round, see *Linthicum v. Truitt*, cited in note 137, *supra*.

³⁵¹ In an action for injury to a seventeen-year-old boy by being permitted by the defendant to engage in games of pool, billiards, and other games without the written consent of his parents, in violation of a statute, it was held in *Griffin v. Dickerson* (1913) 4 Tenn. C. C. A. 409, that the declaration was subject to demurrer, especially in view of the fact that it alleged that the youth was engaged in a mercantile business, because it showed contributory negligence.

It will be presumed that a twelve-year-old girl has sufficient intelligence to avoid the obvious danger, while opening a double storm door, of one of the doors swinging back against her hand. *Dolan v. Callender, McA. & T. Co.* (1904) 26 R. I. 198, 58 Atl. 655, 17 Am. Neg. Rep. 126.

It was held that contributory negligence was shown as matter of law, where a bright boy ten years old, who had been warned of the danger, and knew of the decayed condition of the boards and nails in a fence, leaned his weight against the topmost board in an effort to discover a playmate around the end of a building to which the board was nailed, with the result that it

case slight circumstances may vary the decision as to whether the question is for the court or jury, and general rules cannot well be formulated from particular situations. It has been seen above³⁵³ that contributory negligence on the part of a child may be declared as matter of law if from the undisputed facts no reasonable inference can be drawn except that the child failed to exercise the care which children of the same age, capacity, discretion, knowl-

edge, and experience ordinarily exercise under the same or similar circumstances.

Attention is here called to a few English and Canadian cases in which actions for injuries to children were held maintainable, the decisions dealing principally with the question of negligence on the part of the defendant, although implying that the child was not, at least as matter of law, in acting as one of its age would ordinarily act, guilty of contributory negligence precluding recovery.³⁵³

gave way, and he was precipitated into a quarry and injured. *Herd v. Koenig* (1909) 137 Mo. App. 589, 119 S. W. 56.

It is contributory negligence as matter of law for a thirteen-year-old girl to use as a playground with a companion a "maze" in an amusement park, intended to puzzle by an arrangement of mirrors and glasses, so that there can be no recovery for an injury sustained while so engaged by running into one of the glasses. *Rayfield v. Sans Souci Park* (1909) 147 Ill. App. 493.

And it was held that contributory negligence was shown as matter of law, which would prevent recovery for his death, where a bright boy nearly twelve years old, who was playing about a sea wall, at a place in an unfinished extension of a public park at which the guard railing of the wall had not been placed in position, although he had been warned to keep away from the wall, while throwing stones from a sling, jumped forward to catch the cord of the sling, which had slipped from his hand, but stumbled and fell over the wall, and was killed. *Albert v. New York* (1902) 75 App. Div. 553, 78 N. Y. Supp. 355.

³⁵³ VI. *supra*.

³⁵³ *Harrold v. Watney* [1898] 2 Q. B. (Eng.) 320 (four-year-old boy climbed on a rotten fence adjacent to a highway, with the result that it fell upon and injured him); *Jewson v. Gatti* (1886) 2 Times L. R. (Eng.) 441 (a "little girl," age not stated, leaned against an insecure railing separating an open cellarway from the street for the purpose of watching men at work in the cellar); *Smith v. Martin* [1911] 2 K. B. (Eng.) 775, 80 L. J. K. B. N. S. 1256, 105 L. T. N. S. 281, 27 Times L. R. 468, 55 Sol. Jo. 535, Ann. Cas. 1912A, 334, 2 N. C. C. A. 215 (fourteen-year-old girl burned in complying with her teacher's request to poke the fire and pull out the damper of a stove); *Croker v. Banks* (1888) 4 Times L. R. (Eng.) 324 (seventeen-year-old girl employed by defendant in filling soda-water bottles omitted to wear a protection mask); *Coley v. Canadian P. R. Co.* (1906) Rap. Jud. Quebec 29 C. S. 282 (girl under ten years of age playing on turntable); *Ricketts v. Markdale* (1900) 31 Ont. Rep. 610 (seven-year-old boy injured while playing on timbers negligently piled in street). R. E. H.

NORTH CAROLINA SUPREME COURT.

ARCHIE P. ASHBY, by Next Friend, Appt.
v.
NORFOLK SOUTHERN RAILROAD COMPANY.

(172 N. C. 98, 89 S. E. 1059.)

Master and servant — permitting assistance of child — Liability for injury.

1. A railroad company is liable for injury to an eight-year-old boy because of his

Note. — As to contributory negligence of children on or about railroad tracks, see annotation following *Mollica v. Michigan C. R. Co.* post, 123.

As to contributory negligence of children generally, see annotation following *Jacobs v. H. J. Koehler Sporting Goods Co.* ante, 10.

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attempt, with the knowledge of its foreman, to assist in pushing a car along its track, although it had forbidden the foreman to permit this to be done.

For other cases, see *Master and Servant*, III. a, 2, in *Dig. 1-52 N. S.*

Negligence — contributory — eight-year-old boy.

2. Contributory negligence cannot be ascribed to an eight-year-old boy in attempting to assist in pushing a car along a railroad track.

For other cases, see *Negligence*, II. b, 1, in *Dig. 1-52 N. S.*

(September 27, 1916.)

APPEAL by plaintiff from a nonsuit granted by the Superior Court for Craven County in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. C. A. York, A. D. Ward, and William F. Ward, for appellant:

Where a child is not of sufficient age or intelligence to appreciate the danger of boarding and riding on a car, and the act is such as might be done by a child of his age and intelligence, and the railroad employees invited or permitted him to ride there, the company will be liable; and this is so, although it had forbidden the employees to permit anyone to ride on the car.

33 Cyc. 819; *Burke v. Ellis*, 105 Tenn. 702, 58 S. W. 855; *Thompson v. Missouri, K. & T. R. Co.* 11 Tex. Civ. App. 307, 32 S. W. 191; *Walsh v. Pittsburg R. Co.* 32 L.R.A. (N.S.) 576, note; *Greer v. Damascus Lumber Co.* 161 N. C. 146, 76 S. E. 725; *Dover v. Mayes Mfg. Co.* 157 N. C. 324, 46 L.R.A. (N.S.) 199, 72 S. E. 1067; *Holmes v. Missouri P. R. Co.* 207 Mo. 164, 105 S. W. 624; *Starling v. Selma Cotton Mills*, 168 N. C. 220, L.R.A.1915D, 860, 84 S. E. 388; *McGowan v. Ivanhoe Mfg. Co.* 167 N. C. 192, 82 S. E. 1028, 7 N. C. C. A. 867; *Ferrell v. Dixie Cotton Mills*, 157 N. C. 528, 37 L.R.A. (N.S.) 64, 73 S. E. 142, 3 N. C. C. A. 306; *Illinois C. R. Co. v. Wilson*, 23 Ky. L. Rep. 684, 63 S. W. 608; *Missouri, K. & T. R. Co. v. Rodgers*, — Tex. Civ. App. —, 39 S. W. 383, 1 Am. Neg. Rep. 708; *Willis v. Atlantic & D. R. Co.* 120 N. C. 508, 26 S. E. 784, 1 Am. Neg. Rep. 669.

Messrs. Moore & Dunn, for appellee:

Infant plaintiffs who are negligent are not entitled to recover.

Baker v. Seaboard Air Line R. Co. 150 N. C. 562, 29 L.R.A.(N.S.) 846, 64 S. E. 506, 17 Ann. Cas. 351; *Boland v. Missouri R. Co.* 36 Mo. 484; *Meeks v. Southern P. R. Co.* 52 Cal. 602; *Cauley v. Pittsburgh, C. & St. L. R. Co.* 98 Pa. 498; *Mathis v. Magnolia Mfg. Co.* 140 N. C. 530, 63 S. E. 349; *Murray v. Richmond & D. R. Co.* 93 N. C. 94; *Beck v. Southern R. Co.* 149 N. C. 168, 62 S. E. 883; *Shearm. & Redf. Neg.* § 49; *Whart. Neg.* 314; *Manly v. Wilmington & W. R. Co.* 74 N. C. 655; *Washington & G. R. Co. v. Gladmon*, 15 Wall. 401, 21 L. ed. 114; *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745; *Dull v. Cleveland, C. C. & St. L. R. Co.* 21 Ind. App. 571, 52 N. E. 1013.

It is the duty of minors to give such attention to their surroundings and use such care to avoid danger as may be fairly and reasonably expected from persons of their age and capacity; and children, as well as adults, must use the consideration which persons of their years ordinarily have, and cannot be presumed, with impunity, to indulge in conduct which they know, or ought to know, to be dangerous.

Studer v. Southern P. Co. 121 Cal. 400, L.R.A.1917F.

66 Am. St. Rep. 39, 53 Pac. 942, 4 Am. Neg. Rep. 361.

There was no negligence on the part of the defendant for which he could be held responsible in any wise to the plaintiff.

Catlett v. St. Louis, I. M. & S. R. Co. 57 Ark. 461, 38 Am. St. Rep. 254, 21 S. W. 1062.

Defendant owed plaintiff no other duty than to cause him no wanton injury.

Morrissey v. Eastern R. Co. 126 Mass. 377, 30 Am. Rep. 686.

No act of omission, though the same might result in damage or injury, can be deemed actionable negligence unless the one responsible could, by the exercise of ordinary care under all the circumstances, have foreseen that it might result in damage to someone.

Frazier v. Wilkes, 132 N. C. 437, 43 S. E. 1004; *Raiford v. Wilmington & W. R. Co.* 130 N. C. 597, 41 S. E. 806.

While contributory negligence is matter of defense, it is proper to nonsuit the plaintiff upon his whole evidence when the proof of such defense is there fully made out.

Mitchell v. Seaboard Air Line R. Co. 153 N. C. 116, 68 S. E. 1059.

Clark, Ch. J., delivered the opinion of the court:

This is an action for personal injury to a minor, at the time of the injury, eight years of age, who brings this action by his next friend. The employees of the defendant were operating a push car loaded with crossties under the supervision of the section master. There was evidence that one of the employees asked the plaintiff and two or three other small boys to help push the car to the switch before the arrival of an approaching train, and that when the car approached the trestle one of the boys, with the knowledge and without objection of the employees or the foreman, jumped on the car and rode across; that they continued to push the car for several hundred yards till they approached a cattle guard across the track in which there were sharp iron pointers which the plaintiff was unable to walk upon with his bare feet, and, being cautioned by the foreman to "look out" for the cattle guard, the plaintiff, in attempting to climb upon the car to ride across, slipped and fell, the wheel of the car passing over his foot. There was evidence that the child was not invited by the employees, and that the section master in charge had no knowledge of his participating in pushing the car. But there was evidence for the plaintiff that one of the employees asked the boys to help push the car, and also that the foreman saw the boys pushing the car and made no objection.

Upon a nonsuit this evidence must be taken as true; and, if true, it was negligence for the defendant, through its foreman, to permit a child of the age of the plaintiff to participate in such dangerous work, with its great liability of injury to those who are not presumed to have judgment to avoid the dangers incident to such work.

If the railroad employees invited or permitted the plaintiff to take part in pushing the car, the company was liable though the company had forbidden the employees to permit this to be done. 33 Cyc. 819. It was not only the duty of the defendant to order the child away from its tracks and

from moving cars, but it should see that he does go away. 33 Cyc. 769, and cases there cited. If the boy was there for that length of time, it was negligence if the foreman did not discover the child and make him leave.

In *Greer v. Damascus Lumber Co.* 161 N. C. 146, 76 S. E. 725, the court held that, there being evidence that the fireman permitted the children to ride on the engine, it was actionable negligence not to require them to leave.

Contributory negligence cannot be attributed to a child of the age of the plaintiff at the time of this injury.

The judgment of nonsuit is reversed.

MICHIGAN SUPREME COURT.

ANGELO F. MOLLIKA, Admr., etc., of Vincent Mollica, Deceased, Plff. in Err.,
v.

MICHIGAN CENTRAL RAILROAD COMPANY.

(170 Mich. 96, 135 N. W. 927.)

Railroads — crossing accidents — excessive speed — negligence.

1. The mere fact that a railroad train is run through a town at a speed in excess of that provided by its ordinance is not, standing alone, such negligence as will render the railroad company liable for the death of one struck by a train on a highway crossing.

For other cases, see Railroads, II. d, 3 and 4, in Dig. 1-52 N. S.

Same — contributory negligence — child — diversion of attention.

2. The passing of a passenger train is not sufficient, on the theory that it diverted his attention, to relieve of the charge of negligence a bright boy nine and a half years old, who stands on a parallel track watching it while a train in plain sight on such track bears down upon and strikes him.

For other cases, see Railroads, II. e, 3, in Dig. 1-52 N. S.

Same — gross negligence — failure to stop train.

3. A railroad engineer is not guilty of gross negligence in failing to employ means to stop the train when he sees a boy approaching the track at a railroad crossing 450 feet ahead, so as to render the company liable for the death of the boy, who negligently goes upon the track in full view of

the approaching train after it is too late to avoid hitting him.

For other cases, see Railroads, II. e, 3, in Dig. 1-52 N. S.

(May 3, 1912.)

ERROR to the Circuit Court for Calhoun County to review a judgment in defendant's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. **Affirmed.**

The facts are stated in the opinion.

Messrs. Price & Whiting, for plaintiff in error:

Vincent Mollica, considering his age and the circumstances surrounding him at the time of the accident, was not chargeable with negligence contributing to his injury and death.

Baker v. Flint & P. M. R. Co. 68 Mich. 90, 35 N. W. 836; *East Saginaw City R. Co. v. Bohn*, 27 Mich. 503; *Daniels v. Clegg*, 28 Mich. 40; *Hassenyer v. Michigan C. R. Co.* 48 Mich. 209, 42 Am. Rep. 470, 12 N. W. 156; *Powers v. Harlow*, 53 Mich. 515, 51 Am. Rep. 154, 19 N. W. 257; *Hargreaves v. Deacon*, 25 Mich. 1; *Chicago & N. W. R. Co. v. Smith*, 46 Mich. 504, 9 N. W. 830, 4 Am. Neg. Cas. 24; *Downey v. Hendrie*, 46 Mich. 501, 41 Am. Rep. 177, 9 N. W. 828; *Ecliff v. Wabash, St. L. & P. R. Co.* 64 Mich. 196, 31 N. W. 180; *Coops v. Lake Shore & M. S. R. Co.* 66 Mich. 448, 33 N. W. 541; *McGovern v. New York C. & H. R. R. Co.* 67 N. Y. 417; *Cooper v. Lake Shore & M. S. R. Co.* 66 Mich. 261, 11 Am. St. Rep. 482, 33 N. W. 306.

Even if it could be said as a matter of law that Vincent Mollica was guilty of negligence in putting himself in a place of danger, it was a fair question for the jury whether or not the gross negligence of the defendant was the proximate cause of his injury and death.

Note. — As to contributory negligence of children on or about railroad tracks, see annotation following this case, post, 123.

As to contributory negligence of children generally, see annotation following *Jacobs v. H. J. Koehler Sporting Goods Co.* ante, 10.

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Richter v. Harper, 95 Mich. 221, 54 N. W. 768; Battishill v. Humphreys, 64 Mich. 514, 38 N. W. 581; La Barge v. Pere Marquette R. Co. 134 Mich. 139, 95 N. W. 1073, 14 Am. Neg. Rep. 575; Schindler v. Milwaukee, L. S. & W. R. Co. 87 Mich. 405, 49 N. W. 670; Laethem v. Ft. Wayne & B. I. R. Co. 100 Mich. 297, 58 N. W. 996; Montgomery v. Lansing City Electric R. Co. 103 Mich. 46, 29 L.R.A. 287, 61 N. W. 543; Buxton v. Ainsworth, 138 Mich. 532, 101 N. W. 817, 5 Ann. Cas. 146.

Messrs. Wilson & Cobb, for defendant in error:

The evidence does not show that the death of plaintiff's decedent was caused by the negligence of the defendant or its servants.

Thayer v. Flint & P. M. R. Co. 93 Mich. 150, 53 N. W. 216; Robinson v. Flint & P. M. R. Co. 79 Mich. 328, 19 Am. St. Rep. 174, 44 N. W. 779; Shufelt v. Flint & P. M. R. Co. 96 Mich. 327, 55 N. W. 1013; Tobias v. Michigan C. R. Co. 103 Mich. 330, 61 N. W. 514; Stern v. Michigan C. R. Co. 76 Mich. 597, 43 N. W. 587; Hagan v. Chicago, D. & C. G. T. Junction R. Co. 86 Mich. 615, 49 N. W. 509; Folkmire v. Michigan United R. Co. 157 Mich. 159, 121 N. W. 811, 17 Ann. Cas. 979; Hovey v. Michigan Teleph. Co. 124 Mich. 607, 83 N. W. 600; Flater v. Fey, 70 Mich. 644, 38 N. W. 656; Haines v. Lake Shore & M. S. R. Co. 129 Mich. 479, 89 N. W. 349; Bliekley v. Luce, 148 Mich. 233, 111 N. W. 752; Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328, 52 L. ed. 230, 28 Sup. Ct. Rep. 121; Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 336, 51 L. ed. 209, 27 Sup. Ct. Rep. 90; Cleveland C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722; Trudell v. Grand Trunk R. Co. 126 Mich. 79, 53 L.R.A. 271, 85 N. W. 250; Graf v. Chicago & N. W. R. Co. 94 Mich. 579, 54 N. W. 388; Lyons v. Bay Cities Consol. R. Co. 115 Mich. 114, 73 N. W. 139; Piskorowski v. Detroit, G. H. & M. R. Co. 121 Mich. 498, 80 Am. St. Rep. 518, 80 N. W. 241; Starbard v. Detroit, G. H. & M. R. Co. 122 Mich. 23, 80 N. W. 878; Levy v. Houghton County Street R. Co. 164 Mich. 572, 129 N. W. 683; Buckley v. Flint & P. M. R. Co. 119 Mich. 583, 78 N. W. 655.

Decedent was guilty of contributory negligence.

Folkmire v. Michigan United R. Co. 157 Mich. 159, 121 N. W. 811, 17 Ann. Cas. 979; Knickerbocker v. Detroit, G. H. & M. R. Co. 167 Mich. 596, 133 N. W. 504; Perego v. Lake Shore & M. S. R. Co. 168 Mich. 226, 122 N. W. 535; Trudell v. Grand Trunk R. Co. 126 Mich. 73, 53 L.R.A. 271, 85 N. W. 250; Piskorowski v. Detroit, G. H. & M. R. Co. 121 Mich. 498, 80 Am. St. Rep. 518, 80 N. W. 241; Henderson v. Detroit Citizens' L.R.A.1917F.

Street R. Co. 116 Mich. 368, 74 N. W. 525; Ecliff v. Wabash St. L. & P. R. Co. 64 Mich. 196, 31 N. W. 180; Wight v. Michigan C. R. Co. 161 Mich. 216, 126 N. W. 414; Guntermann v. Michigan C. R. Co. 168 Mich. 37, 133 S. W. 940.

Defendant was not guilty of gross negligence.

Knickerbocker v. Detroit, G. H. & M. R. Co. 167 Mich. 596, 133 N. W. 504; Richter v. Harper, 95 Mich. 225, 54 N. W. 768; Lyons v. Bay Cities Consol. R. Co. 115 Mich. 114, 73 N. W. 139; Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 274; Starbard v. Detroit, G. H. & M. R. Co. 122 Mich. 23, 80 N. W. 878; Redson v. Michigan C. R. Co. 120 Mich. 671, 79 N. W. 939; Levy v. Houghton County Street R. Co. 164 Mich. 572, 129 N. W. 683; Buckley v. Flint & P. M. R. Co. 119 Mich. 583, 78 N. W. 655; Bouwmeester v. Grand Rapids & I. R. Co. 67 Mich. 87, 34 N. W. 414; Bliekley v. Luce, 148 Mich. 244, 111 N. W. 752; Sterling v. Detroit, 134 Mich. 22, 95 N. W. 986.

Steere, J., delivered the opinion of the court:

Plaintiff brought this action as administrator of the estate of his minor son, who was killed by one of defendant's trains at a street crossing in the city of Albion, Michigan, on November 5, 1909.

The deceased, Vincent Mollica, was nine years and six months old, of ordinary size, very bright and quick to learn. He lived with his parents on the south side of defendant's track, and was attending school two and one-half blocks north of the crossing where he was killed. He had crossed the track twice a day in going to and returning from school since the opening of the same in September of that year. School dismissed at 3:30 p. m., after which he delivered newspapers over a route of his own.

On the afternoon in question, at the close of school, he and an older boy named Harold Ford, who was also going to the newspaper office located south of the track, started down Berrien street, hurrying for the office, running part way. The railway was double-tracked at this crossing, and a passenger train, just then pulling out from the railway station, was approaching the crossing from the west. The older boy, progressing faster than deceased, got across in advance of the train, which was on the south track. When deceased arrived at the track on the west side of Berrien street, the train was crossing, and he waited for it to pass, standing in the middle of the north track, looking at it and making motions toward it. Some of the witnesses testified he was waving his hands, or making signs to passengers; and others that he seemed to pick up something

and throw it at the car wheels. While thus occupied, a through "blind baggage" express train on the north track, going west, passing through the city without stopping, struck him. There was a curve in the railroad track 1,400 feet east of the crossing, and the train was in sight from the time it rounded that curve.

Numerous witnesses of the accident were sworn, most of them being schoolmates. Their accounts of the accident are substantially the same, but naturally varying according to the point of observation and the particular things which each individual especially noticed. Several of the witnesses saw the train which killed him approaching and, recognizing the danger, shouted to warn him; but evidently the noise of the passing train on the south track prevented him hearing them.

There was testimony that many trains passed back and forth daily on this road, and that when school was out the children were in the habit of hurrying towards the track to cross ahead of, or see pass, the passenger train due at that time. Just when the blind baggage train was due in Albion is not definitely shown by the testimony. It left Jackson at 2:25; and it was the second section which struck the deceased, which was a mile or more behind the first. One of plaintiff's witnesses, a boy thirteen years of age, testified: "The blind baggage hardly ever passed at that place; it passed at different places. I don't know at what hour it was in the habit of going through Albion; the school children didn't usually see it. I thought it was running pretty fast that day. I didn't see it much until it got right onto him. It usually goes pretty fast through there, anyway. It does not stop at Albion."

There was also testimony to the effect that others of the school children ran towards the track on the day in question along Berrien and other streets, as was common with them, to see the passenger train go past; and some of them on Monroe street, to the west of Berrien, stopped and stood on the north track, and were warned away by the flagman stationed there.

At the conclusion of plaintiff's testimony counsel for defendant made the following motion: "We ask the court to order a verdict for the defendant, because the plaintiff's proof shows that decedent was guilty of negligence that contributed to the accident or injury, and because they do not show by their evidence that the defendant was guilty of either negligence or gross negligence, as they charge in their declaration." This motion was renewed at the conclusion of defendant's testimony.

Counsel for plaintiff then requested the L.R.A.1917F.

court to charge in part as follows: "Plaintiff requests the court to instruct the jury that the defendant was negligent in violating the ordinance of the city of Albion, and that the question of whether the plaintiff's intestate was negligent is for the jury; . . . also that the question of gross negligence on the part of the defendant, and its negligence in not giving warning sooner and taking steps to slacken the speed of its train sooner, is for the jury, and if they believe the defendant was guilty of gross negligence, plaintiff should recover a verdict, regardless of whether Vincent Mollica contributed by his negligence to the injury which caused his death."

This request was refused, and the court directed a verdict in favor of defendant, charging the jury in part as follows: "That, under the evidence here there can be no question but what this unfortunate boy was guilty of negligent conduct. It is a great misfortune; and it is a case, of course, that is most pitiable, and which touches one's sympathies, but that cannot alter the legal situation. For that reason,—the reason that he was guilty of negligence,—there can be no recovery in a case of this kind, except, on the other hand, the agents of the defendant company in charge of the trains were guilty of gross negligence, which means that they either wantonly or recklessly inflicted the injury which resulted in this boy's death. The undisputed evidence in the case shows as a whole that the engineer, the moment that he was warned of impending danger, resorted to every possible means to avert the injury; therefore it cannot be said, and there is no evidence in the case to justify a finding, that there would be gross negligence. Under those circumstances, it is my duty, although it is a responsibility the court does not assume without some hesitation, to enter a direction for a verdict, and the record may show that a verdict is entered in this case, under direction of the court, of not guilty."

Error is regularly assigned on the refusal of the court to give plaintiff's requests and the charge of the court in thus directing a verdict for defendant.

The declaration avers that the train was run at a reckless and dangerous rate of speed, to wit, at the rate of 20 miles an hour or faster, in violation of an ordinance of the city restricting the rate of speed of trains within the corporate limits to 10 miles an hour. The only definite testimony as to speed is that of the engineer and fireman of the train, who testified that, as they approached the city, the brakes were tested, the steam shut off at the whistling post, over a mile out, and the train slowed down to about 20 miles an hour.

The rate of speed is not, per se, negligence. In the absence of an ordinance, it has been held that 25 miles per hour crossing a street in a city of 17,000 inhabitants is not negligence. *Tobias v. Michigan C. R. Co.* 103 Mich. 330, 61 N. W. 514. While the violation of an ordinance is admissible as evidence tending to show negligence, it is not, standing alone, negligence which would justify recovery, or upon which an action could be based. *Haines v. Lake Shore & M. S. R. Co.* 129 Mich. 475, 89 N. W. 349; *Flater v. Fey*, 70 Mich. 644, 38 N. W. 656; *Blickley v. Luce*, 148 Mich. 233, 11 N. W. 752.

The two pivotal points presented for adjudication by the assignments of error are, first, does the plaintiff's testimony, taken as true, show that the deceased was free from contributory negligence on his part? and, second, is there any testimony showing that the engineer of the train which caused the injury was guilty of gross negligence, amounting to an intentional failure to perform a manifest duty in reckless disregard of the consequences affecting the life or property of another?

Were deceased an adult, no one would seriously question his extreme carelessness and negligence in standing upon a railroad track in broad daylight while a train in full view a sufficient time and distance for him to have easily stepped aside and avoided it bore down upon and struck him. It is claimed that deceased was a child of tender years, confused, and his attention diverted by the passenger train which had stopped his progress, and which drowned the sound of the other approaching train, under which circumstances he cannot be held accountable as a person of mature years and experience.

Where the plaintiff is an infant of such tender years as to be without discretion, contributory negligence cannot be imputed to him; and such is the general presumption where the child is under the age of seven years. It is also held by some authorities that such presumption obtains, prima facie, until the age of fourteen years is reached; but, where capacity is shown, the general rule of contributory negligence will apply. While in the case of a child between the ages of seven and fourteen years the allegation of age might raise some presumption which tends to remove the imputation of neglect, it is mainly a matter of pleading; and the fact, when proven on the trial, does not establish that freedom from negligence essential to recovery.

In the case of a child of the age of deceased, the law is well settled in this state that he is responsible for the exercise of such care and vigilance as may reasonably

be expected of one of his age and capacity; and the want of that degree of care is negligence. The fact that he may not have as mature judgment as an adult will not excuse him from exercising the judgment and discretion which he possesses, or from heedlessly rushing into known dangers. Where the dangers are known and understood by him, the rule of contributory negligence is fully applicable.

In this case, therefore, deceased is chargeable with a degree of care proportionate to his age and capacity. It is undisputed that he was nine years and six months old, of average size, possessed of all his faculties, very bright and intelligent; that he crossed these tracks four times each day when attending school, was familiar with the rush of moving trains, and knew that many passed daily. He knew and understood the danger and consequences of standing upon a railroad track when a train was passing over it as fully as the oldest and most experienced person; and he knew equally well that such danger could be easily avoided by keeping off of, or stepping aside from, the railway track. The boy's father testified that he had cautioned him to be careful and not get hurt by the cars; that he was bright, and stood high in his studies; that he understood the danger of being on the track when a train approached, and "would have got off the track, sure," had he seen the train in time. He had that capacity to understand, and the ability to perform, on which duty is predicated. It is manifest that he appreciated the danger when he at last, but unfortunately too late, noticed the train coming towards him, for he hurriedly attempted to jump to one side and avoid it. He had an unobstructed view from where he stood, down the track for a quarter of a mile; and the train was in sight when he went upon the track and took his stand there. A glance in that direction, occupying but an instant, as he approached the danger zone, where he stopped, would have informed him and saved his life; if seasonably discovered, he would have apprehended and avoided this danger as intelligently and quickly as any adult. He was old enough to know, and in the very nature of things did know, that where he stood was a dangerous place. This is not a case where he was required to exercise judgment and experience in choosing between two courses to avoid danger; he was not confronted with any dangers which he did not understand. When struck, he was standing at ease, carelessly amusing himself by throwing something at the train passing on the other track, or saluting its passengers; and his only danger was in the spot he selected to stand upon.

Such being the undisputed facts, did the diversion of watching a passing train and the thoughtlessness and carelessness of youth excuse him for thus exposing himself needlessly to such apparent danger? It has been held by this court that, when a boy possesses such a knowledge and understanding of dangers attending the course he pursues, the fact that he is more reckless and not as discreet and cautious as a man does not in itself excuse him; but he is chargeable with the same degree of care for his own personal safety as an adult, within the scope of his understanding of the risk he takes. *Ecliff v. Wabash St. L. & P. R. Co.* 64 Mich. 196, 31 N. W. 180.

It is well established that, where the facts are undisputed, and the minds of reasonable men are inevitably led to the same conclusions and to draw the same inferences, it is the duty of the court to dispose of the matter as a question of law. Applying this rule to the case of minors, it has been held that, where a boy five and one-half years of age, with permission of his mother, started to go across a traveled street, and running quickly from the curb was struck by defendant's horse and run over, the accident occurring in broad daylight, the child failed to exercise the care which was commensurate with his age and knowledge, and he could not recover. *Hayes v. Norcross*, 162 Mass. 546, 39 N. E. 282.

A boy seven and one-half years old, being shown to have the capacity to understand that if he remained on the railway track while a train passed he would be run over, having lain down upon the track and gone to sleep, it was held his negligence precluded recovery. *Krenzer v. Pittsburg, C. C. & St. L. R. Co.* 151 Ind. 587, 68 Am. St. Rep. 252, 43 N. E. 649, 52 N. E. 220, 5 Am. Neg. Rep. 137.

A bright boy nine years of age, familiar with the movement of trains, who stood beside a railroad track holding a string, one end of which was attached to his wrist and the other end to a piece of ice on the opposite side of the track, was injured by a passing engine striking the string. This was held to be conclusive evidence of contributory negligence. *Spillane v. Missouri P. R. Co.* 135 Mo. 414, 58 Am. St. Rep. 580, 37 S. W. 198.

A boy twelve years old, who stood on one of three railroad tracks waiting for a train to pass, playing at the time, being at a crossing with which he was familiar, was struck by an engine running on the track where he stood. He was held guilty of negligence as a matter of law. *Cleveland Terminal & Valley R. Co. v. Heiman*, 16 Ohio C. C. R. 487, 9 Ohio C. D. 222.

A bright and intelligent boy ten years old, L.R.A.1917F.

going on an errand, while walking on the outer ends of the railway ties, was struck by a rapidly moving train. He was held guilty of negligence which precluded a recovery. *Moore v. Pennsylvania R. Co.* 99 Pa. 301, 44 Am. Rep. 106.

A boy eleven years of age, lounging or playing on a network of tracks, and struck by a passing engine, was held guilty of contributory negligence as a matter of law. *Masser v. Chicago, R. I. & P. R. Co.* 68 Iowa, 602, 27 N. W. 776.

A similar rule has been applied to boys eight and nine years old, when injured on railway tracks. *Murray v. Richmond & D. R. Co.* 93 N. C. 92; *Potter v. Wilmington & W. R. Co.* 92 N. C. 541.

In this state, the same rule has been applied in *Henderson v. Detroit Citizens' Street R. Co.* 116 Mich. 368, 74 N. W. 525; *Trudell v. Grand Trunk R. Co.* 126 Mich. 73, 53 L.R.A. 271, 85 N. W. 250; *Perego v. Lake Shore & M. S. R. Co.* 158 Mich. 225, 122 N. W. 535, and in the recent case of *Knickerbocker v. Detroit G. H. & M. R. Co.* 167 Mich. 596, 133 N. W. 504. In this last case, the principles involved are ably discussed, and the authorities cited and reviewed. It was there held that a boy ten years old, killed at a railway crossing, was, as a matter of law, guilty of contributory negligence in riding his bicycle onto the track in front of an approaching train; there being an unobstructed view for a distance of near half a mile in the direction of the approaching train. The boy was shown to have lived in the vicinity of the railroad track, was accustomed to going about the city, and able to ride and manage a bicycle. The one he was riding was a new one belonging to his father, which deceased was allowed to ride at that time; and he was particularly interested in and entertained by it, evidently to the exclusion of all other matters. It was there said: "The court erred in submitting to the jury the question of the contributory negligence of plaintiff's intestate. . . . Under the circumstances, he was chargeable with some degree of care for his own safety, and it does not appear that he exercised any care."

Under the rule that, where the negligence of the defendant is wilful, wanton, or gross, contributory negligence is no defense, it is claimed by appellant that, even though deceased was guilty of contributory negligence, there is testimony to go to the jury tending to show that the engineer, having discovered the danger in time to avoid the accident, did not act promptly, as the law requires in such cases, but recklessly continued on and ran upon the boy. Counsel for plaintiff say in their brief: "It was a fair question for the jury whether or not

the engineer of the blind baggage was keeping a lookout, or whether he saw Vincent at all until he was so close to him that he could neither slacken the speed of his train or give him timely warning."

It is undisputed that it was broad daylight; and there was an unobstructed view from the track towards the approaching train for nearly a quarter of a mile. The boy came upon the north track and stopped, just as the passenger train was crossing the street; the two trains passed each other practically at that point; the blind baggage was just approaching. The engineer testified, and this testimony is undisputed, that he shut off his steam, applied the brakes, and slowed down the train as it passed through the city, reducing it to about 20 miles an hour; that he kept a sharp lookout, and when he came within about 300 feet of the Berrien street crossing, just as he was meeting the passenger train, deceased came upon the north track and started to play, or make motions as though he was throwing something; that witness at once applied the brakes, shoved the handle clear over to the full emergency, and gave the danger signal with a short, sharp series of blasts of the whistle, continuing them until he struck the boy; that at the moment the boy came upon the track and commenced making motions he realized that he was in a position of danger, and did everything within his power to stop the train. He also testified that he first saw the boy, and particularly noticed him, as he was from 12 to 15 feet from the track; the train then being about 450 feet from the crossing. When first seen by the engineer, though approaching the track, he had no idea the boy was going upon it, and anticipated no danger from seeing him near it until he stepped inside the rails, which took but an

instant. The witness at once realized the gravity of the situation and did everything in his power to avert the accident, having, before that time, assumed he would not go upon the track, but would take care of himself. It is particularly insisted that the engineer was guilty of gross negligence in not taking action and attempting to stop his train when he saw the boy approaching the track.

In *Graf v. Chicago & N. W. R. Co.* 94 Mich. 579, 54 N. W. 388, it was said of a party approaching a railroad track at a street crossing: "Had the brakeman seen the deceased as he was approaching, he certainly would have had the right to presume that he would stop. He might have stopped with perfect safety when within 3 or 4 feet of the track. No obligation rested upon the brakeman to attempt to stop the cars until he saw that the deceased intended to step in front of them, regardless of the danger."

And in the *Kinckerbocker Case*, *supra*, where the engineer saw the boy 25 or 30 feet from the track, approaching it on a bicycle, it was said: "But it is not negligence—clearly it is not gross negligence—to fail to stop, or to fail to gain complete control of, a train of cars, merely because persons are seen approaching the track upon a highway on foot, or with vehicles. Such an approach is not usually evidence of negligence; and such persons are not usually in any peril. No error was committed in refusing to submit the question of 'gross negligence' to the jury." This language is equally applicable to the case at bar, and is controlling.

The judgment is therefore affirmed.

Petition for rehearing denied.

Bird, J., did not sit.

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I. Scope.

The question as to the standard by which the conduct of a child is to be measured in determining whether it exercised due care, even when arising in a case where the injury occurred on or about a railroad track, is considered in the note to *Jacobs v. H. J. Koehler Sporting Goods Co.* ante, 10, as is also the question, even when arising in a case of injury on a railroad track, as to whether the child was too young to be within the rule of contributory negligence. That note also considers the questions as to presumptions of incapacity on the part of a child to contribute negligently to an injury, and as to the age at which a child is chargeable with the same degree of care as an adult, even when these questions arise in actions for injuries to children on or about railroad tracks. It is the purpose of the present note to treat these general questions only in so far as they involve considerations distinctive to actions for injury or death of children on or about railroad tracks, and, in addition, to show the circumstances under which a child assumed to be capable of contributory negligence has been held negligent either as a matter of law or of fact.

This note includes only cases in which, at the time of the injury, the child was on or near the track, and excludes cases in which it was on an engine or cars, either as a passenger or otherwise. See, however, notes cited in indexes to L.R.A. Notes, under the title, "Carriers," as to contributory negligence of person injured, whether an adult or an infant, in actions against common carriers under various circumstances.

Cases within the scope of the following notes, dealing with contributory negligence of children on or about railroad tracks, are, in general, excluded from the present note:

As to contributory negligence in attempting to cross a train standing on a crossing, including cases of injuries to children, see notes in 13 L.R.A.(N.S.) 1066; 34 L.R.A.(N.S.) 466; and 50 L.R.A.(N.S.) 1012.

As to contributory negligence of child in jumping on or off moving railroad train, see note to *Baker v. Seaboard Air Line R. Co.* 29 L.R.A.(N.S.) 846.

As to negligence of railroad company in respect to flying switches or detached cars moving by their own momentum, including the question of contributory negligence of children, see notes in 18 L.R.A. 63, and L.R.A.1916C, 1033.

As to negligence of child injured by trains or cars operated longitudinally along a public street, see note to *Southern R. Co. v. Caplinger*, 49 L.R.A.(N.S.) 661, at p. 686.

As to personal contributory negligence of children riding in vehicle driven or controlled by another at a railroad crossing, see note to *Crosby v. Maine C. R. Co.* L.R.A.1915E, 225, at p. 230. See also *Brennan v. Minnesota, D. & W. R. Co.* (1915) 130 Minn. 314, L.R.A. 1915F, 11, 135 N. W. 611, holding that a six-year-old boy riding with his father cannot be charged with contributory negligence for failing to take precautions for his own safety at a railroad crossing.

The following notes also, dealing with the question of liability of a railroad company in actions for injuries to children on or about railroad tracks, will be found helpful:

Right of persons in charge of train to

presume that child will get out of danger,—note to *Southern R. Co. v. Chatham*, 6 L.R.A.(N.S.) 283.

Liability of carrier for injury to child passenger who exposes himself to danger in consequence of conduct of employee,—note to *Goodfellow v. Detroit United R. Co.* 20 L.R.A.(N.S.) 1124.

Care required of railroad companies to prevent injury to small children upon the track,—note to *Bottoms v. Seaboard & R. R. Co.* 25 L.R.A. 784.

Duty of railroad company to keep lookout for children on the track,—notes in 25 L.R.A. 786; 32 L.R.A.(N.S.) 566; and 41 L.R.A.(N.S.) 274.

Generally, as to duty of railroad company to trespassing child, see note to *Walsh v. Pittsburg R. Co.* 32 L.R.A.(N.S.) 559, and, particularly, as to duty to keep lookout for children, see note in 41 L.R.A.(N.S.) 274.

II. Degree of care; duty generally to stop, look, and listen:

a. In general.

The rule that the standard by which the conduct of a child should be measured in determining whether it exercised due care to avoid danger is that degree of care which is ordinarily exercised by children of the same age, capacity, discretion, knowledge, and experience, under the same or similar circumstances, has been applied in many cases in actions for injuries or death of children on or about railroad tracks. These cases are cited in footnotes 13 to 24, inclusive, of the note above referred to, appended to *Jacobs v. H. J. Koehler Sporting Goods Co.* ante, 10, and the rule and its limitations are there treated at length. At this point it is the purpose only to indicate applications of the rule distinctive to children on or about railroad tracks.

It has been said that, in respect to contributory negligence of children in crossing railroad tracks, the law does not fix the standard as requiring prescribed acts, such as looking and listening, as in the case of adults, but that each case must be determined by its special facts. *Northern P. R. Co. v. Heaton* (1911) 111 C. C. A. 548, 191 Fed. 24.

And the rule that, when a person approaches a railroad crossing, the law requires him to look up and down the track for the approach of trains before attempting to cross, does not apply where the person injured is an infant of such tender age that the requisite capacity to exercise proper care and dis-

cretion is wanting. *Chicago & A. R. Co. v. Becker* (1877) 84 Ill. 483, where a boy six years old was killed by a train approaching in plain sight, while attempting to follow other boys across the track at a street crossing. The court, in affirming a judgment for the plaintiff, stated that the law will not impute negligence to an infant of such tender years.

But a court may declare as matter of law that a bright boy thirteen years old is negligent in walking across a railroad track at a country crossing without looking or listening for a train which he might see and hear, and which strikes and kills him when he steps upon the track. *McGee v. Wabash R. Co.* (1908) 214 Mo. 530, 114 S. W. 33.

And a boy nine years of age is old enough to be guilty of contributory negligence in crossing a railroad track without looking for a train. *Cook v. Louisiana & N. W. R. Co.* (1912) 130 La. 917, 58 So. 767, it being held that negligence was shown in this instance as matter of law.

So, in *Cox v. New York C. & H. R. R. Co.* (1902) 69 App. Div. 451, 74 N. Y. Supp. 1011, an action for the death of a girl fourteen years old by collision with an engine while attempting to cross the track at a crossing, it was held error to refuse to charge that the general duty of looking for the approach of trains was imposed by law upon the girl, notwithstanding she was only fourteen years of age. The court stated, however, that she was required to exercise only the measure of care and caution that is common and usual in one of her age.

One of the questions frequently arising is whether an infant who is approaching years of maturity is required to exercise the same degree of care as an adult in crossing a railroad track. See, on this question generally, IV. of note to *Jacobs v. H. J. Koehler Sporting Goods Co.* ante, 13. On this point, it was said in a Texas case, in an action for injury to an eleven-year-old boy inflicted by a train while he was crossing the track: "The evidence showed that he had the intelligence, education, and experience of youths of his age. He knew how trains were operated, and must be held to have known that, if he was on the track when the engine came along, it would strike and injure him. But, while he knew the danger of being on the track when the engine passed, he may have lacked the discretion to appreciate the imprudence of attempting to cross the track under the circumstances which surrounded him. If a

person of ordinary prudence would not have attempted to cross the track as he did, nevertheless, if the boy lacked the discretion, on account of his undeveloped judgment, to appreciate the danger, his act would be excusable." *Texas & P. R. Co. v. Ball* (1903) — *Tex. Civ. App.* —, 73 S. W. 420, reversed on other grounds in (1903) 96 *Tex.* 622, 75 S. W. 4.

On a later appeal in (1905) 38 *Tex. Civ. App.* 279, 85 S. W. 456, it was held that a bright boy eleven years and eight months old, who is in the fourth grade in school, and is accustomed to railroads, is not, as a matter of law, bound to exercise the same degree of care as an adult to avoid injury from trains in crossing a track. And the court approved an instruction that a child of tender years is not held to the same degree of accountability as an adult, but that the question of his intelligence and mental capacity is for the jury to determine from all the facts and circumstances in evidence; it being contended that this was a charge on the weight of the evidence, and was erroneous also for the reason that the evidence showed that the boy had been raised near the railroad and was better educated and knew more about the danger from railroad cars than the average adult.

A bright boy thirteen years old, although familiar with a railroad crossing and cautioned to be careful in crossing, should not, as a matter of law, be held to the same standard of care to stop, look, and listen for a train before driving on the track as an adult, and the jury may find that he exercised due care, although an adult under the circumstances would have been held guilty of contributory negligence as matter of law. *Russell v. Oregon R. & Nav. Co.* (1909) 54 *Or.* 128, 102 *Pac.* 619. The court said that while a boy of the general intelligence of the one in question approached in some respects the standard of an adult, it was not for the court, as a matter of law, to say that he had the judgment, the power of reflection and discrimination, to appreciate the full extent of the danger at the crossing.

So, it has been held that a fourteen-year-old boy is required, in crossing a railroad track, to exercise only that degree of care ordinarily exercised under similar circumstances by boys of his age, experience, and maturity. *Atchison, T. & S. F. R. Co. v. Hardy* (1899) 37 *C. C. A.* 359, 94 *Fed.* 294.

And in *McNamara v. Chicago, R. I. & P. R. Co.* (1907) 126 *Mo. App.* 152, 103 S. W. 1093, it was held that a fifteen-

year-old boy is not required to exercise the same degree of care as an ordinarily prudent man of mature years, to avoid injury in crossing a railroad track, but is required to exercise only such care and precaution as a reasonably prudent person of his age, capacity, and experience would reasonably be expected to exercise under the same or similar circumstances.

However, in some cases the age, intelligence, experience, and capacity of the infant have been shown to be such that it was held that the same standard as in the case of an adult should apply in determining whether it exercised due care in attempting to cross a railroad track.

Thus, in *Gress v. Philadelphia & R. R. Co.* (1910) 228 *Pa.* 482, 32 *L.R.A.(N.S.)* 409, 77 *Atl.* 810, 21 *Ann. Cas.* 142, where a girl almost fourteen years old was run over by a train while attempting to cross the track, and it appeared that she had been attending school for five or six years and during that time had crossed the track four times daily; that she had been repeatedly warned to observe care at the crossing; and that she was a bright girl, strong and capable beyond her years, the court, in holding that she was guilty of contributory negligence as matter of law, said: "If it would have been negligence in an adult to attempt to cross over the tracks under the conditions we have here, it was negligence in the girl to make the attempt. The legal presumption of her incapacity to appreciate and avoid injury had reached that point in the diminishing scale when it was almost a negligible quantity. She was within ten days of being fourteen years old, when the presumption would have been just the opposite. Against this feeblest presumption in her case is the testimony as to her years of experience in connection with the very danger which she here risked, and her unusual capacity in general affairs."

To a similar effect is *Payne v. Chicago & A. R. Co.* (1896) 136 *Mo.* 562, 38 S. W. 308, where, in holding that a bright boy eleven years old was guilty of contributory negligence, as matter of law, in attempting to cross a railroad track at a street crossing in front of a train approaching in plain sight, which he knew was due, and which was so near that he was struck by it and injured, the court said: "The testimony of plaintiff and of his mother abundantly established that his judgment and discretion, his ability to take care of himself, were adequate to that task,—indeed, were

equal to the judgment and discretion of the average man of mature years. This being the case, it is difficult to see why the same rule as to contributory negligence should not apply to a boy equal in capacity and intelligence to the average man as to the danger to be apprehended and guarded against in crossing a railroad track, as should apply to such men."

And, where in an action for injury to a sixteen-year-old boy, who, while standing beside the track at a station, was injured by a passing freight train, the evidence showed that he was a man in size, had been in the sixth grade in school, and had worked for more than a year about town, had frequently been at the depot, and for years had lived near a railroad station, and there was nothing to indicate that he did not have sufficient discretion and judgment to be aware of the danger from a moving train, it was held not erroneous to refuse an instruction for the plaintiff that, in order to prevent a recovery on account of contributory negligence, the jury must believe that he failed to exercise that degree of care and prudence for his safety that persons of his age, maturity, judgment, and discretion would have exercised under the circumstances. *Heffin v. Eastern R. Co.* (1913) — Tex. Civ. App. —, 159 S. W. 499.

So, in an action for injury to a boy about nine years old, who was run over by an engine while walking along the track, where it appeared that he was in the habit of riding on trains, and knew that the engine was taking coal and was likely to start at any moment, it was held that an instruction was erroneous that a child is not required to exercise the same degree of care as a person of mature years, and is bound to exercise only such care as children of his age, capacity, and intelligence are capable of exercising, since it tended to mislead the jury to infer that a child is never required to exercise the same degree of care as an adult. *Wabash R. Co. v. Jones* (1905) 121 Ill. App. 390.

And in cases where the child was of such age and discretion that the court could declare that it was capable of exercising some degree of care for its own safety, and it appeared that the injury was caused by a train approaching in plain sight while the child was attempting to cross the track, and there was nothing shown which would excuse a failure to look, or to see and avoid the train, it has been held that contributory negligence declared as matter of law would prevent recovery. L.R.A.1917F.

Thus, in *Tucker v. New York C. & H. R. R. Co.* (1891) 124 N. Y. 308, 21 Am. St. Rep. 670, 26 N. E. 916, it was held that failure to look for trains in attempting to cross a number of railroad tracks at a street crossing was contributory negligence as matter of law in an intelligent boy twelve years old, so as to prevent recovery for his death by collision with an engine approaching in plain sight.

And it was held that contributory negligence was shown as matter of law, which would preclude recovery for the death of a thirteen-year-old boy by being struck by a train at a country crossing, where it appeared that a person standing 6 feet from the track could see from 40 to 100 feet in the direction of the approaching train and the boy attempted to walk across the track without looking or listening for a train, although there was nothing to distract his attention. *McGee v. Wabash R. Co.* (1908) 214 Mo. 530, 114 S. W. 33.

So, it was held not erroneous to direct a verdict for the defendant on the ground of contributory negligence, where a bright boy almost nine years old walked in front of a train at a crossing with which he was familiar, and was killed, and it appeared that there was nothing to distract his attention as he approached the crossing, and that for a distance of at least 50 feet before he reached the track he had an unobstructed view of the track for a long distance. *Anderson v. Central R. Co.* (1902) 68 N. J. L. 269, 53 Atl. 391.

And in *McCarthy v. Bangor & A. R. Co.* (1914) 112 Me. 1, L.R.A.1915B, 140, 90 Atl. 490, it was held that a fourteen-year-old boy who was familiar with the crossing, and knew that a train was due, was negligent in failing to take proper precautions to discover the train, which could have been seen and heard, the question being, however, the effect and credibility of the testimony of the person injured in such a case that he looked and listened. The question of contributory negligence as affected by the fact that the party injured was a minor was not particularly considered.

Also, where a boy ten years old was killed while attempting to cross a track in the outskirts of a city, and no claim was made in an action for his death that he was not sui juris, it was held that contributory negligence as matter of law was shown, notwithstanding evidence that, before attempting to cross, he looked both ways, in view of evidence for the plaintiff that the boy had an

unobstructed view of the track in the direction from which the train was coming for a distance of from 300 to 500 feet. *Le Duc v. New York C. & H. R. Co.* (1904) 92 App. Div. 107, 87 N. Y. Supp. 364. It appeared that the boy was familiar with the locality, and that the accident occurred in the daytime; and the court said that, if he did not see the train before he reached the track, it was by reason of his negligence, and that, if he did see it and continued on his way, he was guilty of gross negligence.

And where a sixteen-year-old girl went upon a railroad track at a street crossing with which she was familiar, without looking for trains or taking any precautions, and it appeared that, although the wind was blowing and she was holding onto her hat and hurrying across, there was nothing to prevent her from discovering an approaching train in ample time to avoid injury, had she exercised the slightest care for her own safety, it was held that she was precluded from recovery for the injury so sustained because of contributory negligence as matter of law, although there was evidence that the bell was not rung as the train approached the crossing, and that it was moving at a rate of 10 or 12 miles an hour, in violation of an ordinance prohibiting a speed of more than 6 miles an hour. *Chicago, B. & Q. R. Co. v. Thorson* (1896) 68 Ill. App. 288.

And the same conclusion was reached where a seventeen-year-old girl at a country crossing was killed by a train which, had she looked as she passed over the last 70 feet before reaching the track, she could have seen approaching in plain sight. *Studley v. St. Paul & D. R. Co.* (1892) 48 Minn. 249, 51 N. W. 115.

Where a boy eleven years old was struck at a street crossing by a train running in the dark at an unlawful rate of speed, and he testified that before crossing the track he looked both ways for trains, it was held that, considering his age and capacity, the court could not say, as matter of law, that his manner of looking was negligent in that he failed to see the train, although there was an unobstructed view of the track. *Payne v. Chicago & A. R. Co.* (1895) 129 Mo. 405, 31 S. W. 885. But on a later appeal in (1896) 136 Mo. 562, 38 S. W. 308, it was held contributory negligence as matter of law for the boy to attempt to cross in front of the train, which was approaching in plain sight, and which he knew was due about that time; the court saying that, when the case was previously L.R.A.1917F.

before it, the facts as to the boy's intelligence and capacity were not so fully developed.

It has been held also that it is contributory negligence, as matter of law—

—for a bright boy eight years old, on alighting from a train, instead of following a safe approach to the depot, to attempt to run across four or five tracks in a railroad yard where switching is continually in progress, with the result that he is killed by a backing engine, *Perego v. Lake Shore & M. S. R. Co.* (1909) 158 Mich. 225, 122 N. W. 535;

—for a bright boy fourteen years old, who is familiar with a railroad crossing, knows that a train is about due, and has been cautioned before starting as to the danger, to approach the crossing in a sleigh, in the early hours of the morning, without taking such precautions as to avoid collision with the train, which is plainly visible from the time that he is within 100 feet from the track, although fog somewhat obscures the light from the engine. *Clemons v. Chicago, St. P. M. & O. R. Co.* (1909) 137 Wis. 387, 119 S. W. 102;

—for a bright boy twelve years old, familiar with railroad tracks, to step upon the track in front of an engine approaching in plain sight, with the result that as soon as he steps on the track he is struck and killed; there being nothing apparently to divert his attention, *Virginia-Carolina R. Co. v. Clawson* (1910) 111 Va. 313, 68 S. E. 1003;

—for a bright boy twelve years old to attempt to run across a railroad track in front of a train approaching at the rate of 25 miles an hour, and only 400 feet away, which he must have seen before crossing or failed in his duty to look; and it is immaterial whether he might have crossed in safety had he not been delayed by catching his foot or stumbling on the track, *McPhillips v. New York, N. H. & H. R. Co.* (1884) 12 Daly (N. Y.) 365;

—for a nine-year-old boy of average intelligence, who has been cautioned as to railroads, without looking or listening to step on the track immediately in front of an engine approaching in plain sight, the cause of his failure to see or hear the train not being shown, *Cook v. Louisiana & N. W. R. Co.* (1912) 130 La. 917, 58 So. 767.

It was held that contributory negligence might be inferred on the part of a ten-year-old boy familiar with railroad tracks over which trains ran frequently through a thickly populated part of a city, who ran down an embankment 5 feet high, and had not quite reached the

rail of the nearer track when he was struck and killed by an engine approaching at the rate of 18 miles an hour, which he did not see or hear in time to avoid. *Nolan v. New York, N. H. & H. R. Co.* (1885) 53 Conn. 461, 4 Atl. 106. The court said: "It was broad daylight; the approaching train gave the alarm; no reason appears why the boy could not see and hear; and yet, by some strange fatality, he does not heed the warning, but rushes on until struck by the locomotive and fatally injured. Such conduct, instead of being ordinary, was extraordinary." The decision appears sound, but there was the additional circumstance, to which little consideration is given in the opinion, that the attention of the child was fixed on a train which had just passed in the opposite direction on a farther track.

It was held, however, in *Nolan v. New York, N. H. & H. R. Co.* (Conn.) supra, that a finding of due care on the part of another boy seven years old, who was injured by the same train and under the same circumstances, would not be set aside, the court saying that the difference in the age made the difference in the two cases.

There is no presumption that a ten-year-old boy of average intelligence, who is familiar with a railroad crossing, does not have the capacity to exercise some degree of care as he approaches the crossing. *Plummer v. Indianapolis Union R. Co.* (1914) 56 Ind. App. 615, 104 N. E. 601.

But in an action for injury to an eight-year-old girl by a train while she was crossing the track along a commonly used footpath, the court in *Taylor v. Delaware & H. Canal Co.* (1886) 113 Pa. 162, 57 Am. Rep. 446, 8 Atl. 43, in reversing a judgment of nonsuit, stated that the question of contributory negligence did not arise in the case because of the age of the child. In this state an infant between seven and fourteen years of age is regarded as presumptively incapable of contributory negligence. But the weight of authority is that a child of the age of the one in this case is not, as matter of law, irrespectively of the circumstances of the injury, excused from the exercise of any degree of care.

And recovery was denied in *McMullen v. Pennsylvania R. Co.* (1890) 132 Pa. 107, 19 Am. St. Rep. 591, 19 Atl. 27, in an action for the death of a ten-year-old boy who was run over by a train while he was lying on the track on his back with his head between the rails and

his feet projecting over the rails, on the ground that the boy was a trespasser, although the court stated that he could not be held accountable for his own negligence. The court's statement as to the child's negligence is, of course, obiter, and is plainly opposed to the weight of authority. But if regarded as simply an expression of the doctrine of *prima facie* presumption of incapacity, it shows the impropriety of such a doctrine as applied to children of the age of the one in question under the circumstances indicated.

A special finding that a nine-year-old child who was injured by a backing engine in attempting to cross the track was of sufficient age, intelligence, and experience to know and realize the danger usually attendant upon crossing railroad tracks, was held in *Crabtree v. Missouri P. R. Co.* (1910) 86 Neb. 33, 136 Am. St. Rep. 663, 124 N. W. 932, not inconsistent with a verdict in her favor for the injuries so sustained, which was based upon the view that she used such care as might ordinarily be expected from a child of her years.

b. Child of inferior intelligence.

In the cases above cited the child was of at least average intelligence and discretion for one of his age. But in an action for injury to a boy sixteen years old, of inferior intelligence, who was injured by a train while attempting to drive across the track without stopping, looking, or listening for the train, with his attention fixed on a crowd of people at a depot a short distance from the crossing, it was held error to instruct the jury that he was guilty of contributory negligence, as it was for the jury to determine whether he exercised that degree of care which might reasonably be expected of one of his age, intelligence, and capacity under the circumstances. *Garrison v. St. Louis, I. M. & S. R. Co.* (1909) 92 Ark. 437, 123 S. W. 657. The court said: "It has been repeatedly held by this court that it is negligence for one who approaches a railroad crossing to fail to look and listen for the approach of trains, and only in exceptional cases is it proper to submit to the jury the question as to whether the failure to exercise such care is excusable. The general rule of law is that the failure to exercise that care and diligence is such negligence as will defeat a recovery for any injury that is the consequent result thereof. . . . But this rule of law is applicable to adults and to those minors who have the

full measure of discretion attributed to adults. It is not a rule that is applicable to all minors, and is not applicable to those minors who have not the capacity or intelligence to appreciate the dangers, or the discretion to guard against them. The standard for judging the conduct of a minor is not the care and prudence that would be exercised by an adult, but only that of one of his age, intelligence, and discretion; and it cannot be said as a matter of law that a minor is guilty of contributory negligence under circumstances that would declare an adult to be guilty of such negligence. . . . In the case of a minor, therefore, it becomes a question of fact for the jury to determine, after taking into consideration his age, intelligence, and capacity, whether or not under the circumstances of the case he was guilty of contributory negligence; and it cannot be said as a matter of law that the minor of tender years or of inferior intelligence or discretion is guilty of contributory negligence. . . . The plaintiff in this case was a boy sixteen years old, and was of inferior intelligence. The testimony tended to show that he was not bright, and did not have good understanding. What would be ordinary care for such a boy to exercise might be culpable negligence in an adult. Under the circumstances of this case, it cannot therefore be said as a matter of law that he was guilty of contributory negligence. The court therefore erred in giving the instruction of its own motion declaring the plaintiff guilty of contributory negligence."

III. Excuses for failure to see or avoid cars or engines; in general.

Where there is a failure to give proper warning of the approach of a quietly moving car at a frequented street crossing, slight circumstances may be sufficient to warrant a finding of due care on the part of an infant in crossing the track.

Thus, although a boy eleven years old, at a street crossing, walked immediately in front of a backing train which he could have seen slowly approaching, but did not see in time to avoid, and was killed, it was held in *Schleiger v. Northern Terminal Co.* (1903) 43 Or. 4, 72 Pac. 324, 14 Am. Neg. Rep. 193, an action for his death, that whether he exercised that degree of care required of one of his age and experience was a question for the jury, and a judgment for the plaintiff was affirmed, where there was evidence that he was talking to a com-

panion; that the train was moving obliquely over the crossing with but little noise, although the bell on the engine 300 or 400 feet away was ringing, and that there was no lookout on the rear car or at the crossing although the place was one at which large numbers of people crossed at frequent intervals to and from a ferry.

And it was held that the question of contributory negligence was for the jury in an action for the death of an eighteen-year-old boy while attempting to cross a railroad track in the dark, on or near a street crossing, where he was killed by being struck by a flat car pushed in front of an engine without the sounding of the bell or whistle, and without a light or watchman on the front end of the car, and where there was evidence that the noise of the engine and car could have been heard for 100 feet, but that the headlight on the engine tended to dazzle and prevent a person on the track from seeing the car. *Scoville v. Hannibal & St. J. R. Co.* (1884) 81 Mo. 434.

So, in an action for injuries to a boy apparently over thirteen years of age, who was struck by a train while he was attempting to cross the track in the dark at a street crossing, it was held that the plaintiff had so far sustained the burden of showing freedom from contributory negligence as to require submission of that question to the jury, where he testified that he looked both ways before attempting to cross the track and did not see or hear the approaching train, although it appeared that the view in that direction was unobstructed and that there was a headlight on the engine, and where there was evidence that the night was dark and hazy, that an engine with a headlight burning stood near, facing the crossing, that there were several switch lights in the neighborhood, that he had waited, before attempting to cross, for a long freight train to pass on a farther track, and that the train which struck him was running at about 12 miles an hour and did not sound the bell or whistle. *Beckwith v. New York C. & H. R. R. Co.* (1889) 54 Hun, 446, 7 N. Y. Supp. 719, 721, affirmed without opinion in (1891) 125 N. Y. 759, 27 N. E. 408.

And in an action for the death of a thirteen-year-old boy killed under the above circumstances while in company with his older brother (the plaintiff in the above action), it was held that, in the absence of direct proof that the decedent looked and listened before attempting to cross the track, there was

not such a failure to show that he was free from contributory negligence as to preclude recovery as matter of law, in view of evidence that the older boy had looked both ways before they attempted to cross, and, not seeing or hearing the approaching train, had told the decedent to "come on" and they had hurried across. *Beckwith v. New York C. & H. R. R. Co.* (1889) 54 Hun, 446, 7 N. Y. Supp. 719, 721.

So, it was held in *Northern P. R. Co. v. Heaton* (1911) 111 C. C. A. 548, 191 Fed. 24, that failure on the part of a boy nearly twelve years old, in riding at night over a railroad crossing with which he was familiar, to observe a brilliantly lighted train approaching, when he could have seen it at any time that it was within 1,600 feet of the crossing, was not contributory negligence as matter of law, where he testified that a few seconds before attempting to cross he looked in that direction and failed to see the train, and that his attention was attracted by a light in the opposite direction, which he thought was the headlight of an approaching engine, and there was evidence also that no signal of the approach of the train was given.

It was held also that the question of contributory negligence was for the jury, where a twelve-year-old boy, while crossing, in the dark, a railroad track at a highway crossing, was struck by an engine which there was evidence was running backwards with the tender in front, at a high rate of speed, without warning by light, whistle, or bell. *Byron v. Central R. Co.* (1906) 215 Pa. 82, 64 Atl. 328. The court applied the doctrine that there is a presumption of incapacity on the part of a boy of this age to appreciate the danger, and stated that this presumption was not so conclusively overcome by the evidence of his capacity as to justify a court in holding as a matter of law that he was guilty of contributory negligence.

The same conclusion was reached where a boy eleven years old, while stooping to pick up his cap, which had blown off as he was crossing a railroad track at a crossing, was injured by an engine which he had not seen or heard, and which was approaching in plain sight at a rate of from 8 to 40 miles an hour, in violation of a city ordinance prohibiting a speed of more than 6 miles an hour. *Texas & P. R. Co. v. Ball* (1905) 38 Tex. Civ. App. 279, 85 S. W. 456.

The decision in *International & G. N. R. Co. v. Pinos* (1909) — Tex. Civ. App. L.R.A.1917F.

—, 117 S. W. 936, that a sixteen-year-old girl was not guilty of contributory negligence, as matter of law, in attempting to run across a railroad track at a country crossing, with a sunbonnet on her head, without stopping, looking, or listening for a train, rests apparently on grounds applicable also to adults, such as that she had the right to rely on the duty of the railroad company to give warning at the crossing and not to operate the train at an excessive speed, —the fact that the injured party was a minor not apparently affecting the case.

IV. Crossing in front of observed train or engine.

As to negligent operation of train at crossing as ground of liability for killing or injuring child incapable of contributory negligence, who was aware of train's approach, see note to *Illinois C. R. Co. v. Dupree*, 34 L.R.A.(N.S.) 645.

It has been held that a nine-year-old girl who was killed by a train while attempting to run across the track at a highway crossing cannot be charged with contributory negligence as matter of law, although she saw the train, which was moving at a rate of from 40 to 50 miles an hour, when she was about 40 feet from the track and it was from 500 to 600 feet from the crossing. *Duggan v. Boston & M. R. Co.* (1907) 74 N. H. 250, 66 Atl. 829.

And it was held that the question of contributory negligence was for the jury, where a seven-year-old child, in attempting to cross a railroad track at a crossing in front of a train which she knew was approaching, fell and was run over, and there was evidence that, had she not fallen, she could have crossed in safety. *Costello v. Syracuse, B. & N. Y. R. Co.* (1873) 65 Barb. (N. Y.) 92, appeal dismissed in (1873) 55 N. Y. 641.

So the fact that an eight-year-old child may have purposely waited on a railroad crossing until an engine it saw approaching was close to it, and then recklessly ran in front of the engine and was killed, was considered in *Holmes v. Missouri P. R. Co.* (1905) 190 Mo. 98, 88 S. W. 623, as not necessarily showing contributory negligence. It was said: "Another one of defendant's arguments is that the child knew the train was coming, saw it, and yet jumped right in front of it. In one of its pleas the defendant says the child saw the engine coming, purposely waited until it got close to him, and then recklessly ran in front of it. Much stress is laid on that argument in respondent's brief. But that

also is liable to lead some minds to a conclusion the opposite to that for which it is advanced. There is nothing to suggest a suspicion that the child wanted to commit suicide. If, therefore, as the learned counsel think, he saw the train coming, waited until it was close, and then tried to beat it over the crossing, rushing headlong and heedlessly into imminent danger, his act was very suggestive of a lack of that prudence which we would expect to be shown by a person old enough to take care of himself. If the evidence justifies the inference that the counsel for respondent draws, we could account for the act, if it were committed by a person of mature years and good sense, only on the ground of intentional suicide; but when committed by a child it suggests only a lack of understanding of the danger, or a lack of such prudence as comes only with years." See also later appeal in (1907) 207 Mo. 149, 105 S. W. 624.

The correctness of the view in the latter case seems at least doubtful. Probably the majority of the courts would consider the child under the circumstances indicated guilty of contributory negligence as matter of law. And there are cases in which this conclusion has been reached where the child saw the train approaching, but nevertheless attempted to cross in front of it and was struck and injured.

Thus, where a twelve-year-old boy was killed by a train while attempting to cross the tracks at a depot, to join boys who were playing on the platform on the opposite side of the track, and it appeared that he saw the train when it was about 70 yards from the crossing and was approaching at a rate of about 10 miles an hour, and believed that he could cross in safety, which he probably could have done but for the fact that his foot caught and he fell, it was held that his negligence precluded recovery for his death, notwithstanding failure to stop the train before it reached the crossing, as required by statute. *Gresham v. Louisville & N. R. Co.* (1894) 15 Ky. L. Rep. 599, 24 S. W. 869.

And it was held that contributory negligence was shown as matter of law, which would prevail over a special finding of due care, where a thirteen-year-old messenger boy, of ordinary intelligence, and accustomed to crossing railroad tracks, was struck by a freight train backed across a street at the rate of 5 or 6 miles an hour, and it appeared that he saw the train approaching, and just before starting to cross the track

noticed the cars only 10 feet away, but supposed they were going to stop before reaching the point where he was crossing, as he had observed they had done only a few minutes before. *Chicago, B. & Q. R. Co. v. Laughlin* (1906) 74 Kan. 567, 87 Pac. 749.

So a sixteen-year-old boy familiar with trains and with the conduct of railroad business, who, while engaged in an altercation with a trainman on a licensed way, deliberately places himself upon the track 20 feet in front of an engine which he knows is liable to move at any time, with his back to the engine, is guilty of such negligence as will preclude recovery for an injury caused by his being struck by the engine, which is moved without warning. *Lofdahl v. Minneapolis, St. P. & S. Ste. M. R. Co.* (1894) 88 Wis. 421, 60 N. W. 795.

And a sixteen-year-old boy who, with knowledge that a train is approaching, steps upon the track in front of it, after passing around the end of a car standing on a siding and projecting across the sidewalk, without looking or listening for the train, is guilty of such negligence, although he follows closely behind an adult, as will preclude recovery for an injury caused by his being struck by the train. *Little Rock & Ft. S. R. Co. v. Cullen* (1891) 54 Ark. 431, 16 S. W. 169.

In an action for injury to an eight-year-old boy, caused by his being struck by an engine while he was crossing a street, it was held erroneous to refuse an instruction that, if the boy looked and saw the train and started to cross ahead of it, the plaintiff could not recover, whether the boy started to cross taking the risk of crossing in front of the train, or omitted to be governed by the fact that he had seen it; there being no other instruction covering this proposition, which, in one view of the evidence, was proper for the consideration of the jury. *Lennon v. New York C. & H. R. R. Co.* (1892) 65 Hun (N. Y.) 578, 20 N. Y. Supp. 557.

But, if failure to give proper signals results in the child's failure to discover the train until it is almost on the track, and the child is required to act hastily, the fact that it attempts to cross in front of the train may be excusable. Thus, it was held in *Copley v. New Haven & N. Co.* (1883) 136 Mass. 6, that the burden imposed by statute on the defendant, of showing, in addition to the mere want of ordinary care, gross or wilful negligence on the part of the injured person, was not sustained, as matter of law, in an

action for the death of a sixteen-year-old girl by collision with a train while she was attempting to cross the track at a crossing with which she was familiar, in the dusk of the evening, where, although the view of the track was unobstructed, there was evidence tending to show that she did not see the train until within 3 or 4 feet of the track, when a danger signal was given, and that she then attempted to run across in front of the train which was from 3 to 6 rods of the crossing, and that no previous signal had been given, although the statute required the ringing of the bell and sounding of the whistle 80 rods from crossings. It was said: "She had a right to rely, to some extent, upon the signals of warning which the law required to be given. . . . The want of such signals may have led to her being in that situation. This is a matter of inference. Finding herself there, in the evening, close upon the track, with no previous warning, with a train approaching at great speed, and already within from 3 to 6 rods of her, and perhaps even less, startled by the sudden and sharp whistles, seeing a flashing headlight, with no time to reflect, we cannot say as matter of law that the burden which is imposed by statute on the defendant, of showing, in addition to the mere want of ordinary care, such gross or wilful negligence as is contemplated by the Statute of 1881, . . . was maintained by proving that she attempted to cross the track under these circumstances."

And where a six-year-old girl, while attempting to cross the track at a street crossing, was struck by an engine which she could not see approaching because of cars standing on an intervening track, and there was evidence that she attempted to cross after discovering the approach of the engine, it was held that an instruction was erroneous which ignored the view, as there was evidence tending to show, that she was on the track between the rails when she discovered the approach of the engine, and was placed in this dangerous position because of the neglect of those in charge of the engine to give warning, and charged that, if the jury found that she was of sufficient age, intelligence, and experience to know and realize the danger of attempting to cross in front of an approaching train, and was injured while making such an attempt, she could not recover. *Geist v. Missouri P. R. Co.* (1901) 62 Neb. 309, 87 N. W. 43, 10 Am. Neg. Rep. 414. L.R.A.1917F.

As to crossing in front of observed train on farther track, after passing behind train moving in the opposite direction, see *Chicago G. W. R. Co. v. Mohan*, under V., *infra*.

See also *Tyler v. New York & N. E. R. Co.*, under VIII. d, *infra*, where a fourteen-year-old boy attempted to drive across the track in front of a train which he discovered too late, the view of the track being obstructed.

V. Crossing behind moving train or engine.

The question of contributory negligence on the part of very young children in attempting to cross a railroad track after a train has passed, without exercising sufficient care to see and avoid a train on another track, has properly been held to be for the jury.

Thus, it was held that a girl nearly six years old was not guilty of contributory negligence as matter of law, where it appeared that, after waiting at a railroad crossing for the passing of a train, she crossed behind it and was struck by a train moving in the opposite direction, and there was evidence that, while between the tracks, which were 8 feet apart, she looked in both directions, but that her view of the approaching train was obstructed by a curve in the track and by steam and smoke from the train which had just passed. *Serano v. New York C. & H. R. R. Co.* (1907) 188 N. Y. 156, 117 Am. St. Rep. 833, 80 N. E. 1025, reversing (1906) 114 App. Div. 684, 99 N. Y. Supp. 1103.

And it is not contributory negligence as matter of law for a bright girl seven years old, although she has been cautioned of the danger and is accustomed to crossing the tracks on her way to school, to attempt to run across parallel railroad tracks at a street crossing, after a train on the track nearer her has backed, leaving the crossing apparently clear, without stopping and looking for a train on the farther track, which is hidden from her view by the cars on the nearer track and which she has no reason to anticipate, but which is backed over the crossing without proper warning, and injures her. *Louisville, N. A. & C. R. Co. v. Rush* (1891) 127 Ind. 545, 26 N. E. 1010.

It was held also in *Pennsylvania R. Co. v. Brooks* (1884) 2 Walk. (Pa.) 122, that the question of contributory negligence was for the jury, and a judgment for the plaintiff was affirmed, where a seven-year-old girl on her way to school waited at a street crossing for a freight

train to pass, and then attempted to cross behind it, when she was struck by a train moving at a high rate of speed in the opposite direction.

So, where a child nearly eight years old waited at a street crossing for a train to pass on a farther track, and, on starting to cross behind it, was struck by an engine on a nearer track, it was held that he was not guilty of such negligence, as matter of law, as would preclude recovery for the injury, although he failed to look in the direction from which the train was approaching, where there was evidence that it did not give the warning required by statute, and that the crossing gong maintained by the railroad company at that point was not ringing. *David v. West Jersey & S. R. Co.* (1913) 84 N. J. L. 685, 87 Atl. 440.

But assuming that a child seven years and two months old was sui juris, the court, in *McCarthy v. New York C. & H. R. R. Co.* (1899) 37 App. Div. 187, 55 N. Y. Supp. 1013, held that a nonsuit was properly granted on the ground of contributory negligence, where it appeared that the child, after waiting at a crossing for a train to pass, looking directly ahead of her, started to run across the track, and, on reaching the second track and discovering a train rapidly approaching from the opposite direction, in her fright, ran along by the side of the track in the direction the train was going until struck and injured by the steps of the cars.

In actions for injuries to older children, as to whose capacity to exercise some degree of care in crossing the tracks there could be no doubt, the question of contributory negligence has been held to be for the jury—

—where a boy eleven years old, having been sent on an errand which necessitated his crossing railroad tracks, waited at a street crossing for a freight train to pass, and, crossing behind it, was struck and killed by an engine which, at a rate of about 10 miles an hour, approached without warning from the opposite direction on another track 5 feet from the first track, *O'Mara v. Hudson River R. Co.* (1868) 38 N. Y. 445, 98 Am. Dec. 61;

—where a bright boy ten years old, after waiting at a street crossing for the passing of a train, crossed behind it and was struck by an engine moving in the opposite direction at an unlawful rate of speed without warning of its approach, *McGuire v. Chicago, M. & St. P. R. Co.* (1889) 37 Fed. 54;

—where a thirteen-year-old boy, in L.R.A.1917F.

crossing a railroad track at a crossing in a populous city, while going on an errand, stood on a track watching a train passing on a parallel track, and, as soon as it passed, stepped upon an intervening track, and was struck by a train which, without his knowledge, approached from the opposite direction without warning by bell or whistle. *New Jersey R. & Transp. Co. v. West* (1866) 32 N. J. L. 91, 12 Am. Neg. Cas. 276, affirmed in (1867) 33 N. J. L. 430, 12 Am. Neg. Cas. 281;

—where a fifteen-year-old boy was struck and injured by an engine while he was attempting to cross the track at a street crossing, and there was evidence that he passed behind a train moving in the opposite direction on an intervening track, and that as he went upon the farther track he saw the engine approaching and attempted to pass diagonally in front of it, and had almost cleared the track when he was struck, and that the engine approached without warning at a rate of speed prohibited by ordinance, *Chicago G. W. R. Co. v. Mohan* (1899) 88 Ill. App. 151, affirmed in (1900) 187 Ill. 281, 58 N. E. 395.

A complaint in an action for the death of a boy eleven years old who was struck by a train while attempting to cross, at a street crossing, two parallel tracks 9 feet apart in a thickly settled portion of a city, which alleged that he waited for a freight train to pass on the nearer track, and that as soon as it passed he started to cross without notice or warning of the approach of a train on the farther track from the opposite direction, and without fault on his part, and was struck by the latter train, which he could not see or hear because of the train on the nearer track, and which was running at a rate of 30 miles an hour, without any signals, in violation of an ordinance limiting the speed to 4 miles an hour, was held not subject to demurrer as showing contributory negligence. *Cleveland, C. C. & St. L. R. Co. v. Miles* (1904) 162 Ind. 646, 70 N. E. 985.

And it was held in *Farrell v. Erie R. Co.* (1905) 70 C. C. A. 396, 138 Fed. 28, the fact that the injured person was a minor not being, however, especially considered, that the question of contributory negligence was for the jury, in an action for injury to a sixteen-year-old boy caused by a train while he was attempting to cross parallel tracks at a street crossing, where there was evidence that, as he approached the crossing, he looked both ways; that toward the left he could

see as far as a tunnel 1,300 feet away and no train was in sight, but that a short freight train was approaching from the right on the farther track; that he waited for it to pass, and then looked again to the left, thought the track was clear and attempted to cross, when he was struck by a train approaching from that direction on the intervening track, which, because of smoke from the train moving in the opposite direction and a curve in the track, could not be seen for more than 100 or 150 feet, and was running at a rate of 15 miles an hour, in violation of an ordinance prohibiting a speed of more than 6 miles an hour.

It is not conclusive evidence of contributory negligence on the part of a girl eleven years old that, in crossing a railroad track at a street crossing immediately after a train has passed, she does not look along the track in the direction from which the train has come to ascertain whether another train is following. *Cooper v. Lake Shore & M. S. R. Co.* (1887) 66 Mich. 261, 11 Am. St. Rep. 482, 33 N. W. 306.

And the fact that a nine-year-old boy did not look along the track before starting to cross, or while in the act of crossing, was held, in *Powell v. New York C. & H. R. R. Co.* (1880) 22 Hun (N. Y.) 56, not to show contributory negligence as matter of law, in an action for his death, caused by a train at a crossing, where it appeared that he waited for a freight train to pass upon the nearer track, and then attempted to run across behind it, and was struck by a train on the farther track moving in the opposite direction at the rate of about 30 miles an hour, of the approach of which no warning was given.

In an action for injury to a twelve-year-old boy caused by a train at a street crossing with which he was familiar, it was held, in *Turell v. Erie R. Co.* (1900) 49 App. Div. 94, 63 N. Y. Supp. 402, that the complaint was erroneously dismissed, as evidence that he crossed behind a train moving in the opposite direction, that he did not see the train approaching although he looked in that direction and listened before attempting to cross, that the accident occurred on a foggy morning, although objects might be seen for a distance of at least 200 feet, and that the train gave no signal of its approach, required submission to the jury of the issue of contributory negligence, notwithstanding the fact that he was struck by the overhang of the engine while walking toward the track.

On the other hand, in several cases of L.R.A.1917F.

this kind, the age of the child, and its capacity and experience, have been such that the court declared that it was negligent under the circumstances indicated.

Thus, a nine-year-old boy who was familiar with a railroad crossing and knew that trains ran almost constantly over it, who had been warned of the danger and knew that it was his duty to be careful, and who testified that at the same time on other days he had many times seen an engine pass over the crossing in the same direction as the one causing the injury, was held guilty of contributory negligence as matter of law in attempting to walk hurriedly across the track on his way to school behind a train which had just passed, with the result that, while crossing the intervening track, of which there was practically an unobstructed view, he was struck by an engine moving in the opposite direction. *Henry v. Michigan C. R. Co.* (1915) 189 Mich. 45, 155 N. W. 550.

And although the decision appears to rest largely on the ground that negligence was not shown on the part of the railroad company, the court, in *Buhler v. Morgan's L. & T. R. & S. S. Co.* (1911) 129 La. 423, 56 So. 355, stated that the grossest negligence was shown on the part of a thirteen-year-old girl who, in a place practically given over to the switching of cars, attempted to cross a switch track between a car which had just been placed on the track and a bumper 2 or 3 feet away, and was injured by being caught between the end of the car and the bumper when the car was moved by other cars being switched against it.

And see *Wade v. Chicago & N. W. R. Co.* under XVIII. *infra*, where a boy was riding a bicycle across the track; also *Zwack v. New York, L. E. & W. R. Co.* and *Chicago, R. I. & P. R. Co. v. Kennedy*, under VIII. b, *infra*; and *Casey v. New York C. & H. R. R. Co.* under VIII. a, *infra*.

VI. Crossing near standing car or engine.

Under this heading are included only cases where the injury was due to the movement of the cars or engine around or near which the child was passing in crossing the track.

Generally, as to contributory negligence in attempting to cross in front of engine or cars standing near street crossing, see note to *Atchison, T. & S. F. R. Co. v. Wilkie*, 11 L.R.A.(N.S.) 963.

In the case of injury to very young children, contributory negligence in at-

tempting to cross the track near a standing train should not be declared as matter of law, even assuming that the child may be capable of some degree of care.

Thus, a five-year-old child who, in crossing a street, passes near the rear of a train of freight cars standing in the street, and is struck and injured by the sudden backing of the train, cannot be charged with contributory negligence as matter of law, but the question of its intelligence and capacity is for the jury. *Batchelor v. Degnon Realty & Terminal Improv. Co.* (1909) 131 App. Div. 136, 115 N. Y. Supp. 93. A later appeal, discussing the question of the defendant's negligence, will be found in (1910) 141 App. Div. 879, 126 N. Y. Supp. 433.

And it was held in *Chicago & A. R. Co. v. Murray* (1874) 71 Ill. 601, that a girl seven years and eight months old, who had been sent on an errand necessitating the crossing of railroad tracks, although of sufficient age and discretion to justify her being sent alone, and to know that engines were dangerous and that she should look for trains before crossing, was not guilty of gross negligence as matter of law, after passing over five tracks at a street crossing, in stepping upon the sixth track behind an engine which, according to the evidence, was standing two or three steps away, so as to be precluded from recovery for an injury caused by the engine striking her when it was suddenly backed.

Where a girl five years and eight months old followed her father across a railroad track in a railroad yard, between cars 6 or 8 feet apart, while switching was in progress, and was injured by the movement of the cars closing the opening, the court, in *Ft. Worth & D. C. R. Co. v. Wininger* (1912) — *Tex. Civ. App.* —, 151 S. W. 586, in holding that the trial court had not unduly emphasized in its instructions the proposition that the jury should not find the child guilty of contributory negligence unless they should find that she was possessed of sufficient intelligence to know and appreciate the danger of crossing between cars while switching was in progress, stated that, in view of the tender years of the child, the court would have been justified in instructing the jury as a matter of law that the child was not guilty of contributory negligence.

And it was held that the question of contributory negligence was for the jury—

—where a fourteen-year-old boy who was walking in the center of a street L.R.A.1917F.

saw, as he approached a railroad crossing, an engine standing close to or upon the street, with the tender nearest him, and, while on the track, changed his intention as to crossing, and took two or three steps along the track with his back to the engine, which, backing suddenly without warning, struck and injured him, *Fehnrich v. Michigan C. R. Co.* (1891) 87 Mich. 606, 49 N. W. 890;

—where a ten-year-old boy, in attempting to pass around the end of cars standing on a street crossing, was struck by the cars when they were set in motion by other cars being "kicked" against them, and there was evidence that he was told by a trainman to go around the cars. *Pittsburg, C. C. & St. L. R. Co. v. Blum* (1910) — *Ky.* —, 125 S. W. 300. The court was of the opinion, however, that if, as there was evidence tending to show, the boy attempted to pass around the cars notwithstanding the warning of the watchman not to cross, he was guilty of contributory negligence and could not recover;

—where a thirteen-year-old boy attempted to go around the end of a freight train which obstructed a street crossing, and was killed by the sudden backing of the train without warning, *Atchison, T. & S. F. R. Co. v. Cross* (1897) 58 Kan. 424, 49 Pac. 599, 3 Am. Neg. Rep. 26;

—where a twelve-year-old boy was struck by an engine while attempting to cross the track along a path commonly used by the public without objection, and there was evidence that he saw the engine standing near the crossing before he attempted to cross, and that it was moved without warning, *Houston & T. C. R. Co. v. Boozer* (1888) 70 Tex. 530, 8 Am. St. Rep. 615, 8 S. W. 119;

—where a nine-year-old boy, while attempting on his way home from school to cross a railroad track near a freight car, was injured by being struck by the car when other cars were negligently pushed against it, *St. Louis, I. M. & S. R. Co. v. Sparks* (1906) 81 Ark. 187, 99 S. W. 73.

And a twelve-year-old boy who, in going to a depot, found a street crossing blocked by a freight train with engine attached, and attempted to pass through a 2-foot space accidentally left about 15 feet from the sidewalk between the train and cars standing on a siding, was held in *Chicago, B. & Q. R. Co. v. Russell* (1904) 72 Neb. 114, 100 N. W. 156, 16 Am. Neg. Rep. 483, not guilty of contributory negligence as matter of law, so as to preclude recovery for an injury

by the backing of the train, closing the opening, as he attempted to cross, where it appears that the train had obstructed the crossing for a period of from twenty to thirty minutes and that another person had crossed through the opening five or ten minutes before the accident.

The fact that a boy eleven years old, who is injured while passing near the end of a car standing in a railroad yard by the backing of the car, is acquainted with the dangers incident to the operation of freight trains while being made up in a railroad yard does not impose on him a higher degree of care than is to be expected of children of his age, capacity, and understanding under like circumstances. *St. Louis & S. F. R. Co. v. Hodge* (1916) — Okla. —, 157 Pac. 60. It was said: "Children of his age, capacity, and understanding under like circumstances' would of course mean children such as plaintiff, acquainted with the dangers arising out of the movement of freight trains while switching and being made up; not those unacquainted with such dangers. The instruction required that his conduct be measured not alone by the standard that was expected of other children of his age, but those of his capacity and understanding under like circumstances."

In several cases the question has arisen whether a child was guilty of contributory negligence in attempting to pass through an opening between standing cars. (The question of contributory negligence in attempting to cross a train standing on a crossing is treated in notes in 13 L.R.A.(N.S.) 1066; 34 L.R.A.(N.S.) 466; and 50 L.R.A.(N.S.) 1012,—cases of the latter class being excluded from the present note.)

Thus, contributory negligence is not shown as matter of law by the fact that a seven-year-old boy passed between the cars of a train divided at a street crossing, within 3 feet of the rear car of the forward part of the train, and was injured by its being backed without warning. *Pittsburgh, C. C. & St. L. R. Co. v. McNeil* (1904) 34 Ind. App. 310, 69 N. E. 471.

And the question of contributory negligence was held to be for the jury where a nine-year-old boy attempted to pass through a small opening between cars standing on a crossing, by passing over the drawhead of one of the cars. *Schmitz v. St. Louis, I. M. & S. R. Co.* (1891) 46 Mo. App. 380, later appeal to similar effect in (1893) 119 Mo. 256, 23 L.R.A. 250, 24 S. W. 472.

But it was held that contributory neg-

ligence was shown as matter of law where a thirteen-year-old girl, familiar with the locality, attempted to pass through an opening from 6 to 8 feet wide between cars in a long freight train standing in a freight yard, after one part of the train had started to back to close the opening,—which was in the usual line of travel to a station,—no emergency being shown to justify her conduct, although it appeared that it was the custom to divide trains in this manner so that persons could walk through the opening in going to and from the station. *Wallace v. New York, N. H. & H. R. Co.* (1896) 165 Mass. 236, 42 N. E. 1125, 12 Am. Neg. Cas. 88.

As to the degree of care required of a child in passing through an opening between cars, or the standard by which its conduct should be measured, see footnote 22 of annotation to *Jacobs v. H. J. Koehler Sporting Goods Co.* ante, 10.

And see *Corcoran v. New York Elev. R. Co.* under XXI. *infra*, where an infant was struck by an engine while crossing the track at a station; also *Atchison, T. & S. F. R. Co. v. Hardy*, under VII. a, *infra*; and *Phillips v. Pryor*, under XIV. *infra*.

VII. *Attention diverted by other trains or engines.*

a. *In general.*

The interest which a child naturally has in watching trains and engines in motion, leading it to subject itself to dangers which the experience of an adult would guard against, has frequently been held to render the question of contributory negligence in the case of an injury to a child a question for the jury, when under the same circumstances the court would doubtless have declared an adult negligent as matter of law.

Thus, it was held that the question of contributory negligence was for the jury where a fourteen-year-old boy was struck by a train while crossing the track at a street crossing, where it appeared that he could have seen the train rapidly approaching, although he testified that before reaching the crossing he looked and did not see a train, that he passed in front of an engine standing on a parallel track near the crossing, and that he was watching the engine, which was ringing the bell and blowing off steam. *Atchison, T. & S. F. R. Co. v. Hardy* (1899) 37 C. C. A. 359, 94 Fed. 294. It was said: "Here was a boy fourteen years of age going upon a railroad track in front of a live engine standing on a

sidetrack, which would naturally attract the close attention of boys of that age, and for the time being divert their thoughts from all other subjects. The average boy of fourteen under such conditions would be more interested in the engine than a man, and for that reason would not exercise the same care as an adult to ascertain if a train was approaching on the adjoining track, and it ought not to be required of him that he should do so. Care commensurate with his age, experience, and environment is all that the law should exact."

And it was held that the question of contributory negligence was for the jury—

—where an eight-year-old child, who was familiar with the crossing and had been frequently warned to be careful when crossing the track, was killed, while running with his brother across the track, by a train approaching in plain sight, which there was no evidence that he saw, it appearing that his attention was attracted to a freight train standing on a sidetrack near the crossing, with the engine emitting steam, and that the train approached without giving any signal by bell or whistle, *Holmes v. Missouri P. R. Co.* (1905) 190 Mo. 98, 88 S. W. 623, later appeal in (1907) 207 Mo. 149, 105 S. W. 624; and the court considered that if the child had been going to school for four years that fact would not necessarily require it to hold as matter of law that it had sufficient prudence, so as to render its act a failure to exercise due care;

—where a ten-year-old boy in crossing a railroad track was struck by a train, and there was evidence that it was backing without any signals, that before crossing he saw the train moving in the other direction, and that his attention was attracted by another train which a flagman standing near the place of the accident was flagging, *Barry v. New York C. & H. R. R. Co.* (1883) 92 N. Y. 289, 44 Am. Rep. 377;

—where the attention of an eight-year-old girl, while attempting to cross railroad tracks at a street crossing, was diverted by a train approaching on one of the farther tracks, and she became confused, and ran back and forth on the tracks, failing to observe an engine which approached from the opposite direction without warning, at an excessive speed on an intervening track, although she might have seen it approaching for at least half a block, *Gruebel v. Wabash R. Co.* (1904) 108 Mo. App. 548, 84 S. W. 170; L.R.A.1917F.

—where a nine-year-old boy in crossing a railroad track at a crossing in a populous city was struck by an engine, backed, without the ringing of the bell, at a rate of from 12 to 15 miles an hour, there being evidence that cars standing on an adjacent track to some extent intercepted the view of the approaching engine, and that, moving in the opposite direction, was a train which might have diverted his attention, *Ewen v. Chicago & N. W. R. Co.* (1875) 38 Wis. 613;

—where a nine-year-old girl, while attempting to cross railroad tracks at a crossing, was struck by an engine backed without warning at a rate of 12 or 14 miles an hour, it appearing that her attention was diverted by a train passing in front of her on a farther track, and that the view of the approaching engine was obstructed by cars on an intervening track until she was within a few steps (apparently about 10 to 20 feet) of the track on which it was moving, *Crabtree v. Missouri P. R. Co.* (1910) 86 Neb. 33, 136 Am. St. Rep. 663, 124 N. W. 932.

It was held also in *Crabtree v. Missouri P. R. Co.* (Neb.) *supra*, that a special finding that the girl was of sufficient age, intelligence, and experience to know and realize the danger attendant upon crossing railroad tracks was not inconsistent with the verdict based upon the view that she used such care as might ordinarily be expected from a child of her age; also that a verdict in her favor was not inconsistent with special findings that there was nothing to prevent her seeing the approach of the engine in time to have averted the accident, that she knew that engines and cars frequently moved along the tracks in both directions across the street, and that she did not look before attempting to cross.

In Virginia the doctrine is recognized that an infant between seven and fourteen years of age is *prima facie* incapable of contributory negligence. Yet in *Norfolk & W. R. Co. v. Overton* (1911) 111 Va. 716, 69 S. E. 1060, although a judgment for the plaintiff was reversed on the ground that negligence in the operation of a train resulting in the death of a boy about thirteen years old was not shown, the court stated that it was conclusively shown that the deceased was of sufficient intelligence, experience, and capacity to be held guilty of contributory negligence, considered with reference to the particular situation presented in the case,—it appearing that the boy, who was employed in a mill near the place of the accident,

walked upon a railroad track at a crossing, without looking or listening for a train, but with his attention fixed on a passing train on the farther track, with the result that he stepped on the nearer track in front of a train which was rapidly approaching in plain sight, and was killed.

See also *Baltimore & P. R. Co. v. Cumberland*, under VIII. a, *infra*, where a twelve-year-old boy was struck by an engine while crossing a track, the view of which was obstructed, his attention being diverted by a train moving in the opposite direction; also *Nolan v. New York, N. H. & H. R. Co.* under II. a, *supra*; and *Edwards v. Chicago, M. & St. P. R. Co.* under IX. b, *infra*.

b. Standing on or near track for train on another track to pass.

The decisions in this class of cases are not in harmony. The holding in *MOLICA v. MICHIGAN C. R. Co.* ante, 118, that the passing of a passenger train is not sufficient, on the theory that it diverted his attention, to relieve of the charge of negligence a bright boy nine and a half years old who stands on a parallel track watching it while a train in plain sight on such track bears down upon and strikes him, appears sound.

And in several other cases a similar conclusion was reached, even where the child was younger.

Thus, it has been held that a child only seven years and three months old is guilty of contributory negligence as matter of law in standing on a railroad track for two or three minutes without taking any precautions for her safety, until struck by a train approaching in plain sight, although at the time her attention is diverted by a train passing on a parallel track, and she is engaged in waving at persons on that train, and consequently does not see or hear the train approaching on the track on which she is standing. *Dull v. Cleveland, C. C. & St. L. R. Co.* (1898) 21 Ind. App. 571, 52 N. E. 1013. This appears to be an extreme case, it being at least doubtful whether proper consideration was given to the circumstances which diverted the child's attention. The court said that it approached the consideration of the question of contributory negligence with the facts clearly established that the child was *sui juris*; it being found by the jury that she had been in the habit of going on errands, crossing railroad tracks, and making purchases without assistance, had attended school a part of two terms, understood that it was dangerous to

stand on railroad tracks when trains were approaching, was accustomed to railroads and had been instructed of their danger, was physically and mentally vigorous and intelligent for one of her age, that she was not too young and inexperienced to realize that it would be dangerous to stand on a railroad track, and appreciated the danger that might result from such conduct.

And in *Trudell v. Grand Trunk R. Co.* (1901) 126 Mich. 73, 53 L.R.A. 271, 85 N. W. 250, the court, apparently without attaching importance to the fact that the child's attention might have been diverted by a train moving on a parallel track, held that a boy seven years and four months old who knew and appreciated the danger of being on a railroad track in front of a moving train, was guilty of negligence as matter of law in standing on a track on which a train was approaching which would preclude recovery for his death by being run over by the train.

But, on the other hand, in the majority of the cases of this kind the question of contributory negligence has been held to be for the jury.

An apparently extreme decision, in which the question of contributory negligence was held to be for the jury, is that of a New York court, where a girl sixteen years old, on her way to school, stopped on a street at the intersection of five parallel railroad tracks, for a train to pass, which approached as she was crossing the third track, and, having looked in both directions and not seeing an engine or car in motion, although the view was unobstructed for about a quarter of a mile, remained standing about ten minutes waiting for the train to pass, without again looking, until she was struck by an engine which approached without sounding of the whistle or bell. *Hayercroft v. Lake Shore & M. S. R. Co.* (1874) 2 Hun (N. Y.) 489, affirmed in (1876) 64 N. Y. 636. The court said: "The plaintiff, although of an age when she must be deemed competent to take care of herself, yet she was young and without the experience, especially in novel and dangerous situations, that older persons generally have. Her attention was naturally drawn to the train that just arrived, and she had the right to expect the usual signals from an approaching engine. She did look, after the express stopped, up and down the track to see if anything was approaching that might do her injury. Seeing nothing, hearing nothing, she waited until all danger

from the express train should pass away, and was approached stealthily by an engine, struck and injured. Now, if there is any allowance to be made, in measuring the degree of care which this young girl was bound to use, for her youth, her inexperience, for the tendency of persons of her age to allow their attention to be given to objects of interest in their immediate view, and to overlook dangers from causes not immediately in view, then it was for the jury to say whether this young girl did not, under all the circumstances, use all the care and diligence to guard against danger that could be reasonably required from one of her age. If no allowance is to be made for her youth and inexperience, the question was one of law, and properly disposed of by the learned judge. But I cannot think the law is so unjust as to hold this child to the exercise of the same degree of care and caution that would be required of an older person, and if not, the question should have been submitted to the jury."

And in other similar cases the question of contributory negligence has been held to be for the jury.

Thus, in *Swift v. Staten Island Rapid Transit R. Co.* (1890) 123 N. Y. 645, 25 N. E. 378, it was held that a girl fifteen years of age, unfamiliar with the locality and with the time of the running of trains, was not guilty of contributory negligence as matter of law where she attempted to cross a railroad track at a place near a station at which persons were accustomed to cross, and was struck by a train approaching the station, and she testified that before stepping on the track she looked in the direction from which the train came but it was not in sight, the view in that direction being unobstructed for a distance of 900 feet, and that before attempting to cross she waited for a moment after looking, in order that a train leaving the station might pass on a parallel track. It was said: "Her attention was attracted by the passing train from the east, and her opportunities to see and hear the train from the west were obstructed by the smoke and noise of the bell and engine of the train just starting out; and under all the circumstances it cannot, as we think, be held as matter of law that she neglected to exercise that degree of care and caution required of a person of her age, situated as she was. The degree of care and caution required by the law in such cases depends upon the maturity and capacity of the individual, and all the surrounding circumstances; and if L.R.A.1917F.

there is any doubt as to the facts, or as to the inferences to be drawn from them, the question cannot be determined as matter of law, but must be submitted to the jury."

And it was held in *Davis v. Pennsylvania R. Co.* (1907) 34 Pa. Super. Ct. 388, that the question of the infant's capacity to appreciate the danger, and, therefore, that of contributory negligence, was for the jury, in an action for the death of a boy thirteen years old at a street crossing by collision with a train, which approached in plain sight without warning, while he was standing on the track, watching a train moving in the opposite direction on a parallel track. The court apparently considered the question whether a boy under fourteen had the capacity and discretion to appreciate danger, so as to be chargeable with contributory negligence, as for the jury, at least in the absence of evidence of exceptional intelligence, experience, and capacity on the part of the child.

It was held also that the question of contributory negligence was for the jury where a girl eleven years old, in crossing several railroad tracks at a street crossing, stepped upon the track behind a train, and, discovering another train blocking the street in front of her, while waiting for it to pass, remained on the track looking at the receding train, when she was struck by a train negligently backed over the crossing. *Cooper v. Lake Shore & M. S. R. Co.* (1887) 66 Mich. 261, 11 Am. St. Rep. 482, 33 N. W. 306.

And especially where the child was standing between the tracks watching a train pass, and was struck by a train on the other track, the question of contributory negligence has been held to be for the jury.

Thus, in *Cromeenes v. San Pedro, L. A. & S. L. R. Co.* (1910) 37 Utah, 475, 109 Pac. 10, Ann. Cas. 1912C, 307, it was held that a twelve-year-old boy was not guilty of contributory negligence as matter of law so as to preclude recovery for his death by being struck by a train while attempting to cross parallel tracks laid along a public street, where there was evidence that at the time of the accident he was standing between the tracks awaiting the passing of a train in the opposite direction, that, although there was an unobstructed view of the train which caused the injury, it was running at a rate of from 25 to 30 miles an hour, that the bell was not rung, and that the accident would not have oc-

curred had it been running at a reasonable speed with a proper lookout.

Also in *Tabb v. Grand Trunk R. Co.* (1904) 8 Ont. L. Rep. 203, it was held that the question of contributory negligence was for the jury, where a nine-year-old boy, who was familiar with the locality and had been warned of the danger of trains, while attempting to cross railroad tracks along a footpath, on finding a train passing on one of the track, stood between two tracks, without keeping a lookout, engaged in hitting at the passing cars with a stick, when he was struck by a train on the other track.

So, where a twelve-year-old boy, in crossing railroad tracks at a street crossing, stopped between the tracks to avoid steam from an engine which stood on a track in front of him and started as he was crossing, and while watching the engine was struck by an engine on the other track, the court in *Cleveland, C. C. & St. L. R. Co. v. Morton* (1902) 57 C. C. A. 226, 120 Fed. 936, said: "The principal question relates to contributory negligence. If the boy, having looked up and down the north track, as he says he did, and seeing nothing approach, became so absorbed in the passenger engine that he did not look again upon the other track, and if the situation thus created was such that boys of his age, in a like situation, would have become in a like manner absorbed, the imputation of contributory negligence might not necessarily follow. A boy of twelve, less sensitive to danger than a maturer man, is at the same time more likely to become oblivious to his general surroundings by the presence of some interesting detail, such as the passing of an engine. The law requires of such a boy only the care commensurate with his years and appreciation of danger." A judgment for the plaintiff was, however, reversed because of an instruction which in effect excluded the doctrine of contributory negligence in case the railway company was negligent in failing to keep a proper lookout or to give warning.

And whether a boy eleven years old was negligent, in starting along a footpath across several parallel railroad tracks before a freight train had entirely passed on one of the tracks, and standing between the tracks while waiting for it to pass, was held a question for the jury in *Lodge v. Pittsburgh & L. E. R. Co.* (1914) 243 Pa. 10, 89 Atl. 790. In this case, while the boy was thus standing between the tracks, a passenger train passed, running at the rate of about 50

miles an hour; the last seen of the boy alive was when he was standing on the path between the two tracks, and after the trains had passed he was found lying dead on the path. The court regarded the evidence as sufficient to warrant a finding of contributory negligence, but not to justify a nonsuit on this ground.

But in an action for the death of a twelve-year-old boy by collision with a train at a highway crossing, it was held that absence of contributory negligence could not be inferred from evidence that the boy, who was intelligent and accustomed to crossing the track four times daily on his way to and from school, was last seen alive approaching the crossing in the daytime when a freight train was passing on the further track; that, before it had passed, the train which struck him approached from the opposite direction in plain sight, but without warning; and that the boy was found dead in the cattle guard between the tracks. *Reynolds v. New York C. & H. R. R. Co.* (1874) 58 N. Y. 248, reversing (1874) 2 Thomp. & C. 644.

In several cases of this kind questions have arisen as to the correctness of instructions relating to the care an infant should use under these circumstances.

Thus, in an action for the death of a twelve-year-old boy by an engine while waiting for the passing of a train on a parallel track, it was held in *Cleveland Terminal & Valley R. Co. v. Heiman* (1898) 16 Ohio C. C. 487, 9 Ohio C. D. 222, that an instruction should have been given for the defendant that if boys of his age and experience would not have waited on the track and would have appreciated the danger of waiting there, instead of on the vacant space beside the track, he would be guilty of contributory negligence.

And an instruction, in an action for injury to an eight-year-old boy by a train while, in attempting to cross the track, he waited the passing of a train on another track, that the boy was required to exercise only that degree of care which children of his age, intelligence, capacity, experience, "and knowledge of the conditions and surroundings" would exercise, is erroneous as eliminating the necessity of the boy's exercising any care to discover the approach of a train, where he testifies that he did not know of the approach of the train and there is no evidence that he exercised any care in this regard, it being his duty to exercise such care as one of his age, intelligence, capacity, and experience would use under the circumstances to ac-

quire knowledge of the approach of trains. *Cunningham v. Illinois C. R. Co.* (1911) 165 Ill. App. 382.

In *Dlauhl v. St. Louis, I. M. & S. R. Co.* (1891) 105 Mo. 645, 16 S. W. 281, an action for injury to a fourteen-year-old boy, who was familiar with the locality, and knew that a train was about due, but nevertheless, stood on a railroad track at a crossing for about a minute awaiting the passing of a train on a parallel track, without looking for a train on the track on which he was standing except as he stepped on the track, and was struck by a train approaching in plain sight, it was held error to instruct the jury that if they found that the boy did not exercise care according to his age and discretion in so going upon and standing on the track without looking or listening for the approach of a train, yet if they further believed that the bell on the engine was not sounded 80 rods from the crossing and such failure to sound the bell directly caused the injury, the plaintiff was entitled to recover,—the instruction being erroneous in that it permitted recovery notwithstanding contributory negligence, if the railroad company was negligent in failing to ring the bell.

VIII. Obstructed view.

a. In general; point of observation.

Generally as to duty of traveler approaching a railway crossing as to place and direction of observation, see note to *Wallenburg v. Missouri P. R. Co.* 37 L.R.A. (N.S.) 135.

It was held that the question of contributory negligence was for the jury—

—where a girl ten years old, while attempting to cross a railroad track at a street crossing, was struck by a train backing at the rate of 8 miles an hour without warning, the view being such that, although, as claimed by the child, she looked as she approached the track, the train might not have been in sight except when she was within 6 feet of the track, *Byrne v. New York C. & H. R. R. Co.* (1881) 83 N. Y. 620;

—where a girl nine years old was struck by an engine at a street crossing, the child, although she looked and listened, being unable to see the engine approaching on account of a building adjoining the street, only 4 feet from the track, *Dowling v. New York C. & H. R. R. Co.* (1882) 90 N. Y. 670;

—where a nine-year-old girl, in attempting to cross four parallel tracks at a crossing, in the suburbs of a city, L.R.A.1917F.

which was dangerous on account of an obstructed view of the track except for a distance of four or five hundred feet, was killed by a train running at a rate of about 50 miles an hour, and it appeared that, although the statutory signals for the crossing were given, the child did not hear them, and that if she heard the automatic alarm at the crossing she did not know its meaning, *Louisville & N. R. Co. v. Kimble* (1910) 140 Ky. 759, 131 S. W. 790;

—where a twelve-year-old boy, while assisting his father in lighting street lamps, in attempting to cross a street was struck by an engine drawing a work train, which was backing along the street in the dark at a rate of from 6 to 15 miles an hour, with only a hand lamp on the tender, the view in the direction from which the engine was approaching being obstructed by a curve in the track and by a switchman's box,—it appearing that while crossing his attention was directed to a train moving in the opposite direction on a parallel track, and that when it had passed he proceeded to cross, and did not see or hear the backing engine on the intervening track, although he testified that he looked in that direction, and listened for approaching trains, *Baltimore & P. R. Co. v. Cumberland* (1898) 12 App. D. C. 598;

—where a girl fifteen years old, after waiting for the passing of a freight train at the intersection of a street with a number of tracks leading out of railroad yards on the opposite side of the street, attempted to cross the tracks, and was killed by an engine on the first track, which, without warning, at a speed of from 10 to 12 miles an hour, suddenly backed out of the yards, it appearing that the view of the track was so obstructed by buildings that it was impossible, or at least difficult, to see into the yards until she reached the track, *Casey v. New York C. & H. R. R. Co.* (1879) 6 Abb. N. C. (N. Y.) 104, affirmed in (1879) 78 N. Y. 518, 12 Am. Neg. Cas. 309;

—where a ten-year-old boy, after looking and listening at a crossing 400 feet from a sharp curve in the track, and not seeing or hearing a train, stepped on the track to recover his sister's hat, which had blown off, and was struck by a train, which approached without warning, *Wilson v. Pennsylvania R. Co.* (1890) 132 Pa. 27, 18 Atl. 1087.

But, on the other hand, it was held that contributory negligence was shown as matter of law where a boy fourteen

years old employed in a rolling mill stepped from a door of the mill upon a spur track 3 or 4 feet from the door and was struck and killed by an engine, it being impossible for him to see the engine until he had passed out of the door. *Nagle v. Allegheny Valley R. Co.* (1878) 88 Pa. 35, 32 Am. Rep. 413.

See also cases cited in XIII.; and *Baltimore & O. S. W. R. Co. v. Hickman*, under XV. *infra*; *Farrell v. Erie R. Co.* and *Serano v. New York C. & H. R. R. Co.* under V. *supra*.

b. Obstructions by other cars or engines.

For cases where the view was obstructed by a train passing in the opposite direction, see V. *supra*.

In several cases of this class it has been held that contributory negligence could not be inferred.

Thus, it was held that contributory negligence could not be inferred where a boy nine years old, whose capacity and intelligence were not shown, was killed by a train while attempting to cross the track at a street crossing in the rear of a standing train which obstructed the view of the train by which he was killed, no proper signals of the approaching train having been given. *Metzler v. Philadelphia & R. R. Co.* (1905) 28 Pa. Super. Ct. 180. In this state, however, the doctrine is recognized of a *prima facie* presumption on the part of an infant under fourteen years of age to contribute negligently to an injury.

And it was held in *Taylor v. Delaware & H. Canal Co.* (1886) 113 Pa. 162, 57 Am. Rep. 446, 8 Atl. 43, that a girl eight years old was not chargeable with contributory negligence, in an action for injury while crossing a railroad track on a footpath which passed diagonally over the track, where it appeared that as she reached the track a train of cars was standing upon a switch with a locomotive blowing off steam, that she passed immediately in front of the locomotive, and as she stepped upon the main track she was struck by a passing train. The girl testified that she could not see the approaching train by reason of the train standing on the switch, and that her attention was directed to the locomotive blowing off steam; and the court stated that owing to the age of the child the question of contributory negligence did not arise in the case.

In other cases of this kind the question of contributory negligence has been L.R.A.1917F.

held to be for the jury. It has been so held—

—where a boy eleven years old, in attempting to cross a street in which a number of railroad tracks were laid, was struck by a train on the farthest track, and there was evidence that as he approached the tracks he saw a train coming from the opposite direction and tried to pass in front of it between cars standing on an intervening track, and that before passing through the opening between the cars he could not see the train which caused the injury, and did not discover it until too late to retreat because of the train from the opposite direction. *Baltimore & P. R. Co. v. Webster* (1895) 6 App. D. C. 182.

—where a ten-year-old boy in attempting to cross the track at a street crossing was struck by a train running at a rate of 20 miles an hour, and he testified that, at a point about 25 feet from the place of the accident, he stopped and looked both ways but saw only two engines approaching from the opposite direction, and waited for them to pass, and then attempted to cross, and it appeared that the view in the direction of the approaching train was obstructed by cars on a siding, by the passing engines, and by a curve in the track several hundred feet from the crossing. *Zwack v. New York, L. E. & W. R. Co.* (1899) 160 N. Y. 362, 54 N. E. 785, 6 Am. Neg. Rep. 669;

—where a thirteen-year-old boy in attempting to cross a track at a crossing was struck by a train which there was evidence tending to show was being backed without a lookout on the car farthest from the engine and without the ringing of the bell, as required by an ordinance, although it appeared that the view was unobstructed from the time the boy emerged from behind cars standing on another track about 20 feet from the track on which the train was moving. *Gass v. Missouri P. R. Co.* (1894) 57 Mo. App. 574.

—where a ten-year-old boy, on his way to school, was struck and injured by a train while attempting to cross a street, where there was evidence that he waited for a train to pass on a farther track and then started across on a fast walk, and that he passed between cars standing on the first track which obstructed his view of the approaching train, although it appeared that he could have seen the train approaching had he looked while crossing the distance of 8 feet between the first and the second track, on which the accident occurred,

Chicago, R. I. & P. R. Co. v. Kennedy (1896) 2 Kan. App. 693, 43 Pac. 802. It was said: "In this case the jury found that the plaintiff was familiar with the crossing, being accustomed to pass over it about four times every day; that he knew that engines and trains were at all hours of the day passing back and forth at that point; and that it was dangerous to attempt to cross the railroad in front of a moving train or engine. The jury also found that the plaintiff, at the time of his injury, considering his age and experience, was in the exercise of ordinary care. . . . It is evident that a person of mature years, in the exercise of ordinary care under these circumstances should have looked for an approaching train before going upon the second track. But the degree of care reasonably to be expected from this plaintiff, under the circumstances in which he was placed, must be otherwise determined, and was properly submitted to the jury as a mixed question of law and fact." The only act of negligence shown on the part of the railroad company was the running of the train at a rate of speed prohibited by ordinance, the jury stating that it was unable to determine whether warning was given of the approach of the train.

But, on the other hand, it has been held that a twelve-year-old girl, who is accustomed several times daily to cross railroad tracks at a street crossing, is guilty of such negligence in attempting to cross in front of a rapidly approaching train, of which she had an unobstructed view when within 5 feet of the track and warning of which was given by bell and whistle, which will preclude recovery for an injury by being struck by the train, although she looked before crossing a sidetrack 7 feet from the track on which the injury occurred, and at that time could not see the approaching train because of cars standing on the sidetrack. *Shirk v. Wabash R. Co.* (1895) 14 Ind. App. 126, 42 N. E. 656.

So it was held that the complaint was properly dismissed for want of evidence of freedom from contributory negligence, in an action for the death of a bright girl twelve years old, who for seven or eight years had been accustomed to crossing a railroad track on her way to and from school, where it appeared that while on her way to school she found the crossing obstructed by a freight train, and, attempting to pass around the engine, which was emitting steam, was killed by a train approaching L.R.A.1917F.

on a parallel track from behind the freight train at a rate of 10 miles an hour, which she could have seen while passing the 4-foot space between the tracks, and which had been arriving at that time for several years. *Leary v. Fitchburg R. Co.* (1900) 53 App. Div. 52, 65 N. Y. Supp. 699.

And see *Wade v. Chicago & N. W. R. Co.* under XVIII., where a boy was riding a bicycle across the track; also *Pittsburgh, C. C. & St. L. R. Co. v. Broderick and Johnson v. Boston & M. R. Co.* under XIII. a, *infra*; *Geist v. Missouri P. R. Co.* under IV. *supra*; and *Ewen v. Chicago & N. W. R. Co.* under VII. a, *supra*.

c. Obstructions by snowstorm or fog.

In an action for the death of a fourteen-year-old boy while attempting to cross the track at a street crossing by being struck by a train, it was held in *Erie R. Co. v. Weinstein* (1909) 93 C. C. A. 189, 166 Fed. 271, that contributory negligence was not shown as matter of law by the fact that the track was straight and the view unobstructed by curves, buildings, or standing cars, on the theory that the deceased did not look before crossing, or negligently attempted to cross in front of a train which he saw approaching, where there was evidence that a snowstorm greatly obscured the view, and also evidence as to the speed of the train which might, in connection with the storm, lead to an inference that the train was not in sight when he started to cross, and that it came upon him too swiftly to permit his escape, and also that he stopped, looked, and listened before going upon the track.

Where an eight-year-old boy was struck and injured by an engine while attempting to cross parallel tracks laid in the center of a street 100 feet wide, the reason assigned for failure to see the engine being that the atmosphere was hazy and foggy, the court in *Lennon v. New York C. & H. R. R. Co.* (1892) 65 Hun, 578, 20 N. Y. Supp. 557, intimated that it was not sufficient for the plaintiff to prove that, while on the sidewalk and preparatory to crossing, the child looked and listened for approaching trains, but that it was necessary also to prove that the child looked while traveling the intervening space between the sidewalk and the track. Decision of the point, the court stated, was, however, unnecessary, the judgment for the plaintiff being reversed on other grounds.

See also *Clemons v. Chicago, St. P. M. & O. R. Co.* under II. a, *supra*; and *Turell v. Erie R. Co.* under V. *supra*.

d. Driving across track.

The question has arisen whether it is the duty of one driving across a railroad track, the view of which is obstructed, to alight and go forward to ascertain whether the track is clear.

Thus, where a seventeen-year-old boy, returning home from his work in the dark, drove upon a railroad track at a frequented street crossing and was killed by collision with an engine, and there was evidence that he stopped for several minutes about 10 feet from the track, at a place where the view was obstructed by box cars, it was held that, to avoid the charge of contributory negligence, the deceased was not required as matter of law to alight and lead his horse over the crossing or go in advance to the track and look for an approaching train. *Huckshold v. St. Louis, I. M. & S. R. Co.* (1886) 90 Mo. 548, 2 S. W. 794.

The question has also arisen as to the duty of an infant driving across the track where the view in one direction only is obstructed. And it has been held that a boy nearly nine years old who is familiar with a railroad crossing, and understands its dangers, is negligent as matter of law in driving slowly upon the track without looking for a car, which, had he looked at any time within 70 feet of the track, he could have seen approaching in plain sight, although he had looked in that direction when 90 to 100 feet from the track, at which time the car was not in sight, and thereafter directed his attention in the opposite direction because the view in that direction was so obstructed that one could not see an approaching car until he reached the right of way. *Otto v. Ann Arbor R. Co.* (1915) 189 Mich. 463, 155 N. W. 457. The action was for the value of a horse which the boy was driving, and which was struck by a gasoline car.

In several cases where the infant drove upon the track the view of which was obstructed, and was struck by a train as to which he had been cautioned, it has been held that recovery for the injury was precluded because of his negligence, which the court could declare as matter of law.

Thus, where a boy thirteen years old, familiar with a crossing, with his ears wrapped up on account of the cold, drove down a steep cut in a bluff, which, until he reached the track, prevented

his seeing a train which he had been told was late and would probably arrive at the crossing about the time he did, and was struck by it and killed, it was held that he was guilty of such contributory negligence as would prevent recovery for his death. *Norfolk & W. R. Co. v. Stone* (1891) 88 Va. 310, 13 S. E. 432.

And a bright boy fourteen years old, who is familiar with a railroad crossing, has been cautioned as to a particular train, and has personal knowledge that it is about due, although he stops, looks, and listens for the train at a point 50 feet from the crossing, it being possible from that point to see a train approaching for several hundred feet, and for a thousand feet or more from points nearer the track, and does not see or hear a train, is guilty of such negligence in driving onto the crossing at a walk without again looking, but watching boys on the other side of the right of way, as will preclude recovery for his death by being struck by the train. *Walker v. Wabash R. Co.* (1906) 193 Mo. 453, 92 S. W. 83.

But where the train which produced the injury was following closely the train of which he had been warned, the question of contributory negligence was held for the jury, in *Grenell v. Michigan C. R. Co.* (1900) 124 Mich. 141, 82 N. W. 843. In this case a thirteen-year-old boy, who had been warned that a passenger train was about due, waited at the top of a steep grade, at a point about 12 rods from a railroad crossing, for the train to pass, and then drove through a cut onto the track, and was struck and injured by a freight train following from two to four minutes behind the first train without the giving of the statutory signals and in violation of the rules of the company requiring trains moving in the same direction to be kept at least ten minutes apart, there being evidence also that he was attempting to hold back the team, but that it was very difficult to do so on account of the steep grade. *Ibid*.

The fact that a boy fourteen years old, who was familiar with a street crossing, at which, owing to an embankment, he could not see an approaching train, except the smokestack of the engine, until he was within 15 to 35 feet of the track, did not stop to look and listen for a train in driving across the track was held in *Tyler v. New York & N. E. R. Co.* (1884) 137 Mass. 238, not conclusive evidence of contributory negligence, but this question was held to be for the jury. In this case there was

evidence that the boy exercised some care in approaching the track, in that he checked the speed of his horse and drove on a slow trot towards the track, and it did not appear but that his attention was continuously on the crossing after he passed a point 100 feet from the track. There was evidence that the train failed to give proper signals, and that when the boy saw it, thinking it was too late to stop, he attempted to cross in front of it.

So it was held that the question of contributory negligence was for the jury where a bright boy thirteen years old drove upon a railroad track at a crossing and was struck by a train the view of which was obstructed by an embankment, and it appeared that he drove upon the track without stopping and apparently paying little attention to the train, except that there was evidence that he looked in the other direction, and was possibly deceived by echoes as to the direction from which the train was approaching. *Russell v. Oregon R. & Nav. Co.* (1909) 54 Or. 128, 102 Pac. 619.

Where a ten-year-old boy was driving a team across a railroad track behind a wagon driven by his grandfather, and the evidence was sufficient to require submission to the jury of the question of the latter's negligence in driving upon the track after stopping to look for a train at a place 150 feet from the track, where the view was obstructed, it was held that the question of contributory negligence on the part of the boy was also for the jury. *Hicks v. New York, N. H. & H. R. Co.* (1895) 164 Mass. 424, 49 Am. St. Rep. 471, 41 N. E. 721.

Although the minority of the injured person was not apparently regarded as materially affecting the case, attention is called to *Southern R. Co. v. Jones* (1907) 106 Va. 412, 56 S. E. 155, holding that because of contributory negligence there could be no recovery, and that a demurrer to the evidence should have been sustained, where a fifteen-year-old boy, familiar with a railroad crossing, failed to take any precaution to ascertain whether a train was approaching as he drove upon the crossing, except to stop, look, and listen at a point 75 feet from the track, at which his view was obstructed by cordwood piled along the right of way, and it appeared that at a point 40 feet from the track he could have seen in the direction of the approaching train for over 700 feet, and could have seen for a L.R.A.1917F.

still greater distance as he came nearer the track.

See also *McNamara v. Chicago, R. I. & P. R. Co.* and *Illinois C. R. Co. v. Jones*, under XIII. a, *infra*.

IX. Walking along track.

a. In general.

As to the degree of care required of a child in walking along a railroad track, or the standard by which its conduct should be measured, see footnote 15 of annotation to *Jacobs v. H. J. Koehler Sporting Goods Co.* ante, 10.

It was held in *Ft. Worth & D. C. R. Co. v. Poteet* (1909) 53 Tex. Civ. App. 44, 115 S. W. 883, an action for injury to a seven-year-old boy who while walking on the track was struck by a train approaching from the rear, that an instruction was properly refused which directed the jury to find the boy guilty of contributory negligence if they found that he had "sufficient mental capacity to realize the danger of being upon the track;" and that the court properly submitted the issue of contributory negligence to the jury in an instruction authorizing them to consider on the issue of contributory negligence the child's age, intelligence, experience, and knowledge or information of the danger, with all the other facts and circumstances.

Although the case appears to turn on the proposition that the girl was a trespasser to whom the railroad company owed only the duty of not wantonly or wilfully inflicting injury, the court in *Smith v. Chicago & E. I. R. Co.* (1901) 99 Ill. App. 296, said that a school girl twelve years of age, while not presumed to have the judgment of an adult on many things, must know as well as an adult the dangers of walking on a railroad track.

It was said in *McVoy v. Oakes* (1895) 91 Wis. 214, 64 N. W. 748, that a seven-year-old boy, who was injured from the sudden increase in speed of the train along which he was walking holding to a brake rod, was certainly too young to be held guilty of contributory negligence as matter of law.

In an action for the death of an eight-year-old boy killed by a train approaching in plain sight from the rear while he was walking along the track, it was held erroneous in *Cleveland, C. C. & St. L. R. Co. v. Tarrt* (1894) 12 C. C. A. 625, 24 U. S. App. 504, 64 Fed. 830, to refuse an instruction that if the jury believed that the boy for his own convenience entered on the right of way

and walked along the track in a dangerous position, and did not use his faculties as a person of like age could, and failed to use ordinary prudence to learn if a train was approaching, when the use of such faculties as he possessed would have notified him that a train was approaching in time to avoid the injury, he was not exercising ordinary care.

It was held that contributory negligence might be inferred, where a bright boy ten years old, who was familiar with trains, and had been cautioned as to their danger, was killed by a train approaching from the rear, in plain sight for 500 feet, while he was walking in the daytime along the track, facing another train moving in the other direction on a parallel track. *Schmitt v. Missouri P. R. Co.* (1901) 160 Mo. 43, 60 S. W. 1043.

And an instruction that it was the duty of the boy to exercise that degree of care which an ordinarily prudent person of his age and intelligence under like circumstances would have exercised was not in conflict with another instruction that if, after he saw the train approaching, or might by looking or listening have seen or heard it, he could have gotten out of the way but did not, there could be no recovery. *Ibid.*

b. Matter of fact.

The question of contributory negligence of a child in walking along a railroad track is particularly for the jury where the child is of tender years.

Thus, whether a child not quite seven years old, who while walking on a railroad track was struck and injured by a train approaching in plain sight from the rear, had sufficient capacity to be chargeable with contributory negligence, and whether he was guilty of negligence, were held to be for the jury, and a judgment for the plaintiff affirmed, when the evidence was conflicting as to the speed of the train and whether the bell was rung or the whistle sounded, and it appeared that the boy was confused by the movement of a freight train on a near-by track, the bell of which was ringing, and that he did not hear or see the approaching train. *Edwards v. Chicago, M. & St. P. R. Co.* (1907) 21 S. D. 504, 110 N. W. 832.

So, in an action for injury to a boy seven years and ten months old, who entered railroad tracks over cattle guards at a place within the limits of a municipality where the right of way was fenced and trains were frequently passing, and walked along the track until struck by an engine approaching L.R.A.1917F.

from the rear, the court in *Cleveland, C. C. & St. L. R. Co. v. Adair* (1895) 12 Ind. App. 569, 39 N. E. 672, 40 N. E. 822, stated that, in view of the tender years of the boy, it would hesitate to charge him as a matter of law with contributory negligence. The case, however, turned on the absence of actionable negligence on the part of the railway company.

And in *Ficker v. Cleveland, C. C. & St. L. R. Co.* (1898) 7 Ohio N. P. 600, 9 Ohio S. & C. P. Dec. 804, it was held that contributory negligence was not shown as matter of law where it appeared that a five-year-old child was walking along a space 22 feet wide between railroad tracks in a municipality, where persons were accustomed to walk without protest, and that, being attracted by something on the track or beyond, it stepped upon the track and, before it could return, was run over by a box car, which gave no warning of its approach.

It has even been held that a nine-year-old boy was not guilty of such contributory negligence as matter of law as would preclude recovery for an injury sustained while walking on a railroad track by being struck by a train approaching in plain sight from the rear without warning, at a place commonly used by the public as a footpath, although it appeared that he had alighted from the train at a depot and walked along the track, passing the engine, until he reached a street crossing, when he stepped on the track and walked upon it until overtaken by the train. *Wabash R. Co. v. Jones* (1894) 53 Ill. App. 125, reversed on other grounds in (1896) 163 Ill. 167, 45 N. E. 50. A judgment for the plaintiff was affirmed, partly, it seems, on the ground that there was sufficient evidence to warrant a finding that the injury was wantonly and wilfully inflicted; although the court also appears to regard the question whether the child exercised due care, in view of his age, intelligence, and discretion, as for the jury; and does not apparently base its decision on the doctrine of comparative negligence which formerly prevailed in this state.

It was held also that the question of contributory negligence was for the jury—

—where a bright boy seven years old was killed by a train slowly approaching in plain sight from the rear, while he was running on the track at a place commonly used as a footpath, and it appeared that a train had just passed

in the same direction, and that probably he had stepped on the track 90 feet from the place of the accident, without expecting another train to follow so closely, *St. Louis, S. F. & T. R. Co. v. Bolen* (1910) 61 *Tex. Civ. App.* 339, 129 *S. W.* 860;

—where a boy nearly thirteen years old, familiar with the usual method of operating trains at the place in question, while returning home in the dusk of the evening along a sidetrack commonly used as a footway, saw freight cars on the track ahead of him and, supposing they were standing still, as they probably were at that time, continued walking on the track for about 100 feet without further looking at the cars, his attention, being directed to an engine passing on a parallel track 8 feet away, until he was struck by the cars, *Whalen v. Chicago & N. W. R. Co.* (1890) 75 *Wis.* 654, 44 *N. W.* 849;

—where an eight-year-old child, while walking along a railroad track at a point commonly used as a footway, was struck by a train approaching from the rear in plain sight at a rate of from 6 to 8 miles an hour, *Norfolk & W. R. Co. v. Carr* (1907) 106 *Va.* 508, 56 *S. E.* 276;

—where a nine-year-old boy, while walking along a railroad track at a place commonly used by the public, saw a train rapidly approaching, and while attempting to get off the track stumbled and fell and was run over, and there was evidence that the train was running at an excessive rate of speed without sounding the bell or whistle, *Illinois C. R. Co. v. Varnadore* (1894) — *Miss.* —, 15 *So.* 933;

—where a boy under sixteen years of age was struck by a backing engine, which approached from the rear in the dark without warning, while he was walking with other boys between the rails along an embankment used without objection as a public way, it appearing that they had stepped on the track to avoid a train coming toward them on a parallel track, that they were listening and looking for trains, but did not discover the engine approaching in time to avoid it, *Erdner v. Chicago & N. W. R. Co.* (1911) 115 *Minn.* 392, 132 *N. W.* 339;

—where a boy nine years old, while walking along a street in which railroad tracks were laid, discovered, on turning to cross the track, a train approaching from the rear within 15 or 20 feet, and, in attempting to step back out of the way, stumbled over a pile of cinders along the tracks and fell under the train, *L.R.A.* 1917F.

and it appeared that when about half a block from the place of the accident he looked and saw the train a block away, and intervening were two railroad crossings at which it was the custom to stop trains while employees went ahead to see if the track was clear. *Anderson v. Union Terminal R. Co.* (1900) 161 *Mo.* 411, 61 *S. W.* 874.

c. Matter of law.

In a few cases the age, capacity, and experience of children injured or killed while walking on a railroad track have been shown to be such that the court could declare as matter of law that under the circumstances there was a failure to exercise due care.

Thus, a sixteen-year-old boy, who, although knowing that engines frequently followed freight trains to push them over a hill, stepped on a railroad track in the rear of a train, at the crossing of a highway, without taking any precautions, and was struck by an engine closely following the train, in plain sight, without warning, was held guilty of contributory negligence as matter of law, in *Texas & N. O. R. Co. v. Hare* (1894) 4 *Tex. Civ. App.* 18, 23 *S. W.* 42, notwithstanding it appeared that he became confused at signals from a brakeman on the caboose of the train and stood on the track looking toward the train until struck by the engine.

It was held also that a boy sixteen years old was guilty of contributory negligence as matter of law, where it appeared that while walking along a railroad track in railroad yards, he passed a train with an engine attached heading in the direction in which he was going, and, out of precaution, left the track and walked in a place of safety between the tracks along a beaten path for 150 yards, when, on discovering the train only a few feet behind him, he became frightened and jumped against a switch stand, and was thrown on the track. *Texas & P. R. Co. v. Walker* (1898) — *Tex. Civ. App.* —, 49 *S. W.* 642.

And where a bright boy thirteen years old who in order to reach his destination was compelled to pass along a highway in which three parallel railroad tracks were laid, on discovering a train coming toward him, stepped upon another track, and was struck by a train which was approaching from the rear, and which he had passed shortly before apparently heading in the other direction, it was held that recovery for the injury was precluded as matter of law, both on the

ground of contributory negligence in failing to see and avoid the train, and on the ground that the defendant was not at fault in acting on the belief that the boy would leave the track before the train reached him. *Meredith v. Richmond & D. R. Co.* (1891) 108 N. C. 616, 13 S. E. 137, 12 Am. Neg. Cas. 414.

So, where a bright girl sixteen years old was killed by an engine approaching from the rear, and it appeared that at the time of the accident she was walking along a path beside the track in a place of safety, but on reaching a semaphore stepped between it and the track, instead of passing on the outside, as she might have done by walking on rough stones, and was violating a statute forbidding persons to walk on the track, it was held that, in the absence of evidence that the engineer was reckless or grossly negligent, a verdict was properly directed for the defendant. *Butler v. New York C. & H. R. R. Co.* (1907) 82 C. C. A. 330, 152 Fed. 976.

And it was held that contributory negligence as matter of law was shown where a bright boy nearly sixteen years old, who was familiar with the movement of trains on switching tracks along which he was walking, and knew that cars were then being switched was walking in a place of safety between the tracks, but turned suddenly across a track on which a train was backing at the rate of 4 miles an hour, and was struck by it and killed. *Bess v. Atchison, T. & S. F. R. Co.* (1900) 62 Kan. 299, 62 Pac. 996, 8 Am. Neg. Rep. 25.

It is contributory negligence as matter of law for a ten-year-old boy of average intelligence, who lives near a railroad track and has been cautioned to avoid trains, to run along the track beside a moving train in a path close to the end of the ties, in an effort to keep up with the train. With the result that his foot strikes against the end of the tie and he falls under the wheels. *Fezler v. Willmar & S. F. R. Co.* (1902) 85 Minn. 252, 88 N. W. 746.

So it was held that there could be no recovery on account of contributory negligence, in an action for injury to a boy twelve years old by the sudden movement of a freight car which was being unloaded, where the boy, having walked upon the track between the rails until he had almost reached the car, stooped to gather snow on the track, and a train backed against the other end of the car, causing it to run over him. *Coy v. Missouri P. R. Co.* (1906) 74 Kan. 853, 86 Pac. 468, 20 Am. Neg. Rep. 540. The L.R.A.1917F.

court said that, except for the age of the boy, the case came within the doctrine that it is negligence as a matter of law for one to walk or stand on a railroad track when there is no necessity or occasion for so doing, and that no recovery can be had for injuries received under such circumstances from a moving car or engine, not knowingly or wantonly caused; that age is important only as a mark of capacity; and that, whatever view might otherwise be taken of the matter, the boy's own testimony forbade any relaxation of the rule by reason of his tender years, for it showed a degree of intelligence, a knowledge of the methods of the operations of trains, and an appreciation of the danger to which the situation exposed him, such as might be expected in a person of full maturity.

And it was held that contributory negligence as matter of law was shown where a bright boy fourteen years old, who lived near a railroad track and was familiar with the movement of trains, was injured, while walking on a side-track leading to a depot, by a train approaching from the rear in the dark, he testified that when he reached the track on his way to the depot he noticed that the train was at a switch and that it did not stop there but was coming on down the track, and that he supposed it was on the main line, as it usually was when it did not stop at the switch, and that he did not stop to see which track it was on. *Illinois C. R. Co. v. Crockett* (1901) 78 Miss. 407, 29 So. 162. It appeared that the train had been in operation only a week, and the evidence was insufficient to prove a general custom of stopping trains at the switch before passing to the sidetrack.

In *Wade v. Detroit, Y. A. A. & J. R. Co.* (1908) 151 Mich. 684, 115 N. W. 713, the court apparently regarded the deceased as guilty of contributory negligence as matter of law, although a directed verdict for the defendant was sustained also on the ground that negligence on the part of the defendant was not shown, where a fourteen-year-old boy crawled through a wire fence onto the right of way and walked along the track, instead of following the highway paralleling the track, until killed by a car rapidly approaching from the rear.

And in an action for the death of a girl eleven years old who fell from a railroad embankment into a stream and was drowned, it was held that the plaintiff had failed to show that the deceased was free from contributory negligence,

where the cause of the girl's fall was not shown, but there was evidence that she unnecessarily crossed to that side of the track on her way to school, and was last seen alive walking along a path about 2 feet wide between the track and the embankment, tossing and catching a ball. *Hooper v. Johnstown, G. & K. H. R. Co.* (1891) 59 Hun, 121, 13 N. Y. Supp. 151.

X. Collision with side of train.

As to liability where person or vehicle runs into side of train at crossing, see note to *Gage v. Boston & M. R. Co.* L.R.A.1915A, 363.

It is contributory negligence for a boy of ordinary intelligence, eleven years old, to approach so near a rapidly moving train on a street crossing, after part of the train has passed the crossing, as to be struck by the train. *Payne v. Chicago & A. R. Co.* (1895) 129 Mo. 405, 31 S. W. 885, later appeal in (1896) 136 Mo. 562, 38 S. W. 308.

And in an action for injury to a minor (age not stated) by a train, it was held erroneous in *Pittsburgh, C. C. & St. L. R. Co. v. Geltmaker* (1895) 16 Ky. L. Rep. 861, 30 S. W. 394, to refuse an instruction for the defendant that if the jury believed that the plaintiff, knowing that it was improper or imprudent to do so, voluntarily approached the side of a running freight train, the front end of which had passed him, and thereby came in contact with the train and was injured, he could not recover.

However, in *East Tennessee Coal Co. v. Harshaw* (1895) 16 Ky. L. Rep. 526, 29 S. W. 289, it was held that a boy eight years old, who had been sent on an errand, which perhaps diverted his attention, was not guilty of such contributory negligence as would prevent recovery for an injury sustained in attempting to cross a railroad track in running against a moving car, the accident occurring near a street crossing, and it appearing that no warning by either whistle or bell was given. In this case it appeared that the boy, apparently unconscious of the presence of the moving train, without stopping to look or listen, ran heedlessly against one of the cars, in attempting to cross the track. The court stated that an adult could not have recovered because of contributory negligence, but considered that, in view of the lack of discretion and judgment of the child, its thoughtlessness might be excusable.

As to contributory negligence where a child is struck by the overhang of an

engine while walking towards the track, see *Turell v. Erie R. Co.* under *V. supra*; see also *Nolan v. New York, N. H. & H. R. Co.* under *II. a.*, *supra*, where a child was struck by an engine as it was approaching the track.

XI. Objects thrown or falling from train.

A thirteen-year-old boy is not chargeable with negligence in standing on a street near a railroad track over which a freight train is passing, with the result that he is struck and injured by a cake of ice kicked from the platform of the caboose by a brakeman. *Willis v. Maysville & B. S. R. Co.* (1905) 119 Ky. 949, 85 S. W. 716. Apparently the court regarded the position of the boy as being no evidence of negligence, although it was only necessary to hold that his conduct did not constitute such contributory negligence as would sustain a directed verdict for the defendant. A similar conclusion was reached on a later appeal in (1906) 122 Ky. 658, 92 S. W. 604, 13 Ann. Cas. 74, it being held that the boy was not negligent in standing in the street at a point where there was no danger of being struck by the train, as he was not required to anticipate that persons on the train would throw dangerous articles from it as it passed across the street. And the court stated that there was no evidence of contributory negligence.

And it was held that the question of contributory negligence was for the jury, and a judgment for the plaintiff affirmed, where a boy eleven years old, while sitting on a truck in a lumber yard at a time when cars containing lumber were moving on a track between 5 and 6 feet from the truck, was injured by the fall of lumber from the cars. *Holtzinger v. Pennsylvania R. Co.* (1896) 6 Pa. Dist. R. 430.

XII. Child beside track drawn under train.

As to liability for injury to person near track in consequence of suction from passing train, including cases of injuries to children, see note to *Louisville & N. R. Co. v. Lawson*, L.R.A.1917B, 1161.

A bright boy nine years old, familiar with the movement of trains, is negligent in standing beside a railroad track with a string fastened to his wrist and to a piece of ice on the opposite side of the track, so that a train approaching in plain sight strikes the string and draws him against the train. *Spillane v. Mis-*

souri P. R. Co. (1896) 135 Mo. 414, 58 Am. St. Rep. 580, 37 S. W. 198.

In an action for injury to an eight-year-old child who was jerked under a train by taking hold of sugar cane projecting from the side of a moving car, the jury was instructed in *Correa v. American R. Co.* (1909) 5 Porto Rico Fed. Rep. 251, that, while a child of very tender years cannot be guilty of contributory negligence, a child eight years old, who has ordinary intelligence, is presumed able to avoid danger.

XIII. Effect of flagman, custom to give warning, or lowered gates.

a. Reliance on flagman or custom to give warning.

Generally, as to conduct of flagman, or absence from his post, as affecting the question of contributory negligence in actions for injury at a railroad crossing, see note to *Roby v. Kansas City Southern R. Co.* 41 L.R.A.(N.S.) 355.

In a few cases it appeared, as one of the elements in the situation, that the child in crossing the track relied, to some extent at least, upon the fact that a flagman was present at the crossing and failed to give warning of the approach of the train. And where this is true it has been held that the child could not be declared negligent as matter of law, but that the question whether in crossing it exercised due care was at least for the jury.

Thus, it was held that the question of contributory negligence was for the jury, where an eight-year-old boy in attempting to cross diagonally over railroad tracks at a street crossing, as the rear of a freight train was crossing the street, was struck by an engine backing in the opposite direction, as he stepped, without looking in the direction from which it came, on an intervening track, it appearing that bells on engines on both ends of the freight train were ringing, as was also the bell on the engine which struck him, that the view in the direction from which the engine came was obstructed, except from points within 4 feet of the track, and that a flagman on the opposite side of the street unfurled his flag, but did no other act to warn the boy. *McGovern v. New York C. & H. R. R. Co.* (1876) 67 N. Y. 417.

Regarding the question whether the boy's failure to look in the direction of the approaching engine before attempting to cross the track constituted contributory negligence, the court in *McL.R.A.1917F.*

Govern v. New York C. & H. R. R. Co. (N. Y.) supra, said: "The rule which requires persons before crossing a railroad track to look to see whether trains are approaching, and that if they omit to do so, and are injured by a collision, which if they had looked would have been avoided, are to be deemed guilty of negligence, is not to be applied inflexibly, and in all cases, without regard to age or other circumstances. The law is not so unreasonable as to expect or require the same maturity of judgment, or the same degree of care or circumspection in a child of tender years as in an adult. . . . The circumstances at the time, and the appearances, were calculated to confuse and mislead him. He very naturally may have inferred that the flagman was flagging the passing train, and not the backing engine, and when the first danger was past he doubtless proceeded on his way unconscious of any other peril. The learned judge at the trial, in a very careful charge to the jury, submitted to them to determine on this point whether 'he did all that could be required of a lad of his years for his own safety,' and this, we think, was right, and that he could not have decided the question of negligence as one of law, conceding the fact to be that the deceased did not look west before stepping on the track."

And it was held that the question of contributory negligence was for the jury, and adjudgment for the plaintiff affirmed, in an action for injury to an eight-year-old boy, who, while attempting to pass over the intersection of a street and seventeen railroad tracks over which cars were moving at all times of the day, was run over by a backing train after he had crossed all but the last track, there being evidence that he did not discover the train until in the act of crossing the track on which it was running, and that the watchman stationed at the crossing, whom the injured boy and other children with him passed in crossing the tracks, failed to give warning until too late to avoid the accident. *Louisville & N. R. Co. v. Allnutt* (1912) 150 Ky. 831, 151 S. W. 14. It was said: "It is true the car which ran over appellee was moving at a slow rate of speed and that if he had been careful he could have seen it, but a child of eight years is not charged with the same degree of care for his own safety as an adult would be. It is probable that a grown person in crossing these tracks would keep a sharp lookout for the movement of trains, and in view

of the danger attending the crossing would have exercised unusual care for his own safety. But unless appellee was given such warning or notice of the movement of the train as would be reasonably sufficient to prevent a child of his years from putting himself in a place of peril, the railroad company cannot escape responsibility for the accident that befell him upon the ground that except for his contributory negligence it would not have happened."

It was held also that the question of contributory negligence was for the jury where a fifteen-year-old boy, who was familiar with a crossing, and had been warned of approaching trains by the flagman stationed there, was injured, while driving across the track, by an engine, which when first discovered by him was too close to avoid a collision, and there was evidence that, as he approached the crossing, on account of intervening buildings, he could not see the engine until he reached a point 13 feet from the track, that he was driving on a walk, that he looked and listened, but heard no train, and, observing that the flagman was talking to a companion and gave no signal, concluded that the crossing was clear, and that the engine was running at the rate of 10 miles an hour, and the bell was not rung. *Mc-Namara v. Chicago, R. I. & P. R. Co.* (1907) 126 Mo. App. 152, 103 S. W. 1093.

And the same conclusion was reached where a thirteen-year-old boy, familiar with the locality, was struck by a train at a street crossing, and there was evidence that he stopped and looked in the direction from which the train approached, his view being through a 2-foot space between a building and a car standing on a spur track, that he did not see or hear the train, and, relying on the absence of warning from a flagman standing on the opposite side of the track with his back to the crossing, proceeded behind another person across the spur track and onto the main track 7 feet from the spur track, when he was struck by a train which approached without warning at a rate of from 15 to 20 miles an hour. *Pittsburg, C. C. & St. L. R. Co. v. Broderick* (1913) 56 Ind. App. 58, 102 N. E. 887.

'Under the above circumstances it was held, however, that an instruction was erroneous that the boy was not guilty of contributory negligence if he stopped, looked, and listened within a few feet of the track and exercised care to ascertain if there was an approaching

train, and, after so exercising care and caution, ran across the track without having heard or seen the approaching engine, and was not aware of its approach in time to avoid the injury; since it could not be said, as matter of law, that these facts relieved him from the charge of contributory negligence. *Ibid.*

It was held that gross negligence on the part of children ten and eleven years of age who were killed by a train at a highway crossing was not shown as matter of law, where there was evidence that no signals were given until just before the accident, that the train was running at a rate of 40 miles an hour, that the children looked before crossing, but that the view of the track was obstructed by a fence and by cars moving in the opposite direction, that a flagman at the crossing stood facing the children, but was talking to other persons and gave no warning. *Johnson v. Boston & M. R. Co.* (1891) 153 Mass. 57, 26 N. E. 426.

And it was held that failure to stop, look, and listen before crossing the track was not contributory negligence as matter of law, but that the question of contributory negligence was for the jury, where a ten-year-old boy was struck by a backing train at a street crossing, with which he was familiar, the accident occurring after he had crossed three of four parallel tracks and as he was driving on the fourth track, and there was evidence that as he entered on the crossing he was talking to a man on the wagon with him and had his back to the approaching train, that because of cars on the intervening tracks, and a warehouse near the tracks, the approaching train could not be seen until he had passed the cars on the third track and was within 6 feet of the track on which it was approaching, that the trains on the intervening tracks had been out so as to afford a narrow opening for travel between the cars, and that there was a custom in switching for a flagman to precede the train to warn persons at the crossing, but that in this instance the flagman was on or near the rear car of the backing train, and that the engine was at too great a distance for the bell to be heard at the crossing. *Illinois C. R. Co. v. Jones* (1899) 37 C. C. A. 106, 95 Fed. 370.

For cases where the child relied on the duty or custom of the railroad company to give warning at a crossing at which it was coasting across the track, see XVII. *infra*.

b. Disregarding warning of flagman or lowered gates.

As to duty of traveler going upon railroad crossing when gates are open, see notes to *Koch v. Southern California R. Co.* 4 L.R.A. (N.S.) 521, and *Delaware, L. & W. R. Co. v. Welshman*, L.R.A. 1916E, 821.

Where a child attempted to cross in disregard of the warning of lowered gates or of the flagman at the crossing, it has been held in several cases that recovery was precluded because of contributory negligence which the court could declare as a matter of law.

Thus, where a bright girl eleven years old, who was familiar with a railroad crossing, disregarded the warning of the lowered gates and attempted to cross the tracks, supposing that the gates were down for a switch engine, which was standing near the crossing blowing off steam, and was struck by a train, it was held that she was guilty of contributory negligence as matter of law, it not appearing that there was any occasion for haste or any special inducement or invitation to disregard the warning and attempt to cross when the gates were down. *Marden v. Boston & A. R. Co.* (1893) 159 *Mass.* 393, 34 N. E. 404.

And in *Gress v. Philadelphia & R. R. Co.* (1910) 228 *Pa.* 482, 32 L.R.A. (N.S.) 409, 77 *Atl.* 810, 21 *Ann. Cas.* 142, it was held that a girl nearly fourteen years old, who was capable beyond her years, and fully acquainted with the locality, was negligent as matter of law in passing under closed safety gates at a railroad crossing, and attempting to cross the tracks when a clear view could not be secured of them.

In *Wendell v. New York C. & H. R. R. Co.* (1883) 91 N. Y. 420, an action for the death of a seven-year-old boy who was killed by a train at a street crossing, the court stated that the case was tried upon the assumption that the deceased was sui juris; and on this assumption it was held erroneous to refuse a nonsuit on the ground of contributory negligence, where it appeared that the deceased was a bright, active boy, considered competent by his parents to go to school and upon errands alone, that he was sometimes trusted to drive a horse and wagon, and was in the habit of crossing the track at the place of the accident, that previously he had been stopped while attempting to cross the track by flagmen stationed at that point, and had been cautioned by them against attempting to cross in front of an approaching train, L.R.A.1917F

that the accident happened in broad daylight, that the view was unobstructed for 500 feet, and that, although there was nothing to distract the attention of pedestrians, the boy, with a companion, eluding the flagman who tried to stop him, started to run across the track in front of an approaching train, when he slipped and was killed by the train.

See *Cullen v. Baltimore & P. R. Co.* under XV. *infra*.

XIV. Defective crossing.

Generally as to defective condition of railroad crossing as affecting traveler's right to recover for injuries sustained in collision with train, see notes to *Gehring v. Atlantic City R. Co.* 14 L.R.A. (N.S.) 312, and *Thompson v. Seaboard Air Line R. Co.* 20 L.R.A. (N.S.) 426.

And the question of contributory negligence in attempting to use a railroad crossing known to be in a dangerous or defective condition is treated in a note to *Ft. Smith & W. R. Co. v. Seran*, L.R.A.1915C, 813.

It cannot be held, as matter of law, that a boy fourteen years old, who is within 15 or 20 feet of a railway track, is guilty of negligence in running across the track at a farm crossing when a train is approaching in plain sight a quarter of a mile away, at a rate of 45 miles an hour, although because of the defective crossing his foot is caught between the planks and the rail and he is run over. *Baltimore & O. S. W. R. Co. v. Keck* (1899) 84 *Ill. App.* 159, affirmed in (1900) 185 *Ill.* 400, 57 N. E. 197.

And it will not be presumed, in the absence of evidence in that regard, that a boy eight years old knew and appreciated the danger of his foot becoming fast in an unblocked frog at a place where he is crossing the track as an invitee, so as to prevent recovery for an injury by being run over by a train while unable to extricate himself. *Pittsburgh, C. C. & St. L. R. Co. v. Simons* (1907) 168 *Ind.* 333, 79 N. E. 911.

It was held that the question of contributory negligence was for the jury, and a verdict for the plaintiff sustained, in an action for injury to a boy four years and eleven months old, who, on approaching a railroad crossing with his brother nearly nine years old, turned to see if the latter was following, and, while walking backwards, stepped into the space between the rail and the plank, and, being unable to extricate his foot, was run over by a train. *O'Connor v. Boston & L. R. Corp.* (1883) 135 *Mass.* 352. The question whether the

younger boy, if capable of contributory negligence, as well as whether the older boy, in failing to observe the hole and prevent his brother from stepping into it, was exercising the care ordinarily shown by children of their ages was said to be peculiarly a question for the jury.

In an action for an injury by being thrown from a wagon because of a defective railroad crossing, it was held that the complaint was not subject to demurrer as showing that the plaintiff was guilty of contributory negligence, in that it alleged that she was an infant and was driving a two-horse team, where it did not allege her age. *Louisville, E. & St. L. Consol. R. Co. v. Pritchard* (1892) 131 Ind. 564, 31 Am. St. Rep. 451, 31 N. E. 358.

And it was held also in *Louisville, E. & St. L. Consol. R. Co. v. Pritchard* (Ind.) *supra*, that contributory negligence was not shown as matter of law by the additional fact that the plaintiff was twelve years old, where there was evidence that the horses were gentle and were not afraid of cars, and that she was accustomed to driving them.

So, where a delivery boy in driving across railroad tracks at a street crossing was thrown from the wagon because the horse shied at an engine standing near the crossing which began to let off steam as he was passing, causing the wagon to miss the crossing and strike the rails, it was held that recovery for injury so sustained, based on a failure of the railroad company to maintain a crossing of the width required by statute, was not necessarily precluded on the ground of contributory negligence, but that this was a question for the jury, where it appeared that the boy had been driving the horse for a month, and testified that it had never before attempted to run away with him, and was not afraid of engines when steam was not escaping. *Phillips v. Pryor* (1916) — Mo. App. —, 190 S. W. 1027.

And it was held that the question of contributory negligence was for the jury, and a judgment for the plaintiff affirmed, in an action for injury to a twelve-year-old boy who, while walking along the sidewalk at a railroad crossing with which he was not familiar, caught his foot in an unblocked frog, and was run over by a train before he could extricate it. *Friess v. New York C. & H. R. R. Co.* (1893) 67 Hun, 205, 22 N. Y. Supp. 104, affirmed in (1893) 55 N. Y. S. R. 931.

And it was held also in *Friess v. New York C. & H. R. R. Co.* (N. Y.) *supra*, L.R.A.1917F.

that it was not erroneous to refuse to instruct the jury that there was no evidence that the child was of less judgment or discretion than an adult, where there was evidence as to his experience and knowledge of railroads, that he had never noticed the angle the tracks made when they met, and did not know the nature of a frog, and that he had no such knowledge of switches or frogs as would induce him to believe that it was dangerous to walk over them. The court was, however, of the opinion that an infant of this age is *sui juris*, and, in the absence of evidence tending to show that he is not qualified to understand the danger and appreciate the necessity for observing that degree of caution in crossing a railroad track that an adult would exercise, is bound to exercise the same degree of care as an adult.

It was held in *Gehring v. Atlantic City R. Co.* (1907) 75 N. J. L. 490, 14 L.R.A. (N.S.) 312, 68 Atl. 61, that a thirteen-year-old boy, who, after leaving a position 20 feet from a railroad track, where he looked for an approaching train, proceeds on his bicycle towards and onto the track, and, the bicycle being stopped by the rails, attempts to propel it over them without again looking for a train, is guilty of such negligence that he cannot hold the railroad company liable for injuries caused by being struck by the train, which approaches without giving any signals, although the stoppage of the wheel is due to the removal of the planking, so that a trench is left in the highway which makes use of the crossing difficult.

It should be observed that in *Gehring v. Atlantic City R. Co.* (N. J.) *supra*, the court apparently considered the rules applicable to adults as to care in crossing a railroad applicable to the plaintiff, stating that the fact that he was a boy thirteen years old did not relieve him from the duty of careful observation, that he was old enough to appreciate fully the dangerous character of a railroad crossing and the necessity of using care for his own safety while riding over it, and that the rules which prevail as to adults in similar cases were equally applicable to him. There seems, however, much force in the dissenting opinion to the effect that the question of contributory negligence under the circumstances was for the jury.

So it was held in *Spooner v. Delaware, L. & W. R. Co.* (1886) 41 Hun, 643, 1 N. Y. S. R. 558, affirmed in (1889) 115 N. Y. 22, 21 N. E. 696, that an eight-year-old girl who, in going on a railroad track

at a crossing in order to cause other children to leave the track so as to avoid a train, caught her foot between the planks and the rail, and was run over by the train, was not guilty of contributory negligence as matter of law, but that the question of negligence on her part was for the jury.

XV. Playing about cars or track.

As to the degree of care required of a child in playing on a railroad track, or the standard by which its conduct should be measured, see footnote 15 of annotation to *Jacobs v. H. J. Koehler Sporting Goods Co.* ante, 10.

A six-year-old child who stops for a few moments on a railroad track in a highway to play with something in the sand is not necessarily guilty of such negligence as will defeat recovery for his death by being struck by an engine, due to a failure of those in charge of the engine to keep a proper lookout. *Johnson v. Chicago & N. W. R. Co.* (1880) 49 Wis. 529, 5 N. W. 886. The question of contributory negligence was held to be for the jury also on a later appeal in (1882) 56 Wis. 274, 14 N. W. 181.

So it was held in *Tobin v. Missouri P. R. Co.* (1891) — Mo. —, 18 S. W. 996, that a six-year-old child, who is killed by a train which approaches in plain sight while he is playing on the track near a crossing in a populous city, cannot be charged with contributory negligence as matter of law in failing to get off the track in time to avoid a collision, although he has been forbidden to go on the track, and has been punished for so doing. In this case there was evidence that the child was struck by the train as it was in the act of stepping off the track, that the train was running at a rate from 16 to 30 miles an hour, in violation of an ordinance limiting the speed to 6 miles an hour, and that no signals were given.

And it was held in *Finn v. Delaware, L. & W. R. Co.* (1899) 42 App. Div. 524, 59 N. Y. Supp. 771, 6 Am. Neg. Rep. 611, that a six-year-old child was not guilty of contributory negligence as matter of law in failing to observe and avoid a train which, although in plain sight, gave no signal of its approach, as it was being backed quietly at the rate of about 5 miles an hour along a street, where it appeared that she was unconscious of the danger until too late to avoid it, and was intent only on joining playmates on the opposite side of the street, and that she was walking diagonally across the track, with her back toward the engine. L.R.A.1917F.

Also in *Chicago, R. I. & P. R. Co. v. Ohlsson* (1897) 70 Ill. App. 487, it was held that a six-year-old child, who, while playing in a street in a thickly populated portion of a city, attempted to cross a railroad track to reach a playmate on the other side of the track when a train was only 50 feet away and approaching at a rate of more than 20 miles an hour, was not guilty of such negligence, at least as matter of law, as would preclude recovery for the injury by being struck by the train.

Whether a boy seven years and ten months old, who, while playing in a street, was injured by stepping on a pile of dirt negligently left beside its track by a railroad company, and falling under a moving train, was capable of contributory negligence was held a question for the jury in *Louisville, N. A. & C. R. Co. v. Sears* (1894) 11 Ind. App. 654, 38 N. E. 837.

So a boy seven years and three months old, who, while playing in a street, ran across a railroad track at a crossing in pursuit of companions, and was struck by a train, of the approach of which he was not aware, was held in *Baker v. Flint & P. M. R. Co.* (1888) 68 Mich. 90, 35 N. W. 836, not guilty of contributory negligence as matter of law in failing to look for the train before crossing, although he might have seen it approaching for 400 feet, he knew that it was dangerous to attempt to cross in front of an approaching train, and was accustomed to playing about cars.

In *Counizzarri v. Philadelphia & R. R. Co.* (1915) 248 Pa. 474, 94 Atl. 135, an action for injury to a child seven years old while playing near an opening between cars on a siding by being struck by the overhang of the car when the train was pushed together without warning, the court stated that the age of the child precluded any allegation of negligence. In this state a prima facie presumption is recognized that an infant under fourteen years of age is incapable of contributory negligence.

And it is apparently assumed in *Erie R. Co. v. Swiderski* (1912) 117 C. C. A. 17, 197 Fed. 521, that a child seven years old cannot be charged with contributory negligence in playing about freight cars standing in a street, it being held that the New Jersey statute providing that any person who is injured by an engine or car while walking, standing, or playing on a railroad shall be deemed to have contributed to the injury, and shall not be entitled to recover damages therefor, did not apply to a child who by reason

of its tender years is incapable of contributory negligence.

But in cases of injury to older children by cars or engines while playing on or near the track the courts have generally held recovery precluded because of contributory negligence, which was declared as matter of law.

Thus, it has been held that a sixteen-year-old boy is negligent in running upon the switching tracks of a railroad in pursuit of a ball without looking to see if there is danger of collision with moving cars, notwithstanding he has seen stationary cars on part of the tracks (*Bourrett v. Chicago & N. W. R. Co.* (1911) 152 Iowa, 579, 36 L.R.A.(N.S.) 957, 132 N. W. 973); and that it is contributory negligence as matter of law for an exceptionally bright boy twelve years old, who for six or seven years has lived in the immediate vicinity of a railroad crossing, to use the track as a playground, with a companion, within 10 or 20 feet of an engine fronting in the opposite direction, without taking any precautions, with the result that, on the backing of the engine without warning, he is run over and killed (*Cleveland Terminal & Valley R. Co. v. Heiman* (1898) 16 Ohio C. C. 487, 9 Ohio C. D. 222).

And it was held that contributory negligence was shown as matter of law, where a boy eleven years old, of ordinary intelligence, who lived near a railroad track, was struck by a backing engine at a crossing, which the engine approached at a rate of from 10 to 15 miles an hour without ringing the bell, and it appeared that he had chased a ball which went over the fence of a ball park adjacent to the railroad, and, without looking for a train, and in apparent ignorance of the approaching engine, ran on the track and halted momentarily to throw the ball when the engine was only 60 or 70 feet away. (*Schoonover v. Baltimore & O. R. Co.* (W. Va.) ante, 1.

So, where a boy eleven years old went on a railroad right of way which was fenced, at a place half a mile from a street crossing, though within the limits of a city, and, while playing with another boy between parallel tracks, 12 feet apart, became confused and blinded when a train passed at a high rate of speed and stepped back onto the other track in front of another train and was killed, it was held that he was guilty of contributory negligence, as matter of law, which would preclude recovery for his death, even if the train was running

at a rate of 25 miles an hour, in violation of an ordinance limiting the speed to six miles an hour. (*Masser v. Chicago, R. I. & P. R. Co.* (1886) 68 Iowa, 602, 27 N. W. 776. The court said: "A boy eleven years of age knows, as well as an adult does, what a railroad is, and the use to which it is put, and the consequence to a person who should be struck by a passing train, and knows that he should not stop to play or lounge amid a network of tracks. It is true that a boy of that age cannot be presumed to have the judgment of an adult; but it does not require much judgment to keep from walking in a dangerous place, the dangers of which are fully understood. If the question was as to whether the deceased was guilty of contributory negligence in the mere act of stepping backward upon the defendant's track when the Fort Dodge train passed, the case would be different. The deceased evidently lost his presence of mind somewhat, and he might not have been guilty of negligence in what he did then, even though he did not govern himself with the prudence which might reasonably have been expected of an adult. But his negligence consisted in going, in the outset, and in remaining, where he incurred the danger of losing his presence of mind. We certainly cannot hold that a boy eleven years old is exercising reasonable prudence in making such a place as that to which the deceased and his companion went a playground or lounging place, nor that a jury would be justified in so finding."

It was held also that contributory negligence was shown as matter of law, where a fifteen-year-old boy, while playing in a street on which a railroad track was laid, started to run across the track near closed gates, when an engine 100 feet away was approaching in plain sight at a speed of from 7 to 20 miles an hour, tripped in a hole between the ties and fell when the engine was only 30 feet away, and was run over, the question discussed, however, being principally the doctrine of last clear chance. (*Cullen v. Baltimore & P. R. Co.* (1896) 8 App. D. C. 69.

It was held that a verdict was properly directed for the defendant, both on the ground of lack of negligence and of the failure of the plaintiff to show freedom from contributory negligence, where a twelve-year-old boy, while amusing himself on a railroad track, and in the act of picking up coal near the outer rail, was struck by the projecting beam of the engine pilot of a train approaching

from the rear. *Engelmann v. Lake Shore & M. S. R. Co.* (1894) 8 Ohio C. D. 593, affirmed without opinion in (1895) 53 Ohio St. 656, 44 N. E. 1135.

But whether a ten-year-old boy who was killed by a work train used in ditching and leveling the roadbed near his home had sufficient capacity and intelligence to comprehend and appreciate the danger of playing around and upon the train, so as to be chargeable with contributory negligence, was held to be a question for the jury, in *St. Louis & Southwestern R. Co. v. Abernathy* (1902) 28 Tex. Civ. App. 613, 68 S. W. 539, although it appeared that he had frequently been told not to go about the train, as he might be hurt or killed.

And it was held that a ten-year-old boy who, in running across a railroad track at a street crossing after other boys, was struck by a train was not guilty of contributory negligence as matter of law in failing to stop and listen for the train, no warning of the approach of which was given by the engine bell or whistle, or by an electric gong maintained at the crossing, where it appeared that the view of the track in the direction of the approaching train was obstructed by cars and buildings until he was within 5 or 6 feet of the track, that the train was late, and he had reason to believe that no train was near. *Baltimore & O. S. W. R. Co. v. Hickman* (1907) 40 Ind. App. 315, 81 N. E. 1086.

XVI. Crossing railroad bridge or trestle.

As to the degree of care required of a child in crossing or playing about a railroad bridge or trestle, or the standard by which its conduct should be measured, see footnotes 19 and 20 of annotation to *Jacobs v. H. J. Koehler Sporting Goods Co.* ante, 10.

A court should not assume that a child eight years old who is killed by a train while walking on a railroad trestle is incapable of contributory negligence. *St. Louis & S. F. R. Co. v. Christian* (1894) 8 Tex. Civ. App. 246, 27 S. W. 932.

But where a girl seven years old in crossing a trestle in company with her mother was run over by a train approaching, in plain sight from the rear, the court in *Texas & P. R. Co. v. Fletcher* (1894) 6 Tex. Civ. App. 736, 26 S. W. 446, in holding that the evidence was sufficient to sustain a judgment for the plaintiff, in an action by the child for the injury, said: "The evidence in this case fails to impress us that [the

plaintiff] had sufficient discretion to realize that there was danger from the train, incident to going upon the trestle; and we think under the evidence she should not be held guilty of contributory negligence. Indeed, we think her tender years alone should exempt her from liability for her conduct."

In an action for the killing of a child six and a half years old by a train while crossing a railroad bridge, the court in *Sweet v. Providence & S. R. Co.* (1890) 20 R. I. 785, 40 Atl. 237, in upholding a judgment for the plaintiff, without setting out the circumstances of the accident, stated that the question of contributory negligence was properly left to the jury.

And it was held that the question of contributory negligence was for the jury where a twelve-year-old girl, on reaching a railroad bridge 134 feet long, which for many years had been used by the public without objection as a foot crossing, stopped, looked, and listened for trains, as she knew it was about time for a train, and not seeing any, although the view was unobstructed beyond the bridge for a distance of over 2,000 feet, started to cross the bridge, and when about half way across saw a train coming toward her at the rate of 30 miles an hour, and attempted to retreat, but, when within 10 feet of the end of the bridge, fell and was struck by the engine. *Young v. Clark* (1897) 16 Utah, 42, 50 Pac. 832, 3 Am. Neg. Rep. 315.

So it was held that contributory negligence was not shown as matter of law by the fact that a girl almost eleven years old, when about three-fourths of the distance across a 200-foot railroad trestle, over which she was walking, discovered a train coming toward her, and, instead of jumping from the trestle, which was between 4 and 5 feet high, as other children, who were with her, did without injury, became frightened and attempted to retreat, and was struck by the train when about 12 feet from the end of the bridge. *St. Louis Southwestern R. Co. v. Bolton* (1904) 36 Tex. Civ. App. 87, 81 S. W. 123.

In an action for the killing of a girl seven years old by a train while she was walking with companions several years older across a railroad trestle, it was held in *Cassida v. Oregon R. & Nav. Co.* (1887) 14 Or. 551, 13 Pac. 438, that, on the issue of contributory negligence, evidence was admissible that the children went upon the track and undertook to cross the trestle in order to avoid

vicious cattle near the railroad; and that, under this view, an instruction was inapplicable that travelers approaching a railroad track must use their senses vigilantly and look both ways, and that this precaution is required of children who have the maturity and capacity which justify their being allowed to go abroad unattended.

XVII. Coasting across track.

Generally as to injury to one while coasting in street, see note to *Lynch v. Public Service R. Co.* 42 L.R.A.(N.S.) 865.

As to negligence in coasting across street car tracks, see III. g, of annotation appended to *Bothwell v. Boston Elev. R. Co.* post, 184.

It was held that the question of contributory negligence was for the jury where a boy eleven years old, while coasting down a grade in the street, was struck by a train backed across the street in violation of an ordinance, in that the bell on the engine was not sounded, the speed was excessive, and no one was stationed on the car farthest from the engine. *Eswin v. St. Louis, I. M. & S. R. Co.* (1888) 96 Mo. 290, 9 S. W. 577.

And in *Imus v. Ann Arbor R. Co.* (1912) 172 Mich. 292, 137 N. W. 682, it was held that the question of contributory negligence was for the jury, and a judgment for the plaintiff affirmed, where a seventeen-year-old boy, while coasting along a street intersected by a sidetrack, was struck by a switch engine, it appearing that he could not see the engine until too late to avoid the collision, that he looked before starting down the grade, and, in supposing the way was clear, relied on the custom of the railway company of sending an employee ahead to warn persons when the siding was in use as it was required to do by an ordinance, but neglected to do in this instance.

So, in *Meyers v. Central R. Co.* (1907) 218 Pa. 305, 67 Atl. 620, an action for injury to a boy thirteen years old, while coasting on a highway intersected by a railroad track, by collision with a train, it was held that the question of contributory negligence was for the jury, where there was evidence that the crossing was ordinarily protected by a watchman and safety gates, but was not so protected at the time of the accident, that it was dangerous because of obstructions to the view, and that the engine was backing in the dark, without warning.
L.R.A.1917F.

For other cases of reliance on flagman, see XIII. a, *supra*.

It was held that the question of contributory negligence was for the jury where a ten-year-old boy, while coasting in a toy wagon on a street intersected by a railway track, was struck by a hand car which approached without warning. *Burteh v. Canadian P. R. Co.* (1906) 13 Ont. L. Rep. 632.

And where a ten-year-old boy, while coasting in a toy wagon along a street intersected by a railroad track, without fault on the part of the railroad company ran into a depression along the track and several cars passed over him without inflicting injury, it was held that the jury should have been permitted to determine whether he was negligent in leaving his place of safety and attempting to crawl out from under the train, in doing which he was injured, as evidence was not lacking that his conduct was negligent. *Anna v. Missouri P. R. Co.* (1902) 96 Mo. App. 543, 70 S. W. 398, 12 Am. Neg. Rep. 499.

XVIII. Riding bicycle across track.

Generally as to liability for injury to bicyclist at railroad crossing, including the question of contributory negligence, see notes in 47 L.R.A. 301, and 42 L.R.A. (N.S.) 158.

In *Sewell v. New York, N. H. & H. R. Co.* (1898) 171 Mass. 302, 50 N. E. 541, a boy thirteen years old, who rode a bicycle along a street leading to the seashore, watching for a steamer, was held negligent as matter of law in crossing a railroad track without taking any precautions, with the result that he collided with a train and was injured.

Also in *Knickerbocker v. Detroit, G. H. & M. R. Co.* (1911) 167 Mich. 596, 133 N. W. 504, it was held that a ten-year-old boy, accustomed to going about a city and crossing railroad tracks, who, with nothing to divert his attention, rode a bicycle at a street crossing in front of a train which he could have seen for a distance of 70 feet before he reached the crossing, the view of the track being unobstructed for more than half a mile, was guilty of such negligence as will preclude recovery for his death by collision with the train.

But it was held that a finding that a boy fourteen years old, who was struck by a train while riding a bicycle over railroad tracks at a street crossing, was not guilty of more than a slight want of ordinary care, was supported by evidence that, as he approached from the west the intersection of a street and

three parallel railroad tracks, he looked north and saw no train, but, observing a train approaching from the south on the middle track, waited for it to pass, and then stepped to the west rail of the middle track, and again looked north when about 13 feet from the third track, and, seeing no train, mounted his wheel and proceeded to cross the farthest track, when he was struck by a train approaching from the north at the rate of 30 miles an hour without sounding the whistle or ringing the bell, the view of which was obstructed by cars standing on the first track and by the passing train. *Wade v. Chicago & N. W. R. Co.* (1911) 146 Wis. 99, 130 N. W. 890. The case was decided under a statute making it unlawful for a railroad company to run a train through an incorporated city faster than 12 miles an hour within 20 rods of a public crossing, requiring the ringing of the engine bell continuously within 20 rods of such a crossing, and providing that, in case of injury or death by the negligent omission to comply with these requirements, the fact that the person injured or killed was guilty of a slight want of ordinary care contributing to the injury or death should not bar recovery.

In an action for the death of a fifteen-year-old boy by being struck by a train while riding a bicycle over the track at a crossing, there being evidence that he went upon the crossing without knowledge of the approaching train, and that the customary signals were not given, it was held that evidence that he was a good rider, familiar with the crossing, and was careful, so far as the witnesses had observed, was insufficient evidence of a habit of carefulness from which it could be inferred that on the particular occasion he was careful, in view of other evidence of the flagman at the crossing that he had cautioned the boy about riding his bicycle over the crossing ahead of trains. *Gibson v. Maine C. R. Co.* (1909) 75 N. H. 342, 74 Atl. 589.

See also *Gehring v. Atlantic City R. Co.* cited in XIV. *supra*.

XIX. Asleep on or near track.

As to the standard for measuring the conduct of a child, in determining whether its conduct in falling asleep on a railroad track is negligent, see footnote 18 of annotation to *Jacobs v. H. J. Koehler Sporting Goods Co.* ante, 10.

A fifteen-year-old boy who goes to sleep on a railroad crossing is guilty of such negligence as will preclude recovery for his death by being run over by a

train. *Raden v. Georgia R. Co.* (1886) 78 Ga. 47. The court said: "As both parties seemed to consider and treat the cases in the court below that these boys were injured while asleep on the public crossing, we will so consider the cases. It is quite manifest, if these boys had been asleep upon the railroad crossing that their parents could not recover from the railroad company, because the injury was caused by their own negligence, and such is our law as declared in § 3034 of the Code."

So a ten-year-old girl or average intelligence, in sitting on a railroad track to rest and falling asleep at about the regular time for a train to pass, is guilty of such negligence as will defeat recovery for her death by being run over by the train. *Manly v. Wilmington & W. R. Co.* (1876) 74 N. C. 655.

And a boy nearly twelve years old, who is run over by a train and killed while he is asleep on the track, if of sufficient intelligence and experience to know and appreciate the danger of being on the track, cannot avoid the charge of contributory negligence on the ground that he did not have sufficient intelligence to understand the danger of falling asleep if he sat down on the track. *St. Louis Southwestern R. Co. v. Shiflet* (1900) 94 Tex. 131, 58 S. W. 945, reversing (1900) — Tex. Civ. App. — 56 S. W. 697. It was said: "Two of the witnesses swore that they did not believe that [the deceased] was possessed of sufficient intelligence to understand that if he sat down upon the railroad track he might fall asleep. Giving full force to this evidence and every inference to be drawn from it, can it be said that the boy's failure to realize that he might fall asleep had anything to do with his going into danger, or remaining there? We cannot understand how a jury could infer from the fact that he did not appreciate the danger of going to sleep that therefore he did not appreciate the danger of his position, and it seems to us that the consciousness of danger in the place he occupied constitutes the negligence, and establishes the responsibility for remaining in that position. If he had remained awake, either sitting or standing upon the track, and the accident had occurred to him, he could not have been excused, because he was negligent, and was responsible, under the facts, for his acts. Being negligent and responsible while awake, his falling asleep did not palliate or lessen the degree of his negligence. . . . Admitting that all boys are liable to fall asleep

when they lie down, this does not excuse a boy who is conscious of his danger for lying down or sitting down in a place of danger, and thereby, through his own act, subjecting himself to that infirmity. The natural inclination to sleep did not induce him to go upon the track, but it enhanced the danger to himself."

And it was held in *St. Louis Southwestern R. Co. v. Shiflet (Tex.)* supra, that, in the absence of evidence that the deceased did not understand the danger of being on a railroad track, it was erroneous to submit to the jury the question whether he was of sufficient discretion and judgment to understand and appreciate the danger of his position; also that evidence that he was not of sufficient intelligence and discretion to go alone to other counties and to distant towns did not tend to establish such incapacity. It was said that the deceased was not of that age at which courts hold a child exempt as a matter of law from the charge of contributory negligence, nor of an age at which a court would, as a matter of law, hold that he was responsible for his act, but that his responsibility was a question for the jury; and if there was no evidence on the subject the issue should not have been submitted, or, having been submitted, the jury should have found for the defendant, because it devolved on the plaintiff to show that, for want of discretion, the negligent act of the deceased was not imputable to him.

On a later appeal in the case of *St. Louis Southwestern R. Co. v. Shiflet (Tex.)* supra, reported in (1904) 37 Tex. Civ. App. 541, 84 S. W. 247, affirmed in (1904) 98 Tex. 326, 83 S. W. 677, it was held that the above conclusions were not affected by the additional fact shown on the subsequent trial that persons were accustomed to walk at night on the track at the place of the accident.

However, where a boy (age not stated) who had been invited by a watchman of a railroad company to spend the night with him fell asleep near, but not on, the track, and was killed by a train, it was held in *Gulf, C. & S. F. R. Co. v. Prazak* (1916) — Tex. Civ. App. —, 181 S. W. 711, 12 N. C. C. A. 800, that, although the burden of proof in an action for his death rested on the plaintiff, and it appeared that he had been warned by the watchman several times during the night in reference to passing trains, the question of contributory negligence was for the jury, in view of the youth and probable lack of discretion of the deceased, and the fact that while sitting near the

same place two other trains had passed without injuring him. The court distinguished the case from *St. Louis Southwestern R. Co. v. Shiflet (Tex.)* supra, on the ground that in the latter case the boy was asleep on the track and the decision was based on the proposition that an average boy eleven years old was bound to know the danger under those circumstances from a passing train.

It was held that contributory negligence was shown as matter of law where a twelve-year-old boy fell asleep on a platform adjacent to a railroad track, with his feet so near the track as to be struck by a passing train, where it appeared that he was of average intelligence, and for six months or more had been helping his father, a section foreman, in his duties, was familiar with the locality and the movement of trains, knew that a train was past due and likely to appear at any time, and that his position would be dangerous if a train passed while he slept. *Mann v. Missouri, K. & T. R. Co.* (1907) 123 Mo. App. 486, 100 S. W. 566.

And where a boy seven and a half years old fell asleep on a railroad crossing and was run over by a train, it was held that a verdict in his favor could not be sustained because contributory negligence was shown by a special finding that he was of ordinary intelligence and judgment for one of his age, and of ordinary physical strength and activity; that he knew that trains were operated at that place, and had sufficient intelligence to know that they were likely to pass and that if he remained on the track when an engine or car passed he would be run over and injured; and, while playing on the track, he sat down on a rail with his feet between the rails, and fell asleep, with one leg lying over the rail. *Krenzer v. Pittsburg, C. C. & St. L. R. Co.* (1898) 151 Ind. 587, 68 Am. St. Rep. 252, 43 N. E. 649, 52 N. E. 220, 5 Am. Neg. Rep. 137.

In *Rudd v. Richmond & D. R. Co.* (1885) 80 Va. 546, a twelve-year-old boy, while caring for cows in a field near a railroad track, fell asleep and was killed by a train. He had been repeatedly found on the track in a similar condition and had been warned of the danger, and it was apparently assumed that he was guilty of negligence, the question being whether the railroad company was nevertheless liable on the ground of gross negligence.

And in an action for injury to a six-year-old boy, who was run over by a train while lying between the rails, the

evidence being conflicting as to whether he was asleep, the court in *Meeks v. Southern P. R. Co.* (1878) 52 Cal. 602, held that a finding that neither the plaintiff nor his parents were chargeable with negligence which contributed to the injury was not supported by the evidence, and that there could be no recovery. The court said that, whether the child was asleep or not, his conduct amounted to negligence per se; but the decision appears to rest, partly, at least, on the ground that negligence on the part of the defendant was not shown.

But whether a thirteen-year-old boy who lay down under a car standing on a spur track and went to sleep, and was injured by the movement of the car, was guilty of negligence in lying down under the car, where he saw men lying at the time, was considered a question for the jury, in *Garza v. Texas Mexican R. Co.* (1897) — Tex. Civ. App. —, 41 S. W. 172.

XX. Sitting on track under or near car.

It was held that contributory negligence was shown as matter of law where a bright boy nine years old, who had been frequently cautioned of the danger of going under cars, and knew and appreciated the danger of the position which he occupied, was killed while sitting under a car in a railroad yard by the starting of the car when a switch engine was backed against it. *Atchison, T. & S. F. R. Co. v. Todd* (1895) 54 Kan. 551, 38 Pac. 804.

But in an action for the death of an eight-year-old boy while crawling under cars standing on ground used as a common, by the starting of the car by other cars being pushed against it, it was held in *Hofler v. Southern R. Co.* (1899) 21 Ky. L. Rep. 1020, 53 S. W. 665, 7 Am. Neg. Rep. 50, that the giving of a peremptory instruction for the defendant was erroneous.

Negligence may be ascribed to an intelligent boy seven years old, familiar with trains, who seats himself on a cross-tie near a moving train, with his back to it, and remains seated, paying no attention to the train, which approaches at a rate of 4 or 5 miles an hour, until it is 10 feet away, when, in attempting to avoid it, he stumbles and is run over. *Givens v. Louisville & N. R. Co.* (1903) 24 Ky. L. Rep. 1796, 72 S. W. 320.

And an instruction, in an action for the death of a boy eleven years old who, while sitting on trestlework under a freight car, is killed by the sudden starting of the car, which assumes that he

was in an unsafe position, and charges that he was guilty of negligence if he knew that it was unsafe to sit under the car, is not erroneous. *Ostertag v. Pacific R. Co.* (1877) 64 Mo. 421.

As to whether a child is negligent in leaving a place of safety under a passing car, in doing which it is injured, see *Anna v. Missouri P. R. Co.* under XVII. supra, where the child was coasting and ran into a depression along the track.

See also *Garza v. Texas Mexican R. Co.* under XIX. supra, where a thirteen-year-old boy lay down under a car standing on a siding, and was injured while asleep by the movement of the car.

XXI. Injuries by trains or engines at stations.

It was held in *Corcoran v. New York Elev. R. Co.* (1879) 19 Hun (N. Y.) 368, that a fourteen-year-old boy who, on the request of a brakeman to procure water for use at a railroad station, walked upon an elevated railroad structure along which planks were laid, and crossed in front of a standing engine, in order to reach a hydrant, was not guilty of such negligence as would preclude recovery as matter of law for an injury by being struck by the engine, which was started without warning.

And it was held in *Kyne v. Southern P. Co.* (1912) 41 Utah, 368, 126 Pac. 311, that a girl ten years old, who, having gone on an errand to a station, when she observed a work train stop and the train crew leave it, stood for three or four minutes near another track looking for her father, was not guilty of such negligence as matter of law as would preclude recovery for an injury by being struck by the train, which in the meantime was switched to that track, and approached from the rear without warning.

So it was held that contributory negligence was not shown as matter of law where a fifteen-year-old boy crossed a railroad track at a station to deliver mail, with which he had been intrusted by the station agent, to a baggageman on a train which had entered on a siding, and, being abused and cursed by the baggageman, became confused, and stepped in front of a train approaching from the opposite direction on the intervening track, and was injured. *Chicago, K. & N. R. Co. v. Parkinson* (1896) 56 Kan. 652, 44 Pac. 615.

And where there was evidence that a boy nearly twelve years old, who had gone to a station to meet a passenger, stumbled over obstructions, which he

could not see, on the platform, and was thrown under the wheels of a car and killed, it was held in *New York, C. & St. L. R. Co. v. Mushrush* (1894) 11 Ind. App. 192, 37 N. E. 954, 38 N. E. 871, that the question of contributory negligence was for the jury, and a judgment for the plaintiff in an action for his death was affirmed. The court overruled the contention that it was necessarily negligence for the boy to walk slowly along the platform within a foot and a half of a train moving at the rate of 2 miles an hour.

But it is contributory negligence as matter of law, even if his age may be taken into consideration in determining the degree of care required, for a boy nearly nineteen years old, employed as a messenger at a railroad station, to run along the platform for 100 feet beside a moving train, in order to receive from a trainman an article which is usually thrown from the train and then picked up, and which he has been directed to obtain, without looking in the direction in which he is proceeding, with the result that he collides with a post known to him to be on the platform and in plain sight, and falls under the train and is killed. *Gray v. Wabash R. Co.* (1913) 179 Mo. App. 541, 162 S. W. 672.

See also *Gresham v. Louisville & N. R. Co.* under IV. *supra*.

XXII. Injuries by hand cars or push cars.

As to the degree of care required of a child in playing about hand or push cars, or the standard by which its conduct should be measured, see footnote 17 of annotation to *Jacobs v. H. J. Koehler Sporting Goods Co.* ante, 10.

There is no conclusive presumption of law that a twelve-year-old boy is able to foresee the danger of being crushed by a loaded push car which he and other children are pushing along a track, or that he has sufficient wisdom to avoid it; at least, not in the face of an averment to the contrary in the pleadings. *Cahill v. Stone* (1908) 153 Cal. 571, 19 L.R.A.(N.S.) 1094, 96 Pac. 84; see also later appeal in (1914) 167 Cal. 126, 138 Pac. 712, where the question of contributory negligence was held to be for the jury.

The question of contributory negligence was held to be for the jury, and a judgment for the plaintiff affirmed, where a nine-year-old boy, while playing with a hand car negligently left by a railway company in a public place, was L.R.A.1917F.

injured by his foot being caught in the cogs. *Illinois C. R. Co. v. Wilson* (1901) 23 Ky. L. Rep. 684, 63 S. W. 608.

Contributory negligence cannot be ascribed to an eight-year-old boy in attempting to assist in pushing a loaded push car along a railroad track. *ASHBY v. NORFOLK SOUTHERN R. Co.* ante, 116. In this connection, see *Rhodes v. Georgia R. & Bkg. Co.* under XXV. *infra*.

See also *Burtch v. Canadian P. R. Co.* under XVII. *supra*, where a child while coasting across a track was struck by a hand car.

XXIII. Emergencies.

Attention is called to the discussion of the question of contributory negligence in actions under emergencies in VII. h, of the note to *Jacobs v. H. J. Koehler Sporting Goods Co.* ante, 104, and to other notes therein cited. The cases set out below apply principles not peculiar to actions for injuries or death of children, and are only illustrative and not exhaustive.

Whether or not a bright boy eight years old exercised that degree of care reasonably to be expected from an ordinarily prudent boy of his age under the circumstances was held to be a question for the jury, where it appeared that while he was driving cows along a highway crossed by a railroad, he attempted to save one of the animals which had broken away and run towards the crossing, and moved so close to the track, although not upon it, with his back toward a train rapidly approaching in plain sight, that he was struck by the engine and killed. *Christensen v. Oregon Short Line R. Co.* (1905) 29 Utah, 192, 80 Pac. 746. The court stated, however, that if it should apply the same legal test to the actions of the boy as would ordinarily be applied under like circumstances to persons of mature years, it was not prepared to say, as a matter of law, that he was guilty of contributory negligence.

And a fourteen-year-old boy cannot be charged with contributory negligence in remaining on a railroad bridge and attempting to rescue a girl companion of about the same age who falls between the ties in attempting to escape from an approaching train. *Becker v. Louisville & N. R. Co.* (1901) 110 Ky. 474, 53 L.R.A. 257, 96 Am. St. Rep. 459, 61 S. W. 997.

And see *Spooner v. Delaware, L. & W. R. Co.* cited in XIV. *supra*, where an eight-year-old girl in attempting to rescue other children was run over by a

train while her foot was caught in a defective crossing; also *Copley v. New Haven & N. Co.* and *Geist v. Missouri P. R. Co.* under IV. *supra*, and *Tyler v. New York & N. E. R. Co.* under VIII. *d. supra*, where an infant in crossing the track discovered a train too late and attempted to drive across in front of it.

See also cases under XVI. *supra*.

XXIV. Statutory provisions.

The New Jersey statute making it unlawful for any person other than those connected with or employed on a railroad to walk on the tracks, except when the same shall be laid on a highway, and providing that any person injured by an engine or car while walking, standing, or playing on a railroad, or by jumping on or off a car while in motion, shall be deemed to have contributed to the injuries sustained, and shall not recover therefor, has been held not to apply to a child of such an age that at common law it would not be chargeable with contributory negligence. *Erie R. Co. v. Swiderski* (1912) 117 C. C. A. 17, 197 Fed. 521. The action was for injury to a child seven or eight years old while playing about a freight car in a street, it being apparently assumed that a child of this age is incapable of contributory negligence.

As making a distinction, as regards the liability of a railroad company, in cases of injuries to infants and adults because of failure to fence the track, due to the difference in the conduct ordinarily to be expected in the two classes of persons, attention is called, among possibly other decisions, to several Wisconsin cases dealing with the effect of a statute making railroad companies liable, on failure to fence the track, for all damages to domestic animals and persons "occasioned in any manner in whole or in part" by want of a fence. Thus, it has been held that, whether or not the want of a fence might properly be said to be the cause in any degree of an injury to an adult who enters on a railroad track and is struck by a train, the lack of such a fence may be the cause "in whole or in part" of such an injury to a child who, on account of lack of judgment and discretion, and a tendency to follow the instinct of curiosity, might more easily wander on the track because of the lack of a fence. See *Schrier v. Milwaukee, L. S. & W. R. Co.* (1886) 65 Wis. 457, 27 N. W. 167 (child eighteen months old); *Schwind v. Chicago, M. & St. P. R. Co.* (1909) 140 Wis. L.R.A.1917F.

1, 133 Am. St. Rep. 1055, 121 N. W. 639 (boy ten years old); *Ulickie v. Chicago & N. W. R. Co.* (1912) 152 Wis. 236, 139 N. W. 189 (boy fifteen years old).

XXV. Miscellaneous.

A boy thirteen years old will not be presumed to have sufficient discretion to be chargeable with contributory negligence, in going in front of a car, in response to a request of an employee of the railroad company, and pulling, in an effort to assist in moving the car, with the result that while pulling and walking backwards, out of sight of others engaged in moving the car, he stumbles over a stone between the rails and is run over. *Rhodes v. Georgia R. & Bkg. Co.* (1889) 84 Ga. 320, 20 Am. St. Rep. 362, 10 S. E. 922. See also *ASHBY v. NORFOLK SOUTHERN R. Co.* ante, 116, where an eight-year-old child was held not chargeable with negligence in helping to push a loaded push car.

Where a bright girl eight years old fell from an embankment upon a railroad track and was killed by a train, the court in *Robertson v. New York* (1894) 7 Misc. 645, 28 N. Y. Supp. 13, affirmed without opinion in (1896) 149 N. Y. 609, 44 N. E. 1128, held that, negligence on the part of the defendant being assumed, the complaint was properly dismissed for insufficient proof of the absence of contributory negligence, where it appeared that the girl saw the train approaching, and, although the danger of a fall was obvious, left a position of safety, and ran down a hill onto the embankment.

In an action for injury to a boy (age not stated) while crossing a railroad track, where there was evidence that at the time he was struck by the car he was bending over on the track tying his shoe, it was held that it was not erroneous to instruct the jury that if they found that such act was contributory negligence they should find for the defendant, the evidence failing to show that the boy did not have sufficient discretion to be guilty of contributory negligence. *Over v. Missouri, K. & T. R. Co.* (1903) — Tex. Civ. App. —, 73 S. W. 535. The decision, however, apparently is based on the theory that as the question of the indiscretion of the infant was not raised in the lower court he must be treated as though he were an adult.

Where an eight-year-old boy in passing over a railroad track at a crossing was injured by coming in contact with

an electrified third rail, it was held in *Tarlucki v. West Jersey & S. F. R. Co.* (1914) 86 N. J. L. 301, 90 Atl. 1117, that a verdict directed for the defendant could not be sustained on the ground of contributory negligence, the court stating that this was a question for the jury under the debatable facts in the case, particularly in view of the immature age of the plaintiff.

A fourteen-year-old boy accustomed to cars, who, after passing through a train standing on a crossing, stood so near

another track that he was struck by an engine, which he might have seen approaching in ample time to have avoided it, while he looked under the cars through which he had passed for a companion, was held in *Cleveland, C. C. & St. L. R. Co. v. Gahan* (1902) 24 Ohio C. C. 277, guilty of contributory negligence as matter of law in standing in such a position of danger without taking any precautions to avoid passing trains.

R. E. H.

MASSACHUSETTS SUPREME JUDICIAL COURT.

MARGARET KYLE, Admr., etc., of Walter Kyle, Deceased,
v.

BOSTON ELEVATED RAILWAY COMPANY.

(215 Mass. 260, 102 N. E. 310.)

Street railway — collision with child — contributory negligence.

A six-year-old child is guilty of negligence in following other children across street car tracks at a place other than a street crossing without exercising any care to ascertain whether or not a car is approaching, which will preclude a recovery in case he is struck and killed by a car. For other cases, see *Street Railways, III. c.*, in *Dig. 1-52 N. S.*

(June 17, 1913.)

REPORT by the Superior Court for Suffolk County for the opinion of the Supreme Judicial Court after directing a verdict in defendant's favor of an action brought to recover damages for the alleged negligent killing of plaintiff's infant child. Judgment for defendant.

The facts are stated in the opinion.

Messrs. W. W. Clarke and C. J. Muldoon, Jr., for plaintiff:

The infant plaintiff, as a traveler, was required to exercise only such degree of care as, under like conditions, would have been exercised by the ordinarily prudent child of the same age; namely, six years.

McDermott v. Boston Elev. R. Co. 184 Mass. 126, 100 Am. St. Rep. 548, 68 N. E.

Note. — For circumstances under which child crossing street car track is guilty of negligence either as matter of law or fact, see annotation following *Bothwell v. Boston Elev. R. Co.* post, 172.

As to contributory negligence of children generally, see annotation following *Jacobs v. H. J. Koehler Sporting Goods Co.* ante, 10.

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34, 14 Am. Neg. Rep. 671; *Beale v. Old Colony Street R. Co.* 196 Mass. 119, 81 N. E. 867; *Young v. Small*, 188 Mass. 4, 108 Am. St. Rep. 457, 73 N. E. 1019; *Slattery v. Lawrence Ice Co.* 190 Mass. 79, 76 N. E. 459, 19 Am. Neg. Rep. 298; *Sullivan v. Boston Elev. R. Co.* 192 Mass. 37, 78 N. E. 382, 20 Am. Neg. Rep. 561; *Burns v. Worcester Consol. Street R. Co.* 193 Mass. 64, 78 N. E. 740; *Kennedy v. Worcester Consol. Street R. Co.* 210 Mass. 132, 96 N. E. 78; *Purcell v. Boston Elev. R. Co.* 211 Mass. 79, 97 N. E. 623.

As a pedestrian crossing the street, he had a right to expect that the defendant's car would not be driven at so dangerously high a rate of speed without the usual and required warning signal being given.

Murphy v. Boston Elev. R. Co. 204 Mass. 229, 90 N. E. 398; *Hatch v. Boston & N. Street R. Co.* 205 Mass. 410, 92 N. E. 523; *Hunt v. Old Colony Street R. Co.* 206 Mass. 11, 91 N. E. 883; *Albee v. Boston Elev. R. Co.* 209 Mass. 6, 95 N. E. 110; *Jedrey v. Boston & N. Street R. Co.* 198 Mass. 232, 84 N. E. 316; *Birmingham R. Light & P. Co. v. Oldham*, 3 Ann. Cas. 336, note; *Lunderkin v. Boston Elev. R. Co.* 211 Mass. 144, 97 N. E. 743; *Beale v. Old Colony Street R. Co.* 196 Mass. 119, 81 N. E. 867; *McDermott v. Boston Elev. R. Co.* 184 Mass. 126, 100 Am. St. Rep. 548, 68 N. E. 34, 14 Am. Neg. Rep. 571.

Knowing the usual rate of speed of cars at that place, and being familiar with the custom of the defendant's cars of slowing down at the "special work," it is a fair inference that the plaintiff's intestate relied on these facts in making up his mind with regard to his ability to cross in safety.

Purcell v. Boston Elev. R. Co. 211 Mass. 79, 97 N. E. 626; *Beale v. Old Colony Street R. Co.* 196 Mass. 119, 81 N. E. 867; *Goldberg v. Boston Elev. R. Co.* 212 Mass. 13, 98 N. E. 676; *Lucarelli v. Boston Elev. R. Co.* 213 Mass. 454, 100 N. E. 632.

Messrs. Henry S. MacPherson and John B. Mahar for defendant.

Morton, J., delivered the opinion of the court:

This is an action of tort to recover for the death of the plaintiff's child, a boy five years and eleven months old, who was run over and killed on Huntington avenue in Boston at about 7:25 o'clock in the evening of May 4, 1906, by a car operated by the defendant. At the close of the evidence a verdict was ordered for the defendant on the ground that the plaintiff's intestate was not in the exercise of due care. The case is here on the plaintiff's exceptions.

We do not find it necessary to consider whether there was evidence of gross negligence on the part of the motorman, since we are of opinion that the ruling was right on the ground on which it was put.

The evidence showed that the plaintiff's intestate, whom we shall speak of as the plaintiff, was playing in the park with three or four other boys somewhat older than himself, and that they all started to run across the avenue towards Ward street. The others got over safely, but the plaintiff, who was the last, got about as far as the middle of the track, when he was struck by the car. The car was in plain sight and well lighted, and the street also was well lighted. There is nothing to show that the plaintiff looked or listened, or attempted in any way to exercise any care to avoid a collision, but started with the other boys to run across the track in front of a rapidly

approaching car, which was so near to him that it struck him when he had got only half way across the track. We assume what is, of course, self-evident, that due care on the part of a child of six does not, and cannot, involve the same degree of heedfulness as in the case of an adult, and that the fact that a child is following other children may under some circumstances be considered as bearing on the question of its due care, but after making all proper allowances something must remain which shows the exercise of some care, and we are unable to find that in this case. The place where the accident happened was not on a cross walk, as in *McDermott v. Boston Elev. R. Co.* 184 Mass. 126, 100 Am. St. Rep. 548, 68 N. E. 34, 14 Am. Neg. Rep. 571, but was in the space reserved for the street railway, and the case resembles more, we think, the cases of *Young v. Small*, 188 Mass. 4, 108 Am. St. Rep. 457, 73 N. E. 1019; *Murphy v. Boston Elev. R. Co.* 188 Mass. 8, 73 N. E. 1018; *Morey v. Gloucester Street R. Co.* 171 Mass. 164, 50 N. E. 530; *Stackpole v. Boston Elev. R. Co.* 193 Mass. 562, 79 N. E. 740, and *Russo v. Charles S. Brown Co.* 198 Mass. 473, 84 N. E. 840, than the cases of *McDermott v. Boston Elev. R. Co.* supra, and *Breen v. Boston Elev. R. Co.* 211 Mass. 519, 98 N. E. 511, on which amongst others the plaintiff relies.

Judgment on the verdict for the defendant.

MASSACHUSETTS SUPREME JUDICIAL COURT.

BONNYLIN ADAMS, by Next Friend,
v.

BOSTON ELEVATED RAILWAY COMPANY.

CLARENCE ADAMS

v.
SAME.

(222 Mass. 350, 110 N. E. 965.)

Street railways — crossing tracks — negligence of child.

A six-and-one-half-year-old child is negligent in crossing street car tracks behind a passing car in such a manner as to come into contact with the side of a car moving on the other track, so as to be precluded

Note. — For circumstances under which child crossing street car track is guilty of negligence either as matter of law or fact, see annotation following *Bothwell v. Boston Elev. R. Co.* post, 172.

As to contributory negligence of children generally, see annotation following *Jacobs v. H. J. Koehler Sporting Goods Co.* ante, 10. L.R.A.1917F.

from holding the street car company liable for the resulting injury.

For other cases, see *Street Railways*, III. c, in Dig. 1-52 N. E.

(January 6, 1916.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County made during the trial of actions brought to recover damages for personal injuries received by plaintiff by coming in contact with defendant's car and to recover expenses incurred because of the injuries, which resulted in verdicts for both plaintiffs. Sustained.

The facts are stated in the opinion.

Mr. Frederick Manley Ives, for defendant:

Plaintiff could not recover if she ran into the side of the car, even if she listened, and even if the gong was not rung, and it was immaterial whether she listened and heard no gong, because if she had looked she could not help but see the car.

Itzkowitz v. Boston Elev. R. Co. 186 Mass. 142, 71 N. E. 298; *Fitzgerald v. Boston Elev. R. Co.* 194 Mass. 242, 80 N. E.

224; *Beirne v. Lawrence & M. Street R. Co.* 197 Mass. 173, 83 N. E. 359; *Krock v. Boston Elev. R. Co.* 214 Mass. 398, 101 N. E. 968; *Mabry v. Boston Elev. R. Co.* 214 Mass. 463, 102 N. E. 309; *Callahan v. Boston Elev. R. Co.* 215 Mass. 171, 102 N. E. 330; *Sheehan v. Boston & N. Street R. Co.* 215 Mass. 463, 102 N. E. 690.

Messrs. *Chester M. Pratt and Berry & Bucknam*, for plaintiffs:

The question whether the plaintiff exercised the degree of care reasonably to be expected from a child of her age was for the jury.

Purcell v. Boston Elev. R. Co. 211 Mass. 79, 97 N. E. 626; *Goldberg v. Boston Elev. R. Co.* 212 Mass. 13, 98 N. E. 676; *Beale v. Old Colony Street R. Co.* 196 Mass. 119, 81 N. E. 867; *Tripp v. Taft*, 219 Mass. 81, 106 N. E. 578; *Angelary v. Springfield Street R. Co.* 213 Mass. 110, 99 N. E. 970; *Ayers v. Ratschesky*, 213 Mass. 589, 101 N. E. 78; *Aiken v. Holyoke Street R. Co.* 180 Mass. 8, 61 N. E. 557, 15 Am. Neg. Rep. 73; *McDermott v. Boston Elev. R. Co.* 184 Mass. 126, 100 Am. St. Rep. 548, 68 N. E. 34, 14 Am. Neg. Rep. 571.

Rugg, Ch. J., delivered the opinion of the court:

The first of these actions is by a child, who will be called the plaintiff hereafter, to recover for personal injuries received by her while traveling on foot on Dudley street in Roxbury, by coming into contact with a car of the defendant; and the second is by her father to recover his expenses incurred incident to these injuries. The plaintiff, who at the time of the accident was about six and one half years old, testified, in substance, that being on the sidewalk and having seen a yellow car on the farther track come to a stop and people waiting to get on it, and, having let a green car on the nearer track go by her, "she ran across the street behind the green car listening for the gong of the yellow car. She was pretty close to the back of the green car and heard no gong, or she would not have run across; . . . the front of the yellow car hit her. The last time she saw the yellow car before she came in collision with it, it was at a standstill, and while she was crossing the street she could not see the yellow car because the green car obstructed her view. The green car she ran behind did not stop at all, but continued on its way."

A rule of the defendant required the motorman of the yellow car to sound his gong under the circumstances disclosed. A witness named *Bowman*, called by the plaintiff, testified that "he saw the plaintiff run behind an outbound car and bump into an inbound car near the front. It seemed to

him that she ran into the side of the car near the front. He thought she would bump into something when he saw her crossing the street."

The evidence presented by the defendant tended to show that the plaintiff did not run behind another car at all, but without the intervention of any car passing on the nearer track, ran directly into the side of the car, by which she was injured. In this state of the evidence, the defendant asked for this instruction: "If the jury believe that the plaintiff, *Bonnylin Adams*, was injured by running into the side of the car, the plaintiff in neither case can recover even though she ran behind another car and listened and heard no gong."

This request was denied and no particular instructions were given touching the aspect of the case of her running from behind another car into the side of the car by which she was injured.

There was a material difference in the testimony of the plaintiff and that of the witness *Bowman*, called by her, as to the way in which the accident happened. According to the plaintiff's account, she went behind the green car and was hit by the front of the yellow car. This fairly was susceptible of the construction that she reached some point in front of the yellow car before it had advanced far enough to hit her. According to *Bowman's* narrative, she was not hit by the front of the car at all, but herself ran into the side of the car. This fairly is susceptible of the meaning that she ran into the body of the car. If she did that, having crossed the nearer track behind a car which did not stop at all, but kept moving all the time, she could not have been exercising the care which even a child of her years should exercise. It is not due care even for a child of six years to run into the side of a car just starting from a stationary position, as was that which injured the plaintiff, and which, if she ran into its side, must have been plainly within her vision long enough for her to avoid running into it, when there was no diverting travel on the street other than the car in the rear of which she had passed. The case at bar plainly is distinguishable from *Emery v. Boston Elev. R. Co.* 218 Mass. 255, 105 N. E. 889, *Purcell v. Boston Elev. R. Co.* 211 Mass. 79, 97 N. E. 626, and like cases.

No instructions covering this point were given. There was evidence to which the request was applicable. It was not evidence fragmentary or indecisive. It might be the turning point of the case. The charge intimated to the jury that there were only two theories of the way in which the injury occurred; the one in substance according to

the plaintiff's testimony, and if this was true she might be found to be in the exercise of due care; and the other according to the testimony of witnesses called by the defendant, and if this was true she was not in the exercise of due care. There was in reality a third way in which the jury might have found that it happened, as has been pointed out, and to which the attention of the judge was directed by the defendant's request. The refusal to grant it or to cover the subject-matter in the charge was error.

It is not necessary to consider whether

the defendant's exception to the supplemental charge given by the judge in the absence of both counsel, in response to the question presented by the jury after some deliberation, and to the highly improper suggestion of another attorney then in court touching the question of the jury, and addressed to the court without rebuke, in the presence of the jury, was seasonably taken and ought to be sustained, as it is not likely to be repeated on a new trial.

Exceptions sustained.

MASSACHUSETTS SUPREME JUDICIAL COURT.

WILLIAM J. BOTHWELL, Admr., etc., of
William J. Bothwell, Deceased,
v.

BOSTON ELEVATED RAILWAY COMPANY.

(215 Mass. 467, 102 N. E. 665.)

Evidence — contradiction — affirmative evidence.

1. A statement of a witness at a coroner's inquest, offered in evidence to contradict him in an action for damages for wrongful death, is not affirmative evidence of the facts stated.

For other cases, see *Evidence*, X. d, in *Dig.* 1-52 N. S.

Death — right to recover — care — effect of fright.

2. That a nine-year-old boy was fleeing in fear from a Chinaman whom he had been tormenting, when he ran in front of a street car which killed him, does not eliminate the necessity of care on his part to sustain a recovery against the street car company for his death, under a statute authorizing a recovery for death negligently caused to a person not a passenger "in the exercise of due care."

For other cases, see *Death*, IV. in *Dig.* 1-52 N. S.

Appeal — instructing judgment entry — trial by jury.

3. The constitutional right to trial by jury does not prevent an appellate court, in reversing a judgment for one person which was entered upon a verdict which should have been directed for the other person, from directing that the judgment shall be entered for the person for whom the trial court should have directed the verdict.

For other cases, see *Jury*, I. d, 1, in *Dig.* 1-52 N. S.

(September 12, 1913.)

Note. — For circumstances under which child crossing street car track is guilty of negligence as matter of law or fact, see annotation following this case, post, 172. L.R.A.1917F.

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover damages for the death of plaintiff's intestate which resulted in a verdict for plaintiff. Sustained.

The facts are stated in the opinion.

Messrs. Fletcher Ranney, Wesley E. Monk, and Thomas Allen, Jr., for defendant:

In an action against a street railway company for the death of a person not a passenger or employee plaintiff's intestate must be shown to have been "actively and actually" in the exercise of due diligence.

As to due care generally in crossing streets, see:

Murphy v. Boston Elev. R. Co. 188 Mass. 8, 73 N. E. 1018, 18 Am. Neg. Rep. 129; Morey v. Gloucester Street R. Co. 171 Mass. 164, 50 N. E. 530; Donovan v. Lynn & B. R. Co. 185 Mass. 533, 70 N. E. 1029; Stackpole v. Boston Elev. R. Co. 193 Mass. 562, 79 N. E. 740; Berg v. Old Colony Street R. Co. 208 Mass. 434, 94 N. E. 704; Haynes v. Boston Elev. R. Co. 204 Mass. 249, 90 N. E. 419.

Even in suits at common law for suffering, there is no case where fright has been held to supply the place of care.

Gannon v. New York, N. H. & H. R. Co. 173 Mass. 41, 43 L.R.A. 833, 52 N. E. 1075, 5 Am. Neg. Rep. 613; Dixon v. New York, N. H. & H. R. Co. 207 Mass. 126, 92 N. E. 1030.

Fright of plaintiff's intestate cannot be invoked as an excuse for putting himself in a position of peril.

Black v. New York, N. H. & H. R. Co. 193 Mass. 448, 7 L.R.A.(N.S.) 148, 79 N. E. 707, 9 Ann. Cas. 485; Rundgren v. Boston & N. Street R. Co. 201 Mass. 156, 87 N. E. 189.

Dixon's evidence at the inquest to the ef-

As to contributory negligence of children generally, see annotation following Jacobs v. H. J. Koehler Sporting Goods Co. ante, 10.

fect that Willie was not teasing the Chinaman was part of a statement offered by the defendant merely to contradict Dixon, and is not substantive evidence in this case.

Robinson v. Old Colony Street R. Co. 189 Mass. 594, 76 N. E. 190; *Snow v. Adams*, 200 Mass. 251, 85 N. E. 1052.

Messrs. Coakley & Sherman, D. H. Coakley, R. H. Sherman, and L. F. Monahan, for plaintiff.

Rugg, Ch. J., delivered the opinion of the court:

The plaintiff seeks damages for the death of his intestate under Stat. 1907, chap. 392, which authorizes recovery from a street railway company whose servants in the conduct of its business negligently cause the death of a person not a passenger or an employee, "in the exercise of due care." The uncontradicted evidence shows that the plaintiff's intestate at the time of the accident was nine years and nine months old. With other boys he was standing on a sidewalk looking at a Chinaman who was fixing something on the floor of a shop with a hatchet. The boys were "teasing" or "mocking" the Chinaman, who, after a few minutes, "got up with the hatchet in the air and walked toward the door." Thereupon the boys, some of them in fright, scattered in different directions, the plaintiff's intestate running into the street in front of a car of the defendant and being fatally injured. The only fair inference from the evidence is that the plaintiff's intestate was engaged with the other boys in vexing the Chinaman. The testimony of one of his companions was that "McLeod and Miele were with him. They were looking at the Chinaman, teasing him. . . . The boys teased the Chinaman." While that of another was: "We were mocking the Chinaman." There was nothing to impair the force of this testimony. The contrary sentence in the statement of one of the plaintiff's witnesses at the inquest, offered solely to contradict his testimony at the trial in the superior court in a different respect, was not affirmative evidence of the fact. The point to be decided is whether a finding was warranted that the plaintiff's intestate was "in the exercise of due care," as required by the statute as a condition of recovery. It is not contended that there is any evidence of active exercise of care by the deceased. But the plaintiff's position is that his intestate was relieved from such exercise of care by reason of the fear into which he was thrown by the conduct of the Chinaman.

Much may be excused in a person under the impulse of fear induced by circumstances over which he has no control and for which

he is not responsible. Conduct which unhesitatingly would be pronounced wanting in care in a person under normal conditions may be found prudent in one overwhelmed by fright or confronted with the necessity of instant action in imminent peril. Where the fear has been caused by the defendant there is even more reason for judging with leniency the conduct of the person who suffers harm under such circumstances. But in order that this doctrine may be invoked, the injured person himself must be free from blameworthy participation in the event which has caused the fright. Wrongful conduct cannot be treated as an excuse for being in a position of danger. *Black v. New York, N. H. & H. R. Co.* 193 Mass. 448, 450, 7 L.R.A. (N.S.) 148, 79 N. E. 797, 9 Ann. Cas. 485; *Rundgren v. Boston & N. Street R. Co.* 201 Mass. 156, 158, 87 N. E. 189. The plaintiff's intestate was engaged with his companions in the wrongful project of "teasing" and "mocking" a Chinaman at work on his own premises. It might reasonably have been anticipated that in some way he would attempt to be rid of his tormentors. But whatever may be said of his conduct in trying to scare the boys away, or of relative rights between him and the boys, it is nevertheless true that the acts in which the plaintiff's intestate joined were wholly without justification, and were wrong. It was not an unnatural result of these acts that he should be momentarily put in fear by the victim of his hectoring.

But whether there could be recovery if the intestate had survived and brought an action in his own name, it is plain that the present action cannot be maintained. If, while thus suffering from fright, fatal injuries are sustained by reason of impact with a street railway car, it cannot be said that the injured person was "actively and actually" in the exercise of the diligence which has been held to be necessary in order that there may be recovery under this statute. It has been settled after elaborate consideration that the words "due care" in this statute mean something more than a negative and passive freedom from fault, and require reasonably intelligent and energetic attention to safety, and stand on the same basis as if they were used in an indictment under the same statute. They are not satisfied by "invoking for the test of the defendant's liability under the statute its liability at common law in case of an action for compensation for an injury short of death." *Hudson v. Lynn & B. R. Co.* 185 Mass. 510, 521, 71 N. E. 71, 16 Am. Neg. Rep. 366. It follows that the defendant's request should have been granted to the effect that a verdict be directed in its favor.

It is urged by the defendant that this is

a proper case for this court to exercise the power vested in it by Stat. 1909, chap. 236, and to direct by its rescript that judgment be entered for the defendant. The case appears to have been fully and fairly tried, with an intelligent appreciation by counsel on each side of the issues involved and of the principles of law applicable to it, and its merits on the ample report of the evidence contained in the exception seem plain. Therefore it appears to be a case where the statute properly may be invoked. *Archer v. Eldredge*, 204 Mass. 323, 327, 90 N. E. 525; *Grebenstein v. Stone & W. Engineering Corp.* 205 Mass. 431, 440, 91 N. E. 411; *Newhall v. Enterprise Min. Co.* 205 Mass. 585, 137 Am. St. Rep. 461, 91 N. E. 905; *Burke v. Hodge*, 211 Mass. 156, 163, 97 N. E. 920, Ann. Cas. 1913B, 381.

This course would be followed without discussion but for the decision of *Slocum v. New York L. Ins. Co.* 228 U. S. 364, 57 L. ed. 879, 33 Sup. Ct. Rep. 523, Ann. Cas. 1914D, 1029, which holds that "the right of trial by jury" secured by article 7 of the Amendments to the Constitution of the United States does not permit the entry, after a verdict in favor of one party, of a judgment for the opposing party under circumstances like those in the case at bar. The question there arose in reviewing the action of the circuit court of appeals, which under the Conformity Act (U. S. Rev. Stat. § 914, Comp. Stat. 1916, § 1537), and following a Pennsylvania statute, had entered judgment in favor of the party for whom the trial court erroneously refused to direct a verdict. The substance of that decision is that it is an unconstitutional exercise of the power of legislation to authorize the entry of judgment in a case where a trial by jury has been had, except in conformity to the verdict, and that, although the error committed by the trial court may consist solely in its refusal to direct a verdict in favor of one party, yet after a verdict wrongly rendered in favor of the adverse party as the direct result of such erroneous refusal, the only method for correcting that error within the reach of the legislative or judicial departments of government is to order a new trial, and this because of the scope of the meaning of "trial by jury," as secured by the 7th Amendment to the Federal Constitution. That decision is not a final or binding authority on this court, for the reason that the 7th Amendment does not control the action of the several states in abridging trial by jury within their own jurisdiction. It applies only to the courts and Congress of the United States. *Pearson v. Yewdall*, 95 U. S. 294, 296, 24 L. ed. 436, 437; *Twining v. New Jersey*, 211 U. S. 78, 98, 53 L. ed. 97, 105, 29 Sup. Ct. Rep. L.R.A.1917F.

14. The decision of *Slocum v. New York L. Ins. Co.* was rendered by a bare majority of a divided court, four of the justices, among whom is a former chief justice of this court, joining in a dissenting opinion. But the deference due to a decision by the highest court of the nation when it challenges the constitutionality of our statute (as it does because our own Constitution secures the right of trial by jury) renders necessary thorough consideration, even though our statute has been acted upon heretofore in numerous instances without question of its validity.

The substance of our statute is that in civil cases where at the trial a request has been made that on all the evidence a finding or verdict be returned for either party, and such request has been denied and a finding or verdict has been rendered contrary thereto, and it shall be held by this court on exceptions that such request should have been granted, then, if all exceptions by the prevailing party shall be overruled, this court may by rescript direct the entry in the trial court of judgment for the party in whose behalf the request for the finding or verdict was made and erroneously refused. Before the Statute of 1909 no such power resided in any of our courts. The practice is stated with clearness in *Smith v. Lincoln*, 198 Mass. 388, 84 N. E. 498, where it was held that after a verdict the only power of the trial judge was to set aside the verdict. The aim of the act is plain both from its provisions and its title,—“To provide for expediting the final determination of causes.” However laudable the design for preventing delays in the administration of justice, it can be exercised only in accordance with the limitations imposed by the Constitution. Article 15 of the Declaration of Rights of our Constitution provides: “In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherwise used and practised, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless, in causes arising on the high seas, and such as relate to mariners’ wages, the legislature shall hereafter find it necessary to alter it.” This article has been discussed in numerous cases. It has been held that the legislature may regulate the mode in which the right shall be exercised, and that such regulation does not impair the substance of the right. This rule has been applied to statutes requiring as a condition precedent to the trial an affidavit of defense (*Hunt v. Lucas*, 99 Mass. 404), the filing of claim for a trial by jury in order to prevent waiver of the right (*Foster v. Morse*, 182 Mass. 354, 42 Am. Rep. 438), appeal from decision of tribunal

without a jury (*Kenney's Case*, 108 Mass. 492), the giving of bail and security for costs on appeal from trial before a magistrate (*Jones v. Robbins*, 8 Gray, 329, 341; *Hapgood v. Doherty*, 8 Gray, 373), and to statutes changing the rule as to challenges of jurors (*Com. v. Dorsey*, 103 Mass. 412), the qualifications of jurors (*Com. v. Wong Chung*, 186 Mass. 231, 71 N. E. 292, 1 Ann. Cas. 193; *Com. v. Worcester*, 3 Pick. 462), and the weight to be given to evidence (*Holmes v. Hunt*, 122 Mass. 505, 516, 23 Am. Rep. 381), and restricting the right of the trial judge to set aside a verdict to cases where motion therefor is made and to reasons stated (*Peirson v. Boston Elev. R. Co.* 191 Mass. 223, 229, 77 N. E. 769; *Loveland v. Rand*, 200 Mass. 142, 85 N. E. 948; *James v. Boston Elev. R. Co.* 213 Mass. 424, 100 N. E. 545). See *Com. v. Barry*, 9 Allen, 276.

On the other hand, it has been said that trial by jury implies power of the judge to set aside a verdict and grant a new trial, which cannot be impaired by the legislature. *Opinion of Justices*, 207 Mass. 806, 94 N. E. 846; *Capital Traction Co. v. Hof*, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580.

None of these cases are decisive of the point now presented. It becomes necessary to consider the nature of the trial by jury secured by our Constitution. There was great diversity in the form of jury trial existing in the several states at the time of the adoption of the Constitution of the United States. This is discussed with fecundity of illustration by Hamilton in No. 83 of the *Federalist*. Plurality of jury trials in Massachusetts in the same case there is referred to. Indeed, this variety of custom between the states has been said to have been the reason why no articles securing trial by jury in civil cases was inserted in the Constitution by the convention which framed it. 5 Elliot, Debates, 550.

The trial by jury preserved by our Constitution is the common-law trial by jury in its essential characteristics as known and understood at the time the Constitution was adopted. *Com. v. Anthes*, 5 Gray, 185-229. It did not mean to preserve the minor details or unessential formalities of the trial by jury as it then existed, either in England or here. That is plain both on reason and authority. Trial by jury in some form had existed since the early settlement of this state. Modifications of the system as practised in the mother country had grown up by custom and by legislation in the colony and province of Massachusetts Bay. It is not to be thought that the framers of our Constitution in 1780, performing their labors in the midst of the War of the Revolution, had in mind the system of the

mother country, rather than that with which they were familiar by daily observation. As we understand, the substance of trial by jury in England and in Massachusetts was the same, although there were differences of detail. *Parker v. Simpson*, 180 Mass. 334-355, 62 N. E. 401. If, however, essential differences existed, it seems to us not open to debate that the trial by jury known and practised in this state at the time the Constitution was framed and adopted was the one meant by article 15 of our Declaration of Rights. It was pointed out, with ample reference to the statutes, by Mr. Justice Story in *United States v. Wonson*, 1 Gall. 5, Fed. Cas. No. 16,750, that both in the colonial and provincial periods of the history of our commonwealth two trials by jury upon the same issues in the same case often were permissible as of right, one in the court of first instance and one in the appellate court. This continued to be the law until after the ratification of the Federal Constitution. Stat. 1782, chap. 11, §§ 2, 5, chap. 14, § 3; Stat. 1784, chap. 28, § 8. It has never been suggested, so far as we are aware, that this double jury trial was one of the incidents of the constitutional right of our citizens. Under our practice trial by jury in its constitutional sense does not include all the features which attach to the right in England. This is pointed out in *Simmons v. Fish*, 210 Mass. 563, 569, 97 N. E. 102, Ann. Cas. 1912D, 588, where one difference touching the scope of a new trial is discussed. Our cases there are reviewed at length, and it is shown that a new trial in this state (contrary to the established law of England) has been construed not to require a new trial of all the issues raised by the pleadings when in law and in the exercise of sound sense it appears that the issue as to which alone error was committed in the trial is wholly separable from those as to which a full and fair trial in law was had, and may with entire justice and a jealous regard to the rights of all parties, both in their strictly legal aspects and in the practical phases likely to arise in a jury trial, be submitted as a separate and distinct matter to be determined by a new jury. This power is exercised with caution. But its existence does not impair in any of its essential features the right of trial by jury which the Constitution commands to be held sacred. See *Randall v. Peerless Motor Car Co.* 212 Mass. 352, 392, 99 N. E. 221; *Simmons v. Fish*, 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1912D, 588, and cases collected.

It was a part of common-law trial by jury that the plaintiff might become nonsuited as of right at any time before verdict if not before judgment. *Derick v. Taylor*, 171

Mass. 444, 50 N. E. 1038, and cases there collected; 2 Tidd, Pr. 867; Haskell v. Whitney, 12 Mass. 47, and cases cited in note at page 49. But as early as 1820 it was decided that in this commonwealth, apparently as a practice long existing, a plaintiff had no such right after the case was opened to the jury. *Locke v. Wood*, 16 Mass. 317. See *Earl Carpenter & Sons Co. v. New York, N. H. & H. R. Co.* 184 Mass. 98, 68 N. E. 28. It is pointed out, both in the opinion and in the dissent, in *Slocum v. New York L. Ins. Co.* 228 U. S. 364, 57 L. ed. 879, 33 Sup. Ct. Rep. 523, Ann. Cas. 1914D, 1029, that there is no novelty in a judgment being given at common law without a verdict by a jury, for that was accomplished by a demurrer to evidence. *Copeland v. New England Ins. Co.* 22 Pick. 135. It is stated that our statutes make simpler provision for reaching the result available by that common-law method. *Golden v. Knowles*, 120 Mass. 336. There are other similar instances. It is laid down in 2 Tidd's Practice, 900—a work of undoubted authority as to common law,—as a principle of jury practice at common law, that "it sometimes happens that a point is reserved or saved by the judge at nisi prius with liberty to apply to the court for a nonsuit or verdict; in which case the court has been in the habit of considering itself in the situation of the judge, at the time of the objection raised, and a nonsuit or verdict is entered according to their determination without subjecting the parties to the delay and expense of a new trial." Numerous cases there are cited where such practice has been adopted, the following being the most pertinent: *Cox v. Kitchin*, 1 Bos. & P. 338, 126 Eng. Reprint, 938; *Attwood v. Small*, 1 Mann. & R. 246, 261(a); *Mead v. Robinson*, Barnes, notes, 451, 94 Eng. Reprint, 999; *Kemp v. Strafford*, Barnes, notes, 455, 94 Eng. Reprint, 1001. Judgment appears not infrequently to have been entered by order of the appellate court upon special case stated. See, for example, *Wright ex dem. Plowden v. Cartwright*, 1 Burr, 282, 97 Eng. Reprint, 315, 1 Ld. Kenyon, 529; *Atkin v. Barwick*, 1 Strange, 165, 93 Eng. Reprint, 450; *Coppendale v. Bridgen*, 2 Burr, 814, 97 Eng. Reprint, 576. This practice seems to have been followed in New York in some instances (*Holmes v. Di Camp*, 1 Johns. 34, 3 Am. Dec. 293; *Hatten v. Speyer*, 1 Johns. 37), and perhaps rested in many instances on consent (2 Tidd, Pr. 898). This is akin to our practice on a case stated. *Massachusetts Nat. Bank v. Bullock*, 120 Mass. 86.

A somewhat analogous practice is described at length in *Treacher v. Hinton*, 4 Barn. & Ald. 413, 416, 417, 106 Eng. Re-L.R.A.1917F.

print, 988, 23 Revised Rep. 325, in the compulsory nonsuit by the judge, giving the plaintiff liberty to move for a verdict in his favor, which, if subsequently ruled to have been required by law, then might be entered to be as effective as if pronounced by the jury. This case, decided in 1821, states apparently a well-understood and ancient common-law practice, no doubt in existence at the time of the adoption of our Constitution. Illustrations of this practice are to be found in *Hobbs v. London & S. W. R. Co.* L. R. 10 Q. B. 111, 113, 125, 44 L. J. Q. B. 49, 32 L. T. N. S. 352, 23 Week. Rep. 520, 5 Eng. Rul. Cas. 381; *Reed v. Kilburn Co-op. Soc. L. R. 10 Q. B. 264*. See 26 Harvard L. Rev. 732. It has not been commonly supposed that in England any impairment of the vitals of trial by jury has been wrought by modern statutes. See 8 Am. L. Rev. 256, 274. Yet a practice similar to that prescribed by our statute exists there. *McQuire v. Western Morning News Co.* [1903] 2 K. B. 100, 113, 3 B. R. C. 490, 72 L. J. Q. B. N. S. 612, 51 Week. Rep. 689, 88 L. T. N. S. 757, 19 Times L. R. 471.

In view of all these considerations we are of opinion that Stat. 1909, chap. 236, is not a violation of the right to a trial by jury secured by our Constitution. The falling into disuse of the two trials, which existed in many instances as of right in this commonwealth at the adoption of the Constitution, within half a century thereafter, is evidence to this conclusion. This is confirmed by the early denial to the plaintiff of the right to become nonsuited after the evidence was in. It is supported by the common-law practice to which reference has been made.

The essence of trial by jury is that controverted facts shall be decided by a jury. The constitutional right to trial by jury is preserved in this regard when each party has one fair opportunity to present to a jury the evidence on which he claims to raise an issue of fact. If he fails utterly to improve that opportunity, there is no constitutional guaranty that he shall be given another chance. He has had his day in court. One feature of ideal administration of justice by the jury system is that correct rulings of law shall be made by the presiding judge. If the record is so framed and preserved that the same result may be reached at a later time as would have been attained by such correct rulings at the trial, that end is attained by constitutional means. The function of the jury is to pass upon the facts involved in an action. The statute now under review does not infringe upon this province in any degree. A trial judge always has had power to direct a verdict provided the law required it. The statute simply permits

that to be done by this court which ought to have been done at the trial. The hypothesis by which alone it permits the order to be made is that at the trial no question of fact was in truth presented, but only one of law which the court should have ruled as such. It does not disturb the plain boundary between fact, which a jury must determine, and law, which the court must rule. It permits the right ruling to be given at a time later than that at which it should have been made when no substantial rights have accrued in the meantime.

We are of opinion that the history of our practice as to trial by jury both before and since the adoption of the Constitution shows that the trial by jury of our Constitution has slightly more flexibility in its adaptation of details to the changing needs of society without in any degree impairing its

essential character than is ruled by the majority of the court in *Slocum v. New York L. Ins. Co.* We are constrained not to adopt the reasoning or the conclusion of that opinion as correctly defining the scope of legislative power under our Constitution. Stat. 1909, chap. 236, is not in violation of our Constitution. This result is in harmony with the decisions of many other courts.¹ We do not rest this judgment upon their authority, however, for we have not undertaken the historical study of the several constitutional provisions under which they have arisen to determine their weight.

The defendant's exceptions are sustained, and in accordance with Stat. 1909, chap. 236, judgment is to be entered in the superior court for the defendant and rescript is to go to that effect.

¹*Anderson v. Fred Johnson Co.* 116 Minn. 56, 133 N. W. 85; *Muench v. Heinemann*, 119 Wis. 441, 448, 96 N. W. 800, 15 Am. Neg. Rep. 221; *Hay v. Baraboo*, 127 Wis. 1, 3 L.R.A. (N.S.) 84, 115 Am. St. Rep. 977, 105 N. W. 654; *Cornette v. Baltimore & O. R. Co.* 115 C. C. A. 61, 195 Fed. 59; *Bailey v. Willoughby*, 33 Okla. 194, 124 Pac. 955; *McVeety v. Harvey Mercantile Co.* 24 N. D. 245, 139 N. W. 586, Ann. Cas. 1915B, 1028; *Fishburne v. Robinson*, 49 Wash. 271, 95 Pac. 80; *Roe v. Standard Furniture Co.* 41 Wash. 546, 83 Pac. 1109; *Cruikshank*

v. St. Paul F. & M. Ins. Co. 75 Minn. 266, 77 N. W. 958; *Dalmas v. Kemble*, 215 Pa. 410, 64 Atl. 559; *American Car & Foundry Co. v. Alexandria Water Co.* 221 Pa. 529, 128 Am. St. Rep. 749, 70 Atl. 867, 15 Ann. Cas. 641; *Manning v. Orleans*, 42 Neb. 712, 60 N. W. 563; *Smith v. Jones*, 104 C. C. A. 329, 181 Fed. 819; *Fries-Breslin Co. v. Bergen*, 99 C. C. A. 384, 176 Fed. 76; *Carstairs v. American Bonding & T. Co.* 54 C. C. A. 85, 116 Fed. 449; *Richmire v. Andrews & G. Elev. Co.* 11 N. D. 453, 92 N. W. 819.

Annotation—Circumstances under which child crossing street car track is guilty of negligence either as matter of law or fact.

I. Introduction, 172.

II. Care required of child, 173.

III. Negligence as question of fact:

- a. In general, 175.*
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I. Introduction.

Earlier cases on this question are set out in a note to *Holian v. Boston Elev. R. Co.* 11 L.R.A. (N.S.) 166.

As to liability for injury to children catching rides on street cars, see note to *Elie v. Lewiston, A. & W. Street R. Co.* L.R.A.1916C, 104.

This note is designed only to show the circumstances under which a child, assumed to be capable of contributory negligence, has been held negligent, either as a matter of law or of fact. L.R.A.1917F.

III.—continued.

f. Diverted attention; playing in street, 182.

g. Coasting in street, 184.

IV. Negligence as question of law:

- a. In general, 184.*
- b. Obstructed view; passing behind car, 185.*
- c. Crossing in front of observed car, 185.*
- d. Diverted attention; playing in street, 186.*

The question whether a child of a certain age is capable of contributory negligence at all, even when arising in a case when the child was crossing a street railway, is not treated in this note, but is considered in the annotation to *Jacobs v. H. J. Koehler Sporting Goods Co.* ante, 10. So, the criterion of negligence, or the degree of care required of a child, is treated in that note, and is not covered in the present note, except to the extent that it is affected distinctively by considerations peculiar to a child crossing a street railway track.

The decisions in *KYLE v. BOSTON ELEV. R. Co.* (Mass.) ante, 164, *ADAMS v. BOSTON ELEV. R. Co.* (Mass.) ante, 165, and *BOTHWELL v. BOSTON ELEV. R. Co.* ante, 167, apply the doctrine of contributory negligence in actions for injuries to children where the child failed to exercise any care in crossing street car tracks. The first two cases are important as holding that even children five years and eleven months old and six and one-half years old respectively are not excused from exercising some care to avoid street cars while crossing the track, and may be charged with contributory negligence as matter of law if there is no evidence that they exercised any care. This view is supported by some decisions cited in the annotation above referred to appended to *Jacobs v. H. J. Koehler Sporting Goods Co.*, on the general question of contributory negligence of children. But, as is there shown, some courts take the view that children of these ages should be conclusively presumed to lack the capacity, judgment, and discretion essential to charge one with contributory negligence; while other courts, and doubtless the majority, hold that the question of capacity on the part of children of such ages cannot be determined as matter of law, but is for the jury, with the presumption in favor of incapacity.

II. Care required of child.

Supplementing 11 L.R.A.(N.S.) 167.

The rule, that the standard by which the conduct of a child should be measured in determining whether it exercised due care to avoid danger is the degree of care ordinarily exercised by children of the same age, capacity, discretion, knowledge, and experience, under the same or similar circumstances, has been applied in many cases where actions were brought for injuries to children in crossing street car tracks. See cases cited in footnote 26 of annotation to *Jacobs v. H. J. Koehler Sporting Goods Co.* ante, 10. It is the purpose at this point, as before indicated, to show the application of the general principles considered in that note only in so far as they involve considerations distinctive to the crossing of street car tracks.

The question of the duty generally of the child to look and listen before crossing street car tracks has been considered in several cases. Thus, in *Ruschenberg v. Southern Electric R. Co.* (1900) 161 Mo. 70, 61 S. W. 626, where a six-year-old boy was killed by a street car while attempting to cross the track, L.R.A.1917F.

an instruction was held not prejudicial to the plaintiff that the boy was required to exercise such a degree of care and prudence in crossing the track "and in looking and listening for the car" as an ordinarily careful and prudent boy of his age and intelligence would have exercised under the circumstances. It was said that the measure of care required was such only as a boy of his age and intelligence would have used under the circumstances, and that whether such a boy would look and listen before crossing was a question for the jury.

However, it has been held not erroneous to refuse an instruction, in an action for injury to a six-year-old child due to being struck by a street car while attempting to cross the track, that there can be no recovery if the child stepped on the track without first looking and listening, it being sufficient to instruct the jury that it was the duty of the child to exercise the ordinary care of a person of his age and discretion to look and listen. *Mullin v. St. Louis Transit Co.* (1906) 196 Mo. 572, 94 S. W. 288.

Also in *Louisville R. Co. v. Phillips* (1900) 22 Ky. L. Rep. 842, 58 S. W. 995, an action for injury to a twelve-year-old girl by a car while attempting to cross a street railway track, it was held that an instruction was properly refused that it was her duty to look and listen, and that an instruction was sufficient that it was her duty to exercise such caution as might be reasonably expected of one of her age under the circumstances.

In the annotation above cited, appended to *Jacobs v. H. J. Koehler Sporting Goods Co.*, on the general question of contributory negligence of children, the question is considered in III. as to the age at which a child is required to exercise care to avoid danger. On the latter point, attention may properly be called in this connection to a Massachusetts decision which considers particularly the question as it relates to crossing street car tracks. Thus, in holding that the question was for the jury whether a child four years old was capable of exercising care in crossing a street car track behind another child who was slightly older, in such close proximity to a rapidly approaching car that he was struck by the fender on the nearer side of the car, the court in *Sullivan v. Boston, Elev. R. Co.* (1906) 192 Mass. 37, 78 N. E. 382, 20 Am. Neg. Rep. 561, said: "There doubtless is an age where the court can say as matter of law that a child cannot exercise any care under any circumstances. There also is an age

where the court can say as matter of law that a minor is capable of exercising some care under circumstances like those in question. . . . The limits of these two classes are not settled by our decisions. There are now, and probably always will be, cases where it fairly may be said, as it was said in the case at bar, that the child did not under the circumstances exercise any care; and yet it cannot be said as matter of law that an ordinarily prudent child of the age, or having the capacity, of the child in question—whichever is the correct statement—was capable or incapable of exercising care. Such cases must be left to the jury. In such cases the matter is not a matter of conjecture, and yet nothing more can be proved than was proved in the case at bar. In the case at bar it was proved that the plaintiff in question was 'a lively child, active and energetic,' four years and three months old. The circumstances calling for the exercise of care on his part were these: The accident happened on one of the main thoroughfares of Boston, on which the defendant had a double-track surface railway, and, if the plaintiff's evidence was to be believed, a car was running from fifteen to twenty miles an hour. This boy, while crossing this thoroughfare, walked at a 'pretty lively' gait, or trotted 'at a fair little jog' into the forward fender of the defendant's car. At the time he was behind another boy, who was slightly older. This made out a case for the jury." And the court upheld a verdict for the plaintiff, overruling a contention that he had failed to sustain the burden of proof that he was incapable of exercising any care and that this question under the evidence was merely a matter of conjecture.

In *Reichle v. Philadelphia Rapid Transit Co.* (1913) 241 Pa. 1, 88 Atl. 79, where a child was injured by a street car while she was attempting to cross the track, the court said: "At the time of the accident the injured child was less than six years of age. Contributory negligence cannot be imputed to a child of such tender years, and therefore the whole case turns on the question of the negligence of the defendant."

But there is no presumption that a bright boy eleven years old who is accustomed to crossing street car tracks is incapable of contributory negligence, while attempting to cross the track, in failing to observe and avoid a street car approaching in plain sight. *Jollimore v. Connecticut Co.* (1912) 86 Conn. 314, 85 Atl. 373.
L.R.A.1917F.

Also in *Byrnes v. Brooklyn Heights R. Co.* (1912) 148 App. Div. 794, 133 N. Y. Supp. 243, the court, in holding that contributory negligence was shown as matter of law on the part of the boy ten years old in crossing a street car track, said that a boy of this age, who is not shown to be mentally deficient, must be presumed to know the danger to be anticipated from crossing in front of a moving car; and that where the evidence shows that, without looking at any time when the obligation was upon him to look, and when the exercise of any degree of care would have obviated the accident, he deliberately walks into a position of danger, it is not proper to submit to the jury the question either of the defense of negligence or that of the plaintiff's lack of contributory negligence, for there is no evidence to support a verdict in his favor.

That a bright boy nine years old who has had experience in crossing street car tracks and has been instructed and warned in that regard may be guilty of contributory negligence as matter of law in failure to observe and avoid a street car crossing the track was conceded in *Weitzel v. Detroit United R. Co.* (1915) 186 Mich. 7, 152 N. W. 931, 9 N. C. C. A. 407, rehearing denied in (1915) 186 Mich. 17, 153 N. W. 881, although it was held that under the particular facts the trial court had erroneously directed a verdict for the defendant on the ground of contributory negligence, this being on the evidence a question for the jury.

And in *Hicks v. Nassau Electric R. Co.* (1900) 47 App. Div. 479, 62 N. Y. Supp. 597, it was held that a nine-year-old girl who attempted to cross a street railway track in front of an approaching car might be declared *sui juris* as matter of law, where it appeared from her testimony that she was aware of the danger of being run over by cars unless she looked before crossing, that she saw the car, and, thinking she could cross in front of it, attempted to do so, but was struck by it and injured.

It is apparently assumed in *United R. & Electric Co. v. Carneal* (1909) 110 Md. 211, 72 Atl. 771, that a child not quite three years of age is required to exercise some degree of care in crossing a street railway track, although the court in this instance held that the question of contributory negligence was for the jury, and affirmed a judgment for the plaintiff. The weight of authority, however, as appears from the annotation above cited, appended to *Jacobs v. H. J.*

Koehler Sporting Goods Co., is that there is a conclusive presumption that a child of this age is incapable of contributory negligence.

The question has arisen in a few cases whether infants approaching years of maturity are required to exercise the same degree of care as adults in crossing street car tracks. For instance, in *Campbell v. St. Louis & Suburban R. Co.* (1903) 175 Mo. 161, 75 S. W. 86, the rule was laid down that the care required of a boy sixteen years old in driving across street car tracks is that to be expected of an ordinarily prudent boy of that age, and not of an ordinarily prudent man of mature years. It was said: "The question is, not what would an ordinarily prudent man of mature years have done under like circumstances, but what would an ordinarily prudent boy of sixteen years have done under like conditions? Care and prudence increase with that experience which years of maturity bring, but do not come by intuition to a boy in whose veins the blood of youth is leaping, and to whom danger is a pleasant incentive. Reasonable men considering the case might construe the conduct of a mature man to be inconsistent with the care that should be expected of him, and therefore adjudge him guilty of negligence, yet construe the same conduct in a boy of sixteen years as nothing more than was to be expected of one of his age. We do not mean to say that a boy sixteen years old is to be excused when he fails to exercise that degree of care to be expected of an ordinarily prudent boy of that age, but we mean that he is to be measured by the standard of an ordinarily prudent boy, not by that of an ordinarily prudent man of mature years."

And in an action for injury to a sixteen-year-old girl, while riding in a wagon driven by an adult across a street car track, by collision with a car, the court in *Zalotuchin v. Metropolitan Street R. Co.* (1908) 127 Mo. App. 577, 106 S. W. 548, in holding that the question of contributory negligence was for the jury, stated that on account of her minority her actions should not be measured in law by the standard to be applied to persons of mature years.

Also in *Dubiver v. City & Suburban R. Co.* (1904) 44 Or. 227, 74 Pac. 975, 75 Pac. 693, 1 Ann. Cas. 889, an action for injury to a fifteen-year-old boy by collision with a street car while he was driving a delivery wagon across the track, although it appeared that he had

been delivering goods in the city for more than a year, it was held that an instruction was not erroneous, that, in determining whether he was guilty of contributory negligence, the jury might take into consideration his age and character, and that a child is not expected to use the same degree of care and prudence as an older person.

But it was held in *Binder v. Chicago City R. Co.* (1912) 175 Ill. App. 503, that a boy slightly over sixteen years of age, who had been born and reared in Chicago and resided for years on a street on which street cars were operated, had graduated from the grammar school and attended a manual training high school for a year, and was employed as an apprentice at the plumbing trade while pursuing a course of study in a night school, was chargeable with the same degree of care and caution for his own safety in crossing street car tracks as might reasonably be expected of an adult.

And in an action for injury to a fifteen-year-old boy by collision with a street car while he was attempting to drive across the track, the court in *San Antonio Traction Co. v. Kumpf* (1907) — Tex. Civ. App. —, 99 S. W. 863, in reversing on other grounds a judgment for the plaintiff, stated, with reference to an instruction which directed the jury, on the issue of contributory negligence, to take into consideration the boy's age and intelligence, that "there was no testimony tending to show that he did not have such intelligence as is ordinary to boys of his age, who would ordinarily be capable of exercising as much care in crossing a street railway as an adult; and we hardly think that the court should have called the attention of the jury to his age and intelligence in considering whether he was guilty of contributory negligence in driving upon the track in front of a moving car."

In *Wills v. Ashland Light, Power & Street R. Co.* (1900) 108 Wis. 255, 84 N. W. 998, it was held that the question whether a boy nearly fourteen years old, who was killed by a street car, understood the danger of going on the track without looking and listening "to the same extent as an ordinary adult person" did not present an issuable fact for the determination of the jury.

III. Negligence as question of fact.

a. In general.

Generally, as to whether contributory

negligence of a child is a question for the court or for the jury, see VI. of annotation to *Jacobs v. H. J. Koehler Sporting Goods Co.* ante, 84.

Whether or not a child was negligent in crossing a street car track has generally been held a question for the jury, not because the question is necessarily one of fact, but because the circumstances have usually been such that reasonable men might possibly differ as to the inferences to be drawn therefrom. This has been true especially in cases of injury to very young children. Thus, in an action for injury to a boy seven years old by a street car while attempting to cross the track, the circumstances of the accident not being stated in the opinion, the court in *Names v. Chicago City R. Co.* (1913) 180 Ill. App. 483, in sustaining a judgment for the plaintiff, stated that in view of the plaintiff's age the question whether he was guilty of contributory negligence was for the jury, on which their verdict must be conclusive.

And in *Holdbridge v. Mendenhall* (1900) 108 Wis. 1, 81 Am. St. Rep. 871, 83 N. W. 1109, where a boy six years and nine months old was run over by a street car, and it appeared that he was playing in the street and had not noticed the car, the court stated that the contention that a nonsuit should have been granted on the ground of contributory negligence on the part of the boy or his parents could not be sustained; that in case of an accident to a child of such tender years it must be an extreme case which would warrant a court in granting a nonsuit on the ground of the child's negligence; and that it is frequently said that such a child cannot be held guilty of contributory negligence as matter of law,—citing *Johnson v. Chicago & N. W. R. Co.* (1880) 49 Wis. 529, 5 N. W. 886, and *McVoy v. Oakes* (1895) 91 Wis. 214, 64 N. W. 748.

A child three and a half years old cannot be charged with contributory negligence as matter of law in failing, while attempting to walk across the track, to see and avoid a street car which was standing half a block away when he left the sidewalk and was "three houses away" when he reached the first rail of the track. *Zwirn v. Joline* (1910) 122 N. Y. Supp. 231.

And the mere facts that a six-year-old boy who was struck and injured by a street car was, at the time of the injury, running across the street on his way home from school, and that he did not see the car, do not necessarily show that

he was negligent. *Aiken v. Holyoke Street R. Co.* (1901) 180 Mass. 8, 61 N. E. 557, 15 Am. Neg. Rep. 73.

The conclusion that the question of contributory negligence was for the jury has also been reached especially where there was evidence of some care on the part of the child.

Thus, it was held that the question of contributory negligence was for the jury, and a verdict for the plaintiff sustained, in an action for injury to a nine-year-old girl, where there was evidence that, before starting to cross the street, the girl and her companion, a child of about the same age, looked both ways for cars but saw none, then proceeded to cross slowly, that the car which struck her was moving at a rate of ten or eleven miles an hour through a frequented street, and that the gong was not sounded. *Rosenberg v. West End Street R. Co.* (1897) 168 Mass. 561, 47 N. E. 435, 3 Am. Neg. Rep. 192.

So, in *Nowakowski v. New York & N. S. Traction Co.* (1917) 220 N. Y. 51, 114 N. E. 1042, reversing (1914) 162 App. Div. 881, 148 N. Y. Supp. 456, where an eight-year-old boy, in crossing a double-track street railway, was struck as he was clearing the last rail by a car which approached rapidly without warning, and there was evidence that when he reached the first rail of the first track, he looked in the direction from which the car came and that it was not then in sight, it was held that he was not negligent as matter of law in failing again to look in that direction and continuing diagonally across the track with his face turned away from the approaching car. The court considered the question whether the child was *sui juris*, so as to be within the rule of contributory negligence, as also for the jury.

And in *Breen v. Boston Elev. R. Co.* (1912) 211 Mass. 519, 98 N. E. 511, it was held that the question of contributory negligence was for the jury where a child seven years old was struck by a street car as she had almost cleared the track, and there was evidence that before leaving the curb and again while crossing she had looked for cars, and that the car which struck her, although approaching in plain sight, was four or five car lengths away when she was about 6 feet from the track.

In the last case it appears not only that there was evidence of some care on the part of the child, but that the car was at some distance when the child started to cross. And the same conclusion has been reached where it appeared

that the child did not attempt to cross immediately in front of the car, and that possibly the accident was due to fright. Thus, whether an eight-year-old girl who started to run across a street, in the middle of a block, when a street car was rapidly approaching in plain sight, only 50 feet away, was guilty of contributory negligence was held a question for the jury, and *Smith v. North Jersey Street R. Co.* (1906) 73 N. J. L. 295, 67 Atl. 753, there being evidence that she crossed the track, became frightened, and turned back as the car struck her.

Citizens R. Co. v. Robertson (1910) 58 Tex. Civ. App. 566, 125 S. W. 343, appears to be an extreme case, holding that a ten-year-old girl was not guilty of contributory negligence as matter of law, although from her testimony it appeared that she was familiar with the crossing at which the accident occurred, that she knew that street cars passed there every ten minutes, that she had been cautioned as to the dangers of the cars and knew the danger of crossing the track without looking, and that, without taking any precaution for her safety or paying any attention to the cars, but engaged in reading a letter with her head down to prevent her hat from blowing off, she walked upon the track, and when about in the center of it was struck by a street car which approached in plain sight, and which she did not see or hear in time to avoid. The court apparently relied on the fact that the attention of the girl was temporarily absorbed, and considered that whether going upon the track without looking or listening she was acting as an average child of her age would act was a question as to which reasonable men might fairly differ. And this conclusion was probably strengthened by the facts that the girl testified that on previous occasions, in crossing, she had always heard a gong, and that apparently the jury might have found that in this instance the car approached without warning.

b. Riding or driving across track.

As to duty of motorman on perceiving vehicle near track occupied by child only, see note to *Louisville R. Co. v. Flannery*, 24 L.R.A. (N.S.) 560.

Whether a sixteen-year-old girl who while riding in a wagon driven by her stepfather across a street railway track was injured by collision with a car was guilty of contributory negligence was held to be a question for the jury in *L.R.A.1917F.*

Zaletuehin v. Metropolitan Street R. Co. (1908) 127 Mo. App. 577, 106 S. W. 548. It was said: "Whether plaintiff looked while the vehicle was in a place of safety, saw the car approaching, and failed to warn her stepfather, or did not look at all in the direction from which the car approached until she had reached a dangerous position, her conduct would have been a subject for the jury to classify had the pleadings raised the issue of contributory negligence. . . . Considering her position in the wagon [sitting on a box placed behind the seat, with her face towards the rear of the wagon], and the further fact that, being a mere child, she naturally would rely greatly on the watchfulness and discretion of her mother and stepfather, whose opportunities to judge of the risk involved in attempting the crossing were better than her own, it is a fair inference to say that she acted in a manner to be expected of a person of her age and apparent intelligence."

So it was held that the question of contributory negligence was for the jury where a nine-year-old boy was run over by a street car while attempting to cross the track on a tricycle, and there was evidence that as a car passed he looked, and, not observing any other car, started across, that he then saw another car coming, became confused, and was run over before he could get off the track; also that the car was running at a very rapid rate, without the sounding of the gong. *Phillips v. Duquesne Traction Co.* (1897) 183 Pa. 255, 38 Atl. 611. The decision was followed in *Phillips v. Duquesne Traction Co.* (1898) 8 Pa. Super. Ct. 210, an action involving the same facts.

In *Campbell v. St. Louis & Suburban R. Co.* (1903) 175 Mo. 161, 75 S. W. 86, it was held that the question of contributory negligence was for the jury, where a boy sixteen years old, while driving across a street railway track at a street crossing, was killed by collision with a construction car, which the evidence tended to show was being operated in the dark without a headlight. It was said: "In this case the boy had a right to expect that there would be a headlight on any car on that road, and if he looked in both directions as he approached the tracks and saw no headlight, and if he then concluded, for that reason, that there was no car coming, and drove on the track, the court had no right to say as a matter of law that he was guilty of contributory negligence. We do not mean to say that he was not

guilty of contributory negligence, or that the jury would not have been justified in finding him guilty, but we mean that men might reasonably differ about it, and therefore it was for the jury to say whether under all the circumstances he was or was not guilty.

And whether in the exercise of the care reasonably to be expected of a boy of his age, the deceased should have stopped before crossing the track, in order the better to see and hear, if the street on which he was driving was paved with brick so that the noise of the horse and wagon while in motion made it impossible for him to hear an approaching car, was held to be a question for the jury. *Ibid.*

So, where a twelve-year-old boy, while attempting to drive across a street car track in a closed milk wagon, which had a window in front and doors on the sides, was struck by a street car, it was held that contributory negligence was not shown as matter of law by his testimony that there was nothing to obstruct his view and that he would have seen the car if he had been keeping a lookout, in view of other evidence that before crossing he looked out of the front and sides of the wagon but saw no car, that he heard no signals, and was not aware of the approach of the car until it struck the wagon, and that the car was running at an unusual speed. *El Paso Electric R. Co. v. Kendall* (1904) — *Tex. Civ. App.* —, 78 S. W. 1081. The court said that it did not believe a child twelve years of age, in any ordinary case, can be held guilty of contributory negligence as a matter of law; that the mere failure of a person to look and listen is not negligence per se; and that the testimony of the boy that there was nothing to obstruct his view and that if he had been keeping a lookout he would have seen the car, in connection with his entire testimony, could be taken to mean that he could have looked up the street and could have seen the car approaching if he had done so, but that, looking from his position in the wagon, there was no car as far up the street as he could see.

And where a nine-year-old boy, while riding on the seat beside the driver of a truck, was injured by collision with a street car, while crossing the track at a street crossing, there being evidence that the truck reached the track in time to pass in safety if the car had been under proper control, it was held in *Robinson v. Metropolitan Street R. Co.* (1904) 91 App. Div. 158, 86 N. Y. Supp. L.R.A.1917F.

442, affirmed without opinion in (1904) 179 N. Y. 593, 72 N. E. 1150, that whether the boy should have called the driver's attention to the car, or jumped from the wagon, was a question for the jury, and a judgment for the plaintiff was affirmed.

c. Obstructed view; passing behind car.

Generally as to injury to street car passenger who upon alighting passes around car and is struck by car on another track, see notes to *Hornstein v. United R. Co.* 4 L.R.A.(N.S.) 729, and *Bremer v. St. Paul City R. Co.* 21 L.R.A.(N.S.) 887.

See also IV. b; *infra*, for cases of this kind in which contributory negligence was shown as matter of law.

It was held that the question of contributory negligence was for the jury, in an action for injury to a fourteen-year-old girl by a car while attempting to cross double street car tracks on a dark, misty evening, where there was evidence that, although the track was straight, the view was somewhat obstructed by trees and by a dip in the surface of the street, although under favorable conditions an ordinary person in the daylight could have seen for a distance of at least 200 feet in the direction of the approaching car; that before attempting to cross she stopped at the curb and looked both ways for approaching vehicles but saw none, that when within about 2 feet of the nearer track she glanced again but saw no car, that she then continued across the track, and was struck by a car when she had almost cleared the last rail of the farther track; that the headlight was burning, but no bell was rung, or other warning given. *Lonabaugh v. Pittsburgh R. Co.* (1915) 250 Pa. 42, 95 Atl. 316.

So it was held that the question of contributory negligence was for the jury, in an action for injury to a ten-year-old boy who was struck by a street car while attempting in the dusk of the evening to cross, at a street crossing, double tracks over which he knew cars passed at frequent intervals, where there was evidence that he passed behind a car on the nearer track and looked for a car on the farther track, and that when he stepped upon the latter he was struck by a car, which he had not seen approaching, and which had no light, and did not sound the gong. *Goldberg v. Boston Elev. R. Co.* (1912) 212 Mass. 13, 98 N. E. 676.

Also in *Rastetter v. Peoria R. Co.*

(1908) 142 Ill. App. 417, it was held that the question of contributory negligence was for the jury, and a judgment for the plaintiff affirmed, in an action for the death of a fifteen-year-old boy struck by a street car while attempting to cross the track at a street crossing, where there was evidence that he crossed behind a car moving in the opposite direction, that the accident occurred in the nighttime, that the car was running at a rate of 6 or 8 miles an hour, and that it had no headlight, and the gong was not sounded.

And it was held also that the question of contributory negligence was for the jury—

—where there was evidence that a ten-year-old boy, before attempting to cross double street car tracks at a crossing, looked but saw only a car on the nearer track which had stopped at the crossing, and, following others across behind it, was struck by a car on the farther track, which approached from the opposite direction without warning, *Lucarelli v. Boston Elev. R. Co.* (1913) 213 Mass. 454, 100 N. E. 632;

—where a girl six and one-half years old looked both ways for cars before attempting to cross, and, having waited on the sidewalk until a car on the nearer track stopped in front of the place where she was standing, attempted to pass behind it, and was struck by a car moving in the opposite direction on the farther track, there being evidence that when she walked behind the standing car she listened, but heard no car approaching, and that the car was proceeding at a rapid rate, and the gong was not sounded, *Purcell v. Boston Elev. R. Co.* (1912) 211 Mass. 79, 97 N. E. 626;

—where a seven-year-old child was killed by a horse car at a crossing, and it appeared that when she attempted to cross the car was 40 or 50 feet from the crossing, that she passed behind a car moving in the opposite direction, and, discovering the car as she was on or near the track on which it was rapidly approaching, attempted to pass diagonally across in front of the horses, when they were only 12 or 15 feet away, *Oldfield v. New York & H. R. R. Co.* (1856) 14 N. Y. 310;

—where a boy eight years old waited at a crossing for a street car to pass, and, having listened, but not hearing any bell,—which he had observed was always rung when cars passed at this point,—and not seeing any other car except at a distance, attempted to cross

the tracks, as other persons were doing, and reached the center of the further track, when, on discovering a car approaching from the opposite direction about 10 feet away, he jumped back in an unsuccessful attempt to avoid it, *Burns v. Worcester Consol. Street R. Co.* (1906) 193 Mass. 63, 78 N. E. 740;

—where a boy seven years old, above the average in intelligence, and familiar with the manner of operating street cars at the place in question, was struck by a street car while attempting to cross the track, which was 2 or 3 feet from the sidewalk, and there was evidence that cars at that point ordinarily ran slowly while the car causing the injury was moving at a high rate of speed, without warning, and without heeding a stop signal near the place of the accident, that the boy was crossing closely behind a cart and had almost cleared the track when he was struck, and that it was almost impossible for one approaching the track at that point to see the car because of overhanging bushes, trees, and other obstructions, *Beale v. Old Colony Street R. Co.* (1907) 196 Mass. 119, 81 N. E. 867.

Where a child was struck by a car following another on the same track, the question whether the observance of due care on his part required him to look again before crossing the track, after he had looked and waited for the first car to pass, is presented in *Deschner v. St. Louis & M. River R. Co.* (1906) 200 Mo. 310, 98 S. W. 737. In that case a bright boy eleven years old, who was accustomed to crossing railroad tracks and was familiar with the locality, while attempting to cross parallel street car tracks, intent on an errand, waited for a car on the nearer track to pass, and then, without again looking in the direction from which it came, but looking in the opposite direction for a car on the further track, stepped behind it and was struck by a car which was following the first car, which was concealed by the latter when he looked in that direction, and approached without ringing the gong. It was held that the question of contributory negligence was for the jury. The court said: "The question in this case is not whether as a matter of law he would have been guilty of contributory negligence if he had not looked once, but the question is whether this child as a matter of law should be held guilty of contributory negligence for not looking twice. This is a much more complex proposition than not looking at all; for whether a

boy would look twice would depend upon the frequency with which cars to his knowledge followed each other upon the same track,—the one closely behind the other. It would depend, too, upon the boy's quickness of thought, his mental grasp, his coolness and precision of judgment. . . . There was no proof he ever saw two cars of any class follow each other so closely at that point, and if there had been such proof, we would not be willing to say as a matter of law that, in taking it for granted the ordinary and usual condition of things would exist at that time, namely, that there would be a pronounced distance between two cars going the same way on the same track, the plaintiff was guilty of negligence. Such conduct may be very well within the conduct of a reasonably prudent boy eleven and a half years old."

d. Crossing in front of observed car.

Generally as to contributory negligence in attempting to cross in front of observed car, see annotation to *Manos v. Detroit United R. Co.* L.R.A.1917C, 689.

See III. e, *infra*, for cases where the child fell on the track; also IV. c, *infra*, for cases of the kind here considered in which contributory negligence was shown as matter of law.

It was held that the question of contributory negligence was for the jury, in an action for injury to an eight-year-old girl by a street car while attempting to cross the track diagonally, where she testified that before stepping from the sidewalk, 16 or 18 feet from the track, she stopped and looked, and it seemed to her that the car was stopped about 120 feet away, and that she stopped and looked again as she stepped into the street and the car still seemed to be stopped, and that she thought she had time to cross, and proceeded on a fast walk; and there was other evidence that at the point at which she thought the car had stopped it had slowed down for a conductor to get on, and then proceeded at an unusually rapid rate, that no bell was rung, that the motorman did not see the girl until within a few feet of her, when she was on the track, and that he then shouted, and she became confused and stopped on the track. *Sheehan v. Boston & N. Street R. Co.* (1913) 215 *Mass.* 463, 102 N. E. 690.

It was held also in *Sheehan v. Boston & N. Street R. Co.* (*Mass.*) *supra*, that an instruction was erroneously refused that the girl had no right to assume that

the motorman would look out for her safety to the extent that she was relieved from taking any precautions whatever while walking the distance of 16 or 18 feet from the sidewalk to the track.

So the question of contributory negligence was held to be for the jury—

—where a girl nine years old, who was playing in the street, started to run away from an approaching street car, and, the street being obstructed so as to leave a space only 3 to 5 feet wide along the track, when near the obstructions, suddenly attempted to cross the track so close to the car that she was struck by it and killed, *Calumet Electric Street R. Co. v. Van Pelt* (1896) 68 Ill. App. 582, affirmed in (1898) 173 Ill. 70, 50 N. E. 678;

—where a twelve-year-old girl, in attempting to cross parallel street car tracks at a crossing, was struck by a car, and there was evidence from which it could be inferred that, from a point on the curb she looked and saw the car some distance away on the nearer track, that it appeared to be slowing down, that a team was approaching on a walk from the opposite direction on the farther track, and that she would have passed in safety in front of the team had not the driver whipped up the horses as she reached the nearer track, and while she hesitated as to which way to go, she was struck by the car, *Mullen v. Boston Elev. R. Co.* (1911) 209 *Mass.* 79, 95 N. E. 391;

—where a nine-year-old boy at a street crossing observed a street car drawn by horses approaching about 75 feet from where he stood on the curb, and started to cross the track, which was about 23 feet from him, and when near the track saw the driver increase the speed of the car, and, trying to pass in front of it, was struck and injured, *Ellick v. Metropolitan Street R. Co.* (1897) 15 App. Div. 556, 44 N. Y. Supp. 523;

—where a bright boy, nine years old, who had been cautioned in regard to crossing street car tracks, in attempting to cross a street and finding himself in a "pocket" between parallel tracks, with a street car coming in one direction and an automobile in the other, each about 90 feet away, attempted to cross the track in front of the car, and was struck by it and killed, *Weitzel v. Detroit United R. Co.* (1915) 186 *Mich.* 7, 152 N. W. 931, 9 N. C. C. A. 407, rehearing denied in (1915) 186 *Mich.* 17, 153 N. W. 831;

—where a boy seven years old, in the

habit of crossing street car tracks, was struck by a car while attempting to walk across the tracks, and there was evidence that when half way between the track and the curb he saw the car approaching slowly, 250 feet away, and thought he could get across, and that the accident happened because of the subsequently accelerated speed of the car, *Giaccobe v. Boston Elev. R. Co.* (1913) 215 Mass. 224, 102 N. E. 322;

—where a boy nine years old, while crossing the street after a ball with which he was playing, was struck by the projecting handle of a street car after he had cleared the track, and it appeared that, before attempting to cross the street, which was about 30 feet wide, he looked both ways and saw a car about 215 feet away, that he ran to cross the track, but miscalculated the speed of the car, and that when between the double tracks, on discovering that the car was only about 44 feet away, he increased his speed and attempted to pass in front of it, *Quinlan v. Richmond Light & R. Co.* (1909) 133 App. Div. 402, 117 N. Y. Supp. 641;

—where a nine-year-old girl was struck by a street car while attempting to cross the track at a street crossing in a well-settled portion of a city, and it appeared that when on the curb, about 16 feet from the farther rail, she saw the car rapidly approaching, about 127 feet away, and attempted to walk across the track, although it did not appear that she again looked, or paid further attention to the approaching car, *Hicks v. Nassau Electric R. Co.* (1900) 47 App. Div. 479, 62 N. Y. Supp. 597.

In *Brown v. St. Louis & Suburban R. Co.* (1907) 127 Mo. App. 499, 106 S. W. 83, a judgment for the plaintiff was affirmed, in an action for injury to an eight-year-old boy by a street car while he was attempting to run across the track in response to a school bell, although he testified that he saw the car and ran, thinking he could cross the track ahead of it, and that he had been cautioned in this regard and took his chance after he saw the car. The court took the view that from the evidence the boy had sufficient time to cross the track in safety had the car been running at a lawful speed, that there was no evidence that he discovered it was running at an unlawful speed, and that his testimony could not fairly be construed as meaning that he apprehended the danger and took chances.

In an action for injury to a nine-year-old girl by being run over by a street L.R.A.1917F.

car while attempting to cross the track, it was held in *Dorsch v. Brooklyn Heights R. Co.* (1902) 68 App. Div. 222, 74 N. Y. Supp. 257, that there was sufficient evidence of freedom from contributory negligence to submit that question to the jury and to sustain a judgment for the plaintiff, where she testified that when near the gutter she looked both ways before attempting to cross the street, that the car was then about 170 feet away, and that she proceeded at a fast walk to cross.

e. Falling on track.

In actions for injury to children who have been injured by street cars because of stumbling or falling on the track in attempting to cross in front of a car, the question of contributory negligence has generally been held to be for the jury. These cases, however, appear to involve questions not peculiar to actions for injuries to children.

And in *Mentz v. Second Ave. R. Co.* (1869) 3 Abb. App. Dec. (N. Y.) 274, where, in an action for injury to an eight-year-old boy by being run over by a street car, there was evidence of sufficient time to cross the track in front of the car when he attempted to do so, had he not stumbled and fallen on the track, the court, in affirming a judgment for the plaintiff, said: "To fall by accident, by sickness, by the interference of another, by means of a broken rail, or by stumbling, is not a result that a prudent man is bound to anticipate or provide for in crossing a public street. He is not bound to allow for such an occurrence in crossing a street, much less is such provision required of a lad of the age of eight years. Upon the occurrence of an injury to him under such circumstances, he has been guilty of no negligence contributing to the result."

So, it was held that the question of contributory negligence was for the jury, where an eight-year-old boy in attempting to cross the track was struck by a street car, and there was evidence that he observed the car as it was approaching, and that it was so far distant that he could have walked across in safety if he had not fallen on the track, which was slippery owing to the presence of ice. *Silberstein v. Houston, W. S. & P. Ferry R. Co.* (1889) 4 N. Y. Supp. 843, reversed on other grounds in (1889) 117 N. Y. 293, 22 N. E. 951.

Where a seven-year-old boy, having crossed one of two parallel street car tracks in front of an approaching horse

car, on finding that he could not cross in front of a car approaching from the opposite direction, turned and endeavored to retrace his steps, and would presumably have been able to do so before the car reached him had he not fallen on the track, it was held that contributory negligence was not shown as matter of law. *Block v. Harlem Bridge, H. & F. R. Co.* (1890) 55 Hun, 607, 28 N. Y. S. R. 495, 9 N. Y. Supp. 164. The court stated that if there was time, under ordinary circumstances, for the boy to cross the track, he was not bound to make any allowance for the fall which occurred.

Also in *Lhowe v. Third Ave. R. Co.* (1895) 14 Misc. 612, 36 N. Y. Supp. 403, an action for injury to a boy six or seven years of age by a street car, where there was evidence that he had ample time, when he attempted to do so, to cross the track before the car reached him, if he had not fallen, and that it was not until he was attempting to rise that he was struck by the car, it was held that an instruction was proper that if the accident occurred under these circumstances he was not guilty of negligence.

In *Totarella v. New York & Q. C. R. Co.* (1900) 53 App. Div. 413, 65 N. Y. Supp. 1044, it was held that a boy eleven years old was not guilty of contributory negligence as matter of law in attempting to cross a street car track in front of a car about 50 feet away and moving up grade at a rate of 6 to 8 miles an hour, with the result that he stumbled and fell, and was run over by the car.

And in *Kitay v. Brooklyn, Q. C. & S. R. Co.* (1897) 23 App. Div. 228, 48 N. Y. Supp. 982, a judgment for the plaintiff, in an action for an injury to a ten-year-old boy caused by being struck by a street car while he was attempting to cross the track, was sustained as against an objection that the plaintiff had failed to establish freedom from contributory negligence, where there was evidence that when the boy endeavored to cross the track the car was about 80 feet away, and that he fell on the track.

f. Diverted attention; playing in street.

See also IV. d, *infra*, for cases of this kind in which contributory negligence was shown as matter of law.

It is not contributory negligence as matter of law for a child five years and ten months old, whose mind is intent on an errand on which she has been sent, L.R.A.1917F.

to attempt to cross a street car track at a crossing without taking precautions to avoid injury by cars, although she knows the danger of getting in the way of a moving car, with the result that she is struck and injured by a car which she did not see or hear. *Van Salvellergh v. Green Bay Traction Co.* (1907) 132 Wis. 166, 111 N. W. 1120. It was said: "No authority has been cited to our attention, nor have we been able to discover any, where a child under six years of age, though of sufficient discretion to know of its being dangerous to step in front of a moving car, has been held as a matter of law guilty of contributory negligence in doing so, being momentarily unmindful of the situation." And after quoting from an earlier decision in the same state to the effect that it must be an extreme case warranting a nonsuit on the ground of the child's negligence, the court stated that "as to one under six years of age, any circumstance reasonably sufficient to so fix its attention as to lead to its approaching dangerously near to or entering upon a railway track without looking out for coming cars will preclude holding as a matter of law the case to be extreme within the view indicated."

It was held that the question, whether a boy six years old who in attempting to cross a street car track, was struck by a car was guilty of such contributory negligence as to preclude recovery for the injury, was for the jury, and a judgment for the plaintiff affirmed, where there was evidence that the boy was looking across the track, running and waving his hands at someone, that the view was unobstructed, and that the bell was not rung. *Tecker v. Seattle, R. & S. R. Co.* (1910) 60 Wash. 570, 111 Pac. 791, Ann. Cas. 1912B, 842.

And in *Smith v. Rochester R. Co.* (1910) 197 N. Y. 600, 91 N. E. 1120, affirming the judgment of the trial court on the dissenting opinion of Kruse, J., in (1909) 133 App. Div. 847, 118 N. Y. Supp. 78, it was held that the question of contributory negligence was for the jury where a six-year-old boy while playing in a street attempted to run diagonally across a street car track at a crossing, and, as he stepped on the track, was struck by a car which approached without warning at a rate of 20 miles an hour.

So it was held that the question of contributory negligence was for the jury where a bright boy nine years old, accustomed to street cars, was struck by a

car while attempting to cross the track at a street crossing, over which cars passed only at twenty-minute intervals, and there was evidence that the car was running at a rate of 20 miles an hour, that no warning of its approach was given, and that it was in plain sight as it approached the crossing, but was not seen or heard by the boy, whose attention as he ran across the track was absorbed by a new toy in his hand. *Long v. Ottumwa R. & Light Co.* (1913) 162 Iowa, 11, 142 N. W. 1008.

It was held by a majority of the court in *McFarland v. Elmira Water, Light & R. Co.* (1909) 136 App. Div. 194, 120 N. Y. Supp. 292, that the question of contributory negligence was for the jury where an eight-year-old boy ran across a street car track in pursuit of other boys with whom he was engaged in a game of "tag," and, as he had almost cleared the track, was struck by a street car which gave no signal of its approach. The correctness of the conclusion in this case seems at least questionable, it appearing from the dissenting opinion of two of the judges that the boy was accustomed to crossing street car tracks, had been repeatedly cautioned in that regard, and, without taking any precautions, ran across the track in front of the car, which was approaching in plain sight.

Whether a boy seven years and eight months old, who for a year had been in the habit of going to school unattended along a street over which street cars ran, was guilty of contributory negligence in failing to look for cars before running across the track was held to be a question for the jury, where there was evidence that at the time of the injury he was playing and chasing other boys who had taken his cap, and that when he started from the sidewalk the car was approaching rapidly in plain sight between 70 and 100 feet away. *Sullivan v. Union R. Co.* (1903) 81 App. Div. 596, 81 N. Y. Supp. 449, affirmed without opinion in (1903) 177 N. Y. 525, 69 N. E. 1131.

It was held also that contributory negligence as matter of law was not shown where a boy six years and ten months old, to avoid another boy who was pursuing him and threatening him with a stone, ran along a walk which was close to a street car track, and, without seeing or hearing a car, which was approaching from the rear without warning, suddenly attempted to cross the track in front of the car and was struck by it. *Ritscher v. Orange & P. L.R.A.1917F.*

Valley R. Co. (1910) 79 N. J. L. 462, 75 Atl. 209.

And it was held that the question of contributory negligence was for the jury, and a judgment for the plaintiff affirmed, in an action for the death of a boy, apparently under eleven years of age, who at a school intermission, while playing on a narrow strip of ground between a street car track and a ditch along the side of the street, at the intersection of streets near the school, was struck by a car which he did not see or hear and which approached from the rear at a rapid rate without warning, there being evidence that at the time of the accident other boys were chasing him, and that he was running on or diagonally across the track. *San Antonio Traction Co. v. Young* (1911) — *Tex. Civ. App.* —, 141 S. W. 572.

So, where a seven-year-old boy, who had been sitting on a street fence with other children watching a train on adjoining land, alighted as a street car approached on a track about 6 feet from the fence, and stepped in front of or against the car, the question of contributory negligence, in view of evidence that the bell was not ringing and no warning of the car's approach was given, was held for the jury, and a judgment for the plaintiff, in an action for the injury so sustained, was affirmed in *Madigan v. Berlin Street R. Co.* (1907) 74 N. H. 303, 67 Atl. 404.

And it was held in *Grant v. Bangor R. & Electric Co.* (1912) 109 Me. 133; 83 Atl. 121, that, assuming that a child five years and three months old was capable of exercising care, the question whether it had exercised due care was for the jury, where there was evidence that the child stood 5 or 6 feet from a street car track, with its back to an approaching street car, watching excavation work in the street and apparently not aware of the approach of the car, that she started slowly across the track, and when about the center of the track discovered the car, became confused, and was run over.

In *Butler v. Metropolitan Street R. Co.* (1905) 117 Mo. App. 354, 93 S. W. 877, it was held that the question of contributory negligence was for the jury, where a seven-year-old boy, while crossing a street car track, stopped on the farther rail for the purpose of picking a piece of glass from his bare foot, and was struck by a car, which there was evidence was about 60 feet away when he stopped, was moving at the rate of 10 or 12 miles an hour, and ap-

proached without warning, and which he did not see because of his failure to look.

See also *Quinlan v. Richmond Light & R. Co.* and *Calumet Electric Street R. Co. v. Van Pelt*, under III. d, *supra*.

g. Coasting in street.

In *Lynch v. Public Service Corp.* (1912) 82 N. J. L. 712, 42 L.R.A.(N.S.) 865, 83 Atl. 382, 3 N. C. C. A. 514, it was held that it was for the jury to determine whether a thirteen-year-old boy was negligent in attempting to coast on a street crossing a street railway track, when persons were stationed at the point of intersection to warn coasters and car operators so as to prevent collisions. See note to this case for other cases dealing with the question of injury to one while coasting in a street.

IV. Negligence as question of law.

a. In general.

Generally as to whether contributory negligence of a child is a question for the court or for the jury, see VI. of annotation to *Jacobs v. H. J. Koehler Sporting Goods Co.* ante, 84.

As already stated, the question of contributory negligence may under some circumstances be one of law for the court. It has been so held especially where there was no evidence of the exercise of any care on the part of the child. Thus, in *Lehman v. New York R. Co.* (1915) 153 N. Y. Supp. 978, an action for injury to an eight-year-old boy by a street car, where there was evidence simply that he was struck by the car while attempting to cross the track, it was held that the complaint should have been dismissed in the absence of evidence of the exercise of any degree of care on the part of the child or his parents.

And in *Walukewich v. Boston & N. Street R. Co.* (1913) 215 Mass. 262, 102 N. E. 311, it was held that there could be no recovery, on account of contributory negligence, for injury to a girl seven years old, who, with nothing to obstruct her view or distract her attention, without apparently exercising any care, attempted to run across a street car track in front of a rapidly approaching car which was so near that she had scarcely stepped on the track when it struck her. The court said that to justify recovery the child must have exercised that care of which she was capable, and that the difficulty with the plaintiff's case was that it did not appear that

she exercised any care; also that the evidence left it doubtful whether the child at the time of the accident was following playmates, or attempted to cross the track alone, but that the result was the same in either case as regards the question of the child's due care.

See also *KYLE v. BOSTON ELEV. R. Co.* ante, 164.

It is negligence as matter of law for a fifteen-year-old boy, familiar with the locality, to attempt to cross the tracks of an electric railroad laid along a country highway, without looking to ascertain whether a car is approaching, although if he had looked he could have seen a car dangerously near. *Henke v. Milwaukee Electric R. & Light Co.* (1912) 147 Wis. 661, 133 N. W. 1107.

And where the undisputed evidence showed that a girl eleven years old, who was injured by a car while attempting to cross double street car tracks in front of her home, understood and appreciated the danger of being struck and injured by the cars, and it appeared that she crossed in front of a car approaching on the nearer track only 15 feet away, and stepped on the farther track when a car from the opposite direction was only 4 feet away, and was struck by it and injured, and that there was nothing to obstruct her view or distract her attention, it was held that she was guilty of contributory negligence as matter of law, although she testified that she looked in both directions and did not see a car. *Indianapolis Traction & Terminal Co. v. Croly* (1911) 54 Ind. App. 566, 96 N. E. 973, 98 N. E. 1091. The court treated the case as one in which there was a failure to exercise any care. It was said: "If it appeared from the evidence that she used some care in this respect, it would be for the jury to say whether the care used was such as might be ordinarily expected from a child of her age and experience; but when it appears from the undisputed evidence that she used no care in this respect, and where no excuse is shown for a failure to use the care of which she was capable, the question is one of law for the court. Placing the case in the most favorable light for the plaintiff, she walked across the street looking straight ahead of her, and walked upon the track at a point 3 or 4 feet in front of the car that struck her. True, she says that she looked up and down the street, and that she saw no car; but the physical facts remain that the car was there, within a few feet of her, at the time she stepped upon the track, that

it was daylight, and that the view was unobstructed. If she had seen the car and had misjudged its distance or speed, this might be attributed to her immature judgment. If she had seen the approach of the Brightwood car, and this had distracted her attention in that direction, the fact might have been considered by the jury as an excuse for a failure to use care to observe the approach of a car from the opposite direction; but where it appears that nothing obstructed her view or distracted her attention, we see no excuse for her failure to use such care as she was capable of exercising to observe the approach of a car before stepping upon the track. In our judgment the undisputed evidence shows that the plaintiff failed to use due care in view of her age and experience." A later appeal will be found in (1917) — Ind. App. —, 115 N. E. 105.

In *Schwartz v. Winnipeg Electric R. Co.* (1913) — *Manitoba L. R.* —, 12 D. L. R. 56, it is intimated that an eight-year-old boy of ordinary intelligence, with nothing to distract his attention or to prevent his seeing and hearing an approaching street car, may be charged with contributory negligence as matter of law in failing to look for a car before crossing, or to avoid it if seen.

And in *Henderson v. Detroit Citizens' Street R. Co.* (1898) 116 Mich. 368, 74 N. W. 525, the court was of the opinion that there could be no recovery for injury to an eight-year-old boy, who in crossing a street car track was struck, as he stepped on the track, by the side or corner of a car which he could have seen approaching had he looked, it appearing that he had been frequently cautioned to be careful and look before attempting to cross the street, and that he appreciated the danger in this regard.

b. Obstructed view; passing behind car.

Generally as to injury to street car passenger who upon alighting passes around car and is struck by car on another track, see notes to *Hornstein v. United R. Co.* 4 L.R.A.(N.S.) 729, and *Bremer v. St. Paul City R. Co.* 21 L.R.A.(N.S.) 887.

See also III. c, *supra*, for cases in which the question of contributory negligence was held to be for the jury, in cases of this kind.

In *Koehler v. Chicago City R. Co.* (1911) 166 Ill. App. 571, it was held that, in the absence of evidence of any circumstances which would excuse a L.R.A.1917F.

failure to look, a ten-year-old boy, accustomed to street cars, was negligent as matter of law in crossing behind a street car at a crossing without looking for a car on the farther track, with the result that he collided with the corner of a car on that track moving in the opposite direction.

And in *Burke v. Chicago City R. Co.* (1910) 153 Ill. App. 388, it was held that a boy nearly twelve years old, who was of more than average intelligence and was accustomed to street cars, was guilty of contributory negligence as matter of law in attempting to cross behind a street car from which he had jumped while in motion, and on which he had been riding on the rear fender, without looking for a car on the farther track, which, in the absence of evidence of any circumstances to excuse a failure to look, would preclude recovery for an injury by being struck by a car on the farther track moving in the opposite direction.

It was held also in *McMannus v. Boston Elev. R. Co.* (1913) 216 Mass. 191, 103 N. E. 301, that due care on the part of a nine-year-old boy was not shown, where it appeared that the accident occurred in the daytime, that he was familiar with the locality and knew that cars ran at frequent intervals, that he passed 2 or 3 feet behind a car which had stopped at a crossing, and was struck by an unobserved car approaching from the opposite direction at a rate of 6 or 7 miles an hour, notwithstanding the fact that he testified that he looked in the direction from which the car came, there being no evidence that he looked from a point at which he could see for a substantial distance along the track.

And in *Battles v. United R. Co.* (1913) 178 Mo. App. 596, 161 S. W. 614, an action for the death of a nine-year-old boy who was struck by a street car while attempting to cross the track in the middle of a block behind a car moving in the opposite direction, it was held that contributory negligence was shown as matter of law, where it appeared that he was familiar with the operation of the cars, and stepped on the track in front of the car when it was rapidly approaching, only 2 or 3 feet away.

See *ADAMS v. BOSTON ELEV. R. Co.* ante, 165.

c. Crossing in front of observed car.

See also III. d, *supra*, for cases of this kind in which the question of contrib-

utory negligence was held to be for the jury.

Where there was no evidence that a boy between ten and eleven years old used any degree of care to avoid a street car which he saw approaching, but deliberately walked into a position of danger, it was held that the question of contributory negligence was one of law for the court. *Byrnes v. Brooklyn Heights R. Co.* (1912) 148 App. Div. 794, 133 N. Y. Supp. 243.

So it was held that contributory negligence as matter of law was shown where a girl nine years and nine months old, accustomed to crossing street car tracks, stepped immediately in front of a rapidly approaching street car which she saw, and was run over. *Tjaden v. Brooklyn Heights R. Co.* (1911) 145 App. Div. 581, 130 N. Y. Supp. 280.

A ten-year-old boy, who, as he steps from the curb in the middle of a block, sees a street car rapidly approaching 30 feet away, is negligent as matter of law in walking diagonally toward the track, without paying any further attention to the car until he is about to step on the rail, when, on hearing the motorman's call, he unsuccessfully attempts to step back from the track before the car reaches him. *Byrnes v. Brooklyn Heights R. Co.* (N. Y.) supra.

And in an action for injury to a boy thirteen years old while he was attempting to cross a street car track in the middle of a block, it was held that contributory negligence was shown as matter of law, where it appeared that before leaving the curb he saw the car stop at a street crossing half a block away and thought he would have time to cross, and, although there was nothing to obstruct his view, he failed to look in the direction of the approaching car from the time he left the curb until he reached the track and was struck by the car. *Glynn v. New York C. R. Co.* (1908) 110 N. Y. Supp. 836.

It was held that contributory negligence was shown as matter of law, in an action for injury to a nine-year-old girl by being struck by a street car while crossing the track on her way to school, where it appeared that she had been crossing at that place four times daily for about two years and had often been cautioned in that regard, and that, although there was no occasion for haste and nothing to distract her attention, thinking she could cross ahead of the car which she saw rapidly approaching, she hastened past persons who had stopped beside the track for the car to L.R.A.1917F.

pass, and was struck as soon as she stepped on the track. *Casey v. Boston Elev. R. Co.* (1908) 197 Mass. 440, 83 N. E. 867.

And it was held that a bright boy eight years and ten months old was guilty of contributory negligence as matter of law, where it appeared that he attempted to run across a street car track only a few feet in front of a moving car, which he saw, with the result that when he stepped on the nearer rail, the car was upon him. *Downey v. Baton Rouge Electric & Gas Co.* (1908) 122 La. 482, 47 So. 837.

d. Diverted attention; playing in street.

See also III. f, supra, for cases of this kind in which the question of contributory negligence was held to be for the jury.

In *Jollimore v. Connecticut Co.* (1912) 86 Conn. 314, 85 Atl. 373, it was held that a bright boy eleven years old, who was accustomed to crossing street car tracks, was guilty of contributory negligence as matter of law, so as to preclude recovery for his death by being struck by a street car while he was running across the track after other boys with whom he was playing, where it appeared that the accident occurred in the daytime, that there was an unobstructed view of the approaching car, and that he ran from the curb $7\frac{1}{2}$ feet from the track, and was struck immediately as he reached the track.

So, it was held that a verdict for the defendant was properly directed because of contributory negligence, in an action for injury by a street car to a boy six years and eight months old while crossing the track, where it appeared that he was a bright boy, who for a year had gone along the street in question on his way to school and knew that cars passed frequently at all times of the day, and that at the time of the accident he was playing in the street and, while chasing another boy, ran across the track without exercising any care, the car, which was approaching in plain sight, striking him as soon as he reached the track. *Godfrey v. Boston Elev. R. Co.* (1913) 215 Mass. 432, 102 N. E. 652.

And it was held that due care on the part of a bright boy nine years old, who was accustomed to playing in the street, was not shown, where there was no evidence as to whether he saw the car which injured him or made any effort to discover whether a car was approaching, and there was evidence that while

playing in the street he ran from the curb in the middle of a block when the car was approaching in plain sight from 75 to 100 feet away, and stepped on the track, which was 10 feet from the curb, when the car was rapidly approaching, only 15 or 20 feet away. *Sobol v. Union R. Co.* (1907) 122 App. Div. 817, 107 N. Y. Supp. 656.

Also in the recent case of *McKinnon v. Bangor R. & Electric Co.* (1917) — **Me.** —, 101 Atl. 452, it was held that a ten-year-old boy who attempted to run from the sidewalk diagonally across a street without looking for a car, and ran against the corner of a street car approaching at a rate of from 2 to 4 miles an hour, the bell of which was ringing, and was injured, was guilty of contributory negligence as matter of law, although his attention was diverted by a collision, which had just occurred near by with another street car. The court said: "The undisputed facts that the plaintiff, in the middle of the day, stepped from the sidewalk and attempted to cross a public street upon which the trolley cars were running in plain sight, and, without looking where the cars were coming from, or the rate of speed at which they were traveling, or

without looking for the car that was coming down the street, or without paying any attention to the ringing of the gong, which was being rung all the time, heedlessly ran against the fender of the car and was thrown on the meshes of the car fender, shows beyond question that the plaintiff was not in the exercise of due care, that his want of due care was negligence that contributed to the injuries that he received."

Where a bright boy between five and six years old ran diagonally across a street, chased by other boys, without looking for cars until he reached a street car track, when, on the warning of a person who saw his danger from a rapidly approaching car, he paused and was struck and injured by the car, which was approaching in plain sight, it was held in *Kelley v. Boston & N. Street R. Co.* (1916) 223 Mass. 449, 111 N. E. 1045, that a verdict for the defendant was properly ordered, but it is not apparent to what extent the decision rests on contributory negligence, or to what extent on the absence of negligence on the part of the defendant.

See also *KYLE v. BOSTON ELEV. R. Co.* ante, 164, and *BOTHWELL v. BOSTON ELEV. R. Co.* ante, 167. R. E. H.

NORTH DAKOTA SUPREME COURT.

MARTIN DERRINGER, a Minor, by Guardian ad Litem, Appt.,

v.
HENRY TATLEY, Resp't.

(34 N. D. 43, 157 N. W. 811.)

Master and servant — negligence of minor.

1. Plaintiff, a fourteen-year-old bell boy, was injured because of protruding his head through an opening in the door of a passenger elevator. His duties which he was performing did not require him to so endanger himself, and could have been performed without any risk. He understood the opening and obvious danger that might be the consequence of his act. Assuming negligence in operating the elevator in the condition it was in, and conceding that the same was dangerous, it is, however, held:

Plaintiff is not exonerated from his con-

tributory negligence simply because he did not realize his risk assumed, or did not think of what he was doing and observe the hazardous position in which he was placing himself. His employer had the right to expect that he would avoid such open and obvious danger, admittedly known to plaintiff to be such.

For other cases, see Master and Servant, II. c. 1, in Dig. 1-52 N. 8.

Trial — capacity — question for court.

2. Under the proof as to plaintiff's mental capacity, contributory negligence was a question of law for the court, and precluded his recovery.

For other cases, see Trial, II. c. 8, d, in Dig. 1-52 N. 8.

(Bruce, J., dissents.)

(March 4, 1916.)

APPEAL by plaintiff from a judgment of the District Court for Burleigh County in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. F. H. Register, George M. Register, and S. E. Ellsworth, for appellant:

An inquiry into the known competency,

Headnotes by Goss, J.

Note. — As to contributory negligence of children on and about elevators, see annotation following this case, post, 195.

As to contributory negligence of children generally, see annotation following *Jacobs v. H. J. Koehler Sporting Goods Co.* ante, 10.

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skill, and experience of a fellow servant at the time of an injury is relevant and material.

Carlson v. Wilkeson Coal & Coke Co. 19 Wash. 473, 53 Pac. 725; *Wabash R. Co. v. McDaniels*, 107 U. S. 454, 27 L. ed. 605, 2 Sup. Ct. Rep. 932; *Southern P. Co. v. Huntsman*, 55 C. C. A. 366, 118 Fed. 412, 13 Am. Neg. Rep. 238; *Mares v. Northern P. R. Co.* 3 Dak. 336, 21 N. W. 5; *Lee v. Michigan C. R. Co.* 87 Mich. 574, 49 N. W. 909.

The defense that the plaintiff assumed the risk incident to the employment is an affirmative defense, and should be specially pleaded.

Oregon Short Line & U. N. R. Co. v. Tracy, 14 C. C. A. 199, 29 U. S. App. 529, 66 Fed. 931; *Walker v. McNeill*, 17 Wash. 582, 50 Pac. 518; *Faulkner v. Mammoth Min. Co.* 23 Utah, 437, 66 Pac. 799; *Boin v. Spreckles' Sugar Co.* 155 Cal. 612, 102 Pac. 937; *Mosher v. Sutton's New Theatre Co.* 48 Mont. 137, 137 Pac. 534; *Konig v. Nevada-California-Oregon R. Co.* 36 Nev. 181, 135 Pac. 141; *Sankey v. Chicago, R. I. & P. R. Co.* 118 Iowa, 39, 91 N. W. 820.

Assuming some evidence of contributory negligence existed, this case, owing to the immature age of the plaintiff, is peculiarly one which, on that point, should have been submitted to a jury.

Cleveland, C. C. & St. L. R. Co. v. Scott, 111 Ill. App. 234; 29 Cyc. 540; *Umsted v. Colgate Farmers' Elevator Co.* 18 N. D. 309, 122 N. W. 390; *Northern P. R. Co. v. Heaton*, 111 C. C. A. 548, 191 Fed. 24; *Shebeck v. National Cracker Co.* 120 Iowa, 414, 94 N. W. 930.

In the case of an employee of immature years, with little experience in the operation of dangerous machinery, the master is under a special duty to warn, instruct, and protect him from dangers of which he had no notice, or which he did not appreciate and understand.

Umsted v. Colgate Farmers' Elevator Co. 18 N. D. 309, 122 N. W. 390; 26 Cyc. 1221; *Thompson v. Johnston Bros. Co.* 86 Wis. 576, 57 N. W. 298; *Shebeck v. National Cracker Co.* 120 Iowa, 414, 94 N. W. 932; *Murray v. Chicago, R. I. & P. R. Co.* 152 Iowa, 732, 133 N. W. 123; *Barrow v. B. R. Lewis Lumber Co.* 14 Idaho, 698, 95 Pac. 682.

Messrs. Niles & Koffel and Miller, Zuger, & Tillotson, for respondent:

The complaint fails to state a cause of action.

14 Enc. Pl. & Pr. 340, and note 1; *Peake v. Buell*, 90 Wis. 508, 48 Am. St. Rep. 946, 63 N. W. 1053; *Mau v. Morse*, 3 Colo. App. 359, 33 Pac. 283; *Guichard v. New*, 9 App. Div. 485, 41 N. Y. Supp. 456; *Knapp* L.R.A.1917F.

v. Jones, 50 Neb. 490, 70 N. W. 19, 1 Am. Neg. Rep. 306.

Plaintiff was guilty of contributory negligence precluding him from a recovery.

Baltimore & O. R. Co. v. Depew, 40 Ohio St. 121; *Day v. Toledo, C. S. & D. R. Co.* 42 Mich. 523, 4 N. W. 203; *Mackey v. Newbury Furnace Co.* 119 Mich. 552, 78 N. W. 783; *King v. Ford River Lumber Co.* 93 Mich. 172, 53 N. W. 10; *Monforton v. Detroit Pressed Brick Co.* 113 Mich. 39, 71 N. W. 586; *Borek v. Michigan Bolt & Nut Works*, 111 Mich. 129, 69 N. W. 254.

The court's action in directing a verdict in favor of the defendant was proper.

Grand Forks v. Paulsness, 19 N. D. 293, 40 L.R.A.(N.S.) 1158, 123 N. W. 878; *Heckman v. Evenson*, 7 N. D. 173, 73 N. W. 427; *Morrison v. Lee*, 16 N. D. 377, 13 L.R.A.(N.S.) 650, 113 N. W. 1025; *Beleal v. Northern P. R. Co.* 15 N. D. 318, 108 N. W. 337, 11 Ann. Cas. 921, 20 Am. Neg. Rep. 453; *Umsted v. Colgate Farmers' Elevator Co.* 18 N. D. 309, 122 N. W. 390; *McGinnis v. Canada Southern Bridge Co.* 49 Mich. 466, 13 N. W. 819; *Braatz v. Fargo*, 19 N. D. 538, 27 L.R.A.(N.S.) 1169, 125 N. W. 1042; *Knapp v. Jones*, 50 Neb. 490, 70 N. W. 19, 1 Am. Neg. Rep. 306; *Ballou v. Collamore*, 160 Mass. 246, 35 N. E. 463; *Hoehmann v. Moss Engraving Co.* 4 Misc. 160, 23 N. Y. Supp. 787; *Bremer v. Pleiss*, 121 Wis. 61, 98 N. W. 945, 16 Am. Neg. Rep. 275; *Bolin v. Chicago, St. P. M. & O. R. Co.* 108 Wis. 333, 81 Am. St. Rep. 911, 84 N. W. 446, 9 Am. Neg. Rep. 200; *Arzt v. Litt*, 198 Pa. 519, 48 Atl. 297; *McDonald v. Dutton*, 198 Mass. 398, 84 N. E. 434; *Ford v. Tremont Lumber Co.* 123 La. 742, 22 L.R.A.(N.S.) 917, 131 Am. St. Rep. 370, 49 So. 492; *Pilucki v. Detroit Steel & Spring Works*, 117 Mich. 111, 75 N. W. 295; *Jayne v. Sebewaing Coal Co.* 108 Mich. 242, 65 N. W. 971; *Lendberg v. Brotherton Iron Min. Co.* 97 Mich. 443, 56 N. W. 846; *Sakol v. Rickel*, 113 Mich. 476, 71 N. W. 833; *Lamotte v. Boyce*, 105 Mich. 545, 63 N. W. 517; *Perlick v. Detroit Wooden Ware Co.* 119 Mich. 331, 78 N. W. 127; *Juchatz v. Michigan Alkali Co.* 120 Mich. 654, 79 N. W. 907; *Lindstrand v. Delta Lumber Co.* 65 Mich. 254, 32 N. W. 427; *Wilson v. Michigan C. R. Co.* 94 Mich. 20, 53 N. W. 797; *Johnson v. Hovey*, 98 Mich. 343, 57 N. W. 172; *Melzer v. Peninsular Car Co.* 76 Mich. 94, 42 N. W. 1078; *Mackin v. Alaska Refrigerator Co.* 100 Mich. 276, 58 N. W. 999; *Malsky v. Schumacher & Ettlinger*, 7 Misc. 8, 27 N. Y. Supp. 331; *O'Leary v. Brook Elevator Co.* 7 N. D. 557, 41 L.R.A. 677, 75 N. W. 919, 4 Am. Neg. Rep. 451; *Guggenheim v. Lake Shore & M. C. R. Co.* 66 Mich. 150, 33 N. W. 161; *Beghold v. Auto Body Co.* 149 Mich. 14, 14 L.R.A.(N.S.) 609, 112

N. W. 691; *Woods v. Kalamazoo Paper Box Co.* 167 Mich. 514, 133 N. W. 482; *Sterling v. Union Carbide Co.* 142 Mich. 284, 105 N. W. 755; *Woolf v. Nauman Co.* 128 Iowa, 261, 103 N. W. 785, 18 Am. Neg. Rep. 405; *Cress v. Philadelphia & R. R. Co.* 228 Pa. 482, 32 L.R.A.(N.S.) 409, 77 Atl. 810, 21 Ann. Cas. 142; *Christopherson v. Minneapolis, St. P. & S. Ste. M. R. Co.* 28 N. D. 128, L.R.A.1915A, 761, 147 N. W. 791; *Haugo v. Great Northern R. Co.* 27 N. D. 268, 145 N. W. 1053.

Goss, J., delivered the opinion of the court:

Action to recover damages alleged to have been received through the negligence of the defendant. The answer is a general denial, with a plea of contributory negligence. The defendant, owner of the Grand Pacific Hotel in Bismarck, in September, 1912, installed therein a passenger elevator. Its use was begun September 30th, and this accident occurred October 6th. On account of two glass panels, or guards, to be set in the two doors to the elevator shaft on each floor not arriving, the elevator was operated temporarily without them. During such interval the plaintiff was injured in its operation. The complaint sets forth these facts with particularity and that the elevator as so used "was highly dangerous and liable to cause serious injury to the body or limbs of any person coming in collision or close contact" with the steel elevator cage moving within the elevator shaft; and negligence is charged in permitting it to be operated. It is charged that plaintiff was an employee of said hotel, and while in the discharge of his duties "plaintiff, not knowing, and without warning that he was through said barrier (the hole in one of the doors), passed his head beyond said opening in the upper part of said sliding door and within said elevator. While he was so standing and in the discharge of his duty, speaking to Peter Boehm (another bellboy, employee), said operator, Stenberg (elevator boy), unskillfully, carelessly, negligently, and without any indication whatever to plaintiff of his intention put said elevator in motion downwards toward the basement of said building, and the arch upon the front of the hood or upper part of said passenger elevator, descending with great speed and without warning to plaintiff, caught his head between said arch and the bar across the bottom of the open space in said sliding door, and with great force and violence crushed, tore, and lacerated plaintiff's head and face," inflicting permanent injuries described. The complaint also alleges that the elevator boy at the time was under the age of sixteen years, and that the statute prohibiting the employ-

ment of minors under sixteen years of age was being violated by the defendant at the time, and a recovery is sought on said grounds, as well as upon common-law negligence.

At the close of the evidence the court was requested to take the case from the jury and direct a verdict of dismissal on the grounds of failure of proof and because contributory negligence was established. This the court refused to do, preferring to submit all issues to the jury, and thereafter, if necessary, pass upon the question under a motion for judgment notwithstanding the verdict, should one be made. However, the jury failed to agree, whereupon the court granted the motion for a directed verdict of dismissal. From the judgment thereon, plaintiff appeals.

The injury occurred on the ground floor of the hotel, at the entrance to the elevator. Plaintiff, a boy past fourteen years of age, was severely injured. He had been employed around the hotel off and on for a year or more, and for six or seven months next prior to the accident had worked continuously as bell boy, except that some four weeks next prior to September 30th he had not been at work or around the hotel, having been temporarily absent. He thoroughly understood the hotel and his duties. He knew that the glass guards were not in the doors opening into the elevator shaft. He knew the operation of the elevator and understood the movement of the cage within the elevator shaft. His duties were those of the ordinary elevator bell boy,—to answer calls, look after the convenience of guests, and work as otherwise directed. Three bell boys were employed, two at the time being on duty, this plaintiff and one Peter Boehm. Peter had just a moment before gotten into the elevator at the third floor and descended with the elevator boy to the ground floor en route to the basement, in the performance of his duties, to there turn out the lights. It was between 8 and 8:30 o'clock in the evening of October 6, 1912. The hotel was filled with guests. It was the duty of Peter and Martin to answer bells, and in so doing to go to rooms registered on the indicator. Just at this time two bells rang in different parts of the house. Martin noticed the numbers indicated, tripped the indicator, and turned to give one of the numbers to Peter to look after while he answered the other. At that moment the elevator descended, bearing Peter and the elevator boy, Henning Stenberg, and as it came to the floor Martin was either awaiting it, or at that instant approached it. It stopped, but with the doors opening into the elevator remaining closed. But, as the interior of the elevator cage was lighted, Martin knew it was down;

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and while it was thus remaining stationary, but with the doors into it closed, Martin stuck his head through one of the openings through the doors where the glass had not been installed. This aperture in the door began 42 inches from the floor, was 10 inches wide, and extended 36 inches upward, constituting an open panel 10x36 inches in size. The elevator cage that carried the passengers up and down had no door on it; the doors to the elevator shaft being the door to the elevator. When plaintiff protruded his head through the opening in the door the elevator cage, with the two boys, Peter and Henning, in it, was stationary. Martin says the reason he approached there was to tell Peter the number of the bell for one of the rooms, and that he told him to attend to that room, and that he went close to the elevator because there were too many people around and it was too noisy to tell him without so doing, although he says he could have given him instructions without putting his head through the opening.

Concerning this he was asked and gave the following answer:

Q. Now, was it necessary for you to insert your head in that closed door in order to get close enough to tell him that you had a call?

A. No; it wasn't necessary; I didn't realize any danger, though.

Peter refused to take the order to attend to the room mentioned, and ordered the elevator boy to go on down to the basement. Concerning this plaintiff testifies:

Q. Now, I would like to know and I would like to have you tell the jury what particular thing it was that made you lean over and stick your head in between those bars?

A. To get closer to Pete.

Q. Well, Pete was just inside the bars, wasn't he?

A. He was in there about 3 feet.

Q. And the elevator was standing still?

A. Yes, sir.

Q. And, so far as you knew, there was no intention to move it, was there?

A. No, sir. Not then. But Peter said to Henning, "Let her down." That was right there at that time.

Q. That was after you had your head in there?

A. Yes, sir.

Immediately after this the cage descended, and the top of it caught plaintiff's head at the back, beyond the crown, and jammed his head and face down against the bar across the door, 42 inches above the floor. The cage was brought to a standstill, and plaintiff released, severely injured. In explanation of why he had his head inside of

the elevator shaft plaintiff has testified that he did not know there was any danger there, and "did not know that his head was within that opening in the door as he stood there," and did not sense that such was the fact until the descending elevator struck his head. When asked, "Why didn't you take your head out?" he answers, "I didn't know I had my head in." The undisputed evidence shows that the top of the hood operates within, at the nearest, 3 inches to the inside of the door, so that his head could have been 3 inches within the elevator shaft and still not been touched by the descending elevator cage. As it was, his head must have protruded at least 10 or 12 inches inside the opening in the door, and that far from the perpendicular. Plaintiff was 5 feet 3 inches, or 63 inches, in height, so that exactly two-thirds of his height was below the bottom of the opening, which was 42 inches above the floor upon which he was standing. The 21 inches of his head and shoulders above the bottom of the opening in the door and 42 inches from the floor then must have been bent or thrust at an angle of approximately 90 degrees into the elevator cage. Otherwise plaintiff would not have been caught at the place on the back of his head that was hit by the descending elevator. He could not have known but that his head was within the elevator shaft and in danger, had he been thinking, or had he sensed the situation. In all probability he could not have gotten his head through this 10-inch opening and into the position it must have been in without some effort. The foregoing is based upon the plaintiff's testimony, and views the facts in the most favorable light to his cause. The following is the testimony of Stenberg, the elevator boy: "Well, the elevator bell rang on the third floor, and I went up there, and it was Peter Boehm, and I took him down, and was going down, and I see Martin Derringer leaning up against the elevator,—against the wall there,—and I stopped and he started to talk to Peter about some bell. I think it was 118, and they were talking there, and pretty soon another bell rang, and Martin turned his head away, and I went down to the basement,—started down. I heard him holler, and reversed the elevator, and when I got up he was lying there on the floor."

On cross-examination he states that Martin was standing in front of the opening when the elevator came down, and started talking with Peter about the bell at room 118, when the bell in another room rang, and Peter told him (witness) to go on down, which he did.

Q. And you thought Martin had turned away?

A. Yes, sir.

Q. You didn't see him at the time you started down, that he had his head through the opening?

A. He didn't have his head in there.

Q. He didn't?

A. No.

Q. Well you know a little later he got his head caught between the hood of the elevator and the bar on that door?

Q. And you say he didn't have his head in there when you started down?

A. No, sir; didn't have it in there when I started down.

This testimony is entirely consistent with that of plaintiff as to the facts. Plaintiff understood the mechanism of the elevator and has described how it was operated; he had been instructed in its operation, and knew how to use it and had used it. It is also admitted that at the time in question it was not a part of his duty to use the elevator to answer calls to rooms, but, instead, that he had been positively forbidden to use the elevator for such purposes, and ordered to use the stairs instead, as all the bell boys had been instructed to do. He has also testified that it was not part of his duties to give orders to Peter, and that the hotel clerks gave orders to the bell boys. But, as perhaps the testimony is sufficient to establish that at the time in question he was performing a duty in directing Peter to answer the bell for room 118, it will be assumed that he was acting in the line of his duties in such respect.

The question first arising is whether plaintiff was guilty of contributory negligence in inserting his head through the opening in the door and within the elevator shaft, assuming that he did not realize either the danger or that he had protruded his head within the elevator cage. Resolving all reasonable inferences in his favor, the facts of the situation, speaking for themselves, conclusively establish that, without thinking what he was doing, or sensing the danger that was known and understood by him, or what should have been plainly apparent, he nevertheless voluntarily, though thoughtlessly, placed himself in the dangerous position described, and in which but a moment later he was injured. Must plaintiff be held guilty of contributory negligence precluding his recovery? Every text-writer and every adjudicated case anywhere nearly parallel on facts and on principle answer in the affirmative, and this, too, in spite of plaintiff's youthfulness. The opinion from *Cronin v. Columbian Mfg. Co.* 75 N. H. 319, 29 L.R.A.(N.S.) 111, 74 Atl. 180, is closely L.R.A.1917F.

parallel in fact. It reads: "The plaintiff admitted in his testimony that he knew at the time of his injury that, if he allowed his foot to extend beyond the guard, it would hit the floor above when the elevator went up through, but he testified that he was not thinking of the situation at that time. He was a boy of average intelligence, and about fourteen years of age, who, it appears, understood the situation and appreciated the danger. It was unnecessary, therefore, for the defendant to instruct him that it would be dangerous for him to allow any part of his person to extend beyond the guard when the elevator was in motion. *Hicks v. Claremont Paper Co.* 74 N. H. 154, 157, 65 Atl. 1075. Knowing the situation and appreciating the danger, he must be held to have assumed the risk he incurred. His only excuse is that he 'did not think.' But it was his duty to think, and, in view of his knowledge, to use such care, including the mental operation of some thought, as a boy of his intelligence would exercise under the circumstances. It was not the defendant's duty to tell him to think. *Gorman v. Odell Mfg. Co.* 75 N. H. 123, 71 Atl. 215. He was confessedly 'thoughtless and careless when his duty to the' defendant 'as well as to himself required him to be thoughtful and careful.' *Gahagan v. Boston & M. R. Co.* 70 N. H. 441, 446, 55 L.R.A. 426, 50 Atl. 149. 'The obligation to exercise care is not satisfied by unexplained absence of action and thought in a situation of known danger.' *O'Hare v. Cochecho Mfg. Co.* 71 N. H. 104, 107, 93 Am. St. Rep. 499, 51 Atl. 258. The jury were not warranted in finding that he performed the duty of care imposed upon him; for it does not appear that he used any care with reference to his position in the elevator, which he knew, if he had thought about it, was attended with the special danger which caused his injury."

This plaintiff did not, as he says, "realize the danger;" or, in other words, "did not think" of what he was doing when he should have been intent upon it, accepting his own statements at face, and assuming that he was not partially intoxicated, as to which fact the evidence at least preponderates against him and that he—was intoxicated. Thompson in his Commentaries on the Law of Negligence has a chapter devoted to "Injuries from Elevators in Buildings," and §§ 1086 and 1087 are particularly applicable: "It is contributory negligence as a matter of law to put one's head into an elevator well for the purpose of shouting for the car to come down or of seeing whether or not it is coming or who is in it. . . . For a boy eight years old who has been warned and who knows better, to put his head over the gate of an elevator"—citing *Ramsdell*

v. Jordan, 168 Mass. 505, 47 N. E. 244, 3 Am. Neg. Rep. 47; *Mau v. Morse*, 3 Colo. App. 359, 33 Pac. 283; *Murphy v. Webster*, 151 Mass. 121, 23 N. E. 842; *Guichard v. New*, 9 App. Div. 485, 41 N. Y. Supp. 456; *Peake v. Buell*, 90 Wis. 508, 48 Am. St. Rep. 946, 63 N. W. 1053; *Knapp v. Jones*, 50 Neb. 490, 70 N. W. 19, 1 Am. Neg. Rep. 306.

Section 1086, vol. 1, *Thompson on Negligence*, is now quoted from:

"Where an errand boy twelve years of age, of more than ordinary intelligence, employed on the fourth floor of a factory building, on being sent down on an errand not relating to freight, leaned upon a chain hanging across the entrance to the shaft of the freight elevator to look for the elevator, upon which he had no right to ride, and was injured by the giving away of the chain," recovery was barred by his contributory negligence.

The same "where one who had ridden upon an elevator put his head into the shaft through an opening in the upper part of the door and was killed by the elevator in its descent." *Mau v. Morse*, 3 Colo. App. 359, 33 Pac. 283.

Its facts are practically identical with the case at bar. Plaintiff contends that he should recover because the openings that were left in the doors rendered the elevator inherently dangerous. In *Mau v. Morse* "the elevator did not have a screen above the window," so its entrance was less protected than in this case. Concerning this same contention the Colorado court says: "The negligence complained of is the failure to properly protect the entrance to the elevator, which, when the elevator was not present, was also an entrance to the shaft."

Deceased was killed while looking over the screen for the car, with his head in the elevator shaft. "It is true that, if the opening had been so protected the deceased would probably have been unable to thrust his head into the shaft; but we are not sure that he could not have found some other means of equally unnecessary danger; and as to him, with the knowledge of the situation which he possessed, or ought to have possessed, the failure of the defendants in that regard can hardly be said to be negligence. It is possible that, while the opening was in the exposed condition described in the complaint, a case might have arisen in which the defendants would be held liable for a resulting injury, but such a case would differ widely in all its distinctive features from the one before us. If a man is in his sound senses, with his eyes open, voluntarily and deliberately, even if carelessly, thrusts himself into the jaws of death, we know of no theory upon which anyone can be held L.R.A.1917F.

responsible for the consequences of his act but himself."

Labatt on Master and Servant, vol. 3, announces the same rule at § 1251: "The doctrine stated at the beginning of the last section has also been applied, as shown in the following paragraphs, to actions for injuries received under circumstances mentioned: . . . (2) Taking a position in which there is danger from the movement of an elevator cage; and . . . (4) taking a position rendered dangerous by moving machinery; . . . (6) getting onto a stationary machine which may be put in motion at any moment."

The doctrine referred to in § 1250 is: "The general effect of the authorities upon this subject is that, where the evidence shows that the injury complained of was due to the fact that at the time of the accident the servant was occupying a position which was obviously more dangerous than another which was available, a prima facie presumption of contributory negligence arises which will warrant a court in declaring as a matter of law that the action cannot be maintained."

Hence, if plaintiff be considered as a servant discharging his duties as bell boy in giving orders to Peter, although he admits and the court would have been warranted in finding that he was without authority to give orders which would come from the hotel clerk instead, yet, assuming the contrary, the plaintiff's own testimony, showing that he unnecessarily placed himself in a position of great danger in the performance of said duty, convicts him of contributory negligence for not giving orders from outside the elevator and without protruding his head into the elevator shaft.

In this connection it may be well to remark that there is a clear line of demarcation in the authorities between issues of negligence and contributory negligence, considered as to those entering into or alighting from passenger elevators and as to accidents occurring while the passenger is being carried therein, from cases like this at bar, where a person, whether a servant or would-be passenger, either understandingly or heedlessly thrusts head or limbs through an opening into an elevator shaft. A search has disclosed no case of the latter kind where contributory negligence was not imputed and precluded recovery as a matter of law.

And appellant's brief cites no authority to the contrary. However, he contends that on account of plaintiff's minority, youth, and immaturity he should be measured in his conduct by what is usual to minors of his age and mental capacity; and asserts that, when such a standard is applied, an

issue of fact upon contributory negligence necessarily arises, to be decided as a question of fact by a jury, instead of resolving into a proposition of law. It is true that, in considering cases where an infant is to be charged with contributory negligence, the age and mental capacity are to be considered with all other attending circumstances. Where, in the light of human experience, the infant is so young as not to be presumed to sense or foresee danger liable to follow his acts, negligence will not be imputed, because he is non sui juris. And therefore there must be a zone between ignorance of and knowledge of impending danger, inability and ability to foresee and understand consequences. These considerations may be of fact for the jury to determine according to the state of the proof. Where the infant is of such tender years as usually to possess no such knowledge, ignorance is presumed, and the question is one of fact for the jury. And the same is true as to the other extreme, where the minor has so far reached maturity in understanding and comprehension as naturally to fully appreciate the danger that must follow his negligent act; the court must likewise act upon the proof of such ability, and direct the jury accordingly as a matter of law, instead of submitting to it an assumed issue of fact where there is none in the proof. Any other rule would result in making the employer of an intelligent minor of plaintiff's age and mental ability, beyond all doubt fully appreciative of any usual risks voluntarily and understandingly undergone by him, the insurer in damages of injuries resulting from the minor's recklessness, at the caprice of a jury viewing the facts sympathetically and with knowledge that its decision establishes liability. Concerning this the very recent work of Labatt on Master & Servant, vol. 3, § 1264, declares: "If he [the minor] has not the ability to foresee and avoid the danger to which he may be exposed, negligence will not be imputed to him if he unwittingly exposes himself to that danger. For the exercise of such measure of capacity and discretion as he possesses he is responsible. In a recent decision of one of the Federal courts of appeals it was laid down that, after passing the age of fourteen years, a child is presumed to be capable of avoiding danger by the exercise of due care. And this is probably the rule in all jurisdictions."

An examination of the evidence discloses that plaintiff became fourteen years of age in July, preceding his injury on October 6, 1912; that he had worked as a bell boy in this hotel off and on for a year or more. He was of at least medium size for his age, and was bright and intelligent, and an L.R.A.1917F.

eighth-grade pupil when at school. He has given his testimony understandingly, and has evinced the knowledge of an adult at all times of the situation concerning which he has testified. The elevator had been in operation one week, during which time he had learned to run it and understand its operation and mechanism, its horse power and velocity. He knew that it was unfinished. During this time he had once had an accident with it, running it so far toward the roof as to cause it to automatically stall, as a result of which there is evidence tending to establish, although the fact is denied by him, that he was ordered to keep away from it and leave it entirely alone, except when he was taking up passengers or baggage, and at which time necessarily the elevator boy would operate the elevator. The rule of *res ipsa loquitur* applies and prevails. Shearm. & Redf. Neg. § 710a. Plaintiff knew and must have known, had he stopped to think of what he was doing, that by doing what he did he was placing himself in great danger. The only question in the lawsuit is whether he is excused, as a matter of law, from imputed contributory negligence in protruding his head within the elevator cage simply because he "did not realize," i. e., "did not think" of, what he was doing, when, had he done so, he could not have avoided discovering his risk. Had he done so knowingly, it would have been utter recklessness on his part. He had knowledge enough to foresee the danger and understand the risk. Under every authority he is not excused because of his minority, solely by reason of his failure to think when he should have done so. Possessing the knowledge to appreciate the danger, understanding had he thought of the peril, his minority is not an excuse any more than maturity would have been. His employer had the right in law to assume that he would use that knowledge of understood and apparent peril to protect himself, instead of any assumption that he might take such hazards. The question here is not one of mental capacity, but of heedlessness. And the court was warranted in instructing a verdict upon the basis of his contributory negligence, notwithstanding his minority. *Cronin v. Columbian Mfg. Co.* 29 L.R.A. (N.S.) 111, and cases cited in the note thereto (75 N. H. 319, 74 Atl. 180); 29 Cyc. 541: "Notwithstanding the immaturity of a minor, if it appears that he knew of the danger, he will be held guilty of contributory negligence,"—and cases cited sustaining the text; *Binder v. Chicago City R. Co.* 175 Ill. App. 503, where a recovery by a minor sixteen years of age at the time of the accident was set aside, and he was held guilty of contributory negli-

gence as a matter of law in spite of his minority; *Wilson v. Chicago City R. Co.* 133 Ill. App. 433, where a child nine years old was held guilty of contributory negligence as a matter of law; *Koehler v. Chicago City R. Co.* 166 Ill. App. 571, where a boy ten years old was held guilty of contributory negligence as a matter of law and a verdict set aside; *Central of Georgia R. Co. v. Chambers*, 183 Ala. 155, 62 So. 724; *Jackson v. Butler*, 249 Mo. 342, 155 S. W. 1071.

But appellant cites an excerpt from *Umsted v. Colgate Farmers' Elevator Co.* 18 N. D. 309, 122 N. W. 390, wherein 29 Cyc. 540, is cited to the effect that "in every case the question of the intelligence of the child and the measure of his capacity should be left to the determination of the jury."

The portion quoted is but part of a lengthy discussion of contributory negligence as applied to infants, and immediately following this excerpt *Upthegrove v. Jones & A. Coal Co.* 118 Wis. 673, 96 N. W. 385, 14 Am. Neg. Rep. 670, is also quoted as follows: "The true test as to whether a minor has assumed the ordinary risks of his employment or is guilty of contributory negligence is not whether he, in fact, knew and comprehended the danger, but whether, under the circumstances, he ought to have known and comprehended such danger. . . . Where it appears from the undisputed evidence that the defect or danger is open and obvious, and such as, under the circumstances, ought to have been known and comprehended by the plaintiff, then he will be held to have assumed the risk as a matter of law."

This is the doctrine applied in this case at bar. We quote again from *Umsted v. Colgate Farmers' Elevator Co.*: "A servant, although under age, assumes all patent and obvious risk of his employment if he has sufficient intelligence to understand and appreciate it (26 Cyc. 1220, E), except where the child is so young as to be incapable of exercising judgment or discretion. The rule of contributory negligence applies where the person is an infant the same as where he is an adult." 29 Cyc. 535.

And on the second appeal after retrial in *Umsted v. Colgate Farmers' Elevator Co.* it was held, quoting from the syllabus of 22 N. D. 242, 133 N. W. 61: "That it conclusively appears that plaintiff was not only guilty of contributory negligence, but that he assumed the risks incident to such experimental tests. Hence his recovery cannot be sustained."

Though plaintiff was a minor, it was held that he was guilty of contributory negligence as a matter of law, although the jury had found the contrary by their verdict; L.R.A.1917F.

and it may be noted that the opinion in both cases is by the same justice. See also *Krisch v. Richter*, — Tex. Civ. App. —, 130 S. W. 186, where a boy sixteen years old was held bound to know and appreciate open and obvious danger. The same was held in *Herd v. Koenig*, 137 Mo. App. 589, 119 S. W. 56, in which the syllabus reads: "Plaintiff, a bright, intelligent boy, ten and one half years old, while leaning over a fence maintained as a barrier to a quarry, fell into the quarry, because of the breaking of the fence. He had been warned repeatedly of the danger of playing near the quarry; had been driven away from it by a person living near; had been whipped several times by his father for refusing to stay away. He admitted that he was entirely familiar with the danger of the place and knew of the defective condition of the fence, and that the boards were rotten and the nails insufficient to hold the boards. Held, that he was negligent."

A directed verdict of dismissal was sustained. In this case are cited the following cases, in all of which the plaintiff, although younger than this plaintiff, was held guilty of contributory negligence in every instance as a matter of law, precluding recovery, viz.: *Payne v. Chicago & A. R. Co.* 136 Mo. 562, 38 S. W. 308, where the plaintiff was eleven years of age; *Graney v. St. Louis, I. M. & S. R. Co.* 157 Mo. 666, 50 L.R.A. 153, 57 S. W. 276, where plaintiff was eleven years and nine months of age; *Walker v. Wabash R. Co.* 193 Mo. 453, 92 S. W. 83, where the plaintiff was fourteen years of age; *McGee v. Wabash R. Co.* 214 Mo. 530, 114 S. W. 33, where plaintiff was a boy thirteen years of age; *Mann v. Missouri, K. & T. R. Co.* 123 Mo. App. 486, 100 S. W. 566, where plaintiff was a boy twelve years of age; *Twist v. Winona & St. P. R. Co.* 39 Minn. 164, 12 Am. St. Rep. 626, 39 N. W. 402, where the plaintiff was a boy ten and one-half years of age; *Merryman v. Chicago, R. I. & P. R. Co.* 85 Iowa, 634, 52 N. W. 645, where the plaintiff was a boy thirteen years of age; *Carson v. Chicago, R. I. & P. R. Co.* 96 Iowa, 583, 65 N. W. 831, where the plaintiff was a boy twelve years of age; *Knox v. Hall Steam Power Co.* 69 Hun, 231, 23 N. Y. Supp. 490, where the plaintiff was a boy twelve years of age; and *Spillane v. Missouri P. R. Co.* 135 Mo. 414, 58 Am. St. Rep. 580, 37 S. W. 198, where a boy nine years of age was held guilty of contributory negligence as a matter of law. This last case was distinguished in *Herd v. Koenig* on the facts from *Holmes v. Missouri P. R. Co.* 190 Mo. 98, 88 S. W. 623, where it was held as to an eight-year-old child under the proof of noncapacity that contributory negligence was a question for the jury. But

in *Ridenhour v. Kansas City Cable R. Co.* 102 Mo. 270, 13 S. W. 889, 14 S. W. 760, 4 Am. Neg. Cas. 634, it is held: "That it cannot be adjudged as a matter of law that a child of nine years of age is incapable of negligence."

See 2 L.R.A.(N.S.) at page 759; 4 R. C. L. 559; 9 R. C. L. 1236 and 1258; *Thomp. Neg.* §§ 280-318, covering "Injuries to Children and Others Non Sui Juris" on negligence and contributory negligence, and particularly §§ 316-318.

This plaintiff acted recklessly and heedlessly, and should be bound by the consequences brought upon him by his own carelessness. He was guilty of contributory negligence as a matter of law. This holding decides the case adversely to appellant and renders unnecessary an examination of any other assignments presented in his brief.

Appellant contends that the fact that the jury disagreed upon supposed questions of fact of negligence and contributory negligence submitted to it should be considered and taken as strong evidence that, because of plaintiff's minority, he was not guilty of contributory negligence. The answer is that in many of the cases cited verdicts were returned finding plaintiff not to be guilty of contributory negligence, but which were set aside, and the contrary found as a matter of law. Plaintiff's argument, carried to its logical conclusion, would prevent any determination as a matter of law that a plaintiff

had been guilty of contributory negligence barring his recovery where the court had erroneously submitted such questions to a jury, and it had happened to pass erroneously thereon, no matter how culpable and gross the plaintiff's negligence. In reading the record many matters are disclosed upon which a jury might disagree and from conclusions upon a portion of the proof erroneously applied or omitted to be applied at all to the evidence surrounding contributory negligence a disagreement might result on such supposed issue of fact. Plaintiff's intoxication or nonintoxication is an illustration. One can scarcely read the record without concluding that the preponderance of the evidence was to the effect that plaintiff was considerably intoxicated at the time of this accident, which alone would establish the reason why he did not think of what he was doing when he got his head in the path of the descending elevator. However, nonintoxication of plaintiff has been assumed as the fact, and upon that assumption the case is determined adversely to appellant.

The judgment of dismissal is affirmed, with costs.

Bruce, J., dissents.

Petition for rehearing denied April 27, 1916.

Annotation—Contributory negligence of children on and about elevators.

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I. Scope.

Questions generally as to the standard of care required of children, the age at which they may be chargeable with contributory negligence, and presumptions as to capacity, are discussed in the note to *Jacobs v. H. J. Koehler Sporting Goods Co.* ante, 10, even when these questions arose in actions for injury to children on elevators. (See particularly cases cited in note 38 of that note, as to the standard of care required of a child in actions for injuries on and about elevators.) It is the purpose of the present note to show the practical results reached in the application of the general rules L.R.A.1917F.

considered in the above note, in actions for injuries to or death of children on and about elevators.

Generally as to liability for injury to elevator passenger, see notes to *Edwards v. Manufacturers' Bldg. Co.* 2 L.R.A.(N.S.) 744, and *Tippecanoe Loan & T. Co. v. Jester*, L.R.A.1915E, 722.

And as to liability of the owner of an elevator for injury to trespassers or licensees, see notes to *Davis v. Ohio Valley Bkg. & T. Co.* 15 L.R.A.(N.S.) 402, and *Sweeden v. Atkinson Improv. Co.* 27 L.R.A.(N.S.) 124.

As illustrative of the class of cases treated in the note above referred to,

appended to *Jacobs v. H. J. Koehler Sporting Goods Co.* ante, 10, which are excluded from the present note, because the questions involved were not distinctive of actions for injuries to children on or about elevators, attention is called to the case of *Scott v. McMenamin* (1893) 51 Ill. App. 121, where, in an action for injury to a sixteen-year-old boy in the defendant's employ, who, while standing in a shaft, cleaning an elevator, was struck by the descent of the weights on another elevator, it was held erroneous to instruct the jury that the law does not require that a person of the age of the plaintiff shall exercise the same degree of care and caution as a person of maturer years, but only such care and caution as a person of his age, intelligence, and discretion would naturally and ordinarily use under like circumstances. The court stated that the inquiry was whether the minor exercised such care as, under the circumstances, might be expected from one of his age and intelligence, and that the instruction that the law did not require that a person of the age of the plaintiff should exercise the same degree of care and caution as a person of maturer years, even in connection with what followed, was, to say the least, misleading. See II. d, of the note above cited, for other cases of a similar nature.

II. In general.

See note to *Jacobs v. H. J. Koehler Sporting Goods Co.* ante, 10, for discussion of questions generally as to standard of care for measuring conduct of a child, presumptions of capacity, and age at which it may be chargeable with negligence.

In *Kaufhold v. Arnold* (1894) 163 Pa. 269, 29 Atl. 883, the court was apparently of the opinion that a boy eleven years old, who was injured on an elevator while in the defendant's employ, was not within the rule of contributory negligence, stating that if he had been an adult he would have been debarred of recovery, but, being less than fourteen years of age, he was not chargeable with contributory negligence. In this state there is a *prima facie* presumption that a child under fourteen years of age is incapable of contributory negligence; but, as will be observed from the note to *Jacobs v. H. J. Koehler Sporting Goods Co.* ante, 10, this presumption may be overcome by proof of unusual capacity or experience. The *Kaufhold* Case does not appear to be in accord with the weight of authority. Most

courts would, it seems, have held the infant chargeable with contributory negligence as matter of law under the facts of this case, it appearing that he was standing on doors in a factory floor through which an elevator was likely to ascend at any moment, that he was familiar with the method of operating the elevator, and had been instructed in that regard, and was injured when the ascending elevator opened the automatic doors on which he was standing.

It should be observed that recovery for an injury sustained by an infant on an elevator may be precluded on the ground that the infant was a trespasser. It is not the purpose of the present note to treat this question, but attention is called to the case of *Springer v. Byram* (1894) 137 Ind. 15, 23 L.E.A. 244, 45 Am. St. Rep. 159, 36 N. E. 361, among possibly other cases of the kind, in which it was held that a newsboy who attempts to ride in a passenger elevator after he has notice of the rule that newsboys are not allowed to ride, although they are permitted to enter the building to ply their vocation, is a trespasser as to any use of the elevator, so as to defeat his right to recover for injuries received in such an attempt.

The question of contributory negligence was held to be for the jury, and a judgment for the plaintiff affirmed, in an action for the death of a sixteen-year-old boy, who, for about a week, had been engaged in operating a freight elevator in the defendant's factory, where there was evidence that he accidentally seized the cable by which the elevator was raised and lowered, instead of the "check ropes" by which it was managed, the latter being from 6 to 18 inches from the cable, and that his hand was drawn into an unprotected drum, near which the elevator passed and around which the cable was coiled. *Thompson v. Johnston Bros. Co.* (1893) 86 Wis. 576, 57 N. W. 298.

And the same conclusion was reached where a seventeen-year-old boy, while in the defendant's employ, engaged in using a freight elevator, after entering the elevator, pulled in the usual way upon the cable provided for starting it, and, no response following his act, applied greater force on the cable, whereupon it suddenly loosened, and the elevator ascended, causing him to fall and his leg to be caught and injured between the elevator and a floor. *Zongker v. People's Union Mercantile Co.* (1905) 110 Mo. App. 382, 86 S. W. 486. The court said: "The elevator had been out of re-

pair in the manner described for some time. It was a common thing for the cable to catch, and those operating it had been accustomed to pull vigorously when they found it fast. Plaintiff, a mere youth, followed the example of others. No imminent danger was threatened and there is no evidence in the record before us which points to any want of due care in plaintiff. He fell because of the unexpected suddenness and violence of the loosening of the cable, and this was the direct result of the defective condition of the machinery."

Also in *Krey v. Schlussner* (1891) 16 N. Y. Supp. 695, it was held that contributory negligence was not shown as matter of law, where a fifteen-year-old boy, in delivering goods by means of a dumb-waiter, stood under the elevator, holding the hoisting rope while the goods were being removed, and, the rope breaking, was killed by the fall of the elevator.

III. Projecting part of body beyond car in motion.

The decisions in this class of cases are not altogether in accord. In the majority of the cases the question of contributory negligence has been held to be for the jury. It was so held—

—where a child less than seven years old sat on the floor of an elevator so close to the door that, in turning around, at the call of one of the boys operating the elevator, his foot was caught and injured, between the elevator and a floor of the building, as the elevator ascended, *Kentucky Hotel Co. v. Camp* (1895) 97 Ky. 424, 30 S. W. 1010, affirming a judgment for the plaintiff;

—where a thirteen-year-old delivery boy, who had been for several months in the defendant's employ, while riding on a freight elevator which was unprotected, permitted his foot to extend beyond the platform while the elevator was in motion, with the result that his foot was caught and crushed by a sill projecting more than 8 inches into the shaft from a floor of the building, *Strawbridge v. Bradford* (1889) 128 Pa. 200, 15 Am. St. Rep. 670, 18 Atl. 346;

—where a sixteen-year-old boy, on the day of entering the defendant's employ for the purpose of running an elevator in a factory, was injured by his foot's slipping from the platform of the elevator, which was unprotected, and being caught between the car and a floor as the car ascended. *Otis Elevator Co. v. Mann* (1911) 112 C. C. A. 306, 191 Fed. 716. It was held also not erroneous to L.R.A.1917F.

instruct the jury that the plaintiff was required to exercise a degree of care appropriate to his years, and to refuse to charge that he was held to the same degree of care as a person of maturer years.

And whether a boy nearly fifteen years old, employed in the defendant's factory, who was injured on an unprotected elevator by his foot being caught and crushed against a projecting sill on a floor as the elevator ascended, exercised that degree of care which boys of the same age, capacity, and intelligence ordinarily exercise under the same circumstances, was held a question for the jury in *Obermeyer v. F. H. Logeman Chair Mfg. Co.* (1906) 120 Mo. App. 59, 96 S. W. 673. The court said: "Does respondent's evidence conclusively convict him of contributory negligence? We do not think so. He was standing near the edge of the elevator, but not in a position to be caught between it and the strip on the floor beam. He was a boy who was not to be expected to be on his guard at all times to avoid the danger, was leaning on the shoulder of another boy, who, he says, stepped back on his foot, and to relieve his foot of the pressure, respondent stepped back and his heel was caught in the manner he described. A man, in respondent's situation, would perhaps have noticed that the elevator was near a floor, and have remembered the danger of having his foot caught should he throw it back, but whether a fourteen-year-old boy should so closely observe and exercise such a degree of prudence, we think was a question for the jury." It should be observed that in this case the boy testified that he had been working on the elevator for about an hour a day for twelve days prior to the injury, that he knew of the projecting sills, that it was not so dark as to prevent him from seeing his surroundings, but that he had not been warned as respects this danger.

So, where a fourteen-year-old boy, while a passenger on an elevator, permitted his foot to extend over the floor of the elevator so that, as the elevator ascended, it struck against the floor of the building and was injured, the court, in *Citizens' Bank v. Fairweather* (1917) — Ark. —, 191 S. W. 911, held that the question of contributory negligence was for the jury, in view of the immature age of the plaintiff, although stating that the situation was such that a person of mature years would be deemed to have assumed the risk. It was said: The "plaintiff had equal opportunity with the

operator of observing the danger, and if he had been on an equality with the operator in point of intelligence, it should be said that that which constituted negligence on the part of one was necessarily negligence on the part of the other; but they were not equal in intelligence; at least, the court could have so found; and we cannot say as a matter of law that the plaintiff was guilty of negligence, or that he assumed the risk. He states in his testimony that there was enough light for him to see, and that if he had looked he could have seen that his foot would strike the beams of the floors; but we think it was a question for the jury, under all the circumstances, to determine whether the boy was of sufficient discretion and intelligence to appreciate the danger so as to be held to have assumed the risk."

The case of *DERRINGER v. TATLEY*, ante, 187, was distinguished in *Citizens' Bank v. Fairweather (Ark.)* supra, it being said that in the former case the court held that a boy fourteen years of age, who was injured by thrusting his head through an opening in a passenger elevator, could not recover, on account of contributory negligence, and that "the doctrine of that case may be sound without necessarily controlling the one now before us, for the character of the alleged negligent act was totally different. It might well be said that for a passenger in an elevator to thrust his head through an opening was so obviously dangerous that a child of immature age and discretion would be bound to know that it was dangerous, and to know and appreciate the danger; but it would be different in testing his conduct with reference to a less glaring danger, such as allowing his toes to extend over the edge of the elevator floor. The conclusion is reached that the court properly left it to the jury to determine whether or not the plaintiff was guilty of contributory negligence, or whether he assumed the risk of danger."

In an action by a fourteen-year-old boy against his employer for injury on an elevator, by his foot being caught between the car and the shaft, it was held in *Siegel, C. & Co. v. Treka* (1905) 218 Ill. 559, 2 L.R.A.(N.S.) 647, 109 Am. St. Rep. 302, 75 N. E. 1053, 19 Am. Neg. Rep. 166, that whether the boy was guilty of contributory negligence and whether he assumed the risk of using an elevator, the doors closing the opening into which were set on the side of the wall, away from the car, so as to leave recesses into which portions of a passen-

ger's body might project and be caught as the car moved, was, under all the circumstances, a question for the jury.

And, in affirming a judgment for the plaintiff, in an action for an injury to a five-year-old child, who, although forbidden to do so by her parents, entered a car of an automatic, push-button, electric passenger elevator in an apartment house, and, while running the elevator, was injured by her leg being caught between the floor of the car and the second floor of the building, as the car ascended, the court in *Shellabarger v. Fisher* (1906) 5 L.R.A.(N.S.) 250, 75 C. C. A. 9, 143 Fed. 937, said that the child was not guilty of contributory negligence, because she did not possess the maturity or capacity to know the danger or to appreciate the risk to which she was exposed, and therefore was not chargeable with any legal duty to avoid it.

See also *Mitchell v. Keene and National L. Ins. Co. v. McKenna*, under VI. infra.

On the other hand, in a few cases of this kind it has been held that contributory negligence was shown as matter of law.

Thus, where a fourteen-year-old boy was injured by being caught between an elevator on which his duties required him to ride and a passing floor, and his only explanation of the injury was that he did not think, it was held, in *Cronin v. Columbian Mfg. Co.* (1909) 75 N. H. 319, 29 L.R.A.(N.S.) 111, 74 Atl. 180, that he could not hold his master liable for the injury.

And it was held in *Ludwig v. Pillsbury* (1886) 35 Minn. 256, 28 N. W. 505, that contributory negligence was shown as matter of law in an action for injury to a thirteen-year-old boy, sustained while riding on an elevator in the defendant's mill in which he was employed, where there was evidence that he was an unusually bright boy, had been at work in the mill for a month, and during that time had ridden daily on the elevator, and that, although there was nothing to distract his attention, and no necessity or controlling cause for his conduct, he extended his head 8 or 10 inches beyond the elevator when it was in motion, and was injured by contact with the elevator shaft.

Also in *Hoehmann v. Moss Engraving Co.* (1893) 4 Misc. 160, 23 N. Y. Supp. 787, where a fourteen-year-old boy in the defendant's employ, while riding on a freight elevator, was injured by the striking of his heel, which projected over the platform of the car, against one of

the ties in the shaft, as the elevator ascended, it was held that the danger was so obvious that even a boy of this age should have observed it, and that the complaint should have been dismissed on the ground of contributory negligence as well as on the ground of insufficient evidence of negligence on the part of the defendant.

IV. Falling down shaft.

a. In general.

It was held that freedom from contributory negligence was not shown so as to permit recovery for injury to a bright boy, twelve years old, by falling down an elevator shaft, where it appeared that, on being sent on an errand, he went to the shaft of a freight elevator which he had no right to use, and, finding the gates open, instead of rattling the chain, which he knew was the usual method of summoning the elevator, leaned against the chain to see if the elevator was coming, when the chain broke and he fell. *Knox v. Hall Steam Power Co.* (1893) 69 Hun, 231, 30 Abb. N. C. 152, 23 N. Y. Supp. 490.

On the other hand, the age of the child may be such that contributory negligence under the circumstances cannot be inferred.

Thus, where a child five years and three months old was killed while playing about a freight and passenger elevator in a mill, with older boys, and there was evidence that he fell or was knocked from the platform by the descending counterweight while the children were operating the elevator, which was unprotected, it was held that the court properly instructed the jury, in an action for his death, that the child was not guilty of negligence. *Decker v. Itasca Paper Co.* (1910) 111 Minn. 439, 127 N. W. 183. The court considered, but did not determine, whether a child under seven years of age may be chargeable with contributory negligence; but held that, in any event, the dangers of playing about the elevator were not so obvious to a boy of this age, of ordinary intelligence, that he could be charged with contributory negligence.

And the question of contributory negligence in several cases of this kind has been held to be for the jury.

Thus, where a fifteen-year-old boy, who, for several months, had been employed in a mill, and who was required to transport goods on a freight elevator between the first, second, and third floors, loaded the elevator at the first

floor, set it in motion, and walked up stairs, and, finding that the elevator had gone to the attic and was stuck there because a box in the elevator was caught between the elevator floor and the shaft, reached into the elevator and pulled the box, causing the elevator to fall and precipitate him to the bottom of the shaft, it was held, in *Stone v. Boscawen Mills* (1902) 71 N. H. 288, 52 Atl. 119, that, in the absence of instruction or warning by his employer, contributory negligence on his part was not shown as matter of law in failing to test the tension of the rope at the top of the elevator, which appeared to be pulling the elevator up, or in failing to observe whether the machinery was set for the elevator to ascend or descend, or in failing to call the mechanic, whom he had orders to notify if there was trouble with the elevator or it needed fixing.

And in an action for the death of a youth nineteen years old, employed in a factory, who was killed by falling down an elevator shaft, where negligence on the part of the employer was sufficiently shown by evidence that the elevator was unsafe and that an ordinance had been violated, the court, in *Dallemand v. Saalseldt* (1898) 175 Ill. 310, 48 L.R.A. 753, 67 Am. St. Rep. 214, 51 N. E. 645, 5 Am. Neg. Rep. 9, in affirming a judgment for the plaintiff, said that the evidence showed that the deceased was an intelligent, sober, and careful youth, and from this evidence and the circumstances before them, as there was no eyewitness to the accident and no countervailing evidence, the jury were authorized to find that he was, at the time of the injury, using due care for his own safety.

See also *Toohy v. McLean*, under *V. infra*.

b. Mistake as to location of elevator.

A sixteen-year-old boy who had been in the employ of the tenant of a building for two or three weeks prior to the injury, and had been in the elevator two or three times prior to the accident, was held not guilty of contributory negligence as matter of law in *B. Shoninger Co. v. Mann* (1905) 219 Ill. 242, 3 L.R.A. (N.S.) 1097, 76 N. E. 354, 19 Am. Neg. Rep. 198, where he was sent to an unlighted entry-way to deliver packages, and fell into an unlighted and unguarded elevator well, after the elevator, without notice to him, had been moved to another floor.

And a fifteen-year-old servant, who, seeing his immediate superior in an elevator shaft, the door of which was open,

on the first floor, endeavoring to open a rear door leading to a driveway 14 inches below the first floor, stepped into the shaft, assuming that his superior was standing on the floor of the elevator, when in fact he was standing on a ledge, and fell to the bottom of the shaft in the basement, was held, in *Marshall v. United R. Co.* (1916) — Mo. App. —, 184 S. W. 159, not guilty of contributory negligence as matter of law, where there was evidence that the elevator shaft was dark, and it was usual to leave the door to the shaft open at this floor only when the elevator was on a level with the driveway.

On the other hand, in a number of cases of this kind it has been held that recovery was precluded because of contributory negligence shown as matter of law.

Thus, a seventeen-year-old boy, engaged in operating an elevator in a factory, who was familiar with the situation and had been directed not to leave the elevator, but stepped from it on the fourth floor for his lunch basket, returning in about a minute, and, supposing that the elevator was still at that floor, when in fact the engineer had entered through a door on the opposite side of the shaft and moved the elevator, backed into the shaft, fell, and was injured, was held precluded from recovery because of contributory negligence shown as matter of law, in *Dieboldt v. United States Baking Co.* (1894) 81 Hun, 195, 30 N. Y. Supp. 745, where it appeared that the accident occurred after quitting time, that this was not the first time during the week the boy had been operating the elevator that the engineer, after quitting time, had taken the elevator from the upper floors, where it had been left, and that it was sufficiently light for the boy to see that the elevator had been moved, had he looked carefully, although he testified that he did look before entering the shaft. To the same effect is an earlier appeal in (1893) 72 Hun, 403, 25 N. Y. Supp. 205.

And it was held in *Dieboldt v. United States Baking Co.* (N. Y.) supra, that the fact that the elevator was not equipped with automatic fasteners, as required by statute, would not excuse the conduct of the plaintiff, since he knew the situation, and it was, therefore, his duty to guard against any accident likely to occur because of the absence of the fasteners required by the statute.

So, in *Kauffman v. Machin Shirt Co.* (1914) 167 Cal. 506, 140 Pac. 15, where a fifteen-year-old boy, inexperienced in

the handling of elevators, having goods to deliver on the fourth floor of a building, entered an elevator and transported himself to that floor, as he was expected to do, and, on reaching his destination, found the door of the shaft open, and, having performed his errand, returned in about a minute to the elevator, and, believing that it was still there, stepped into the shaft, fell, and was killed, it was held that a complaint alleging these facts, and also that "to all appearances the said door and the said platform were in the same condition that he had left them, less than one minute before," was subject to demurrer on the ground of contributory negligence. The court said: "There is no statement that he looked, or that, if he had looked, there was any physical reason why he could not have seen that the elevator had been moved. In the absence of any such showing, the court must assume that 'to look was to see,' and that if he had looked he must have noticed the danger. . . . He was old enough and sufficiently experienced to run the elevator in safety to the fourth story of the building. He lived and worked in a great city where hundreds of elevators are in daily use. It would be absurd to say that a lad of that age was ignorant of the necessity of exercising ordinary caution in entering an elevator."

And it was held also in *Kauffman v. Machin Shirt Co.* (Cal.) supra, that the boy was guilty of such contributory negligence as would preclude recovery for his death, assuming that an ordinance was violated which required devices closing automatically the door of the elevator shaft when the elevator was moved from the door, since the condition in which the boy found the door when he reached the fourth floor was notice to him that there was no automatic device attached to that particular door, or that it was not in working order.

It was held also in *Ballou v. Collamore* (1893) 160 Mass. 246, 35 N. E. 463, that a fifteen-year-old delivery boy, who was familiar with the elevator in an apartment hotel, at which he was accustomed to deliver goods, was negligent as matter of law in stepping through the open door into the elevator shaft after delivering goods on one of the upper floors, without looking to see if the elevator was there, which would preclude recovery for injuries sustained by falling down the shaft, where it appeared that there was another passenger in the elevator, and that, after the

boy had stepped from the elevator, leaving the door of the shaft open, the elevator continued to ascend, that the hall was dark, and that nothing was said by the plaintiff to the elevator boy about waiting, although the latter sometimes waited when passengers were in the elevator.

c. Playing near shaft.

Where a bright boy twelve years old, who for eighteen months had been employed in the defendant's mill as a sweeper, was killed by falling down an elevator shaft, and the evidence showed that he had been specially warned of the danger on the day of the accident, the door in the floor through which the elevator passed being at that time under repair, and that he persisted in playing about the opening, although his duties did not require him to go close to it, it was held in *McDaniel v. Lynchburg Cotton Mills Co.* (1901) 99 Va. 146, 37 S. E. 781, that there could be no recovery for his death, the court saying that plaintiff had failed to establish negligence on the part of the defendant, but that if such negligence was shown, there could be no recovery because of contributory negligence of the deceased; and that his maturity and intelligence were sufficient to overcome the presumption, on account of age, that he was incapable of contributory negligence.

V. Injuries in entering elevator.

Where a fifteen-year-old servant attempted to jump upon an elevator when it was ascending and was from 2 to 3 feet above the floor on which he was standing, and, before the elevator could be stopped, was caught between it and the floor above, and killed, it was held that his negligence would preclude recovery from his employer for his death. *Johnson v. Chandler* (1909) 202 Mass. 510, 89 N. E. 107.

And it was held in *Shields v. Merchants' & M. Transp. Co.* (1911) 230 Pa. 624, 79 Atl. 804, that a nonsuit was properly entered, apparently on the ground of contributory negligence as well as a failure to show negligence on the part of the defendant, in an action for the death of an eighteen-year-old servant, who, although familiar with the mode of operating a freight elevator on a boat on which he was employed, attempted to step on the elevator after it started to ascend, fell, and was caught between the floor of the elevator and the deck, and killed.

Also in *A. M. Rothschild & Co. v. L.R.A.* 1917F.

Levy (1905) 118 Ill. App. 78, the court reversed a judgment for the plaintiff in an action for the death of an eight-year-old boy, on an elevator, stating that there was no evidence that the deceased exercised such care as might reasonably be expected of one of his age and intelligence, the only direct evidence as to the circumstances of the accident being that he attempted to board the elevator when it was ascending between the fifth and sixth floors of the building and was a foot or more above the fifth floor.

A sixteen-year-old servant, familiar with her surroundings, who unnecessarily stands so close to an elevator shaft while waiting for the elevator that, as it descends, it strikes and injures her foot, is negligent as matter of law. *Roberts v. Sanitas Nut Food Co.* (1905) 142 Mich. 589, 106 N. W. 68.

It was held, however, that the question of contributory negligence was for the jury where a minor (age not stated) was injured while attempting to enter an elevator under the following circumstances: The boy, having clothes to deliver, entered an elevator and alighted on the fourth floor, where, after performing his errand, he returned to the elevator with clothes on both arms, and, finding the gate open and the elevator apparently at rest, undertook to enter the elevator, in the absence of the elevator boy, when the clothing he was carrying caught in the lever, causing the elevator to ascend suddenly, and precipitating him down the elevator shaft. *Toohy v. McLean* (1908) 199 Mass. 466, 85 N. E. 578.

VI. Injuries in alighting from elevator.

In an action for injury to a boy thirteen or fourteen years of age on an elevator, it was held in *National L. Ins. Co. v. McKenna* (1915) 141 C. C. A. 163, 226 Fed. 165, that the mere fact that on cross-examination the boy admitted that he appreciated the fact that, if he got beyond the cage, he would be caught and hurt, and if he had been paying attention he would not have been injured, would not charge him with contributory negligence as matter of law, where it appeared that, as he approached his destination, the elevator slowed down and stopped, that the operator reached out his hand as if to open the door, and the boy thereupon stepped forward, and, as the elevator suddenly started again to ascend, his foot was caught between the elevator and the floor.

So, where a messenger boy (age not

stated) having telegrams to deliver to persons in a hotel stepped upon the elevator at the hotel, and showed the telegrams to the elevator man, who, knowing the persons to whom they were to be delivered, started the elevator, which was stopped at the third floor, it was held that, there being no other person in the elevator, the boy had a right to assume that he had arrived at the floor upon which he was to alight, and was not negligent, at least as matter of law, in placing himself in a position to leave the elevator as soon as the door of the shaft should be opened, the car itself having no door, so as to preclude recovery for an injury by the catching of his foot between the shaft and the elevator when the car was started again without warning. *Mitchell v. Keene* (1895) 87 Hun, 266, 33 N. Y. Supp. 1045.

See also *Davis v. Ohio Valley Bkg. & T. Co.* under VII. *infra*.

VII. Hiding on top of elevator.

Whether a twelve-year-old boy who was killed while trying to get off the top of an elevator where he had been riding was guilty of such negligence as precluded recovery for his death was held a question for the jury in *Davis v. Ohio Valley Bkg. & T. Co.* (1908) 127 Ky. 800, 15 L.R.A.(N.S.) 403, 106 S. W. 843. The court stated that, in determining the extent to which his contributory negligence affected the right to recover for his death, his age must be taken into consideration; and that a boy twelve years old is not held to the same degree of care as an adult. See preceding subdivision for other cases of injuries sustained in attempting to alight from elevator.

VIII. Projecting head into elevator shaft.

In some cases of this kind the question of contributory negligence has been held to be for the jury.

Thus, where a thirteen-year-old girl, employed in a department store, carried goods to a dummy elevator for the purpose of sending them to a lower floor, overloaded the elevator, causing it to fall, and projected her head into the shaft, as the elevator fell, with the result that she was struck and killed by a counterweight detached by the fall of the elevator, it was held that the question of contributory negligence was for the jury, notwithstanding a notice posted by the opening of the shaft, to "keep heads out." *Winkle v. George B. Peck Dry Goods Co.* (1908) 132 Mo. App. 656, 112 L.R.A.1917F.

S. W. 1026. The court said: "We do not give our approval to the argument of defendant that we should pronounce the child guilty of contributory negligence as a matter of law. She participated with her companions in the overloading of the box, but the jury were entitled to infer that in doing this she and her companions acted after the manner of children of their age. Likely enough they thought it would be fine sport to make the box fall, but they did not know nor had they any reason to believe that a 20-pound iron weight would be hurled down the shaft, to their great peril. What they did might have been culpable in a person of mature years, but in a child of thirteen years, we think the characterization of such conduct falls clearly within the province of the jury."

And it was held that contributory negligence was not shown as matter of law on the part of a boy eleven years old who was injured by projecting his head through an unfinished panel in the door of an elevator shaft, where it appeared that he accompanied his mother to one of the upper floors of an office building and was directed by her, when they were about to return, to signal an elevator, and, seeing a freight elevator ascend and stop after the top of the car had passed the floor on which he was standing, but before the bottom of the car had reached that floor, out of curiosity, projected his head into the shaft and was struck by the top of the car when it started to descend. *Shortridge v. Scarritt Estate Co.* (1910) 145 Mo. App. 295, 130 S. W. 126.

So, a sixteen-year-old girl, who, for more than a year, had been employed in a factory, and had been directed to use a freight elevator, which could be signaled only by calling into the shaft, was held in *Timmerman v. Frankel* (1913) 172 Mo. App. 174, 157 S. W. 1051, not negligent as matter of law in projecting her head into the shaft over a 4-foot gate, to call for the elevator, without knowing the location of the elevator or looking upward, so as to be precluded from recovery from her employer for an injury sustained by being struck by the descending car, which was only 2 or 3 feet above her when she projected her head into the shaft, where she had not been warned of the dangers attending on such conduct, and was merely following the example of older persons.

On the other hand, it has been held in several cases of this class that contributory negligence was shown as matter of law.

See *DERRINGER v. TATLEY*, ante, 187. As distinguishing the case of *DERRINGER v. TATLEY* from a case where the infant permitted his foot to extend over the platform as the elevator ascended, with the result that it was injured by contact with a floor, see *Citizens' Bank v. Fairweather*, under III. supra.

And where an eight-year-old boy climbed upon a sill about 3½ feet from the ground and projected his head through an opening used for loading purposes in the wall of a warehouse adjacent to a street, and was struck by a descending lift, which was about 2 feet from the outer edge of the sill, a notice that the place was dangerous being beside the aperture, the court, in *Stiefsohn v. Brooke* (1889) 5 Times L. R. (Eng.) 684, in holding that there could be no recovery, stated that the danger was evident, even to a child. The decision, however, seems to be based principally on the ground that there was insufficient evidence of negligence on the part of the defendant.

So, although the question as to the effect of the youthfulness and consequent lack of discretion on the part of the injured person was not raised, attention is called to the case of *Knapp v. Jones* (1897) 50 Neb. 490, 70 N. W. 19, 1 Am. Neg. Rep. 306, where it was held that a bright boy, sixteen years old, employed in an office building, who knew that a wire screen separating a part of the elevator shaft in the building from the adjacent stairway had been removed for a temporary purpose, was negligent as matter of law in projecting his head through the opening caused by the removal of the screen, over a 3-foot board partition, to ascertain

whether his employer was in the ascending elevator, with the result that he was struck by the descending weights.

It was held in *Guichard v. Mew* (1895) 84 Hun, 57, 31 N. Y. Supp. 1080, that the question of contributory negligence was for the jury where an eight-year-old boy, after alighting from an elevator, which started to descend, in order to speak to the elevator man, projected his head over a gate 3 feet high separating the elevator shaft from the hallway, and was struck by an iron bar at the top of the car. On a later appeal, however, in (1896) 9 App. Div. 485, 41 N. Y. Supp. 456, it was held that contributory negligence was shown as a matter of law, where it appeared that he had several times been warned prior to the accident not to project his head over the gate or he would get hurt, that he was attending school, and was in the habit of playing in the street. The court said: "The case is, therefore, presented of a boy attending school, playing in the streets, distinctly warned not to do a particular act, and that if he does injury will ensue, yet doing that act with full knowledge and despite the warning he has received. We think the case is one which did not require the submission to the jury of any question as to the ability of the plaintiff to exercise ordinary care and prudence under the circumstances, for he was old enough and intelligent enough to understand that the act he was warned against was one which would involve him in a peril, and having done that which he was distinctly warned not to do, the consequence of his folly must be visited upon him, precisely as in any other case." R. E. H.

ARKANSAS SUPREME COURT.

MRS. H. T. URQUHART, Appt.,
v.

MARION HOTEL COMPANY.

(— Ark. —, 194 S. W. 1.)

Bonds — corporate — provision for payment of taxes — income tax.

The Federal income tax which the corporation is required to withhold at its source is not within the provision of a corporate bond binding the corporation to pay without

deduction from either principal or interest for any tax or taxes which it may be required to pay or retain therefrom under any law, the corporation agreeing to pay such tax, since such income tax is not levied upon the bonds, nor primarily upon interest accumulating thereon.

For other cases, see Bonds, III. a, in Dig. 1-52 N. S.

(McCulloch, Ch. J., and Hart, J., dissent.)

(April 2, 1917.)

Note.—As to whether provision of contract for payment without deduction for taxes is applicable to income tax, see annotation following this case, post, 205. L.R.A.1917F.

A PPEAL by plaintiff from a judgment of the Circuit Court for Pulaski County in defendant's favor in an action brought to recover the amount of a Federal income tax retained by defendant from the payment of

interest on bonds issued by it to plaintiff. Affirmed.

The facts are stated in the opinion.

Mr. George A. McConnell for appellant.
Messrs. Morris M. Cohn and Louis M. Cohn, for appellee:

The terms of the bond and mortgage of defendant are fully carried out when it pays all the taxes imposed upon the mortgaged property, and all of the taxes imposed upon the bonds and coupons, as such, in the hands of third persons. It cannot be assumed that such terms contemplated that it was to go farther and pay the debts of the bond or coupon holder.

United States v. Baltimore & O. R. Co. 17 Wall. 322, 326, 327, 21 L. ed. 597, 599; Black, Income Taxes, § 360; Haight v. Pittsburgh, Ft. W. & C. R. Co. 6 Wall. 15, 18 L. ed. 818; Central Nat. Bank v. United States, 137 U. S. 355, 363, 34 L. ed. 703, 705, 11 Sup. Ct. Rep. 126; Cooley, Taxn. 1st ed. p. 403; Northern C. R. Co. v. Jackson, 7 Wall. 262, 269, 19 L. ed. 88, 90.

Smith, J., delivered the opinion of the court:

Appellant is the owner of certain bonds issued by the Marion Hotel Company on June 1, 1906, which contain the following clause: "The Marion Hotel Company, for value received, hereby promises to pay to the bearer hereof, at the office of the Bank of Commerce, Little Rock, Arkansas, without deduction from either such principal or interest, for any tax or taxes, which the Marion Hotel Company may be required to pay or retain therefrom, under any present or future law, the Marion Hotel Company agreeing to pay such tax or taxes."

The interest on these bonds was made payable at the Bank of Commerce, in the city of Little Rock, where appellant applied for the payment of matured coupons owned by her. Pursuant to the requirement of the Federal Income Tax Law, she filed her certificate, in which she declared that "I do not now claim exemption from having the normal tax of 1 per cent withheld from said income, by the debtor, at the source," but, notwithstanding this certificate, she demanded payment of the full amount of interest due, without deduction of the 1 per cent, the demand therefor being based upon the theory that the corporation, and not herself, was liable for the tax. It is argued that the very terms of the bond itself required the company to pay any tax or taxes which it (the company) might be required to retain. We are of the opinion, however, that the provision of the Income Tax Law, requiring the withholding of the tax at its source, is a mere provision, intended only

to facilitate the more convenient and certain collection of the tax upon income; that the tax in question is not levied upon the bonds, nor primarily upon the interest accumulating thereon. The thing taxed is the income of the holder of the bond, and it may or may not be true that the income from a particular bond will be subject to the tax. The condition governing the taxability of the accumulated interest represented by any particular coupon depends not upon the recitals in the bond contract, but upon the amount of income of the particular holder. And the provision of the law, for the collection of this tax at its source, rather than from the income taxpayer after the receipt of his dividend, will not change the contractual rights of the parties.

We are cited to no case where the exact question here involved has been decided; but the view we have expressed comports with the construction of such contracts expressed in Black on Income Taxes, 2d ed. 1915, § 360. That learned writer there says: "Sec. 360. Bonds of many corporations are issued under a contract by which they are made 'tax free;' that is, a contract by which the obligor undertakes to pay all taxes which may be assessed on the bonds. But apparently such a covenant does not bind the obligor to pay the income tax on the interest, unless it includes the income tax by name. Under a similar statute enacted by Congress at an earlier day, it was held that a provision in a corporation mortgage, requiring the company to pay the debt and interest 'without any deduction, defalcation, or abatement to be made of anything for or in respect of any taxes, charges, or assessments whatsoever,' relates to taxes on the property mortgaged or on the mortgage debt, and does not refer to the periodical interest payments regarded as income of the bondholder, and hence does not require the company to pay the interest clear of the income tax (levied in 1864), which tax companies were 'authorized to deduct and withhold from all payments on account of any interest or coupons due and payable.' On the contrary, it was held, the company complies with its contract when it pays the interest, less the tax, and retains the tax for the government."

In support of this text he cites: Haight v. Pittsburgh, Ft. W. & C. R. Co. 6 Wall. 15, 18 L. ed. 818; Baltimore v. Baltimore & O. R. Co. 10 Wall. 543, 19 L. ed. 1043. It was there further said: "The position of the Treasury Department on this question is one of indifference as between the bondholder and the corporation. It will exact payment of the income tax on corporate interest, in the usual manner, without regard to the existence of such a contract or cove-

nant, leaving the question of ultimate responsibility to be settled by the parties themselves. The regulation declares that 'the stipulation in bonds whereby the tax which may be assessed against them, or the income therefrom, is guaranteed, is a contract wholly between the corporation and the bondholder; and, in so far as the income tax law applies, the government will not differentiate between coupons from bonds of this character and those from bonds carrying no such guaranty. The debt- or corporation, or its duly authorized withholding agent, will be held responsible for the normal tax due on the coupons on which no tax has been withheld in cases wherein no exemption is claimed.'"

We conclude that the tax in question is the personal obligation of Mrs Urquhart, arising out of her possession of an income

in excess of her exemptions, and that the provision of the law for the collection of this tax (thereby discharging this obligation) at its source makes it none the less her obligation, and that the purpose and legal effect of the language quoted from the bond was only to impose upon the hotel company the duty of paying all taxes, of any character, imposed upon the property mortgaged to secure the payment of the bonds, and to pay the taxes upon the bonds and coupons as such.

It follows, therefore, that the judgment of the court below, refusing to render judgment against the hotel company for the amount of the tax so withheld, was a proper one, and it is affirmed.

McCulloch, Ch. J., and Hart, J., dissent.

Annotation—Provision of contract for payment without deduction for taxes as applicable to income tax.

The decision of *URQUHART v. MARION HOTEL CO.* ante, 203, is to the effect that a general provision in a written instrument such as a corporate bond, for payment of the principal and interest without any deduction for any taxes which the corporation may be required to pay or retain therefrom, does not prevent the corporation from deducting therefrom a bondholder's Federal income tax which the recent Federal Income Tax Acts require shall be withheld at its source. This decision is of considerable importance, since at first blush it would seem that a provision such as was under consideration (any tax or taxes required to be paid or retained under any present or future law) would be broad enough to cover a deduction at the source under an income tax act subsequently enacted.

The use of the word "retain" in the clause of the bond involved in the *URQUHART CASE* would seem to present the most serious question as to the correctness of the decision in that case. Perhaps the force of the argument based on that word might be met by assuming that it was employed in anticipation of the possibility that a tax, to be paid by the corporation at the source, might be imposed on the bondholder specifically in respect of interest on the bonds. Upon that assumption some scope can be allowed to the word "retain" without applying it to the income tax. The position taken in the *URQUHART CASE* seems to be in accord with the general spirit and policy of the Income Tax Act, and is L.R.A.1917F.

doubtless to be favored if it can be consistently with the language employed.

A line of reasoning similar to that adopted in the *URQUHART CASE* has been advanced by the Supreme Court of the United States in a case (*Haight v. Pittsburgh, Ft. W. & C. R. Co.* (1868) 6 Wall. (U. S.) 15, 18 L. ed. 818) which seemingly differs only in that the tax-free clause did not contain the word "retain" and was in a mortgage securing a bond, and the deduction at the source was made under an earlier Federal Income Tax Act. In this case it was held that a clause in a mortgage made by a railroad company, binding it to pay the principal and interest "without any deduction made for or in respect of any taxes, charges, or assessments whatsoever," had no application to the income tax of the bondholders imposed by the Revenue Act of June 30, 1864, chap. 172, § 122, which required all corporations to deduct and withhold an income tax of 5 per cent from all payments on account of any interest or coupons due by it on mortgages or the accompanying bonds, so that suit could not be maintained by a bondholder to recover from the issuing corporation a tax which it had withheld pursuant to the statute unless the corporation had expressly contracted to pay such a tax. When the case was before the circuit court, the judge argued as follows (1 Abb. (U. S.) 81, Fed. Cas. No. 5,903): "There is no special contract to pay government taxes upon the interest. The measure of the defendants' liability is expressed in the bonds as being debt and

interest only. They have nothing to do with the taxes which the government may impose upon the plaintiff for the interest payable to him. The clause in the mortgage cannot enlarge the obligation which the mortgage was given to secure; that is, the payment of debt and interest. It is to be found in all mortgages, and if the doctrine contended for by the plaintiff be sound, the standard by which the imposition of taxes should be regulated would be in proportion to a man's poverty, and not his wealth; for the mortgagor would be bound to pay not only his own taxes, but those of the mortgagee. . . . It was to be paid somewhere, and it was to meet investments like this in banks, railroads, insurance and other companies, that the 122d section of the Act of 1864 was passed. Congress enjoined it as a duty upon all such corporations to deduct and withhold from all payments on account of

any interest or coupons and dividends due and payable, the tax of 5 per cent; and provided that the payment of the same shall discharge the companies from that amount of interest or coupon, unless where said companies have contracted otherwise;" and the Supreme Court in effect adopted such opinion, expressly stating in its opinion that the law was "correctly decided" by the circuit judge.

No other cases seem to have involved the question, and as a result of the above decisions it may be said that the law at present, at least, is that contracts in bonds and mortgages rendering the principal and interest tax free do not include taxes on the income of the holder of such obligations unless such a tax is expressly included in the guaranty. This is also the view taken in *Black on Income Taxes*, 2d ed. § 360, which is quoted at length in the *URQUHART CASE*. G. J. C.

NEW JERSEY COURT OF ERRORS AND APPEALS.

MAXIME BOUQUET, Appt.,
v.
HACKENSACK WATER COMPANY,
Respt.

(— N. J. —, 101 Atl. 379.)

Nuisance — public — individual action.

1. In order that an individual may maintain an action for a public nuisance, he must prove that he thereby suffers a particular, direct, and substantial injury.

For other cases, see Nuisances, II. a, in Dig. 1-52 N. S.

Water — riparian right — pollution.

2. A riparian owner on a tidal navigable stream suffers no peculiar injury as such because the stream has been made less pleasant for boating, fishing, and bathing. The injury to him is the same as that to any other member of the public, and for the reason that his right qua riparian owner is that of access, and not a special right to use the stream in any different manner than others may use it.

For other cases, see Nuisance, II. a, 1, in Dig. 1-52 N. S.

Appeal — nominal damages — reversal.

3. A judgment for appellant for nominal damages, although erroneous, will not be

Headnotes by PARKER, J.

Note. — For interference with pleasurable use of stream as causing special damage or peculiar injury which will sustain an action by a private individual for nuisance, see annotation following this case, post, 208.

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reversed if he was not entitled to any damages.

For other cases, see Appeal and Error, VII. m, 8, in Dig. 1-52 N. S.

(White and Taylor, JJ., dissent.)

(June 18, 1917.)

APPEAL by plaintiff from a judgment of the Supreme Court, Hudson Circuit, in his favor, for nominal damages only, in an action brought to recover damages for an alleged nuisance created by defendant. Affirmed.

The facts are stated in the opinion.

Mr. Arthur T. Dear, for appellant:

Plaintiff suffered injury differing in kind and degree from that suffered by the public at large.

Wilkes v. Hungerford Market Co. 2 Bing. N. C. 281, 132 Eng. Reprint, 110, 2 Scott, 446, 1 Hodges, 281, 5 L. J. C. P. N. S. 23; *Zabriskie v. Jersey City & B. R. Co.* 13 N. J. Eq. 314; *Higbee v. Camden & A. R. Co.* 19 N. J. Eq. 276; *Hatfield v. Central R. Co.* 33 N. J. L. 251; *Prudden v. Morris & E. R. Co.* 19 N. J. Eq. 386, 20 N. J. Eq. 530; *Stevens v. Paterson & N. R. Co.* 34 N. J. L. 532, 3 Am. Rep. 269; *Prudden v. Lindsley*, 28 N. J. Eq. 378, 29 N. J. Eq. 615, 31 N. J. Eq. 436; *Mehrhof Bros. Brick Mfg. Co. v. Delaware, L. & W. R. Co.* 51 N. J. L. 56, 16 Atl. 12; *H. B. Anthony Shoe Co. v. West Jersey R. Co.* 57 N. J. Eq. 607, 42 Atl. 279; *Ryerson v. Morris Canal & Bkg. Co.* 69 N. J. L. 505, 55 Atl. 98; *Liermann v. Milwaukee*, 132 Wis. 628, 13 L.R.A.(N.S.) 253, 113 N. W. 66; *Callanan v. Gilman*, 107 N. Y. 360, 1 Am. St.

Rep. 831, 14 N. E. 264; Flynn v. Taylor, 127 N. Y. 596, 14 L.R.A. 556, 28 N. E. 418; Cranford v. Tyrrell, 128 N. Y. 341, 28 N. E. 514; Seifert v. Dillon, 83 Neb. 322, 19 L.R.A. (N.S.) 1018, 131 Am. St. Rep. 642, 119 N. W. 686, 17 Ann. Cas. 1126; Smart v. Aroostook Lumber Co. 103 Me. 37, 14 L.R.A. (N.S.) 1083, 68 Atl. 527; Green v. Thresher, 235 Pa. 169, 83 Atl. 711, Ann. Cas. 1013D, 1210.

Messrs. Edwards & Smith and Edwin F. Smith, for respondent:

The damages claimed were too far removed and consequential to be recovered.

Liermann v. Milwaukee, 132 Wis. 628, 13 L.R.A. (N.S.) 253, 113 N. W. 65; Baxter v. Winooski Turnp. Co. 22 Vt. 114, 52 Am. Dec. 84; Cleveland v. Citizens Gaslight Co. 20 N. J. Eq. 201.

There is no common-law right to bathe in a navigable stream.

Blundell v. Catterall, 5 Barn. & Ald. 268, 106 Eng. Reprint, 1100, 24 Revised Rep. 353; Bagott v. Orr, 2 Bos. & P. 472, 126 Eng. Reprint, 1391, 5 Revised Rep. 668; Joyce, Water Courses, p. 339; 29 Cyc. 304; Sedgw. Damages, § 425, p. 616; George v. Peckham, — Neb. —, 103 N. W. 664; 2 Pom. Eq. Jur. § 1349; Wesson v. Washburn Iron Co. 13 Allen, 95, 90 Am. Dec. 181; Naugle v. Nescosceck Twp. 225 Pa. 68, 73 Atl. 1021; Anthony Wilkinson Live Stock Co. v. McIlquan, 14 Wyo. 209, 3 L.R.A. (N.S.) 733, 83 Pac. 364; Innis v. Cedar Rapids, I. F. & N. W. R. Co. 76 Iowa, 165, 2 L.R.A. 282, 40 N. W. 701; Lansing v. Smith, 8 Cow. 146; Kuehn v. Milwaukee, 83 Wis. 583, 18 L.R.A. 553, 53 N. W. 912; Grey ex rel. Simmons v. Paterson, 58 N. J. Eq. 1, 42 Atl. 749.

Parker, J., delivered the opinion of the court:

Appellant, plaintiff below, claims to be legally aggrieved by the action of the trial judge in directing a verdict in his favor for nominal damages of 6 cents.

His case, as finally submitted, was that he owned land on the easterly side of the Hackensack river, a navigable stream, on which land was a dwelling house occupied by him and used for the keeping of summer boarders; and that, prior to the summer of 1914, he had many boarders and did a profitable business, but in that year and thereafter the water in the river in front of his place was fouled by the act of the defendant, so that it was not so pleasant as it had been to look at or so available for fishing, boating, and swimming, and that in consequence the boarders, who had been attracted by the view and the boating, fishing, and swimming, were caused to remain away, whereby plaintiff suffered material loss. There was L.R.A.1917F.

some claim of an odor from the water, but this was disregarded at the trial and is not now urged. The view taken by the trial court was that, on the assumption that plaintiff's title extended to high-water mark in the river, the rights, if they existed, of swimming in the river, boating on it, and looking at the view, were not special rights of plaintiff qua riparian owner, or of his guests claiming under his license, but were rights of a purely public character, and that in their infringement plaintiff suffered simply as a member of the public and could not claim special damage in a private action.

Our examination of the case satisfies us that plaintiff was in no way legally injured by this ruling. It is not claimed that he was entitled to recover in this suit as a member of the public, for the deprivation of benefits because his guests found the river no longer pleasant for boating, fishing or swimming. The claim must rest, if at all, on the injury resulting to plaintiff as an abutting owner. But the right of an owner of the ripa of navigable water is that of access; and if that be unlawfully interfered with he may maintain a special action. Stevens v. Paterson & N. R. Co. 34 N. J. L. 532, 553, 3 Am. Rep. 269. Apart from this, he has no peculiar right to the use of the water or of the shore. 34 N. J. L. 542, 543, 3 Am. Rep. 269; Whitmore v. Brown, 102 Me. 47, 9 L.R.A. (N.S.) 868, 120 Am. St. Rep. 454, 65 Atl. 521. Plaintiff, as owner of land on or near the river, may have more occasion to make use of the public rights of boating and (if there be such rights) of fishing and bathing, but those rights remain public, and not private.

The rule, as we understand it, is this: That in order that an individual may maintain an action for a public nuisance he must prove that he thereby suffers a particular, direct, and substantial injury. 19 E. R. C. 263. The same rule in different phraseology will be found in Mehrhoff Bros. Brick Mfg. Co. v. Delaware, L. & W. R. Co. 51 N. J. L. 56, at page 57, 16 Atl. 12. It may be conceded that plaintiff's injury was substantial; there is more doubt whether it was direct, but that may also be conceded for the sake of argument; it was not, however, particular, as we have already seen. The result is that the trial judge would have been justified in awarding a nonsuit or in directing a verdict for the defendant. All this has been predicated on the assumption that plaintiff exhibited a title running down to high-water mark. The case does not, in our judgment, show that he gave proof of any such title. His deed, offered in evidence, called for certain lots on a designated map (which map was not put in evi-

dence), and the only mention of the river was contained in a clause in the deed reading as follows: "Together with all right, title, and interest of the party of the first part in and to the land lying between high-water mark of the Hackensack river and the middle of Riverside avenue, as shown on said map, lying directly opposite or in front of such of the property above described as has a frontage on said Riverside avenue."

There was no proof of what that right, title, and interest was, or that there was any at all. It affirmatively appeared that there was a strip several feet wide between Riverside avenue and the river. If plaintiff did

not own this strip, his right even to access to the river was no better than that of an owner of land a long distance away, or one not an owner at all. But as plaintiff might peradventure have shown some title as a riparian owner, we have preferred to treat the case as if such were the fact.

Inasmuch as plaintiff was not harmed by the direction in his favor of a nominal verdict, the judgment will be affirmed. *Sypherd v. Myers*, 80 N. J. L. 321, 79 Atl. 340; *Butterhof v. Butterhof*, 84 N. J. L. 288, 86 Atl. 394.

White and Taylor, JJ., dissent.

Annotation—Interference with pleasurable use of stream as causing special damage or peculiar injury which will sustain an action by a private individual for nuisance.

In *BOUQUET v. HACKENSACK WATER CO.* ante, 206, the stream in question was tidal, and it was held that a riparian owner has no peculiar right to a tidal navigable stream but that of access.

In *Booth v. Ratté* (1890) L. R. 15 App. Cas. (Eng.) 188, the plaintiff had a floating wharf and boathouse on the navigable Ottawa river, moored to his shore and situated over a water lot, either by his own right or by a license of the owner of the water lot, and he carried on the business of hiring and housing pleasure boats. It was held that he was entitled to an injunction against, and damages for, the pollution of the stream by refuse from the defendants' mills, which also impeded navigation. This refuse, it was found, "accumulates in great floating masses, substantial enough occasionally for a man to walk upon, and the tendency of the currents and the prevalent direction of the winds bring these masses in front of the plaintiff's property, up to his boathouse and wharf and the banks of his lot. Depositions of sawdust are thus by degrees formed before his property, and they result not only in fouling the water, making it offensive both to taste and smell, but produce from the gas generated underneath the surface frequent explosions, which are disagreeable and sometimes dangerous. It is thus proved that the plaintiff sustains special injury beyond the rest of the public by this unauthorized interference of the defendants with the flow and purity of the stream. He is injured in the personal enjoyment of the property and the river, and he is injured in the business which he follows of hiring and housing pleasure boats." L.R.A.1917F.

The plaintiff was considered to be a riparian owner.

It was held, however, in *Innis v. Cedar Rapids, I. F. & N. W. R. Co.* (1888) 76 Iowa, 165, 2 L.R.A. 282, 40 N. W. 701, that a person who, after the erection of a bridge over a lake, has purchased boats, and engaged in the business of renting them for purposes of pleasure and for fishing, has no other or different rights than are enjoyed by other persons in respect to the navigation of the lake, sufficient to enable him to maintain an action to abate the bridge as a nuisance, on the ground that it obstructs the navigation of the lake.

In *Winchell v. Waukesha* (1901) 110 Wis. 101, 84 Am. St. Rep. 902, 85 N. W. 668, where a riparian proprietor obtained an injunction against a city's throwing sewer water into a stream, it appeared that the water was rendered unfit for bathing, etc.

In *Smart v. Aroostook Lumber Co.* (1907) 103 Me. 37, 14 L.R.A.(N.S.) 1083, 68 Atl. 527, it was held that a lumber company, although it has monopolized the commercial business on a navigable river and its tributaries, cannot fill the channel with logs for an unreasonable time, so as to prevent persons from using the stream in the summer months for floating boats and transporting goods to their cottages on its banks, or so as to stop sportsmen from passing up and down the stream, and that special damages are sustained by one whose means of access to his cottage on the banks of a navigable river is cut off by an obstruction of the stream with logs, there being no other highway leading thereto, since this is a use and benefit

differing from that required by the public.

But it may be noted that it was held in *Whitmore v. Brown* (1906) 102 Me. 47, 9 L.R.A.(N.S.) 868, 120 Am. St. Rep. 454, 65 Atl. 516, where the plaintiff was the owner of property used as a summer residence, that mere ownership of land on a cove does not give one a standing in court to enjoin the construction of a wharf therein which will interfere with the public right of navigation, even though a boating privilege connected with his land is affected, which results in a depreciation in the value of his property.

The following cases are of interest in this connection:

In *People v. Hulbert* (1902) 131 Mich. 156, 64 L.R.A. 265, 100 Am. St. Rep. 588, 91 N. W. 211, it was held that the fact that a city, as a lower riparian proprietor upon a lake, decides to use the water for drinking and cooking purposes, does not render the reasonable use of the lake by upper proprietors for bathing purposes unlawful, although such use has a tendency to render the water less desirable for drinking and cooking purposes. The court, however, said: "We do not mean to intimate that an upper proprietor may convert his property into a summer resort, and invite large numbers of people to his premises for purposes of bathing, and give them the right possessed only by the riparian owner and his family. We are undertaking to decide only the case which is presented here."

Where the plaintiffs, the lower riparian owners, had constructed a dam and reservoir by which they impounded the waters of the stream for the purpose of supplying water daily to the growing of roses, a business in which they were engaged, and the defendant constructed a dam across the stream upon his own premises, thereby creating a reservoir about one and a half acres in extent, and impounded the water therein for both ornamental and domestic purposes, the trial court found as a fact that by reason of the construction of the dam and reservoir by the defendant "a much larger surface of water is exposed to sun and air than otherwise would be exposed, and the increased evaporation and absorption caused the water to cease flowing to and over the plaintiffs' land, and deprived them of the use of water to which they were entitled." In the absence of any finding that the defendant's use of the water was unreasonable, the appellate court, L.R.A.1917F.

in reversing an injunction against the continuance of the defendant's dam, said as to the riparian owner: "He may also construct ornamental ponds and store them with fish, or use them for his geese, his ducks, or his swans, so long as the size of the pond is not so large as to materially diminish, by evaporation and absorption, the quantity of water usually flowing in the stream." *Pierson v. Speyer* (1904) 178 N. Y. 270, 102 Am. St. Rep. 499, 70 N. E. 799.

It may be noted that the right of the public in waters includes their use for purposes of pleasure. Thus, in *Atty. Gen. v. Woods* (1871) 108 Mass. 436, 11 Am. Rep. 380, the court said: "Navigable streams are highways; and a traveler for pleasure is as fully entitled to protection in using a public way, whether by land or by water, as a traveler for business. . . . If water is navigable for pleasure boating, it must be regarded as navigable water, though no craft has ever been upon it for the purposes of trade or agriculture." See also *Smart v. Aroostook Lumber Co.* (1907) 103 Me. 37, 14 L.R.A.(N.S.) 1083, 68 Atl. 527, supra. So, in *Grand Rapids v. Powers* (1891) 89 Mich. 94, 14 L.R.A. 498, 28 Am. St. Rep. 276, 50 N. W. 661, it was said of a river: "It will ever be an important public stream, and its navigability for pleasure is as sacred in the eye of the law as its navigability for any other purpose." And in *Park Comrs. v. Diamond Ice Co.* (1905) 130 Iowa, 603, 3 L.R.A.(N.S.) 1103, 105 N. W. 203, 8 Ann. Cas. 28, it was held that the legislature may forbid the taking of ice from a stream the title to which is in the public, in favor of a public use for skating and other sports.

For right of municipal corporation to drain sewage into waters, see the notes to *Platt Bros. v. Waterbury*, 48 L.R.A. 691; *Georgetown v. Com.* 61 L.R.A. 694; *State v. Concordia*, 20 L.R.A.(N.S.) 1050; and *McLaughlin v. Hope*, 47 L.R.A.(N.S.) 137; and as to prescriptive right to do so, see the note to *Miles v. Board of Health*, 25 L.R.A.(N.S.) 589; and as to remedy by injunction, in such case see the note to *Atlanta v. Warnock*, 23 L.R.A. 301. For other matters as to pollution of waters, see the L.R.A. Indexes, under "Waters."

For the subject of interference with fishing, see the L.R.A. Indexes, under "Fisheries."

For correlative rights of upper and lower proprietors as to use and flow of

water in stream, see the note to *Barnard v. Shirley*, 41 L.R.A. 737.

For right of action by owner of upland for interference with access to navigable water, see the notes to *State ex rel. Denny v. Bridges*, 40 L.R.A. 593, and to *Ferry Pass Inspectors & Shippers Asso. v. White River Inspectors & Shippers Asso.* 22 L.R.A.(N.S.) 345.

For private right of action for obstruction of navigable stream, see the

notes to *Viebahn v. Crow Wing County*, 3 L.R.A.(N.S.) 1126, and *Swain v. Chicago, B. & Q. R. Co.* 38 L.R.A.(N.S.) 763, for right of one who navigates a stream or floats logs therein to abate nuisance arising from bridge, see the note to *Marion v. Tuell*, 51 L.R.A.(N.S.) 1172; for the right to obstruct or destroy rights of navigation, see the note to *Hutton v. Webb*, 59 L.R.A. 33. B. B. B.

OKLAHOMA CRIMINAL COURT OF APPEALS.

ROBERT ALLEN, Plff. in Err.,
v.
STATE OF OKLAHOMA.

(— Okla. Crim. Rep. —, 164 Pac. 1002.)

Appeal — remarks of counsel.

1. Remarks of the county attorney in his argument will be considered and construed in reference to the evidence, and in order to constitute reversible error the impropriety indulged in must have been such as may have improperly influenced the verdict.

For other cases, see *Appeal and Error*, VII. m, 5, in *Dig. 1-52 N. S.*

Same — technical error — reversal.

2. Where the guilt of the appellant is clearly and conclusively established, and there is no good reason to believe that upon a second trial an intelligent and honest jury could, or would, with reason and propriety, arrive at any other verdict than that of guilt, a new trial will not be granted except for fundamental error.

For other cases, see *New Trial*, I. in *Dig. 1-52 N. S.*

Jury — use of alcoholic medicine — misconduct.

3. The use of small quantities of whisky

Headnotes by MATSON, J.

Note. — The question whether a conviction should be reversed because of unfair or irrelevant argument or statements of facts by the prosecuting attorney is the subject of a note in 46 L.R.A. 641. A number of specific aspects of the general subject have been treated in subsequent notes, as follows: Reference by prosecuting attorney, in argument to jury, to attempts to tamper with witnesses or jurymen as ground for reversal, note to *Turpin v. Com.* 30 L.R.A.(N.S.) 795; reference by prosecuting attorney, in argument to jury, to the result in another case, note to *State v. Corpening*, 38 L.R.A.(N.S.) 1130; argument by prosecuting attorney that an acquittal would encourage lynch law, as ground for reversal, note to *Hemphill v. State*, 51 L.R.A.(N.S.) 914.

The following subsequent cases are in point on the subject of the general note L.R.A.1917F.

or other intoxicants, mixed with curative drugs, or diluted and used strictly for medicinal purposes, by jurors when not deliberating upon the verdict, is not such misconduct as will vitiate the verdict and authorize the granting of a new trial, where it appears that such jurors were in no way incapacitated thereby for the proper performance of their duties.

For other cases, see *New Trial*, III. d, in *Dig. 1-52 N. S.*

Appeal — nonreversible error.

4. Record examined as to other alleged misconduct of jury, and held not reversible error in this case.

For other cases, see *Appeal and Error*, VII. m, 7, in *Dig. 1-52 N. S.*

(May 19, 1917.)

ERROR to the Superior Court for Oklahoma County to review a judgment convicting defendant of murder. Affirmed.

The facts are stated in the opinion.

Messrs. Pruett, Snigga, & Tripp, for plaintiff in error:

The improper conduct and argument of the assistant county attorney, John Choate, in his argument to the jury, was prejudicial to defendant and constitutes reversible error.

Vickers v. United States, 1 Okla. Crim. Rep. 452, 98 Pac. 467; *Hamilton v. State*,

first mentioned; *Ivey v. State*, 54 L.R.A. 959 (conviction reversed); *Beason v. State*, 69 L.R.A. 193 (conviction reversed); *State v. Campbell*, 9 L.R.A.(N.S.) 533 (conviction affirmed); *People v. Ranney*, 19 L.R.A.(N.S.) 443 (conviction affirmed); *State v. Nyhus*, 27 L.R.A.(N.S.) 487 (conviction reversed); *State v. Davis*, 34 L.R.A.(N.S.) 295 (conviction affirmed); *State v. Larkin*, 46 L.R.A.(N.S.) 13 (conviction reversed on another ground); *Edwards v. State*, 44 L.R.A.(N.S.) 701 (conviction affirmed); *Fisk v. United States*, L.R.A.1915A, 909 (conviction reversed); *Latham v. United States*, L.R.A.1916D, 1118 (conviction reversed).

For consumption of liquor by jury as ground for new trial or reversal, see note to *Myers v. State*, L.R.A.1915C, 302, and references therein for notes on related questions

97 Tenn. 452, 37 S. W. 194; *Long v. State*, 81 Miss. 448, 33 So. 224; *State v. Thompson*, 106 La. 362, 30 So. 895, 14 Am. Crim. Rep. 31; *Rodriguez v. State*, 23 Tex. App. 503, 5 S. W. 255; *Cox v. Territory*, 2 Okla. Crim. Rep. 668, 104 Pac. 378; *Watson v. State*, 7 Okla. Crim. Rep. 591, 124 Pac. 1101.

Defendant was entitled to be tried by a jury of twelve men who were cool, dispassionate, unprejudiced, and duly sober; but the jury which convicted defendant were not of this kind.

Brant ex dem. Buckbee v. Fowler, 7 Cow. 563; *People v. Douglass*, 4 Cow. 26, 15 Am. Dec. 332; *State v. Baldy*, 17 Iowa, 39; *Davis v. State*, 35 Ind. 496, 9 Am. Rep. 760; *Weis v. State*, 22 Ohio St. 486; *State v. Appelgate*, 28 N. D. 395, L.R.A.1915C, 315, 149 N. W. 356; *Bilton v. Territory*, 1 Okla. Crim. Rep. 575, 99 Pac. 163.

Messrs. S. P. Freeling, Attorney General, and R. McMillan, Assistant Attorney General, for the State:

Drunkenness is no excuse for a homicide, although it may be considered in reduction of punishment.

Stouse v. State, 6 Okla. Crim. Rep. 415; 119 Pac. 271; *Updike v. State*, 9 Okla. Crim. Rep. 124, 130 Pac. 1107.

In order for improper argument to work a reversal, it must be grossly unwarranted and improper, and the statements made must be of a material character, and such as injuriously affect the defendant's rights.

Williams v. State, 4 Okla. Crim. Rep. 534, 114 Pac. 1114; *Morgan v. State*, 9 Okla. Crim. Rep. 26, 130 Pac. 522; *Edwards v. State*, 9 Okla. Crim. Rep. 322, 44 L.R.A. (N.S.) 701, 131 Pac. 956; *Bouie v. State*, 9 Okla. Crim. Rep. 345, 131 Pac. 953.

The fact that a juror in a prosecution for homicide, during the progress of the trial, used intoxicating liquor, combined with other curative agents, as a medicine, without medical advice, will not vitiate the verdict in the absence of any showing that it was used without the knowledge of the prisoner or his counsel, or that its effect was intoxicating.

State v. Morphy, 33 Iowa, 270, 11 Am. Rep. 122; *Pope v. State*, 36 Miss. 121; *State v. Cucuel*, 31 N. J. L. 249; *Gilman-ton v. Ham*, 38 N. H. 108; 12 Enc. Pl. & Pr. 629.

Remarks to or casual conversations with jurors do not necessarily constitute a ground for granting a new trial, where such remarks are not calculated to produce a more unfavorable impression upon the minds of the jurors than that produced during the trial, or are not of such a nature as is calculated to produce probable harm to the accused.

12 Enc. Pl. & Pr. 610; *People v. Symonds*, L.R.A.1917F.

22 Cal. 348; *Stockwell v. Chicago, C. & D. R. Co.* 43 Iowa, 470; *Stewart v. Small*, 5 Mo. 525; *Stites v. McKibben*, 2 Ohio St. 588; *State v. Belknap*, 39 W. Va. 429.

Defendant was ably defended and had a fair deal, and no procedure in any trial will occasion the setting aside of a verdict unless it appears that, upon an examination of the entire record, there was a probable miscarriage of justice, or the violation of some constitutional or statutory right.

Atchison v. State, 3 Okla. Crim. Rep. 295, 105 Pac. 387; *Offitt v. State*, 5 Okla. Crim. Rep. 49, 113 Pac. 554; *Brown v. State*, 9 Okla. Crim. Rep. 382, 132 Pac. 359; *Fowler v. State*, 8 Okla. Crim. Rep. 130, 126 Pac. 831.

Matson, J., delivered the opinion of the court:

A statement of facts will not be necessary for a determination of the questions presented in this appeal, except to state that the evidence upon the part of the state shows a wilful, premeditated, and intentional killing without any justifiable or excusable cause, while the defendant claimed either that he was too drunk to know what he was doing, or else he killed the deceased in self-defense. The defendant's testimony is conflicting as to which theory of defense he relied upon. The theory of temporary insanity as well as self-defense were both covered by the court's instructions. The sole errors relied upon relate entirely to alleged improper argument on the part of the assistant county attorney and improper conduct of the jury while impaneled and considering the evidence in the case. The first alleged error relied upon for a reversal is the improper conduct and argument of the assistant county attorney. The excerpts from said argument contained in the brief of plaintiff in error which are claimed to be improper and prejudicial to this appellant are as follows: First: "You took the life of a man who was there defenseless. You know it, Allen. You were there. You know it."

This remark was objected to by counsel for the appellant, and that part of the argument, "You know it, Allen," was by the court promptly stricken, and the jury admonished not to consider it. Second: "If you went home to your wife and little children and told them what you had heard from the witnesses, what would their conscience tell them?"

Counsel for appellant made the following objection to this line of argument:

"Note our exceptions to that argument as not legitimate and not germane to the case."

Third: "No you would not say that child's conscience told it wrong. Don't go

home and have a child tell you those things."

To the foregoing statement the following objection was interposed by counsel for appellant:

"We object to this kind of argument as being made for the purpose of arousing prejudice only."

Fourth: "Go home and look your dear wife in the face. When you speak to her and she says, 'John, what did you do in the face of that testimony?' You do not have any doubt of his guilt."

To the foregoing counsel for appellant objected as follows:

"We object as not germane or legitimate argument, not relevant, and note our exceptions."

Fifth: "Let's go beyond the personalities in this case and get down to the real issues. There is no politics in this case. Pruiett took it out when he discovered a man with a John Fields button on."

To the foregoing remark counsel for the appellant excepted as follows: "Note our exceptions to that argument."

After which the county attorney continued as follows: "I don't care for your exceptions. Who brought that into this case? Not a man on the jury will say that I brought it in here. Where does it cut any figure anyway? Be courageous, men."

Whereupon counsel again excepted as follows:

"Note our exceptions to the argument of counsel as being highly improper."

"By the court: Just a minute, Mr. Choate; gentlemen of the jury, these arguments of counsel both for the state and the defendant in regard to politics having entered into this case; the court fails to see where any politics has entered, and fails to see where it is relevant or should be commented upon by counsel for the state or the defendant, either one. You will therefore disregard all statements of counsel in regard to politics having entered into the case, the same being impertinent and not properly before you."

The foregoing excerpts from the brief of counsel for the appellant and the record itself contain all the statements of the assistant county attorney alleged to be improper, and the rulings of the trial court thereon. It will be noted that although there was no request on the part of counsel for the appellant that the court withdraw any of this argument from the consideration of the jury, that the court of its own motion, however, did withdraw certain portions of this argument from the jury and instructed the jury not to consider it. The assistant county attorney engaged in a line of argument which is not to be commended, L.R.A.1917F.

and we agree with counsel for the appellant that the argument made had a tendency to appeal to the passion and prejudice of the individual members of the jury. However, it is not such argument as the making of which is a ground for a new trial under the statutes of this state. In our opinion, this argument could have been cured by its withdrawal from the consideration of the jury by the trial court, and counsel for the appellant should have requested its withdrawal in order that the court might have cured the error, if any. This was not done. Counsel at the time only saw fit to object and take an exception without any ruling by the trial court upon the impropriety of certain of these remarks. Others the trial court, of its own motion, as heretofore indicated, saw fit to withdraw, and admonished the jury not to consider. It is not every species of improper argument that justifies this court in reversing a judgment of conviction. The argument may be improper, but the proof of guilt may also be so overwhelming that it is evident that upon a second trial an impartial and intelligent jury could arrive at no honest conclusion except that of guilt. That is the situation in this case. The proof upon the part of the state, when considered in connection with the evidence of the defendant, is so convincing and conclusive that it is readily to be seen that a verdict of guilty of murder was the only logical conclusion that an intelligent jury could have arrived at in this case. It would be an imposition upon the law-abiding citizens of this state and an unjust burden upon the taxpaying public to reverse this judgment because of these alleged errors in the argument where no request was made to have the trial court withdraw the remarks from the consideration of the jury. It is not the rule in Oklahoma that error presumes injury, but this court is required to examine the entire record carefully and determine from all the facts and circumstances surrounding the case (where the error is not fundamental,—i. e., such as involves the violation of some express constitutional or statutory right of the defendant) whether the error complained of has probably resulted in a miscarriage of justice. This cannot be said to be true in this instance because of the conclusive proof of the guilt of this appellant.

We hold, therefore, that where the guilt of the appellant is clearly established, and there is no good reason to believe that upon a second trial an intelligent and honest jury could or would, with reason and propriety, arrive at any other verdict than that of guilt, a new trial will not be granted except for fundamental error.

It is also contended that the jury, while

considering the evidence in the case, drank whisky. The evidence in support of this alleged ground for a new trial is substantially as follows: It appears that after the jury was impaneled and while the evidence was being introduced the court took a recess over Thanksgiving Day, and on said day the jury was kept together, in charge of a sworn bailiff, a part of the time being located in a room at a hotel in Oklahoma City. One of the jurors was sick, and on the recommendation of his physician was told to take a little quinine and whisky. In some manner, not disclosed by the record, this juror procured a half pint of whisky, and mixed the quinine with it, and during Thanksgiving Day, while the jury was not considering the evidence, this juror drank the greater part of such mixture. It appears also, that another juror drank two drinks of this mixture on that day. On the next morning before going to the trial this sick juror took one drink of the whisky and quinine.

The foregoing is the misconduct complained of. Counsel for appellant rely largely upon the decision of this court in the case of *Bilton v. Territory*, 1 Okla. Crim. Rep. 566, 99 Pac. 163, in which it was held: "The use of intoxicating liquor as a beverage by a juror during the trial and consideration of a capital case will vitiate a verdict of guilty, and entitle the accused to a new trial."

It will be noted that in that case the intoxicating liquor was used as a beverage, while in this case it was prescribed as a medicine and used upon the advice of a physician. In the *Bilton Case* the whisky was drunk at a time when the jury was considering the evidence. In this case the whisky and quinine was taken at a time when the jury was not considering the evidence, but during a recess occasioned by the happening of Thanksgiving Day. It also appears from the *Bilton Case* that the decisions upon which that holding of this court rests are based upon the use of intoxicants after the jury had retired to consider of its verdict. The drinking of whisky or any other intoxicating beverage by the jury or by any member thereof should not be tolerated, and the bailiff in charge of a jury should be very careful to guard against the reception and use of such intoxicants by the jury.

The *Bilton Case*, we think, is distinguishable from this case. First, in that in the *Bilton Case* the jury used whisky as a beverage and drank considerable quantities of it throughout the progress of the trial, while in this case only two members of the jury partook of whisky mixed with quinine as a medicine, and then during a recess in the trial, and it is not shown that the effect of such mixture deadened the sensibilities of

the jurors to any extent whatever, or rendered either of them incapable of the proper performance of their duties. Further, it is not contended in this case that after the jury retired to consider of their verdict that any intoxicants were consumed by any member thereof. In the *Bilton Case* it was shown that certain members of the jury drank whisky at a saloon "while hearing this case and deliberating upon their verdict." So that it may be readily seen that the facts in the *Bilton Case* are very dissimilar to the facts in this case.

The supreme court of Iowa in the case of *State v. Morphy*, 33 Iowa, 273, 11 Am. Rep. 122, distinguishes in fact and principle the case of *State v. Baldy*, 17 Iowa, 39 (cited with approval in the *Bilton Case*), as follows: "It is next assigned as error that the court refused to set aside the verdict of the jury on the ground that one of the jurors drank intoxicating liquor during the progress of the trial. The affidavits as to the fact that the juror did so drink are not set out in full in the abstract. So far as we are able to determine the circumstances upon the abstract and arguments they are, that one of the jurors, not in the habit of drinking, was ill during the trial, and took for medicinal purposes, without medical advice or prescription, some brandy and blackberry balsam or mixture; that it was done during the hearing of the case, and not after the jury retired. There is no showing or claim that its effects were intoxicating or other than remedial; nor is it shown that the facts concerning it were not well known to defendant and his counsel at the time and before the cause was submitted to the jury. The case is not, either in its facts or principles, within *State v. Baldy*, supra, nor *Ryan v. Harrow*, 27 Iowa, 494, 1 Am. Rep. 302, and there was no error in the action of the court in this respect."

The facts in the *Morphy Case* are very similar to the facts in this case. In the case of *Gilmanton v. Ham*, 38 N. H. 114, the use of a small quantity of brandy by a juror for medicinal purposes is held not to be error where his disease is real and manifest, and the use of brandy had been previously prescribed by a physician. This later case distinguishes the principle previously announced by that court in the cases of *State v. Bullard*, 16 N. H. 139, and *Leighton v. Sargent*, 31 N. H. 119, 64 Am. Dec. 323 (cited with approval in the *Bilton Case*), although the former decisions were not mentioned. In *Gilmanton v. Ham*, supra, the court said: "We see no sufficient cause for setting aside the verdict, in the conduct of the juror in drinking a small quantity of brandy, which, upon the evidence before us, he must be holden to have taken only and

strictly as a medicine, previously prescribed by his physician, as a remedy for the disease under which he was manifestly laboring at the time, and not as a beverage. It was taken by him alone, apart from and without the knowledge of any of his fellows, in good faith, as a remedial agent for a serious and troublesome malady. The facts found by the case do not seem to us to differ substantially in effect from what they would have been if the juror had carried in his pocket a vial of medicine for the relief of the difficulty under which he was suffering, and had taken a dose of it on one of the numerous occasions when he was obliged, as the consequence of his illness, to leave the jury room. His disease was real and manifest, and not feigned; the juror was not in the habit of using spirituous liquors; he requested the officer to obtain the small quantity of brandy for him, as the medicine prescribed by his physician for the disease under which he was palpably suffering; he drank it privately as a medicine, and not as a beverage, after his mind was made up in the case; and it is impossible to conceive how, under the circumstances, the defendant can have suffered from the influence of the liquor upon the judgment of the juror, or what injurious influence can be exerted on the community as the result of such an occurrence. There would not seem to have been anything in the conduct of the juror, as disclosed by the case, which can rightfully be regarded as imprudent or injudicious, much less deserving the severe reprehension and rebuke which would be involved in setting aside the verdict on that account."

A similar distinction is made in the case of *Pope v. State*, 36 Miss. 121, wherein it was held: "The introduction by the bailiff of intoxicating liquors, in a sufficient quantity to produce drunkenness, into the room where the jury in a felony case are deliberating upon their verdict, is illegal and improper; and if nothing more appear, the verdict will be set aside upon the ground that the jury were thereby exposed to an improper influence; but if it appear that such liquor was used by only one of the jury, who was sick, and that he was not intoxicated thereby, the presumption which would otherwise arise against the purity of the verdict is rebutted, and it will not be disturbed."

Other cases to like effect are *State v. Cucuel*, 31 N. J. L. 249, and *People v. Romero*, 12 Cal. App. 466, 107 Pac. 709.

While there appears to be a direct conflict in the authorities as to whether or not the use of intoxicating liquors as a beverage by members of the jury during the progress of the trial and while deliberating upon the

verdict is of itself sufficient ground for granting a new trial, there appears to be a uniformity of modern opinion to the effect that the use of small quantities of whisky or other intoxicants, mixed with curative drugs, or diluted, and used strictly for medicinal purposes by jurors, is not such misconduct as will vitiate the verdict and authorize the granting of a new trial, where it appears that such jurors were in no way rendered intoxicated or incapacitated for the proper performance of their duties. There is an affirmative showing in this case that neither of the jurors who partook of whisky and quinine were in any way incapacitated thereby.

Finally it is contended that other misconduct of the jury should reverse this judgment. This assignment of error refers to the fact that during recesses taken during the progress of the trial the jurors were permitted to have access to certain local newspapers containing statements of other homicides committed in Oklahoma county while the trial of this case was in progress, and also during a recess some of the jury saw the sheriff come into the courthouse carrying a hat and two butcher knives, and one of the jurors spoke to him and asked him if that was all he got, and he replied, "No, I got one dead one and five live ones." It is asserted that this conduct is such as to greatly prejudice this defendant and deprive him of a fair and impartial trial. While the conduct of the juror in yelling to the sheriff as he was passing through the courthouse is subject to criticism, and is such as the trial court should always rebuke should attention be called to it, nevertheless we cannot see wherein this defendant's substantial rights were prejudiced thereby. Our statutes (Rev. Laws, §§ 5899, 5900, and 5937) provide that there shall be no communication with the jury after it has been impaneled and sworn to try the case by any person, on any subject connected with the trial itself; and if such a communication is had, it is ground for new trial, and the verdict should be set aside. In this case it is shown conclusively that no person was permitted to communicate with the jury upon any subject connected with the trial, and it is also shown that the newspapers which the jurors were permitted to read contained no statement with reference to this particular trial; that such matters were torn or cut out of the papers before they were handed to the jurors. No statutory right of this defendant, therefore, was violated, the jury did not discuss these outside matters in any way, and it does not appear that the defendant was probably injured by such alleged misconduct; but, on the other hand, the testimony of the persons

called by the defendant in support of the motion for new trial, in our opinion, shows that no injury was occasioned this defendant by any of these matters set forth in the motion.

Where the evidence is so conclusive and convincing of the guilt of the defendant of the degree of crime of which the jury found him guilty, before this court may set such a judgment of conviction aside it must clearly appear that the defendant has been deprived of some constitutional or statutory right, or that the errors complained of have probably resulted in a miscarriage of justice. In this case, it is our firm conviction, not

only that there has been no miscarriage of justice, or that the defendant has not been deprived of any of his constitutional or statutory rights, but also that the conviction of murder received at the hands of the jury was the only honest verdict which an intelligent and unbiased jury could have found under the evidence.

For the reasons given, the judgment of the Superior Court of Oklahoma County is affirmed.

Doyle, P. J., and Armstrong, J., concur.

OREGON SUPREME COURT. (In Banc.)

STATE OF OREGON EX REL. JAMES
WITTHYCOMBE, Governor,

v.

J. R. STANNARD, County Clerk of Curry
County, et al.

(— Or. —, 165 Pac. 566.)

Party — governor — mandamus to county officials.

1. The governor may maintain an action to compel county officials to take the necessary steps to hold an election which will affect the whole state.

For other cases, see Mandamus, II. b, in Dig. 1-52 N. S.

Mandamus — to compel holding of election — prematurity.

2. Mandamus will lie to compel county officials who have declared their intention not to comply with the requirements of the law necessary to the holding of an election to take the steps necessary for that purpose, although the time has not yet arrived for the performance of any act.

For other cases, see Mandamus, I. f, in Dig. 1-52 N. S.

(Burnett, J., dissents.)

(June 6, 1917.)

PROCEEDING for a writ of mandamus to compel defendants to perform the duties imposed upon them by law in regard to the calling and holding of elections. Demurrer to writ overruled.

The facts are stated in the opinion.

Mr. George M. Brown, Attorney General, and I. H. Van Winkle, Assistant Attorney General, for petitioner:

The constitutional amendment known as

Note. — As to mandamus to compel steps preliminary to an election before the arrival or expiration of the time fixed therefor, see annotation following this case, post, 221.

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§ 11 of art. XI. has no application to any indebtedness that might be incurred by reason of the election provided for by chap. 422, General Laws of Oregon, 1917.

Grant Count v. Lake County, 17 Or. 464, 21 Pac. 447; Burnett v. Markley, 23 Or. 440, 31 Pac. 1050; Municipal Secur. Co. v. Baker County, 33 Or. 352, 54 Pac. 174; Cunningham v. Umatilla County, 57 Or. 517, 37 L.R.A.(N.S.) 1051, 112 Pac. 437; Edwards v. Bibb, 54 Ala. 481; McClellan v. McClellan, 65 Me. 500; Moers v. Reading, 21 Pa. 189; Southern P. R. Co. v. Orton, 32 Fed. 473; Indianapolis v. Navin, 151 Ind. 139, 41 L.R.A. 344, 47 N. E. 525, 51 N. E. 80; Cooley, Const. Lim. 7th ed. pp. 91, 92; State v. Cochran, 55 Or. 157, 104 Pac. 419, 105 Pac. 884.

Messrs. S. M. Endicott and W. C. Winslow for defendants.

McBride, Ch. J., delivered the opinion of the court:

This is a proceeding in mandamus to compel the defendants to perform the duties imposed upon them by law in regard to the calling and holding of elections, and in particular in respect to the special election to be held throughout the state of Oregon on June 4, 1917. It is alleged that the defendants, who are the county commissioners, county judge, clerk, and the sheriff of Curry county, refuse to take steps required by law or to give the notices necessary in respect to such special election, and declare that they will not take the steps required by law to hold such election. To this writ a demurrer is filed stating two grounds: (1) That the relator has not the legal capacity to sue; and (2) that the writ does not state facts sufficient to constitute a cause of action.

As to the first ground, it may be said, in brief, that by § 10 of article 5 of the Constitution it is declared that the governor shall take care that the laws shall be faithfully executed.

Where a public official charged with a duty to the whole state, as in this case, refuses to execute the law and to perform his duty in that regard, we think the governor is acting only in obedience to this requirement of the Constitution in appealing to the court to compel that official to perform such legal duty.

It is also alleged that this proceeding is premature, and that mandamus will not lie until the time has arrived upon which the posting of notices and other prerequisites to an election are required to be done. Upon this theory the relator would be compelled to wait until the last minute of the last hour within which the act might be done, and after that time had expired, before he could bring a proceeding to compel the act to be performed. A proceeding to compel performance of an act after the time for such performance has expired would be futile, and would result in a condition wherein there would be no adequate remedy against a grave public wrong. The law does not contemplate any such absurdity; and accordingly it has been held that while ordinarily mandamus will not lie to compel the performance of an act until the time for doing the act has arrived, yet where a refusal to perform the act has occurred, and where it seems probable that the act will not be performed within the time required, mandamus will lie, and a proceeding brought upon the strength of such refusal is not premature. *State ex rel. Dawson v. Chicago, B. & Q. R. Co.* 85 Kan. 649, 118 Pac. 872; *Atty. Gen. v. Boston*, 123 Mass. 460; *People ex rel. Hotchkiss v. Smith*, 152 App. Div. 514, 137 N. Y. Supp. 387. The latter case was one of mandamus to compel the board of elections to file certain certificates of nomination, wherein the court says: "The duty devolved upon the board of elections is to file certificates of nomination which are in conformity to the provisions of the last valid statute relating thereto, if any such exists. No express demand to file any particular certificate has been made upon defendants. There has been no express refusal to do so. Granting that defendants' duty is a public one, and that omission to perform such duty is equivalent to a refusal to perform, . . . it may be urged that as yet the defendants have not omitted to perform, for the time fixed within which performance may be had has not yet expired. . . . But although evidence is lacking of an express refusal to perform a particular act, we think that it may justly be inferred that defendants will refuse to file any certificate except one which shall comply with the requirements of the statute above referred to. . . . Where delay in reaching such determination will result in

depriving one of an efficient remedy if the determination is erroneous, either the presumption above referred to should prevail, or the person charged with the performance of the duty should seasonably announce his determination respecting his future action in terms admitting of no mistake or misunderstanding."

The case above cited is not so strong as the case at bar, because here the defendants absolutely refused to take steps toward holding the election, and declared their intention not to do so. The statutes under which those decisions were rendered are similar to our own, and the opinions seem to be based upon sound common sense.

The following cases are cited as holding a contrary view, and while some of them upon a cursory examination, would appear to be in point, yet, when thoroughly analyzed, none of them are applied to circumstances exactly identical to those in the case at bar:

The first case is *Lake County v. State*, 24 Fla. 263, 4 So. 795. In this case there was no allegation in the complaint that the commissioners had refused to call the election. It was also alleged that they did not intend to and would not perform that duty. The court held that this was not a sufficient allegation to call into effect the power of mandamus. The other Florida cases are to the same effect.

Lee v. Taylor, 107 Ga. 362, 33 S. E. 408, merely holds that mandamus will not lie to compel a tax collector to pay over tax moneys to an outgoing treasurer so that such treasurer can get a commission. It seems to have no relation whatever to the case at bar.

In *Gormley v. Day*, 114 Ill. 185, 28 N. E. 693, there does not appear to have been any refusal on the part of the clerk to post the copies of an ordinance. The court also held, on the merits, that the petitioner was not entitled to the relief sought. The case is not in point.

The case of *People ex rel. Cooley v. Quinn*, 143 Ill. App. 123, was a mandamus proceeding by the city treasurer to compel the city comptroller to pay over to the relator moneys received by such comptroller from day to day, as they were collected. It was held that mandamus does not lie to direct the performance of an act until a default; that the defendant was entitled to a reasonable time within which to pay over the money he held; and that, if he held it beyond such time mandamus would lie. In that case it is apparent that no serious mischief would have resulted had the issuance of a writ been delayed until after refusal to comply, while in the case at bar it is plain that delay in the issuance of the writ

until the time prescribed by law for the county court of Curry county to perform its duty would render any proceeding entirely futile, and might result in defeating the will of the people of the whole state as to important measures to be submitted at the ensuing special election.

The case of *State ex rel. Cook v. Houser*, 122 Wis. 534, 100 N. W. 964, grew out of a political controversy as to whether the La Follette or anti La Follette delegates should be placed on the ballot as the genuine Republican delegates. The court held that, as the time for placing the names of the candidates upon the official ballot had not arrived, the proceeding was premature. Nevertheless they went into the question upon its merits in an opinion which, owing to its learned length, it is impossible to epitomize here. In said case, as in a case in Wisconsin, hereafter to be noted, we find the court practically conceding that there may be "special circumstances" in which courts will depart from the general rule that mandamus will not lie to compel the performance of an act until the duty to perform it is due.

Ex parte Cutting, 94 U. S. 14, 24 L. ed. 49, was mandamus to compel the court to allow an appeal. Held, that the petition must show that the petitioner has a clear right to an appeal, which has been refused him, and that it was not shown in that particular case. The case is not in point.

State ex rel. Board of Education v. Hunter, 111 Wis. 582, 87 N. W. 485, was a mandamus proceeding to compel a city treasurer to set aside certain moneys as school funds, wherein it was held that the funds had not yet come into his hands and might never come there, and that the application was premature. In the course of the opinion it is said that mandamus will not lie to compel the performance of an act not yet due by a public officer because of a mere threat by him that he will not perform it.

The court admits that this is contrary to the ruling in *Atty. Gen. v. Boston*, 123 Mass. 460, and adds very significantly: "Extreme cases may, perhaps, arise demanding the use of mandamus to control the performance of prospective duties; but this is certainly not such a case."

It appears to us that the case at bar is just such an "extreme case." Here there rests upon the county court of Curry county an important duty, which, by their general demurrer, they admit they have been requested to perform, and refuse to perform, and will not perform; and this, too, in a case where such refusal might defeat the will of the whole people of the state in respect to important measures which will L.R.A.1917F.

come up for their vote at the ensuing election. They say, in effect, that they intend to paralyze the arm of the state and defeat the will of the voters. If this is not an extreme case, it would be difficult to find such.

The case of *Northwestern Warehouse Co. v. Oregon R. & Nav. Co.* 32 Wash. 218, 73 Pac. 388, was mandamus to compel defendants to build a side track for plaintiff's warehouse. This is a somewhat complicated case, in which it is announced that mandamus will not lie in anticipation of a supposed omission of duty, but it must appear that there has been an actual default in the performance of a clear legal duty actually due. The court held that the law did not require the defendants to construct the track, and the case went off on entirely different grounds from anything involved in the case at bar.

Sights v. Yarnalls, 12 Gratt. 292, was mandamus to compel the issuance of a saloon license, in which it was held that mandamus would not lie to compel the council to grant a license until the time had arrived at which the application for such license could come up for consideration. This was evidently a case where a delay would not defeat plaintiff's right.

Spiritual Atheneum Soc. v. Randolph, 58 Vt. 192, 2 Atl. 747, is a case fully covered by the syllabus, which is as follows: "A petition for a writ of mandamus will not be granted to compel public officers to do an act already beyond their control, nor against their successors in office, not yet elected, to compel them to perform an act in the future."

It is evident this case is not in point by a thousand miles.

Thaxton v. Terrell, 99 Tex. 562, 91 S. W. 559. This was mandamus to compel the land commissioner to receive an application for state land. It appears that defendant accepted the application after the writ issued, subject to certain conditions as to the minerals on the same. It was held that this acceptance avoided the necessity of issuing the writ; that plaintiff had a remedy in equity to compel the issuance of patents without the restrictions imposed by the land commissioner. For that reason the case is not in point.

State ex rel. Swinton v. Bates, 38 S. C. 326, 17 S. E. 28, was mandamus to compel the state treasurer to transfer certain stocks formerly owned by a deceased person to the relator, who was his legatee, and the court in that case decided that such transfer should not be made until the expiration of one year prescribed by law for creditors to present their claims, and that for this reason the application was premature. It is plain that the transfer might never be made

if the claims should consume the stock. The case is not in point.

Zanesville v. Richards, 5 Ohio St. 589, was mandamus to require the auditor to enter upon the tax list for the years 1855 and 1856 certain taxes levied for city purposes for these years. The return showed that the time had passed within which the auditor could place levies upon the tax list for 1855, said list having passed out of his hands, and that the list for 1856 had not yet come into his possession. The case does not disclose that he refused to place the taxes for 1856 on the list when they should come into his possession. The case is easily distinguishable from the one at bar for the reasons already given.

State ex rel. Mitchell v. School Dist. 8 Neb. 93, is a similar case, in which there is no allegation of a demand or refusal to comply.

In *State ex rel. Star Pub. Co. v. Associated Press*, 159 Mo. 410, 51 L.R.A. 151, 81 Am. St. Rep. 368, 80 S. W. 91, demand and refusal had not occurred. The court lay special stress upon this fact.

Public School Comrs. v. Allegany County, 20 Md. 449, was mandamus to compel the county commissioners to levy a tax, and it was therein held that there was no presumption that because the commissioners had refused to levy the same kind of a tax in 1861, they would refuse to levy it in 1862, and that the court would not act on such presumption.

Sterling v. McMaster, 82 Md. 164, 33 Atl. 461. This was mandamus to compel McMaster, treasurer and collector, to place in the hands of the sheriff bills for the collection of unpaid taxes. The case is somewhat similar in some respects to the case at bar, but it has this distinguishing feature: In that case there was ample time left after the period fixed by law for the treasurer to turn over the bills in which mandamus might be brought and the alleged duty enforced. A failure to issue the writ therefor would not work any serious injury, and under these circumstances the court held that the writ was premature. These are practically all the cases cited outside of our own state, and in many of them it is laid down as a general rule that mandamus will not issue to compel the performance of a duty before the time for such performance has arrived. This rule, in some form or other, has been "parroted" down from court to court and from judge to judge, without any particular reason being given for it, or any attempt to distinguish between those cases where a denial of the writ will work no serious or irreparable injury and those "extreme cases," to use the words of the Michigan supreme court, where such L.R.A.1917F.

denial would work great injustice or public injury, or prevent the exercise of the constitutional right of all citizens of the state to a voice in the elections. The rule, as a general one, is good; but, as heretofore shown, there are well-defined exceptions to it, and this is one of them. The courts will not chop technicalities when their aid is asked to compel the performance by a public officer of a duty which he owes to the citizenry of the whole state, but, where no other remedy presents itself, will exercise their constitutional authority to compel by mandamus the performance of such duty.

The demurrer is overruled.

McCamant, J., took no part in the consideration of this case.

Barnett, J., dissenting:

On petition of the relator an alternative writ of mandamus issued out of this court, reciting the official character of the governor of the state and of the attorney general, and the fact that the defendants are officers of Curry county. It is also set forth that by chapter 422 of the Laws of 1917, now in effect, a special election is required to be held throughout the state June 4, 1917, at which sundry legislative enactments and proposed amendments to the Constitution shall be submitted to the people for their approval or rejection. The essential charging part of the writ reads thus: "That notwithstanding the provisions of said chapter 422 Laws of 1917, and the requirements of the other laws of the state of Oregon, the defendants herein, and each of them, have refused, and do now refuse, to perform the duties imposed upon them by law with respect to giving notice of and holding elections with reference to the election provided for in said chapter 422, within Curry county, or to do or perform any other duty or thing with respect to preparing for, giving notice of, or holding any election within said Curry county, Oregon, on the 4th day of June, 1917, or to canvass or abstract and record the returns of said or any election to be held on said date, or to transmit the certificate thereof to the secretary of state or to do any other act or thing in connection therewith, and threaten and declare that they will not do so, and, unless commanded so to do by order of this honorable court, will not perform such duties aforesaid."

A demurrer to the writ having been overruled pro forma, the defendants have answered to the effect that Curry county has no funds available for the expense of the election, it not having been included in the annual budget; further, that the county is already indebted in at least the sum of

\$5,000, and that the additional expenditure involved will be in excess of the constitutional limit; and, lastly, that, in order to meet the cost of the election, the county court will be compelled to levy taxes in excess of the 6 per cent limit prescribed by the constitutional amendment adopted at the November election held in 1916.

The initial act required in the matters involved is for the county clerk to issue notice of election not less than ten days prior to the day appointed for holding the same. This action is not indispensably necessary of performance in any event until at least May 24, 1917,—a date yet in the future. The quoted excerpt from the writ, upon which the relator bases his claim, contains only conclusions of law. It is in effect nothing more than the expression of his prediction that the defendants will not meet his views of the law in their action in the premises. Mr. Chief Justice Moore, writing in *State v. Williams*, 45 Or. 314, 330, 67 L.R.A. 167, 77 Pac. 970, said: "The writs having stated that the municipal judge neglected to issue bench warrants 'as required by law,' the phrase quoted is only a legal conclusion, and not the averment of a material fact, stated as the foundation of an enforceable right."

This doctrine is well supported by many authorities, both before and since then, holding that such statements do not present any issue for consideration.

Moreover, paraphrasing the statement of the writ, the defendants have a right to "refuse, and do now refuse, to perform the duties imposed upon them by law," for the very good reason that the time for their performance has not yet arrived. "A relator is not entitled to the writ unless he can show a legal duty then due at the hands of the respondent; and, until the time arrives when the duty should be performed, no threats or predetermination not to perform it can take the place of such default. The law does not contemplate such a degree of diligence as the performance of a duty not yet due. The general rule is that the writ will not be granted in anticipation of a supposed omission of duty, however strong the presumption may be that the person sought to be coerced by the writ will refuse performance at the proper time. An important reason for refusing the writ in such cases is that, until the duty is due, no practical question can be presented to the court, but simply a supposed case." 2 Spelling, *Extr. Relief*, § 1385.

Again, we find in § 12 of *High on Extraordinary Legal Remedies*, 3d ed. the following: "Mandamus is never granted in anticipation of a supposed omission of duty, however strong the presumption may be that

the persons whom it is sought to coerce by the writ will refuse to perform their duty when the proper time arrives. It is therefore incumbent upon the relator to show an actual omission on the part of the respondent to perform the required act; and, since there can be no such omission before the time has arrived for the performance of the duty, the writ will not issue before that time. In other words, the relator must show that the respondent is actually in default in the performance of a legal duty then due at his hands, and no threats or predetermination can take the place of such default before the time arrives when the duty should be performed; or does the law contemplate such a degree of diligence as the performance of a duty not yet due."

This court itself has spoken on the same subject in *State ex rel. Booth v. Bryan*, 20 Or. 502, 507, 38 Pac. 619, where Mr. Justice Wolverton writing, uses this language: "It is a just presumption that all public officers will faithfully discharge the functions of their respective offices, and observe all the duties enjoined upon them by law, and it would be a work of supererogation for the courts, by mandamus or other process, to command them to perform their duties in futuro, as they are by law directed. Courts will not assume or exercise supervisory control over public officers and functionaries, whether state, county, or municipal, nor will they attempt to control their acts, or command them to act, except in cases where there has been a plain violation of official and public duty which the law specially enjoins upon them, and it is made to appear that some private individual or the public has a legal right or title to the due performance of such duty, and that there exists no other plain, speedy, or adequate remedy in the ordinary course of law."

The following precedents are to the same effect: *United States ex rel. Langley v. Bowen*, 6 D. C. 196; *Lake County v. State*, 24 Fla. 263, 4 So. 795; *Ex parte Ivey*, 26 Fla. 537, 8 So. 427; *Lee v. Taylor*, 107 Ga. 302, 33 S. E. 408; *Gormley v. Day*, 114 Ill. 185, 28 N. E. 693; *Chicago, D. & M. R. Co. v. Olmstead*, 46 Iowa, 316; *State ex rel. Price v. Carney*, 3 Kan. 88; *Sterling v. McMaster*, 82 Md. 164, 33 Atl. 461; *Public School Comrs. v. Allegany County*, 20 Md. 449; *State ex rel. Star Pub. Co. v. Associated Press*, 159 Mo. 410, 51 L.R.A. 151, 81 Am. St. Rep. 368, 60 S. W. 91; *State ex rel. Mitchell v. School Dist.* 8 Neb. 92; *Hardin v. Guthrie*, 26 Nev. 246, 66 Pac. 744; *State ex rel. Shaw v. Noyes*, 25 Nev. 31, 56 Pac. 946; *Zanesville v. Richards*, 5 Ohio St. 589; *State ex rel. Swinton v. Bates*, 38 S. C. 326, 17 S. E. 28; *Thaxton v. Terrell*, 99 Tex. 562,

91 S. W. 559; *Spiritual Atheneum Soc. v. Randolph*, 58 Vt. 192, 2 Atl. 747; *Sights v. Yarnalls*, 12 Gratt. 292; *Northwestern Warehouse Co. v. Oregon R. & Nav. Co.* 32 Wash. 218, 73 Pac. 388; *State ex rel. Board of Education v. Hunter*, 111 Wis. 582, 87 N. W. 485; *Ex parte Cutting*, 94 U. S. 14, 24 L. ed. 49; *State ex rel. Cook v. Houser*, 122 Wis. 534, 100 N. W. 964; *People ex rel. Cooley v. Quinn*, 143 Ill. App. 123; *Missouri, K. & T. R. Co. v. Thompson*, 55 Tex. Civ. App. 12, 118 S. W. 618; *State ex rel. Abbott v. Adcock*, 225 Mo. 335, 124 S. W. 1100; *Pierce v. Executive Council*, 165 Iowa, 465, 146 N. W. 85; *Scott v. Singleton*, 171 Ky. 117, 188 S. W. 302.

A leading case, sometimes cited in opposition to this doctrine, is that of *Atty. Gen. v. Boston*, 23 Mass. 460, where the city council, authorized by statute to maintain a ferry at rates to be prescribed, ordered that it be free of ferriage after a certain future day, and the court, on application made before that time arrived, compelled the continued collection of toll by a writ of mandamus. Rightly considered, this case is not variant in principle from those already cited; for the duty to collect toll was imperative at and before the issuance of the writ, and it was what the court sought to enforce by its precept. Besides, the statute of the state of Massachusetts governing the matter gives jurisdiction to its courts far more extensive than ours on the subject of mandamus. The law of that state, as quoted in the opinion, is this: "The court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein, where no other remedy is expressly provided, and may issue writs of error, certiorari, mandamus, prohibition, quo warranto, and all other writs and processes, to courts of inferior jurisdiction, corporations, and individuals, necessary to the furtherance of justice and the regular execution of the laws." Gen. Stat. chap. 112, § 3.

The procedure there contemplates that mandamus may be used as a preventive remedy. This case has been cited many times as authority for allowing mandamus at the suit of some private person or of the attorney general to enforce a general public duty, but rarely, if ever, in support of the proposition that the writ will lie to enforce a duty not due when it was issued. In *State ex rel. Dawson v. Chicago, B. & Q. R. Co.* 85 Kan. 649, 118 Pac. 872, this procedure was employed to compel two railroads to install connections as required by an order of the railroad commission directing the work to be done within ninety days. The precept was issued three days after the order was made. The defendants defended on the

merits, pointing out, among other things, that it would be an unreasonable burden, entailing more expense than the revenue derived therefrom would liquidate. By some means or other the decision was delayed until after the expiration of the ninety days. Under those circumstances the court made the rule absolute, but the same judge who penned the majority opinion dissented from the doctrine thereof on this point, saying: "The duty and the time were coextensive. It was held in *State ex rel. Price v. Carney*, 3 Kan. 88, that no previous threat or predetermination not to perform a legal duty can amount to a fault or omission, even though the showing be sufficient to convince the court that the respondents will omit to perform their duty. This was followed in *State ex rel. Shaw v. Wyandotte*, 4 Kan. 430, in *Dobbs v. Stauffer*, 24 Kan. 127, and quoted with approval in *Rosenthal v. State Canvassers*, 50 Kan. 129, 19 L.R.A. 157, 32 Pac. 129, and is in accord with the mandatory requirement of the statute. A present omission to do a future duty is a legal impossibility. The first time when it could be definitely known that the order had been disobeyed was nearly ninety days in the future, and I think an action before that time must have been premature."

In *Nevada Tax Commission v. Campbell*, 36 Nev. 319, 135 Pac. 609, the court gave a moot opinion on the duty of county officers to furnish tax rolls by a certain future time, but dismissed the proceeding, with leave to apply again if the plaintiff should be so advised. It was said explicitly, though, that the writ would not be granted in anticipation of a refusal to perform the duty when the time for it should come.

State ex rel. Howells v. Metcalf, 18 S. D. 393, 67 L.R.A. 331, 100 N. W. 923, was a case where the defendant officer was required by alternative mandamus to place the names of certain candidates on the official ballot. Without citing authority in support of its opinion, the court said: "Having made his demand, concerning which no doubt exists in this case, if the auditor did not express a willingness to comply therewith, it was proper to institute this proceeding, when, if defendant intended to comply with the demand, he might have disclosed such intention and have avoided any judgment for disbursements. But, having answered and contested the relator's right, he cannot be heard to say that he would or might have complied with the relator's demand."

A similar case (*People ex rel. Hotchkiss v. Smith*, 152 App. Div. 514, 137 N. Y. Supp. 387), cited in support of the instant writ, was modified on appeal in 206 N. Y. 231, 241, 99 N. E. 568, the court saying that it should not be considered as a precedent, and

that it should be limited to the very case itself. Later, in *People ex rel. Woodruff v. Britt*, 206 N. Y. 246, 249, 99 N. E. 574, the case was further limited, and, speaking of the situation, the court says: "The remedy for this incongruous result is with the legislature." These few cases are opposed to the great weight of authority, and are sporadic instances of where courts have used their power in meddling with mere political questions.

It is required by our statute that the writ shall "state concisely the facts, according to the petition, showing the obligation of the defendant to perform the act, and his omission to perform it." L. O. L. § 616. There can be no present omission to perform an act in the future. The writ is not to be

confounded with injunction. Neither can it be made to perform the office of a bill of *quia timet*. We are not required to balance the relator's fears for the future against the presumption that the defendant officers will regularly perform their duties at the proper time. *Mandamus* ought to be used sparingly, and only in clear cases, and this court ought not hastily to use its original jurisdiction to clarify a mere political emergency. No refusal to perform any official act, presently required or past due, is imputed to any of the defendants; and if we regard the authority of *State ex rel. Booth v. Bryan*, 26 Or. 502, 38 Pac. 618, already decided by this court, as well as the great weight of reason and precedent, the writ should be dismissed.

Annotation—Mandamus to compel steps preliminary to an election before the arrival or expiration of the time fixed therefor.

As to *mandamus* as a proper remedy to enforce duties with respect to nominations; see note to *State ex rel. Hagerman v. Drabelle*, L.R.A.1917E, 475. Attention is called particularly to the case of *State ex rel. Rinder v. Goff* (1906) 129 Wis. 668, 9 L.R.A.(N.S.) 916, 109 N. W. 629, cited in that note, holding that *mandamus* may issue to determine which candidate should be represented by an official ballot, even before the time for the printing of the ballot arrives; also to the cases of *People ex rel. Hotchkiss v. Smith* (1912) 206 N. Y. 231, 99 N. E. 568; *State ex rel. Allen v. Brodigan* (1912) 34 Nev. 486, 125 Pac. 699; *State ex rel. Sayer v. Junkin* (1910) 87 Neb. 801, 129 N. W. 630; and *State ex rel. Shepard v. Superior Ct.* (1910) 60 Wash. 370, 140 Am. St. Rep. 925, 111 Pac. 233, cited in that note, which involve the question whether the action for *mandamus* was prematurely brought.

The decision in *STATE EX REL. WITHYCOMBE v. STANNARD*, ante, 215, seems sound, in view of the special circumstances existing in that case. It is supported by a number of cases cited in the present note and the note above referred to, discussing the remedy of *mandamus* as applied to nominations. It seems that unless this remedy is permitted in the class of cases under consideration, in advance of the time designated for performance of the act in question, in the event of a clear refusal or expressed intention not to perform the act, it would often occur that no practical benefit could be obtained thereby. Of course, in the absence of such special circumstances, an application for *mandamus* in

advance of the time fixed for performance would be premature; and in the majority of the cases in the present note in which it has been held that the application was premature, it seems as though an application for *mandamus* after the time fixed for performance would not have been futile, as it would have been in *STATE EX REL. WITHYCOMBE v. STANNARD*.

The general rule is laid down by High on *Extraordinary Legal Remedies*, 3d ed. § 12, that "*mandamus* is never granted in anticipation of a supposed omission of duty, however strong the presumption may be that the persons whom it is sought to coerce by the writ will refuse to perform their duty when the proper time arrives. It is, therefore, incumbent upon the relator to show an actual omission on the part of the respondent to perform the required act; and since there can be no such omission before the time has arrived for the performance of the duty, the writ will not issue before that time."

This rule is quoted and applied in *People ex rel. Smither v. Richmond* (1893) 5 Misc. 26, 25 N. Y. Supp. 144, in which it was held that an application for a writ of *mandamus* to compel a board of councilmen to redistrict wards of a city was premature, where the statute provided for redistricting at least thirty days before an election, and more than a month remained for the council to perform its duty, it not appearing that the council had taken final action in the matter, while they denied that they had refused and would continue to refuse to perform their duty in this respect. The

court said: "I am aware of the rule that where public officers have refused to act, or have unreasonably delayed action, the mandamus will issue. . . . But this rule is limited and has exceptions. The rule applies where the statute imposes a duty upon public officers, and does not provide the time within which the duty shall be performed. But where the statute specifies the time within which the duty shall be discharged, a different rule prevails. In such a case they have the right to act within the time specified, regardless of the question of unreasonable delay."

So, where the time prescribed by law for correcting errors in the registration lists had not arrived, it was held in *United States ex rel. Langley v. Bowen* (1867) 6 D. C. 196, that a writ of mandamus would not be granted to compel judges of election to place the petitioner's name on the registry of voters, as the court would not act upon an anticipated refusal of the judges to perform their duty, or assume that they would not do so when the proper time arrived.

The rule was laid down in *Ex parte Ivey* (1890) 26 Fla. 537, 8 So. 427, that mandamus does not lie to compel the performance of an official duty before there has been an actual default of performance; and that allegations that officers do not intend to perform the duty, or will not do so, are insufficient. It was held accordingly that a case for mandamus against a state board of canvassers was not made by a petition which alleged that false election returns had been certified to the state board of canvassers, showing that the petitioners' opponents had been elected, and that the petitioners were advised and believed that, without the intervention of the court, it would be the duty of the state board to canvass such false returns, and which prayed for an order restraining the board from making the canvass until a further order of the court, and for an inquiry as to the true vote cast.

Also in *Lake County v. State* (1888) 24 Fla. 263, 4 So. 795, the doctrine that mandamus will not lie to compel performance of an official duty until there has been an actual default in the performance thereof by the officer upon whom it is imposed, and that allegations that officers do not intend to perform or will not perform their duty do not authorize the issuance of the writ, was applied in a case where a writ of mandamus was sought to compel county commissioners to call an election for the choice of a county seat, it being held L.R.A.1917F.

that a demurrer to the alternative writ should have been sustained, where it appeared that at the time it was issued there had been no default on the part of the defendants (the statute in question making it their duty to order another election within ninety days after a prior election at which no place voted for obtained a majority of the votes cast, and only thirty days having elapsed), although it was alleged that the defendants did not intend to, and would not, order the election as they were required by law to do.

And it was held that mandamus would not be awarded to compel county commissioners to meet and hear applications for certificates of reinstatement on registration rolls on allegations merely that the commissioners were indisposed to meet and continue in session a sufficient length of time to afford the petitioner and others an opportunity to apply for a certificate entitling them to reinstatement on the rolls. *State ex rel. Scott v. Jefferson County* (1880) 17 Fla. 707. The rule was laid down in the syllabus by the court that "the existence of circumstances indicating that members of the county board do not intend to meet at a time, and for public purposes, as provided by law, will not authorize a mandamus before an actual omission of duty has occurred." And in the opinion it was said: "It is not alleged that the board has refused to meet at the request of any person to consider such application. The general allegation that the board has shown a disinclination so to meet, no actual refusal to act in any case being charged, is not enough to warrant extraordinary proceedings against them. Mandamus is never granted in anticipation of a supposed omission of duty, however strong the presumption may be that the persons whom it is sought to coerce by the writ will refuse to perform their duty when the proper time arrives. It is therefore incumbent on the relator to show an actual omission on the part of the respondents to perform the required act; and since there can be no such omission before the time has arrived for the performance of the duty, the writ will not issue before that time. No threats or predetermination can be considered tantamount to a default or omission of duty."

The doctrine that until an officer has neglected or refused to perform a duty, he cannot be proceeded against by mandamus, was stated and applied also in *State ex rel. Bloxham v. Gibbs* (1871) 13 Fla. 55, 7 Am. Rep. 233, in which it

was held that, as a peremptory writ of mandamus will not be allowed upon the return of the alternative writ unless the respondent may be required to do all that is required by the alternative writ, the peremptory writ should be refused, where the alternative writ required that all the members of a board of canvassers canvass the returns and declare the result of an election, and that thereafter one of them, in another official capacity, report the proceedings of the board, and issue a certificate thereon, since the officer required to give the certificate could not be so required until the board had acted.

And it was said in *State ex rel. Cook v. Houser* (1904) 122 Wis. 534, 100 N. W. 964, in holding that a court of equity had jurisdiction of a suit to restrain the secretary of state from certifying the relators' opponents as candidates for office, where the time had not arrived when the secretary of state was required to make certification of nominations, that "it must be conceded that by the general rule there is no legal effective remedy to prevent the alleged threatened wrongful act, or to redress it, if commission thereof were permitted. The remedy by mandamus is not available, generally speaking, in advance of some actual default in respect to a clear official duty. *State ex rel. Board of Education v. Hunter* (1901) 111 Wis. 582, 87 N. W. 485. If special circumstances may create an exception to that rule, as suggested in the case cited, whether this case would fall within such exception is sufficiently involved in doubt to warrant a court of equity in opening its doors so far as it can afford a remedy, if the commission of a great wrong is in fact impending, as alleged. It seems quite plain that since the defendant cannot, by any action on the part of the relators, be put in default in respect to the matter until a few days before the official ballot must be prepared for use at the coming general election, and he may, if he sees fit, wait until fourteen days prior to that time before certifying the names of the nominees to the county clerks, that the time to elapse thereafter, before the official ballot must be ready for use, is too brief to enable aggrieved parties to use effectively their remedy by mandamus, or any other legal remedy."

On the other hand, in *State ex rel. Howells v. Metcalf* (1904) 18 S. D. 393, 67 L.R.A. 331, 100 N. W. 923, the court, in granting a writ of mandamus to compel a county auditor to place the names of candidates for office on the official

ballot, held that the fact that the law did not require the official ballots to be printed and in possession of the proper officer until ten days before election did not, prior to that time, deprive the court of jurisdiction of a controversy to settle the names which should be placed on the ballots. The court said: "Had the relator delayed his demand until ten days before the day of election, his rights and those of his associates might have been lost, or the county put to the useless expense of printing erroneous ballots. Having made his demand, concerning which no doubt exists in this case, if the auditor did not express a willingness to comply therewith, it was proper to institute this proceeding, when, if defendant intended to comply with the demand, he might have disclosed such intention and have avoided any judgment for disbursements. But, having answered and contested the relator's right, he cannot be heard to say that he would or might have complied with the relator's demand."

And in *State ex rel. Morris v. Wrightson* (1893) 56 N. J. L. 126, 22 L.R.A. 548, 28 Atl. 56, the court, in holding that mandamus to compel officers to proceed under prior laws in respect to elections instead of following an unconstitutional statute was not premature because there had been no demand and refusal, nor had the time arrived when it was the duty of the officers to act, said: "The remaining question is whether these proceedings were prematurely instituted, the contention being that a previous demand and refusal to perform a duty are essential to an application for a mandamus in any case and under all circumstances. There is a distinction between duties of a public nature and duties of a private nature, affecting only the rights of individuals. In the latter class of cases, demand and refusal are held to be necessary as a condition precedent to relief by mandamus; in the former class, the duty being of a public nature, there is not the same necessity for a literal demand and refusal. In such cases the law itself stands in lieu of a demand, and omission to perform the required duty is an equivalent for a refusal. . . . To postpone the commencement of these proceedings until the time preceding the annual elections, at which the county clerk and the clerks of the cities and townships of the county are required to perform the duties devolved upon them under the election laws, would effectually prevent proceedings then instituted being practically of any avail."

The question as to the necessity of a demand and refusal of performance as a condition precedent to an application for mandamus is, as is indicated in the case last above cited, one which is somewhat closely connected with the question under consideration; and, without attempting to treat the former question exhaustively, it seems advisable to call attention to what appears to be the general rule in this regard.

The distinction made in *State ex rel. Morris v. Wrightson* (N. J.) *supra*, as to the necessity of a demand and refusal, between cases involving performance of duties of a public nature and those of a private nature, seems to be in accord with the weight of authority. Thus, it is said in 26 Cyc. 181, that "as a general rule relator must have demanded performance of the act or duty which he seeks to enforce. Where, however, the duty is strictly public and enjoined by law, and no person is charged by law with the duty to demand, no demand is necessary."

So in *Rizer v. People* (1902) 18 Colo. App. 40, 69 Pac. 315, the court held that a demand on and refusal by a city council to call a special election for the purpose of electing a mayor to fill a vacancy was not a condition precedent to the maintenance of an action for a writ of mandamus on the relation of electors and taxpayers of the city to compel the calling of the election. It was said: "These relators have no private interest, peculiar to themselves, in the act or duty the performance of which is demanded. If they had, demand and refusal would be an essential precedent condition to the relief sought. But the weight of authority is that where a duty is enjoined by law which is strictly public in its nature, and concerns one individual no more than another, no formal demand or refusal is necessary. The law constitutes the demand, and the neglect to perform, the refusal."

And in *State ex rel. Hanna v. Rahway* (1868) 33 N. J. L. 110, the court, in granting a writ of mandamus to compel a common council to order an election to fill a vacancy created by the resignation of a councilman, stated that, to authorize the issuing of the writ, there need not be a positive refusal to perform the duty; that the delay in the performance of a plain duty is equivalent to a direct refusal; and that if, by any act of omission, an intention not to perform the duty is manifested, the writ should issue.

It is interesting in this connection to consider the question, although exhaustively

tive treatment is not attempted, of the effect of the expiration of the time fixed for performance on the right to the writ of mandamus. This would appear to depend largely on whether the granting of the writ would be futile or would require an illegal act, and this in turn depends in some cases upon whether the statute fixing the time for performance is mandatory or merely directory.

In 26 Cyc. 149, it is said, in discussing the point that mandamus will not issue where it would be nugatory or unavailing: "It follows that mandamus will be refused where the lapse of time has rendered the relief sought nugatory, or where the time within which the act may be lawfully done has expired." As supporting this doctrine in election cases, attention is called, among possibly other cases, to *Summerson v. Schilling* (1902) 94 Md. 582, 51 Atl. 610 (holding that an order was proper dismissing a petition for mandamus to compel a registration board to question the petitioner, as an applicant for registration, as to his ability to read, and to enter his statement in respect thereto in the registry books, where, at the time the order was issued, the duties of the defendants, as a board of registry, had ceased, and they no longer had control of the registry books, or authority to make entries therein); *Summerson v. Schilling* (1902) 94 Md. 591, 51 Atl. 612 (holding that the mere possibility of a special election during the ensuing year would not warrant the granting of mandamus to compel assistance in marking a ballot where the general election has passed, the petition being for mandamus to compel defendants to assist petitioner to mark his ballot at the general election "or at any other election to be held during the ensuing year"); *People ex rel. Willey v. Buck* (1913) 181 Ill. App. 110 (holding that where, pending an appeal from a judgment awarding a writ of mandamus to compel trustees to call an election for officers of a park district, the date fixed in the judgment for holding the election passed, the appeal would be dismissed); *People ex rel. Payson v. Kay* (1910) 154 Ill. App. 233 (dismissing a writ of error to review a judgment for the defendant on application for mandamus to compel city officers to take steps to an election on a certain date, where the time for the election had passed). See, however, among other similar cases, *People ex rel. Giese v. Dillon* (1915) 266 Ill. 272, 107 N. E. 583, holding that the fact that before the appellate court could determine an appeal from a judgment properly

awarding a writ of mandamus to compel a town clerk to place on the ballot at a general election the proposition whether the town should become anti-saloon territory, the election was held, did not require reversal of the judgment on the ground that the proceeding had become merely a moot case.

Statutes requiring the performance within a fixed time of certain acts preliminary to an election have in some cases, however, been construed as directory merely, so that the fact that the time has expired, as fixed by the statute for performance of the act, has been held not to prevent the issuance of a writ of mandamus to compel performance.

Thus, it was said in *State ex rel. Webster v. Baltimore County* (1868) 29 Md. 516, that "where the duty prescribed is of a public nature, and intended for the public benefit, and is directed to be performed within a specified time, courts have adopted as a general rule in the construction of statutes, that they are, in respect to the time, to be regarded as directory merely, unless, from the nature of the act to be performed, or the language employed in the statute, it plainly appears that the designation of time was intended as a limitation of power of the officer." And it was held accordingly that a statute providing that county commissioners, within twenty days after the passage of the act, should order an election in each road district for supervisors of roads, was merely directory as to the time within which the election must be held, and was not a ground for refusing an application for a writ of mandamus to compel the commissioners to take steps to an election after the time specified in the statute had expired. The court said further that no application for mandamus could have been entertained until default by the defendant.

And the doctrine that it is no objection to awarding the writ of mandamus that the time for performance has passed was applied in *McConihe v. State* (1879) 17 Fla. 238, to a case where a writ of mandamus was sought to compel municipal officers to call an election for the purpose of electing their successors in office, the defense being that the term of office had been extended by a statute, which the court held was unconstitutional. The court said: "Nor is it any objection that the precise date at which the election was to be held has passed.

... Such a doctrine would practically abolish the remedy by mandamus in such cases. The writ does not lie before, but only after, default in the perform-

ance of a ministerial duty, . . . and if it be a good defense to allege that the time fixed for its performance has passed, it is evident that the very ground upon which you must base your application for the writ becomes a sufficient reply to the alternative writ when granted."

Also in *State v. South Kingstown* (1893) 18 R. I. 258, 22 L.R.A. 65, 27 Atl. 599, it was held that the requirement of a new election within ten days, in a statute providing that if there was no election of senator and representative in the general assembly in a certain town on the day appointed by law for the election, the town council should order a new election to be held not more than ten days from the first election, did not limit the power to call another election, but was intended to insure its timely exercise, and must be regarded, not as mandatory, but as merely directory. And the court awarded a writ of mandamus to compel the town council to order a new election, although ten days had elapsed after the last election.

To a similar effect is *State ex rel. McGregor v. Young* (1894) 6 S. D. 406, 61 N. W. 165, holding that the designation in a village charter of the day for the annual election of officers was so far directory that if, from any cause, no election was held on that day, it was the duty of the president and board of trustees to call an election at the earliest practicable day thereafter; and that if they neglected to do so, the circuit court had power by mandamus to compel them to call such an election.

And in *People ex rel. Young v. Fairbury* (1869) 51 Ill. 149, it was held, under a statute providing that the president and trustees of a town should continue in office for one year and until their successors were elected and qualified, and that it should be their duty, before their time expired, to give notice of a meeting to elect their successors, that after the expiration of the year for which they were elected, the town officers might be compelled by mandamus to give such notice.

It was held in *People ex rel. Hull v. Taylor* (1913) 257 Ill. 192, 100 N. E. 534, that a petition for mandamus by candidates for office against election commissioners, to compel them to furnish ballots and ballot boxes instead of voting machines for use at a general election, was not barred by laches, in that the petitioners, with knowledge of the making of contracts for the purchase of voting machines, at great expense, and

of the intention to install them, took no action for several months, but waited until a few days before the election to bring the action, as the doctrine of laches is not applicable to suits involving the public interests.

However, where mandamus was sought for the petitioner's private interest, to compel deputy state supervisors of elections to hear and determine objections to the nomination for office of the petitioner's opponent, mandamus was refused in *State ex rel. Scott v. Swan* (1914) 91 Ohio St. 61, 109 N. E. 587, as

the petition was filed fifty-five days after the primary election and after the time within which the state supervisor of elections was directed by statute to certify the names of candidates, with form of ballot, to the board of deputy state supervisors of election of the several counties of the state, it being said that had the petitioner been vigilant in the assertion of his rights, the court would have been equally vigilant in compelling by mandamus the election officers to perform any official duty clearly imposed upon them by law. R. E. H.

RHODE ISLAND SUPREME COURT.

MAX GLANTZ

v.

SAMUEL E. GARDINER, Deputy Sheriff.

(— R. I. —, 100 Atl. 913.)

Fraudulent conveyances — compliance by purchaser with Bulk Sales Law — effect.

1. That the purchaser learns that the list of creditors furnished by the vendor is incomplete before he consummates the sale does not render the sale void if he gives the required notices to the list of persons furnished him, under a statute making void a sale of goods in bulk unless the transferee demands and receives from the transferor a list of his creditors, certified under oath to be, to the best of his knowledge and belief, a full, accurate, and complete list of his creditors, and unless the transferee shall notify them of the intended purchase.

For other cases, see Fraudulent Conveyances, I. in Dig. 1-52 N. S.

Same — fraud in fact — concealment of creditors.

2. That one purchasing a stock of merchandise in bulk learned, before he completed his purchase, that the seller had not furnished him a complete list of creditors, does not render the sale void for fraud in fact if he advertised for creditors, paid all who applied, and paid the vendor the balance of the full value of the property, where it does not appear that the vendor has not sufficient property to satisfy the claims of the remaining creditors.

For other cases, see Fraudulent Conveyances, I. in Dig. 1-52 N. S.

(June 6, 1917.)

CERTIFICATION, upon an agreed statement of facts, by the Superior Court for Providence and Bristol Counties, for the

Note. — As to notice to creditors under Bulk Sales Law, see annotation following this case, post, 230.
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determination of the Supreme Court, of an action brought to recover possession of certain goods attached by defendant as deputy sheriff. Decision for plaintiff.

The facts are stated in the opinion.

Messrs. Archambault & Archambault, for plaintiff:

The plaintiff is a bona fide purchaser for value, who acted in absolute good faith. He saw that all creditors whose claims came to his attention before the transfer were paid, and paid full value, for the stock purchased: to wit, \$4,000.

Coach v. Gage, 70 Or. 182, 138 Pac. 847.

Messrs. Sullivan & Sullivan for defendant.

Baker, J., delivered the opinion of the court:

This is an action of replevin, brought by the plaintiff in the superior court for Providence county to recover possession of certain goods attached by the defendant as a deputy sheriff of said county. To this the defendant pleads noncepit, and for a second plea, "that the said goods and chattels in said declaration mentioned were then and there and now are the property of one Frank S. Lockhart alias, and as the property of said Frank S. Lockhart alias were attached and held in custody by the said defendant under and by virtue of a writ of attachment issued out of the superior court" in said county "at the suit of Alphonso Brickett against said Frank S. Lockhart alias." The parties thereafter filed in the office of the clerk of said superior court for said county an agreed statement of facts, whereupon the cause was certified to this court for hearing and determination in accordance with the provisions of § 4 of chapter 298 of the General Laws of 1909.

The agreed statement of facts shows that on the 19th day of December, 1916, the plaintiff, Max Glantz, paid to said Frank S. Lockhart the sum of \$100, and received

from Lockhart the following written instrument:

Received of M. Glantz one hundred (\$100) dollars, deposit on sale of all household furniture contained in stores Nos. 605-613 Westminster street; also in storehouse in rear; also Columbia truck. Balance due, thirty-nine hundred dollars (\$3,900), to be paid in full December 22, 1916.

[Signed] Frank S. Lockhart.

In presence of William A. Reiner.

Thereafter, on the same day, said plaintiff consulted Alberic A. Archambault, Esq., an attorney at law, and as a result of his advice the following memorandum was, on the 20th day of December, 1916, written on the foregoing instrument, to wit:

Time on this agreement extended to December 27, 1916, by mutual agreement.

[Signed] F. S. Lockhart.

Max Glantz.

On the said 20th day of December, 1916, the plaintiff demanded from the said Lockhart a written list of the names and addresses of his creditors, and on the same day received from him a written list, giving names, addresses, and amounts, signed and sworn to by said Lockhart as "a true, full, accurate, and complete list" of his creditors "and the amounts due each of them," "to the best of his knowledge and belief." The list included six names and addresses, and amounts of indebtedness aggregating \$796.21, and in addition the following: "City of Providence, taxes, amount not known." On said December 20th the plaintiff sent by registered mail a letter to each of said creditors named in said list, giving notice that said Frank S. Lockhart had entered into an agreement with said Max Glantz for the sale of all his stock of furniture and house furnishings, that the transfer of title would take place on December 27, 1916, at 9 o'clock A. M., and requesting the addressee to present his claim against said Lockhart to him, said Glantz, before December 27, 1916. On December 21, 1916, the plaintiff inserted in the Evening Bulletin of that day the following notice:

Legal Notice.

Frank S. Lockhart, doing business at 605-613 Westminster street, Providence, Rhode Island, will transfer his entire stock of furniture to Max Glantz, Wednesday, December 27, 1916, at 9 A. M.

Prior to Decemehr 27, 1916, accounts and claims against said Frank S. Lockhart were L.R.A.1917F.

filed with Max Glantz and his attorneys, amounting to \$2,186.48, all of which were paid by Glantz on said 27th day of December before the transfer of the title to him of said furniture and house furnishings, and which were all the claims against said Lockhart of which said Glantz and his attorneys had knowledge at the time of the transfer. In addition to the \$100 deposit receipted for on December 19, Glantz paid Lockhart \$1,000 on December 22d, and on said December 27th, \$713.52, making in all \$1,813.52 so paid, which, together with the \$2,186.48 paid to Lockhart's creditors, made up the total purchase price of \$4,000. Said Alphonso Brickett was a creditor of said Lockhart prior to and at the time of said transfer, but his claim was not included in the list delivered by Lockhart, and was not filed with said Glantz or his attorneys prior to said transfer, and neither of them had any knowledge of such claim until several days after December 27th.

Chapter 387 of the Public Laws was passed April 14, 1909, and is entitled, "An Act to Prohibit Sales of Merchandise in Bulk in Fraud of Creditors." Section 1 thereof is as follows: "The transfer of the major part in value of the whole of a stock of merchandise and fixtures, or merchandise or fixtures, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the transferer's business, whether in one or more parcels or to one or more persons, provided the transfer is all part of substantially one transaction or proceeding or occurs substantially at one time, shall be fraudulent and void as against all persons who are creditors of the transferer at the time of such transfer unless the transferee demands and receives from the transferer a written list of the names and addresses of the creditors of the transferer and certified by him, under oath, to be, to the best of his knowledge and belief, a full, accurate, and complete list of his creditors; and unless the transferee shall, at least five days before such transfer, notify personally, or by registered mail, every creditor whose name and address are stated in said list of the proposed transfer."

The precise question presented by the agreed statement and as argued by the counsel of both parties in their briefs is whether the transfer of said goods and chattels by said Lockhart to the plaintiff on December 27, 1916, was, under the provisions of § 1 of said chapter 387 of the Public Laws, fraudulent and void as to said Alphonso Brickett.

Within the last twenty years nearly all, if not all, of the states, have enacted statutes regulating the sale of merchandise in bulk. This widespread legislation at least

implies a general belief in the existence of a widespread evil requiring legislative control. While these statutes are similar in general purpose, they differ in phraseology, both in their requirements of the parties to such sales and particularly in the language which declares the effect of non-compliance with the provisions of these acts. "That evil is the tendency and practice of merchants who are heavily in debt to make secret sales of their merchandise in bulk for the purpose of defrauding creditors." *Wright v. Hart*, 182 N. Y. 330, 346, 2 L.R.A. (N.S.) 338, 75 N. E. 410, 3 Ann. Cas. 263. A convenient classification of these laws into five groups, based upon the different requirements imposed upon the parties to such sale, may be found in *Kidd, D. & P. Co. v. Musselman Grocer Co.* 217 U. S. 461, 467-469, 54 L. ed. 839, 844, 30 Sup. Ct. Rep. 606. These requirements vary, from the simple one by which a prospective vendor is compelled to have recorded, from five to ten days previous to the actual sale in the town clerk's office of the town in which he conducts his business, a notice of his intention to make such sale, describing the property to be sold, the condition of such sale, and the parties thereto, to the more onerous ones of the preparing by the vendor and vendee together of an inventory of the property and its cost, and of requiring the vendee to demand and receive sworn lists of the vendor's creditors, with their addresses and the respective amounts to them, and to notify these creditors of his intended purchase, and, in a few instances, to see that the purchase price is applied, so far as necessary, to the payment of the vendor's creditors.

As to the effect of a failure to comply with the requirements of these statutes, they fall into two classes: First, those acts in which the sale is declared fraudulent and void; second those acts in which the sale is declared presumptively fraudulent and void. It is reasonable to infer that these different acts vary much as effective instrumentalities in checking actual fraud. The courts differ in their construction of the acts in the second class, some holding that they simply prescribe a rule of evidence, throwing the burden of showing good faith on the purchaser, with the right to introduce any evidence pertinent to this question, as in *Thorpe v. Pennock Mercantile Co.* 99 Minn. 22, 108 N. W. 940, 9 Ann. Cas. 229, and *Fisher v. Herrmann*, 118 Wis. 428, 95 N. W. 392, while others restrict the evidence to the showing of a compliance with the requirements of the statute. *Wm. R. Moore Dry Goods Co. v. Rowe*, 90 Miss. 30, 54 So. 650, Ann. Cas. 1913C, 1213; *Cantrell v. Ring*, 125 Tenn. 472, 145 S. W. 160. L.R.A.1917F.

The statute of this state belongs to the first class. It provides in effect that the transfer of "the whole of a stock of merchandise and fixtures" in bulk in one transaction "shall be fraudulent and void as against all persons who are creditors of the transferor at the time of such transfer unless the transferee" does certain things; that is to say, without any regard to the solvency of the vendor, or the fairness of the purchase price to be paid, or the good faith of the vendor and vendee, and although the transaction may not be fraudulent in fact, it will be fraudulent and void in law, so far as the vendor's creditors are concerned, unless the vendee or transferee does the things required of him by the provisions of the statute. In other words, in order to guard against the commission of actual fraud in the class of sales with which it deals, the law regulates them by requiring the performance of certain acts in the carrying out of such a sale, and declares that the failure to perform these acts will render the transaction fraudulent in law. It is obvious that this is not the enactment merely of a rule of evidence, but a declaration of substantive law that the nonobservance of certain statutory provisions constitutes fraud in law. See *Jaques & T. Co. v. Carstarphen Warehouse Co.* 131 Ga. 1, 16, 62 S. E. 82, and *Pennell v. Robinson*, 164 N. C. 257, 80 S. E. 417, Ann. Cas. 1915D, 77.

Such laws have generally been upheld as a justifiable use of the police power. As such statutes declare sales in bulk fraudulent and void if the regulations governing such sales are not complied with, it is clearly implied and must inevitably follow that, if these regulations are complied with, the sale or transfer is not fraudulent and void under these statutes. As already appears, said chapter 387 makes a transfer or sale of a stock of merchandise in bulk fraudulent and void as to the transferor's creditors unless the transferee or purchaser "demands and receives from the transferor a written list of the names and addresses of the creditors of the transferor and certified by him, under oath, to be, to the best of his knowledge and belief, a full, accurate, and complete list of his creditors; and unless the transferee shall, at least five days before such transfer, notify personally, or by registered mail, every creditor whose name and address are stated in said list of the proposed transfer." Did the plaintiff in this case demand and receive from Lockhart a written list of the names and addresses of the latter's creditors, certified by Lockhart under oath to be, to the best of his knowledge and belief, a full, accurate, and complete list of his creditors, and did

the plaintiff, at least five days before the transfer, notify in the manner required by the statute every creditor whose name and address were stated in said list of the proposed transfer? The agreed statement of facts clearly shows that he did all of these things, and apparently satisfied the requirements of the statute.

It is urged, however, that inasmuch as the list of Lockhart's creditors received by the plaintiff was not in fact "a full, accurate, and complete list of his creditors," and as the plaintiff afterwards learned this, but before the transfer was made, the sale, in consequence, was void. So far as chapter 387 is concerned, we do not think this fact affects the situation. The statute declares the sale void *only* on the failure of the purchaser to do what is required of him. It does not declare the sale void if the list of creditors furnished by a vendor under oath is not in fact "full, accurate, and complete." It does not in any way make the purchaser responsible for any incorrectness in the list. We think it would be unreasonable to so construe it. See *Coach v. Gage*, 70 Or. 182, 188, 138 Pac. 847; *International Silver Co. v. Hull & Co.* 140 Ga. 10, 12, 45 L.R.A. (N.S.) 492, 78 S. E. 609. The Oregon statute is more stringent than ours, in that, if the purchaser pays any part of the purchase price before demanding and receiving the sworn list of creditors and before notifying the creditors named in the list, the sale will "be conclusively presumed fraudulent and void" as to such creditors. The statute of Georgia and of some other states is similar in this respect. Under such a statute the transaction now inquired into would be conclusively presumed fraudulent and void in consequence of the payment of the \$100 on December 19th and the \$1,000 on December 22d. The provisions in the statutes of the two states just named relative to demanding and receiving lists of creditors and to notifying them are substantially the same as in our statute. In *Coach v. Gage*, supra, 70 Or. on page 188, the court, in interpreting these last provisions, said: "The act in question, in our judgment, imposes upon the purchaser (1) the duty to demand a written statement, under oath, of the vendor, of the names and addresses of his creditors, and (2) upon the receipt of such list to notify the persons named therein of the proposed purchase. For an intentional breach of either of these duties, it was entirely competent for the legislature, by way of penalty for such breach, and to secure the faithful performance of such duty, to declare that their nonperformance should constitute conclusive evidence of fraud, and render the sale void as to creditors; but it is not in the L.R.A.1917F.

power of the legislature to make a breach of duty by the vendor evidence of fraud in the vendee. To hold the law means that an omission of the name of a creditor by the vendor, without the knowledge of the vendee, renders the transaction void as to him, would be to hold that it was the intent of the legislature to ordain that a fraud committed by the vendor upon the vendee by falsifying the list of creditors should be conclusively presumed to be the fraud of the person so defrauded and deceived. Such a construction would be so contrary to every principle of law and good morals that it is inconceivable that the legislature intended it."

And in *International Silver Co. v. Hull & Co.* supra, 140 Ga. on page 12, the court said: "If the purchaser demands from the vendor a written statement, under oath, of the names and addresses of the creditors of the latter, with the amount due or owing by the seller to each of them, and the seller delivers a statement purporting to contain all of his creditors, and the purchaser, in good faith and without any knowledge or notice of the omission of the name of a creditor therefrom, proceeds to comply with the requirements of the statute, there is no declaration that he shall lose his purchase because of the omission by the seller of the name of a creditor. . . . There is nothing here to show that an omission by the vendor of a creditor from the sworn list should be visited on a bona fide purchaser without notice. It was argued that the statute required the purchaser not only to demand, but also to 'receive' from the vendor a list of all of the creditors of the latter, and that he had not received a list of all of them if one were omitted. But this is too exacting and verbal a construction. The statute did not make the purchaser a warrantor of the absolute completeness and accuracy of the sworn statement of the vendor, or punish him for the omission from such sworn statement of the name of a creditor, without any fault on his part, or any notice thereof."

This precise question has been considered in few reported cases, and most of the cases under statutes in the class to which ours belong have arisen where the purchaser has not complied with the statute, although both parties may appear to have acted in good faith. In such cases the sale has uniformly been held fraudulent and void. The defendant relies much on *Rabalsky v. Levenson*, 221 Mass. 289, 108 N. E. 1050. The statute of that state as to demanding and receiving a list of the vendor's creditors and giving such creditors notice is like our own. The facts are meagerly stated in the opinion. But if it is taken to mean that

the purchaser did all that was required of him, but that the vendor made out and delivered an incorrect list of creditors although acting in good faith, and that in consequence the sale was void, we decline to follow it, as an authority. As, therefore, the plaintiff as purchaser did all that the statute required of him, we are of the opinion that the transfer to him was not fraudulent and void under said chapter 387.

It may be urged that under the statute, as thus interpreted, opportunity is afforded a vendor to successfully practise fraud. That is entirely possible. We think the remedy for this situation lies with the law-making body, and not with the courts. It is noteworthy that, while common observation shows that it is the dealer in merchandise who, for one reason or another, attempts to defraud his creditors by the sale of his stock, our statute, like some others, declares such a sale fraudulent and void only on a failure of the purchaser to do certain things. Chapter 387 is in effect an addition to § 1 of chapter 253 of the General Laws, relating to conveyances in fraud of creditors. Of course this transaction, like others, is open to inquiry as to the existence of fraud in fact. There is opportunity for collusion in making up the list of creditors, and, apart from any active participation in actual fraud, the purchaser might have knowledge of a fraudulent intent of the vendor, so that the question of the purchaser's good faith might be material. We think the words "good faith," as used in some opinions in cases under acts regulating the sale of merchandise in bulk, have reference to this aspect of the case; namely, the existence of fraud in fact.

The question of actual fraud under chapter 253 has not been argued, although the

defendant's brief, near the end, suggests that the court may decide the sale void on the ground that the vendee is not a bona fide purchaser for value, without notice. We do not, however, feel justified in so deciding the case on the agreed statement of facts. There is no suggestion that the price paid for the goods was not fair and adequate; the good faith of the purchaser is not impeached; he advertised the proposed transfer, in addition to giving the personal notice; he paid all known creditors out of the purchase money; and whatever inferences he might have drawn from the subsequently ascertained fact that the list of creditors furnished him was incomplete, as to the original intention of the vendor relative to the payment of his creditors, it is admitted that when he paid over to the vendor the balance of the purchase money he had no knowledge that there was any creditor of the vendor who had not been paid. Moreover, it does not affirmatively appear that Lockhart is not able to pay any judgment that Alphonso Brickett may obtain against him, or that he has not property on which such a judgment might be levied. In these circumstances, it is our judgment that the sale by Lockhart to the plaintiff should not be held to be in fact fraudulent and void as to said Alphonso Brickett as a creditor of Lockhart.

Our decision accordingly is that the plaintiff acquired a good title to the goods and chattels transferred to him by Frank S. Lockhart on December 27, 1916, and that he is entitled to the entry of judgment for their possession. The papers in said cause, with our decision certified thereon, are ordered to be sent back to the Superior Court for the entry of final judgment upon the decision.

Annotation—Notice to creditors under Bulk Sales Law.

Generally as to statutory requirements on sale of stock of goods in bulk, see note to *Everett Produce Co. v. Smith*, 2 L.R.A. (N.S.) 331. And as to constitutionality of bulk sale legislation, see notes to *Boise Asso. v. Ellis*, L.R.A.1915E, 917, and *Young v. Lemieux*, 20 L.R.A.(N.S.) 160.

Statutory provisions.

Bulk sales statutes have been enacted in practically all jurisdictions, and in nearly every instance there is a requirement that, in case of a sale falling within the terms of the act, notice in some form, either actual or constructive, must be given the creditors of the seller. The most common form of requirement as to notice to creditors of the seller is that L.R.A.1917F.

the purchaser must notify the creditors listed by the seller, either personally or by registered mail. As shown by the adjudications, this is the requirement of the statutes of the following states:

Ark.—*Stuart v. Elk Horn Bank & T. Co.* (1916) 123 Ark. 285, 185 S. W. 263, construing Laws 1913, p. 326.

Fla.—*Goldstein v. Maloney* (1911) 62 Fla. 198, 57 So. 342, construing Acts 1907, chap. 5679, § 2.

Ga.—*Carstarphen Warehouse Co. v. Fried* (1905) 124 Ga. 544, 52 S. E. 598; and *W. B. Parham & Co. v. Potts-Thompson Liquor Co.* (1906) 127 Ga. 303, 56 S. E. 460, construing Acts 1903, p. 93; *International Silver Co. v. Hull & Co.* (1913) 140 Ga. 10, 45 L.R.A.(N.S.) 492,

78 S. E. 609, construing Civil Code, §§ 3226-3229.

Ill.—*G. S. Johnson Co. v. Beloosky* (1914) 263 Ill. 363, 105 N. E. 287, Ann. Cas. 1915C, 411, construing Laws 1913, p. 258, which were enacted to obviate the constitutional objection to the Laws 1905, p. 284, which was pointed out in *Charles J. Off & Co. v. Morehead* (1908) 235 Ill. 40, 20 L.R.A. (N.S.) 167, 126 Am. St. Rep. 184, 85 N. E. 264, 14 Ann. Cas. 434.

Ind.—*Hirth-Krause Co. v. Cohen* (1912) 177 Ind. 1, 97 N. E. 1, Ann. Cas. 1914C, 708, construing Acts 1909, chap. 49, § 1.

Ky.—*Dwiggins Wire Fence Co. v. Patterson* (1915) 166 Ky. 278, 179 S. W. 224, construing Laws 1904, chap. 22, §§ 1-4 (Ky. Stat. 1915, § 2651a).

Mich.—*Kidd, D. & P. Co. v. Musselman Grocer Co.* (1910) 217 U. S. 461, 54 L. ed. 839, 30 Sup. Ct. Rep. 606, construing Mich. Pub. Acts 1905, No. 223.

Neb.—*Appel Mercantile Co. v. Barker* (1912) 92 Neb. 669, 138 N. W. 1133, construing Laws 1907, chap. 62, § 31 (Comp. Stat. 1911, chap. 32, § 31).

N. Y.—*Seeman v. Levine* (1910) 140 App. Div. 272, 125 N. Y. Supp. 184, reversing on point of law (1910) 67 Misc. 74, 121 N. Y. Supp. 645, and construing and applying Personal Property Law, § 44.

Ohio.—*Steele, H. & M. Co. v. Miller* (1915) 92 Ohio St. 115, L.R.A. 1916C, 1023, 110 N. E. 648, Ann. Cas. 1917C, 926, construing Act April 18, 1913 (Gen. Code, §§ 11,102 et seq. as amended).

Okl.—*Noble v. Ft. Smith Wholesale Grocery Co.* (1911) 34 Okla. 662, 46 L.R.A. (N.S.) 455, 127 Pac. 14, construing Okla. Sess. Laws 1907-08, p. 558, § 1.

Pa.—*Wilson v. Edwards* (1907) 32 Pa. Super. Ct. 295, and *Ritter v. Wray* (1911) 45 Pa. Super. Ct. 440, construing Act March 28, 1905, P. L. 62.

B. I.—*GLANTZ v. GARDINER*, ante, 226, construing Pub. Laws 1909, chap. 387, § 1.

Tenn.—*Neas v. Borches* (1902) 109 Tenn. 398, 97 Am. St. Rep. 851, 71 S. W. 50; *Cantrell v. Ring* (1911) 125 Tenn. 472, 145 S. W. 106; and *Daly v. Sumpter Drug Co.* (1913) 127 Tenn. 412, 155 S. W. 167, Ann. Cas. 1914B, 1101, construing Acts 1901, chap. 133, § 1.

Tex.—*Nash Hardware Co. v. Morris* (1912) 105 Tex. 217, 146 S. W. 874; *Bewley v. Sims* (1912) — Tex. Civ. App. —, 145 S. W. 1076; *Williams v. J. W. Crowder Drug Co.* (1914) — Tex. Civ. App. —, 167 S. W. 187; and *Kell Mill. Co. v. H. O. Wooten Grocery Co.* (1917) — L.R.A. 1917F.

Tex. Civ. App. —, 195 S. W. 342, construing Gen. Laws 1909, p. 66 (Rev. Stat. 1911, art. 3971).

Utah.—*Block v. Schwartz* (1904) 27 Utah, 387, 65 L.R.A. 308, 101 Am. St. Rep. 971, 76 Pac. 22, 1 Ann. Cas. 550, construing Act March 14, 1901, and holding same unconstitutional.

W. Va.—*Marlow v. Ringer* (1917) — W. Va. —, L.R.A. 1917D, 619, 91 S. E. 386, construing W. Va. Code 1913, § 3832.

Wis.—*Fisher v. Herrman* (1903) 118 Wis. 424, 95 N. W. 392, construing Laws 1901, chap. 463, p. 684.

In Mississippi registered mail is not required, the requirement being merely that the purchaser shall have, in good faith, "notified personally or by mail" each of the seller's creditors. See *Moore Dry Goods Co. v. Rowe* (1910) 97 Miss. 775, 53 So. 626, on subsequent hearing in (1910) 99 Miss. 30, 54 So. 659, Ann. Cas. 1913C, 1213, construing Miss. Acts 1908, chap. 100, § 1 (c).

In Oregon notice may be made personally or by wire or by registered mail. See *Coach v. Gage* (1914) 70 Or. 182, 138 Pac. 847, construing L. O. L. § 6070.

In South Dakota the statute provides that the vendee shall give to each of the listed creditors written notice of the contemplated purchase. See *William Tackaberry Co. v. German State Bank* (1917) — S. D. —, 163 N. W. 709, construing S. D. Laws 1913, chap. 116.

In a few jurisdictions the provision is that the seller must give some specified form of notice. Thus, in Iowa the seller must send by registered mail a notice to his creditors of intention to sell, at least three days before the sale. See *Des Moines Packing Co. v. Uncaphor* (1916) 174 Iowa, 39, 156 N. W. 171, construing Code Supp. 1913, §§ 2911a, 2911b. And in North Carolina the seller must, within seven days before the sale, "notify the creditors" of the proposed sale, etc. See *Gallup & Co. v. Rozier* (1916) 172 N. C. 283, 90 S. E. 209, construing and applying Gregory's Supp. to Pell's Revisal, p. 962, § 964a. And in Arizona notice of intention to sell must be filed with the county recorder at least ten days before the sale. *Nolte v. Winstanley* (1914) 16 Ariz. 327, 145 Pac. 246, construing Ariz. Civ. Code 1913, title 51, chap. 7 (Laws 1909, chap. 47, § 1). For another statute which required the seller to file notice of intention with the county recorder, see 99 Ohio Laws, 241, as set out and held unconstitutional in *Williams & T. Co. v. Preslo* (1911) 84 Ohio St. 323, 95 N. E. 900, Ann. Cas. 1912C, 704. In Connecticut, by the Act of 1901,

a sale in bulk had to be recorded by the seller in the town clerk's office within one day after the sale, and by the Act of 1903 (Pub. Acts 1903, chap. 72, p. 49) a notice of intention to sell was required to be recorded in the town clerk's office seven days previous to the sale. See *Young v. Lemieux* (1907) 79 Conn. 434, 20 L.R.A.(N.S.) 160, 129 Am. St. Rep. 193, 65 Atl. 436, 600, 8 Ann. Cas. 452. And by Pub. Acts 1909, chap. 21, the period was extended to not less than ten days nor more than thirty days previous to the sale. See *Connecticut Steam Brown Stone Co. v. Lewis* (1912) 86 Conn. 386, 45 L.R.A.(N.S.) 495, 85 Atl. 534.

In Nebraska, by virtue of express statutory provision (Laws 1907, chap. 62, § 31; Comp. Stat. 1911, chap. 32, § 31), the notice required by statute may be dispensed with, it having been provided that "the seller may file with the county clerk . . . an agreement with all his creditors, waiving the inventory and notice above required." See *Appel Mercantile Co. v. Barker* (1912) 92 Neb. 669, 138 N. W. 1133.

By the Tennessee Act (Acts 1901, chap. 133) it is provided that whenever the notice is sent by registered mail, the person to whom it is mailed shall be presumed conclusively to have received the notice, and the time of notice shall be dated from the time of mailing and registration thereof. See *Neas v. Borches* (1912) 109 Tenn. 398, 97 Am. St. Rep. 851, 71 S. W. 50, and *Daly v. Sumpter Drug Co.* (1913) 127 Tenn. 412, 155 S. W. 167, Ann. Cas. 1914B, 1101.

To whom notice must be given.

Some question has also been made as to whom notice must be given.

Thus, it has been held that by the term "creditors" is meant all creditors, both merchandise and general, regardless of whether they are judgment creditors or not. Thus, in *People's Sav. Bank v. Van Allsburg* (1911) 165 Mich. 524, 131 N. W. 101, it was held that Mich. Pub. Acts 1905, No. 223, §§ 1, 3, which provided that the sale shall be void as against "the" creditors of the seller unless the statutory notice is made, giving a "full, accurate, and complete" list of his creditors, and that if the purchaser does not comply with the provisions of the act, upon application of "any" of the creditors he shall become a receiver, applied to no particular class of creditors, but to all creditors, including other than merchandise creditors. And in *Re P. Pastene & Co.* (1914) 156 N. Y. Supp. 524, 11 L.R.A.1917F.

was held that the word "creditors," as used in the N. Y. Bulk Sales Act (Personal Property Law, § 44), includes all the creditors of the seller who are to receive notice, regardless of whether they are judgment creditors or not. And in *Joplin Supply Co. v. Smith* (1914) 182 Mo. App. 212, 167 S. W. 649, it was held that the inclusion in the bill of sale, at the instance of the purchaser, of a provision that the goods were free and clear of encumbrance, did not constitute compliance with the statutory provision requiring notice to both general and merchandise creditors by informing vendee that the vendor had no creditors, so as to excuse the giving of other notice. And see, to the same effect, as regards scope of the term "creditors," *Rabalsky v. Levenson* (1915) 221 Mass. 289, 108 N. E. 1050, as set out *infra*. And see also *Nash Hardware Co. v. Morris* (1912) 105 Tex. 217, 146 S. W. 874, wherein it was said that "the creditors to be notified embraced all classes."

And in Tennessee, under a statute requiring inquiry as to "each and all of the creditors of the seller," and notification to "each of the creditors," and declaring a sale in violation of the statute presumptively fraudulent and void as against "the creditors of the seller," it has been held that creditors of a partnership of which the seller was a member were entitled to notice, partnership debts being several as well as joint. *Mahoney-Jones Co. v. Sams Bros.* (1913) 128 Tenn. 207, 159 S. W. 1095. But although notice of a sale in bulk of a partnership stock in trade to one of the partners should be given the individual creditors of the selling partner, such creditors cannot attack the sale as fraudulent where the payment of the partnership creditors by the purchaser consumed the whole firm stock, the partnership creditors being first entitled to payment over the individual creditors of either partner. *Gilbert v. Ashby* (1915) 133 Tenn. 370, 181 S. W. 321. In connection with the foregoing Tennessee cases see *Whitehouse v. Nelson* (1906) 43 Wash. 174, 86 Pac. 174, wherein it was held that the provisions of the Wash. Bulk Sales Law (Laws 1902, chap. 109, p. 222), requiring a list of creditors and the notifying of same, did not apply to individual creditors of a partner where the sale was made by the partnership, and therefore that such a sale was not void as to such creditors, although the statute was not complied with even as to partnership creditors.

And a statutory requirement that the purchaser shall notify the creditors of

his vendor does not require him to notify the creditors of one who sold to his transferrer; or, in other words, the statute does not apply to prior transfer. *Seeman v. Levine* (1910) 140 App. Div. 272, 125 N. Y. Supp. 184, reversing (1910) 67 Misc. 74, 121 N. Y. Supp. 645; *Huston v. Alexander Drug Co.* (1915) — Okla. —, 158 Pac. 892.

Notice or lack of notice, and the effect.

The weight of authority is to the effect that full compliance with the statute by the purchaser absolves him from liability to any creditor who may not have received notice. This rule has been laid down in *Stuart v. Elk Horn Bank & T. Co.* (1916) 123 Ark. 285, 185 S. W. 263 (dictum); *International Silver Co. v. Hull & Co.* (1913) 140 Ga. 10, 45 L.R.A. (N.S.) 492, 78 S. E. 609 (quoted in *GLANTZ v. GARDINER*, ante, 226), holding, as is stated in the headnote, that "if one desiring to purchase a stock of merchandise in bulk demands and receives from the vendor a written statement under oath, purporting to contain the names and addresses of all the creditors of the vendor, together with the amount of the vendor's indebtedness to each of them, and, within the time required by the statute, due notice of the proposed sale, the price to be paid, and the terms and conditions thereof, is given by the purchaser to each of the creditors whose names appear on the list so furnished, and thereafter the purchaser, in good faith, pays over to the vendor the purchase price agreed on, without notice or reason to suspect that the vendor has omitted from the sworn list the name of any of his creditors, the sale is not void, either in whole or in part, by reason of the fact that the seller omitted to name one of his creditors and the purchaser failed to give that creditor notice of the sale, though such creditor did not in fact have any notice of the sale, and though the seller is insolvent;" *South Georgia Grocery Co. v. Wade-Chambers Grocery Co.* (1913) 12 Ga. App. 213, 77 S. E. 6; *Seeman v. Levine* (1910) 140 App. Div. 272, 125 N. Y. Supp. 184; *Coach v. Gage* (1914) 70 Or. 182, 138 Pac. 847 (see case as discussed and quoted in *GLANTZ v. GARDINER*), holding that the validity of a sale is not affected by the fact that the name of a creditor was omitted from the list furnished by the seller, where he acts in good faith and fully complies with the statutory requirement; and *GLANTZ v. GARDINER*.

And it has been held that a sale is not L.R.A.1917F.

rendered void by the fact that the purchaser learns, before he consummates the sale, that the list of creditors furnished by the seller is incomplete, if he has fully complied with the terms of the statute. *GLANTZ v. GARDINER*. But, in connection with the above cases, see *Rabal-sky v. Levenson* (1915) 221 Mass. 289, 108 N. E. 1050, discussed and provisionally disapproved in *GLANTZ v. GARDINER*, wherein it was held that a sale in bulk was fraudulent as to general creditors of the seller under Mass. Stat. 1903, chap. 415, where the seller, in good faith, and with an honest purpose to fulfil the requirements of the statute, prepared a list of his merchandise creditors, and the purchaser received it and properly notified such creditors, but, solely and because of their mistaken interpretation of the statute, they had failed to prepare a list of or notify the seller's general creditors. The opinion in this case does not indicate whether the decision was upon the ground that the failure of the seller to furnish a complete list vitiated the sale, or that the purchaser, as a consequence of such omission, failed to notify the general creditors, or both; but, to say the least, the decision seems to be in conflict with the *GLANTZ CASE*.

In Kentucky, by express provision of the statute, the purchaser is not responsible to any creditor not mentioned in the written statement furnished by the seller. See *Dwiggins Wire Fence Co. v. Patterson* (1915) 166 Ky. 278, 179 S. W. 224, construing Ky. Stat. 1915, § 2651a.

And the Michigan, Missouri, and Texas enactments afford examples of those statutes which provide that the purchaser, if he conforms to the provisions of the law, shall not be liable to any of the creditors of the seller. See *People's Sav. Bank v. Van Allsburg* (1911) 165 Mich. 524, 131 S. W. 101, construing Mich. Pub. Acts 1905, No. 223; *Joplin Supply Co. v. Smith* (1914) 182 Mo. App. 212, 167 S. W. 449, construing Mo. Bulk Sales Law, § 2 (Laws 1913, p. 163); and *Nash Hardware Co. v. Morris* (1912) 105 Tex. 217, 146 S. W. 874, construing Tex. Gen. Laws 1909, p. 66, § 2; *Bewley v. Sims* (1912) — Tex. Civ. App. —, 145 S. W. 1076 (construing the same act and holding that the provision means that a purchaser who, in good faith, observes the directions of the act, may purchase freely and in such case take good title, free from attack); and *Williams v. J. W. Crowder Drug Co.* (1914) — Tex. Civ. App. —, 167 S. W. 187 (construing Tex. Rev. Stat. 1911, art. 3972, and holding that a failure to obtain a sworn list, as

required by statute, rendered the sale invalid as to a creditor whose name was omitted from the list, irrespective of whether the omission was caused by innocent mistake or fraud).

And conversely, where the statute makes it the duty of the purchaser to make inquiry as to the seller's creditors, and he purchases without doing so, he acts at his peril, and a failure to notify any creditor, as required by statute, brings the sale within the terms of the statute. See *Re Calvi* (1911) 185 *Fed.* 642, applying *N. Y. Personal Property Law*, § 44; *Terrell Grain & Mercantile Co. v. Young* (1912) — *Tex. Civ. App.* —, 152 *S. W.* 671, applying *Tex. Rev. Stat.* 1911, art. 3971; *Kohn v. Fishbach* (1904) 36 *Wash.* 69, 104 *Am. St. Rep.* 941, 78 *Pac.* 199, construing and applying *Wash. Bulk Sales Law*; and *Marlow v. Ringer* (1917) — *W. Va.* —, L.R.A.1917D, 619, 91 *S. E.* 386, construing *W. Va. Code* 1913, § 3832. And where no notice is given a creditor, as required by statute, the sale is fraudulent, or at least presumptively so, according as the statute provides or is construed. See the following cases, in which no notice was given as required by statute: *Re Calvi* (*Fed.*) *supra*, applying *N. Y. Personal Property Law*, § 44; *Stuart v. Elk Horn Bank & T. Co.* (1916) 123 *Ark.* 285, 185 *S. W.* 263; *Goldstein v. Maloney* (1911) 62 *Fla.* 198, 57 *So.* 342; *Carstarphen Warehouse Co. v. Fried* (1905) 124 *Ga.* 544, 52 *S. E.* 598; *Niklaus v. Lessenhop* (1916) 99 *Neb.* 803, 157 *N. W.* 1019; *Pennell v. Robinson* (1913) 164 *N. C.* 257, 80 *S. E.* 417, *Ann. Cas.* 1915D, 77; *Wilson v. Edwards* (1907) 32 *Pa. Super. Ct.* 295; *Cantrell v. Ring* (1912) 125 *Tenn.* 472, 145 *S. W.* 166; *Daly v. Sumpter Drug Co.* (1913) 127 *Tenn.* 412, 155 *S. W.* 167, *Ann. Cas.* 1914B, 1101; *Mahoney-Jones v. Sams Bros.* (1913) 128 *Tenn.* 207, 159 *S. W.* 1094; *Fisher v. Herrmann* (1903) 118 *Wis.* 424, 95 *N. W.* 392; *Gazett v. Iola Co-op. Mercantile Co.* (1916) 164 *Wis.* 406, 160 *N. W.* 170.

A few courts have had before them the question of what will excuse the purchaser from giving the notice as required by statute. Thus it has been held that where the statute requires the purchaser to demand and receive from the seller a written list, under oath, of the creditors, and to give notice to same, he cannot excuse a failure to notify creditors by showing reliance upon an oral statement of the seller that he had no creditors, although such statement was made in answer to a demand for a list of credi-

tors. *Peck v. Hibben* (1916) — *Ind.* —, 114 *N. E.* 216. Nor can a failure to comply with the statutory requirement as to the furnishing of a list of creditors and the notifying of same be excused by the fact that the purchaser has assumed the obligation to and paid all those creditors of whom he had knowledge. *Stuart v. Elk Horn Bank & T. Co.* (1916) 123 *Ark.* 285, 185 *S. W.* 263, wherein it was said that the purpose of the requirement is to give publicity to creditors, and that a failure to comply with same cannot be excused. And a purchaser cannot excuse a failure to notify a creditor upon the ground that such creditor was unknown to him, because of the fact that his name did not appear on the list furnished by the seller, where such list was not furnished for the time required by statute, and notice was not sent, as required, to those whose names were furnished. *Ibid.* In Arkansas the statute requires that the list shall be furnished not less than ten days prior to sale and delivery and payment, and that, ten days before taking possession or paying, the purchaser shall notify the listed creditors.

A wrongful omission to notify one creditor of a proposed sale in bulk renders the sale invalid as to him, but does not affect its validity as to the creditors who received proper notice. *Ritter v. Wray* (1911) 45 *Pa. Super. Ct.* 440.

A statutory requirement that the notice be made "within" a stated time means "inside of," and not without or exceeding, and does not require that the notice shall be given for the full period, but only during such period. *Gallup & Co. v. Rozier* (1916) 172 *N. C.* 283, 90 *S. E.* 209. G. J. C.

CALIFORNIA SUPREME COURT. (In Banc.)

RE ESTATE OF JOHANNE AUGUSTA
EMILY MARX, Deceased.

STEFANIE HENKE, Appt.

(— Cal. —, 164 *Pac.* 640.)

Will — revocation — execution of second one.

1. A second will which purports to dis-

Note. — The revocation of a will, as affected by invalidity of some or all of the dispositive provisions of a later will, is discussed in the annotation following *Re Melville*, L.R.A.1916C, 101.

Other questions relating to the revocation of wills are discussed in the notes referred to in the Indexes to L.R.A. Notes, under the title, "Wills," subtitle, "Revocation."

pose of the whole estate, but does not expressly revoke the prior one, does not, if it contains invalid bequests sufficient in amount to satisfy the bequests in the former one not provided for in the later one, revoke such bequests, but both wills may stand, so far as such bequests are concerned, under a statute declaring that a prior will shall be revoked by a later one containing provisions wholly inconsistent with the terms of the former one.

For other cases, see *Wills, I. c., in Dig.* 1-52 N. S.

Same — revocation of probate.

2. The revocation of an order admitting a will to probate is not necessary upon the discovering of a former will, a portion of which is not revoked by the later one.

For other cases, see *Wills, I. c., in Dig.* 1-52 N. S.

(Angellotti, Ch. J., dissents.)

(April 7, 1917.)

A PPEAL by an heir at law of Johanne Augusta Emily Marx, deceased, from an order of the Superior Court for Napa County, admitting two instruments to probate as her last will. Modified and affirmed.

The facts are stated in the opinion.

Messrs. William Loewy, Walter Loewy, and Wallace Rutherford, for appellant:

The will of 1913 is a complete and independent will, disposing of the entire estate of decedent, and is "wholly inconsistent" with the will of 1910, and revokes the latter.

40 Cyc. 1175; 30 Am. & Eng. Enc. Law, 2d ed. 626; Jarman, Wills, 6th ed. p. 133; Henfrey v. Henfrey, 4 Moore, P. C. C. N. S. 29, 13 Eng. Reprint, 211, 6 Jur. 355; Schilling v. Bawek, 135 Iowa, 131, 112 N. W. 210; Bobb's Succession, 42 La. Ann. 40, 7 So. 60; Gardner v. McNeal, 117 Md. 27, 40 L.R.A. (N.S.) 553, 82 Atl. 988, Ann. Cas. 1914A, 119, note; Smith v. McChesney, 15 N. J. Eq. 359; Re Baby, 1 Connolly, 317, 4 N. Y. Supp. 182; Ludlum v. Otis, 15 Hun, 410; Re Gilman, 65 Misc. 409, 121 N. Y. Supp. 909; Teacle's Estate, 153 Pa. 219, 25 Atl. 1135; Burden's Estate, 11 Phila. 130; Reese v. Probate Ct. 9 R. I. 434; Swann v. Housman, 90 Va. 816, 20 S. E. 830; Fisher's Will, 4 Wisa. 254, 65 Am. Dec. 309; Conover v. Hoffman, 15 Abb. Pr. 100; Robinson v. Smith, 13 Abb. Pr. 359; McLoskey v. Reid, 4 Bradf. 334; Nelson v. McGiffert, 3 Barb. Ch. 158, 49 Am. Dec. 170; Brant ex dem. Willson v. Willson, 8 Cow. 56; Clarke v. Ransom, 50 Cal. 595.

Mr. Garret W. McEnerney amicus curiae.

Mr. Clarence N. Riggins, for respondent Brant:

The 1910 will was not revoked by the 1913 will.

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Re Murphy, 104 Cal. 554, 38 Pac. 543; Re Molson, 18 Ann. Cas. 279, and note, 21 Ont. L. Rep. 289; Besancon v. Brownson, 39 Mich. 388; Conoway v. Fulmer, 34 L.R.A. (N.S.) 970, note; Williams v. Miles, 68 Neb. 463, 62 L.R.A. 383, 110 Am. St. Rep. 431, 94 N. W. 705, 96 N. W. 151, 4 Ann. Cas. 306.

The 1910 will could be admitted to probate as a part of the last will of deceased without a revocation of the probate of the 1913 will.

Schultz v. Schultz, 10 Gratt. 358, 60 Am. Dec. 335; Waters v. Stickney, 12 Allen, 1, 90 Am. Dec. 122; Besancon v. Brownson, 39 Mich. 388; Cousens v. Advent Church, 93 Me. 292, 45 Atl. 43; Vance v. Upsom, 64 Tex. 266.

The statute does not require a contest of an existing probate, or the issuance or service of a citation, in order to probate an after-discovered will.

Re Mears, 9 Ann. Cas. 962, note; Re Crozier, 65 Cal. 332, 4 Pac. 109; Re Cobb, 49 Cal. 599; Re Murphy, 104 Cal. 554, 38 Pac. 543; Re Pforr, 144 Cal. 121, 77 Pac. 825; Re Walker, 160 Cal. 547, 36 L.R.A. (N.S.) 89, 117 Pac. 510; Re Molson, 21 Ont. L. Rep. 289, 18 Ann. Cas. 279, and note at 284; Leslie v. Leslie, Ir. Rep. 6 Eq. 332; Graham v. Burch, 47 Minn. 171, 28 Am. St. Rep. 353, 49 N. W. 697.

Messrs. U'Ren & Beard, for executors-respondents:

A will of a deceased person may consist of more than one document, and two or more wills executed at different times may be probated together and treated as one will.

40 Cyc. 1093; Re Murphy, 104 Cal. 554, 38 Pac. 543; Schultz v. Schultz, 60 Am. Dec. 335, note; Re Benable, 127 N. C. 344, 37 S. E. 465; Whitney v. Hanington, 36 Colo. 407, 85 Pac. 84; Parnell v. Thompson, 81 Kan. 119, 33 L.R.A. (N.S.) 658, 105 Pac. 502; Van Wert v. Benedict, 1 Bradf. 114; Fletcher v. Gates, — Tex. Civ. App. —, 63 S. W. 937; Gordon v. Whitlock, 92 Va. 723, 24 S. E. 342; Re Dietz, 41 N. J. Eq. 284, 7 Atl. 443; Nelson's Estate, 9 Pa. Co. Ct. 552; Re Petchell, L. R. 3 Prob. & Div. 155, 43 L. J. Prob. N. S. 22, 30 L. T. N. S. 74, 22 Week. Rep. 353.

The will of 1910 was executed with all of the formalities required by law, and thereupon became the last will and testament of decedent. Thereafter it could be revoked only in the manner prescribed by law.

Re Comassi, 107 Cal. 1, 28 L.R.A. 414, 40 Pac. 15; Re Hickman, 101 Cal. 614, 36 Pac. 118; Re Tillman, 3 Cal. Unrep. 677, 31 Pac. 563; 40 Cyc. 1171; Runkle v. Gates, 11 Ind. 95; Re Curtis, 135 App. Div. 745, 119 N. Y. Supp. 1004; Re Akers, 173 N. Y. 620, 66 N. E. 1103; Williams v. McKinney, 34 Kan.

518, 9 Pac. 265; *Simpson v. Foxon*, L. R. [1907] P. 54, 76 L. J. Prob. N. S. 7, 96 L. T. N. S. 473, 23 Times L. R. 150; *Re Walkerley*, 108 Cal. 627, 49 Am. St. Rep. 97, 41 Pac. 772; *Re Young*, 123 Cal. 337, 55 Pac. 1011; *Re Reinhardt*, 74 Cal. 365, 16 Pac. 13.

Mr. Edmund Nelson, *amicus curiæ*:

It was not necessary to revoke the probate of the will of 1913 in order to admit the two documents to probate as the last will of the deceased.

McCauley v. Harvey, 49 Cal. 497; *Re Murphy*, 104 Cal. 554, 38 Pac. 543.

The will of 1910 could be declared admissible to probate separately, as a part of the last will of the decedent, without a revocation of the probate of the will of 1913.

Schultz v. Schultz, 10 Gratt. 358, 60 Am. Dec. 335; *Vance v. Upson*, 64 Tex. 266; *Gaines v. Hennen*, 24 How. 566, 16 L. ed. 774; *Bowen v. Johnson*, 5 R. I. 120, 73 Am. Dec. 49.

Shaw, J., delivered the opinion of the court:

The record presents an appeal by Stefanie Henke, a niece of the decedent, and her only heir at law, from an order admitting to probate, as constituting together the last will of the decedent, two documents, testamentary in character, executed at different dates.

The decedent died on May 14, 1914. One of the documents in question was dated March 8, 1910, the other March 26, 1913. The latter was found immediately after her death, and, on petition of the persons named therein as executors, was duly admitted to probate on June 8, 1914. Several months after their appointment as executors, upon examining the other papers and effects of the decedent, they discovered the document dated March 8, 1910. Being in doubt whether the document of 1910 constituted a part of the will of the decedent, or was revoked by the will already admitted to probate, they filed a petition, upon which the order appealed from was made, alleging the probate of said will of 1913, the subsequent discovery of the will of 1910, together with the other facts made essential by the Code to a petition for the probate of a will, and praying, in the alternative, that the two documents be admitted to probate together as the last will of the decedent; or, that the will of 1910 be admitted as the last will, or that the will of 1913 alone be declared to constitute the will; also that if the court found that the will of 1910 constituted any part of the will of the decedent, it revoke the order previously made admitting the will of 1913 to probate. Upon the hearing of this petition the court L.R.A.1917F.

made an order declaring that the decedent left the said two wills, dated, respectively, March 8, 1910, and March 26, 1913, that they together constituted the last will of the decedent, and admitting the same to probate as such last will. The order also declared that the previous order of June 8, 1914, admitting to probate the document of March 26, 1913, alone, as the last will of the decedent, "be vacated and set aside, and that all proceedings thereunder be vacated and set aside."

The will of 1913 contained no declaration as provided in § 1292 of the Civil Code, revoking the will of 1910. The appellant contends that it was wholly inconsistent therewith, and consequently operated as a revocation by implication, under the rule prescribed by § 1296 of the Civil Code, which is as follows: "A prior will is not revoked by a subsequent will, unless the latter contains an express revocation, or provisions wholly inconsistent with the terms of the former will; but in other cases the prior will remains effectual so far as consistent with the provisions of the subsequent will."

The authorities support the proposition that a later will containing no express revocation of former wills, but which, in fact, disposes of the entire estate, leaving nothing upon which the former will could operate, is, in effect, a revocation thereof. If the later provisions were carried out it would consume the entire estate, and the prior will could have no effect. On this point Mr. Jarman says that in all cases where a later will is adequate to the disposition of the entire property of the deceased, the case "rests on the true construction of the contents of the two instruments, and the complete disposition contained in the second must, unless controlled by the context, wholly revoke the first." 1 Jarman, Wills, 6th ed. *138; other authorities to the same effect are Page, Wills, § 269; 1 Underhill, Wills, § 251; 1 Redf. Wills, **362, 365.

The respondent, in answer to this proposition, presents the point that although the dispositions of the will of 1913, if carried out literally, would consume the entire estate, yet that because of the fact that the charitable gifts therein far exceed one third of the estate, there is a considerable portion thereof which is not lawfully disposed of because of the invalidity of the disposition as to such excess, and, consequently, that the rule that a later will adequate to the complete disposition of the estate revokes a prior will does not apply. The facts support this contention. The gifts to charitable uses in the will of 1913 amount to \$113,610. The value of the estate, as shown by the appraisal filed, was \$140,141.68. One third of the estate would, therefore, be \$49,-

713.89, and this is the full extent of the valid charitable gifts. The gifts not charitable amount to \$61,018.40. As the valid gifts of this will, therefore, amount to \$110,732.29, the balance of \$38,409.39 remains undisposed of by that will. The gifts of the will of 1910 to persons who are not mentioned in the will of 1913 amount to only \$25,100. The balance undisposed of by the will of 1913 would therefore satisfy the dispositions of the will of 1910, if the respective dispositions of the two wills are not to be cumulated, and the two wills may be probated together, under this theory, without any complications arising from the over-disposition of the estate.

The authorities support the proposition that an invalid disposition in a subsequent will does not operate to revoke a disposition in the prior will, and is ineffective for any purpose. In *Austin v. Oakes*, 117 N. Y. 577, 23 N. E. 193, the testatrix having only a restricted power to appoint by her will the persons to take under her husband's will, executed a will containing a lawful exercise of the power. Afterwards, by a codicil, she attempted to declare a different appointment as to one share by giving it to persons who were not within the class to which, by the terms of the power, she was confined. The court said: "A revocation of an earlier disposition of a will by a later one, or by a codicil, . . . is never anything but a rule of necessity, and it operates only so far as is requisite to give the later provision effect. . . . But no revocation could give effect to this codicil."

And, referring to the fact that the later disposition of the codicil was invalid, it further said: "No violence is done to her intention if, that failing, the disposition of her will is suffered to stand; for I deem it beyond a reasonable doubt that if she had known what we now know, that an appointment to the daughter's children was not within her authority, she never would have made it, but would have suffered the disposition of her will to remain."

So in *Altrock v. Vandenberg* (Sup.) 54 N. Y. S. R. 326, 25 N. Y. Supp. 851, the testator had devised his land to his son for life, with remainder to his son's children. The son died, and he then, by a codicil, devised the land to the same children, but in a manner which was void, being in violation of the law of New York against perpetuities. The court held that the codicil did not revoke the former devise of the remainder in fee, saying: "It would be strange, indeed, if a wholly inoperative attempted disposition should nevertheless have the effect of destroying a prior valid devise, especially when, as in this case, it is apparent that the testator did not wish to die intestate as to L.R.A.1917F.

his real estate, and that, if he had known he could not lawfully make the disposition last attempted, he would have been content with the first."

The case is analogous to those where a testator, having made a will, and desiring to make a new one, cancels the first will preparatory to making the second, and thereafter fails lawfully to execute the same, or makes therein an invalid disposition of his property. In such cases it is held that the attempted cancellation of the old will is ineffectual because the full intent is wanting, it being conditional upon the execution of a valid new will. Mr. Underhill, on this subject, says: "It will be presumed (and the presumption is sanctioned by reason and good sense) that the testator meant the cancellation to operate as a revocation only in the event of the will which he had intended to make being valid. If, therefore, he is prevented from executing any will, or the one he intends to make, or if he executes a will which turns out to be invalid, the will which has been revoked will revive." 1 Underhill, Wills, § 252.

It will perhaps be more accurate to say that the prior will does not revive, but that the attempted revocation will be deemed ineffectual.

These principles apply to the present case. The prior will can be deemed to have been revoked only by reason of the fact that the subsequent will is wholly inconsistent therewith, and would be a revocation if it were effectual to the disposition of the entire estate. But it appears that a large portion of the dispositions made is invalid, and by reason of that invalidity the entire estate is not disposed of. The will of 1913 is inadequate to the disposition of the estate, and to that extent it is not inconsistent with the prior will. Consequently, it is not wholly inconsistent therewith, and does not completely revoke it. It is not necessary upon this consideration of the case, and hence it would be improper, to determine to what extent the legacies given in the prior will are revoked, or whether they are revoked at all by legacies given to the same legatees in the subsequent will. The court below did not err in admitting the two wills as constituting together the last will of the decedent.

The appellant further contends that the portion of the order purporting to vacate the order of June 8, 1914, admitting the will of 1913 alone to probate, and vacating all proceedings thereunder, is erroneous. This contention, we think, is well taken. After a will has been probated and another paper of an earlier date is found which constitutes a part of the last will of the decedent, together with that already probated, it is not

necessary to revoke the former order of probate. A different question would be presented if the earlier will had been the one first discovered and probated. In that case, the later will, if admitted to probate, would partially supersede and revoke the prior will if inconsistent in part only, or wholly revoke it if entirely inconsistent. Within the year from the first probate, the later will could be offered for probate in connection with a petition to revoke the probate of the earlier one, if it was inconsistent therewith, on the ground that the later will substantially affected the validity of the will probated, as provided in subdivision 4 of § 1312, Code of Civil Procedure. Code Civ. Proc. §§ 1327-1330. After that period perhaps the probate of the earlier will would be conclusive so far as it disposed of the estate. Code Civ. Proc. § 1333; *State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118. The present petition was filed within the year, and therefore the precise question last mentioned does not arise. Nor is there a question presented affecting the validity of the will of 1913, already probated. That will is the later will. If it lawfully disposed of the entire estate, it would be the only valid will. So far as it does so, it is final and conclusive against any prior will; it cannot be affected thereby. The will of 1910, when probated, takes effect and can take effect only because the will of 1913 is not effective to dispose of the whole estate, and it takes effect only upon property not disposed of by the will of 1913 and as to which that will left the decedent intestate. The will of 1913 must stand unaffected, and must prevail over that of 1910, in any event. It was therefore unnecessary to revoke the probate of the will of 1913 and immediately readmit it to probate. And as rights may have accrued under the proceedings taken in the meantime, it was improper to vacate the previous proceedings. The proper practice was to ad-

mit the earlier, but later found, will to probate, as constituting, so far as may be, a part of the decedent's last will. Proceedings already taken would remain effective so far as rights may have vested under them. The facts stated in the petition showed no cause for the revocation of the former probate and did not require or justify the issuance of the citation required by § 1328, Code of Civil Procedure, where a petition to revoke the probate of a will is filed. The part of the order appealed from purporting to revoke the previous probate of the will of 1913, and vacating the proceedings had under the previous order of probate, should not have been inserted therein. This conclusion, however, does not render it necessary to reverse the entire order. All that need be done is to modify it by striking out the objectionable portion. It is therefore ordered by this court that the order appealed from be modified by striking therefrom the following words: "That the order made and filed herein on the 8th day of June, 1914, admitting the document dated March 26, 1913, to probate alone as the last will and testament of said deceased and appointing Percy S. King and J. E. Beard (also known as Edgar Beard) as executors thereof, and ordering that letters testamentary be issued to them without bonds be vacated and set aside, and that all proceedings thereunder be vacated and set aside."

And that as so modified the order be affirmed; appellant to recover costs of appeal.

We concur: Sloss, J.; Lorigan, J.; Melvin, J.

I dissent: Angellotti, Ch. J.

Petition for rehearing denied May 7, 1917, Angellotti, Ch. J., and Henshaw, J., dissenting.

KANSAS SUPREME COURT.

STATE OF KANSAS

v.

ALBERT N. MILLER et al., Appts.

SAME

v.

FRANK P. KIBBEY et al., Appts.

SAME

v.

CHARLES H. BASKIN, Appt.

(92 Kan. 994, 142 Pac. 979.)

Intoxicating liquor — what is.

1. Under §§ 1 and 4 of chapter 164 of the L.R.A.1917F.

Laws of 1909, relating to intoxicating liquors, any spirituous, malt, vinous, or fermented liquor shall be construed and held to be intoxicating liquor, and any other liquor which is intoxicating in fact shall be construed and held to be intoxicating liquor.

For other cases, see Intoxicating Liquors, III. a, in Dig. 1-52 N. S.

Same — tests.

2. The test to be applied in determining whether or not the sale and keeping for sale

Headnotes by BURCH, J.

Note. — For alcoholic liquids not ostensibly intended for beverages as within prohibitory or regulatory statute, see annotation following this case, post, 241.

of liquors other than those specifically mentioned in the statute are prohibited is this: If the liquor in question be of such a kind that the distinctive character and effect of intoxicating liquor be absent, it is outside the statute; if the distinctive character and effect of intoxicating liquor be present, it is within the statute. The fact is to be determined by the jury, or by the court sitting as a trier of the facts.

For other cases, see Intoxicating Liquors, III. a, in Dig. 1-52 N. S.

Same — classification — abrogation.

3. The classification of liquors made in the decision in the Intoxicating Liquor Cases, 25 Kan. 751, interpreting the Intoxicating Liquor Law of 1881, and the definition of intoxicating liquor which that law contained, were abrogated by the Statute of 1909.

For other cases, see Intoxicating Liquors, III. a, in Dig. 1-52 N. S.

Same — meaning — scope.

4. When the Statute of 1909 became effective, the words "intoxicating liquors," wherever used in the intoxicating liquor laws, became impressed with the significance given them by that statute.

For other cases, see Intoxicating Liquors, III. a, in Dig. 1-52 N. S.

Same — Jamaica ginger.

5. The evidence examined and held to be sufficient to sustain a finding that Jamaica ginger is an intoxicating liquor, notwithstanding it has a medicinal use, the formula for its preparation is given in the United States Dispensatory, and it is there classified with lemon, vanilla, cinnamon, cloves, camphor, cologne, paregoric, wintergreen, and like tinctures, extracts, and essences.

For other cases, see Evidence, XII. k, in Dig. 1-52 N. S.

(Porter, J., dissents.)

(July 7, 1914.)

SEPARATE APPEALS by defendants from judgments of the District Court for Geary County in plaintiff's favor in actions brought to enjoin them from maintaining common nuisances contrary to the provisions of the Intoxicating Liquor Law. Affirmed.

The facts are stated in the opinion.

Messrs. Thomas Dever, W. S. Roark, and James V. Humphrey for appellants.

Messrs. John S. Dawson, Attorney General, and William W. Pease, for the State:

Jamaica ginger is an intoxicating liquor within the terms of the statute, and is prohibited.

Mitchell v. Com. 106 Ky. 602, 51 S. W. 17; Arbuthnot v. State, 56 Tex. Crim. Rep. 517, 120 S. W. 478; Mason v. State, 1 Ga. App. 534, 58 S. E. 139; King v. State, 66 Miss. 502, 6 So. 188; State v. Coulter, 40 Kan. 87, 19 Pac. 368; McNeil v. Horan, 153 Iowa, L.R.A.1917F.

630, 133 N. W. 1070; Marks v. State, 159 Ala. 71, 133 Am. St. Rep. 20, 48 So. 864.

Statutes prohibiting the sale of intoxicating liquor are applicable to druggists, unless special provisions are made in their favor and the sales made within the provisions, and such statutes are to be strictly construed.

23 Cyc. 166; State v. Harris, 122 Iowa, 78, 97 N. W. 1093; Lawson v. Com. 23 Ky. L. Rep. 1983, 66 S. W. 1010; People v. Remus, 135 Mich. 629, 98 N. W. 397, 100 N. W. 403; King v. State, 66 Miss. 502, 6 So. 188; Com. v. Gould, 158 Mass. 409, 33 N. E. 656; Com. v. Joslin, 158 Mass. 482, 21 L.R.A. 449, 33 N. E. 653.

The sale of intoxicating liquor by a druggist for purposes other than excepted by the statute is illegal.

State v. Shackle, 29 Kan. 341; State v. Hunt, 29 Kan. 762; State v. Teissedre, 30 Kan. 476, 2 Pac. 650.

Burch, J., delivered the opinion of the court:

The actions were instituted to enjoin the defendants from maintaining common nuisances contrary to the provisions of the Intoxicating Liquor Law. The cases were tried together, and the state prevailed. The defendants took separate appeals, which may be considered together.

The defendants are druggists owning and conducting retail drug stores in the city of Junction city. The judgments rest on proof that the defendants kept for sale and sold the article known as Jamaica ginger. On occasions they manufactured the article according to the formula found in the United States Pharmacopoeia. The following stipulation was made: "It is herewith agreed that the testimony as to sales that will be introduced in these cases will relate to the following article or compound; to wit, that tincture, extract, or essence that is designated in the United States Dispensatory as 'Tincture of Ginger,' and is commonly called and known as 'Jamaica Ginger.' Is in the United States Dispensatory classed with those of lemon, vanilla, cinnamon, cloves, camphor, cologne, paregoric, peppermint, wintergreen, and many others of like character, and also that said tincture of ginger is composed of ingredients, as shown by the formula in the United States Dispensatory, as follows: 93 to 94 per cent alcohol, the balance being a fluid extract of ginger."

The evidence was that the use of Jamaica ginger as a substitute for whisky has become quite extensive in Junction city. The preparation is intoxicating, the ginger—itsself a stimulant—working no change in the intoxicating character of the alcohol, and the effect produced is about the same as that

of whisky. It is capable of being used as an intoxicating liquor, the method being to dilute it with water, and it was so used to such an extent that black lists were kept of persons who were known to be using it too freely. The city marshal furnished the druggists of the city with a list of the names of eleven such persons. Some of the defendants had other persons in mind also. Persons on the black list would send unsuspected persons to the drug stores to buy for them. The preparation seems to have been sold in 2, 3, and 4-ounce bottles. One witness paid 25 cents per bottle (size not stated) for what he drank. The defendants were quite indefinite as to the matter of total daily sales. One of them who was pressed for an estimate said he did not think his sales were as much as \$3 or \$4 per day. One habitué said there was a difference in the color and strength of the liquid procured from different drug stores. Sometimes bottles were sold without a label. Sometimes bottles were refilled. In one instance two young men, referred to in the course of the trial as boys, drank a bottle together. When giving judgment in the case the court said: "It is true, these druggists took precautions, and I don't think they intended, really, to sell to anyone that they found out was really using it as a beverage, but yet they must have known that it was being used in that way."

Two of the defendants possessed internal revenue stamps. The other did not. Possession of such a stamp was explained in this way:

Q. Mr. Miller, you may state whether or not you have any drugs, medicines, or compounds in your establishment that require a government stamp for intoxicating liquors.

A. Yes, sir; we have a good many of them.

Q. About how many of them?

A. I wouldn't dare to say how many of them. There are 247 patent medicines we are notified by the government of the United States that we must have a stamp to carry. I couldn't say how many of them I have.

Q. State whether that is the reason you had a stamp.

A. Yes, sir; and we were notified by Mr. Jackson at the time.

A. Ever since I have carried a stamp, because none of those 247 patents, we are not furnished with a list of them, and every once in a while there are 20 or 30 added to it, and every once in a while an internal revenue man might drop in.

The Law of 1881 contains these provisions:

"Any person or persons who shall manu-

facture, sell or barter any spirituous, malt, vinous, fermented or other intoxicating liquors, shall be guilty of a misdemeanor, and punished as hereinafter provided: Provided, however, that such liquors may be sold for medical, scientific and mechanical purposes, as provided in this act. Laws 1881, chap. 128, § 1.

"All liquors mentioned in § 1 of this act, and all other liquors or mixtures thereof, by whatever name called, that will produce intoxication, shall be considered and held to be intoxicating liquors within the meaning of this act (Laws 1881, chap. 128, § 10)." Gen. Stat. 1901, §§ 2451, 2460.

Material portions of the injunction statute under which the present proceedings were commenced are the following:

"All places where intoxicating liquors are manufactured, sold, bartered or given away in violation of law, or where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage, or where intoxicating liquors are kept for sale, barter or delivery in violation of the law, and all intoxicating liquors, bottles, glasses, kegs, pumps, bars and other property kept in and used in maintaining such a place, are hereby declared to be common nuisances. . . . Laws 1901, chap. 232, § 1."

"The attorney general, county attorney, or any citizen of the county where such a nuisance as is defined in § 1, chap. 232, Session Laws of 1901, exists, or is kept, or is maintained, may maintain an action in the name of the state to abate and perpetually enjoin the same. . . . (Laws 1903, chap. 338, § 1)." Gen. Stat. 1909, §§ 4387, 4388.

The Liquor Laws of 1881 was interpreted in the *Intoxicating Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284, decided in 1881. Speaking through Mr. Justice Brewer, the court said:

"This section [10], whose language is unfortunately chosen, is the one which has provoked this litigation, and has tended to create so much prejudice against the statute; for its letter reaches to preparations which no man can believe were within the intent of the legislature, and any interference with whose sale, if within the power of the legislature, would be felt by every one to be unnecessary and unreasonable. Alcohol is the intoxicating principle, the basis, of all intoxicating drinks. Whatever contains alcohol will, if a sufficient quantity be taken, produce intoxication. Hence, whatever liquor contains alcohol is within the statute. So reads its letter. But when we come to inquire as to the liquors which contain alcohol, we find a lengthy list of fluids which are never used as beverages.

Cologne, extract of lemon, bay rum, paregoric, tincture of gentian, and many other medicinal preparations contain alcohol, and all will produce intoxication. They are seldom used as a beverage, and yet they may be. Intoxication produced by drinking bay rum has been known. Yet few will drink it. Its uses are for the toilet. But three of the cases before us are prosecutions for the sale of bay rum, essence of lemon, and tincture of gentian, respectively. These preparations contain alcohol, and will each, it is charged, produce intoxication. If the statute includes such articles, many of them are absolutely and wholly shut out from sale."

"But the legislature never intended such a sweeping prohibition. The use of intoxicating liquors as a beverage was the evil, and the statute must be read in the light thereof. It intended to put a stop to such use, and limit the use to the necessities of medicine. Now the cases before us group themselves into three classes; and the same division is far-reaching and of general application. The first embraces what are generally and popularly known as intoxicating liquors, unmixed with any other substances. Thus in one case the sale of brandy is charged. The second includes articles equally well known, standard articles, and which, while containing alcohol, are never classed as intoxicating beverages. Their uses are culinary, medical, or for the toilet. They are named in the United States Dispensatory and other similar standard authorities; the formulæ for their preparation are there given; their uses and character are as well recognized and known by their names as those of a horse, a spade, or an arithmetic. The possibility of a different and occasional use does not change their recognized and established character. A particular spade may be fixed up for a parlor ornament, but the spade does not belong there. So essence of lemon may contain enough alcohol to produce intoxication, more alcohol proportionately than many kinds of wine or beer. It is possible that a man may get drunk upon it, but it is no intoxicating liquor. Bay rum, cologne, paregoric, tinctures generally, all contain alcohol, but in no fair or reasonable sense are they intoxicating liquors or mixtures thereof. The third class embraces compounds, preparations, in which the alcoholic stimulant is present, . . . which are not found in the United States Dispensatory, or other like standard authorities, and which may be purely medicinal in their purpose and effect, or mere substitutes for the usual intoxicating beverages. If not intoxicating liquors, they may be 'mixtures thereof' within the scope of the statute. L.R.A.1917F.

Here belong many of the patent medicines, the bitters, cordials, and tonics of the day. Here also are such compounds as that charged in one of the informations before us, a compound of whisky, tolu, and wild cherry." pp. 762, 766.

The conclusion was that the first class was within the statute, the second class was without the statute, and the courts could so declare as a matter of law. Whether or not articles belonging to the third class were within the statute presented a question of fact for the jury.

The defendants argue that the stipulation entered into places Jamaica ginger in the second class referred to in the Intoxicating Liquor Cases, as a medicinal article whose ordinary use is the relief of colic, diarrhea, and similar disorders; the use of culinary, toilet, and medicinal articles belonging to this class as substitutes for whisky not having been in the legislative mind in 1881, the statute does not embrace them now; and judgment should in strictness have been rendered against the state on the stipulation.

The difficulty with this argument is that the Statute of 1881 as interpreted in the Intoxicating Liquor Cases is no longer in force. In 1909 the legislature passed a new act which extended the prohibition of the law to the manufacture and sale of intoxicating liquors for medical, scientific, and mechanical purposes, and which superseded the old definition of intoxicating liquors.

Sections 1 and 4 of chapter 164 of the Laws of 1909 read as follows:

"Section 1. That § 2451 of the General Statutes of Kansas, 1901, be amended so as to read as follows: Sec. 2451. Any person or persons who shall manufacture, sell or barter any spirituous, malt, vinous, fermented or other intoxicating liquors shall be guilty of a misdemeanor and punished as hereinafter provided."

"Sec. 4. That § 2460 of the General Statutes of Kansas, 1901, be amended so as to read as follows: Sec. 2460. All liquors mentioned in § 1 of this act shall be construed and held to be intoxicating liquors within the meaning of this act." Gen. Stat. 1909, §§ 4361, 4364.

The only modification of the Act of 1909 is that, under an act passed in 1911 (Laws 1911, chap. 178), wholesale druggists of a certain class may sell alcohol for medicinal, scientific, and mechanical purposes to registered pharmacists engaged in good faith in the retail drug business, in quantities of not less than 1 gallon and not more than 5 gallons. The result is that the court has before it for interpretation a statute substituted for the one on which the defendants rely for the purpose of meet-

ing conditions which have arisen since 1881, and for the purpose of extending and strengthening the prohibitory law.

In the case of *State v. Ross*, 86 Kan. 799, 121 Pac. 909, an interpretation given the act of 1881 by a decision rendered in 1887 was pressed upon the court. In response it was said: "The legislature has traveled very far since that statute was enacted and that case was decided, and a person would make a great mistake to rest conduct upon the liquor law as it then stood. The schemes and shifts and devices to evade the law have been so numerous and cunning, and the social benefits hoped for from regulation of the liquor traffic have been so persistently circumvented, that the legislature has felt it necessary again and again to call upon the people to make personal forbearances in the interest of what has been esteemed the general welfare." p. 802.

One of the perfectly natural and inevitable consequences of the strict enforcement of the prohibitory law was that persons with alcoholic addictions and others desiring the stimulating effect of alcohol should turn to the nearest substitutes for the usual intoxicating agents. In 1881 it was known that persons would use bay rum for purpose of intoxication. *Intoxicating Liquor Cases*, 25 Kan. 751, 762, 37 Am. Rep. 284. Extract of lemon has been used for the same purpose with success. *Holcomb v. People*, 49 Ill. App. 73. The same is true of essence of cinnamon (*State v. Muncey*, 28 W. Va. 494), and Jamaica ginger cases are common in the books. *Mitchell v. Com.* 106 Ky. 602, 51 S. W. 17; *Arbuthnot v. State*, 56 Tex. Crim. Rep. 517, 120 S. W. 478; *Bertrand v. State*, 73 Miss. 51, 18 So. 545.

In the case of *Mitchell v. Com.* 106 Ky. 603, 51 S. W. 17, the opinion reads: "Appellant was convicted of the offense of selling intoxicating liquors in violation of a special act applicable to Laurel and four other counties. The sole proof was of a phial of Jamaica ginger, White's brand. It is claimed that this was a variance. It was not a variance if Jamaica ginger was a spirituous liquor. The jury found that it was. But the objection is urged that there was no evidence to support this finding, as both the vendor and vendee swore it was not intoxicating. Evidence of a druggist was introduced that the regulation requirement of Jamaica ginger was 96 per cent alcohol and 4 per cent ginger. If the jury believe this testimony, and believed that the phial contained Jamaica ginger (and it was bought and sold as such), they were authorized to conclude that it was intoxicating. Moreover, we think that, without the druggist's evidence, it is a mat-

ter of common knowledge that Jamaica ginger is an intoxicant and a spirituous liquor, and it is hardly more necessary to introduce testimony of that fact than it would be of whisky." p. 603.

It will not be assumed that the legislature was ignorant of the fact that persons deprived of their usual stimulants would resort to substitutes, or that dealers with an eye to profit would supply customers desiring stimulants with fair substitutes.

In 1909 the small remedial value of alcoholic stimulants, as compared with the former popular notion regarding their curative properties, had been established. The pathway to inebriety through the use of patent and other medicines, consisting of intoxicating liquor containing some barks or drugs or roots or seeds having more or less medicinal property, had been unmasked. The United States Pharmacopœia, which lists straight alcohol,—the common beverage of a certain class of drinkers,—was no longer the touchstone by which to divide medicines from intoxicants. None of the social disasters which had been predicted as results of the Law of 1881 had befallen the state. Fear lest the law might be brought into disrepute by encroachment on the right to use preparations containing alcohol was no longer entertained. Nearly thirty years' experience disclosed that restraints, which year by year had been continually imposed, and which would have been regarded as unnecessary and unreasonable when the law was new and strange, were fit and wholesome, and were approved by public sentiment. The progress of events had been such, when the legislature approached a revision of the law of 1909, that the intellectual, moral, social, and legal atmosphere had become a wholly different medium from that in which the legislature of 1881 labored. If in the Act of 1909, which cut off the sale of intoxicating liquors for even medicinal purposes, the legislature had inserted the following definition: All liquors mentioned in § 1 of this act, and all other liquors or mixtures thereof, by whatever name called, which will produce intoxication, shall be considered and held to be intoxicating liquors,—no one would have regarded the language as unfortunately chosen, or as tending to produce prejudice against the law, or as unnecessary or unreasonable because reaching culinary, toilet, or medicinal preparations in fact intoxicating and used as substitutes for whisky. The spirit and internal sense of the law would have been regarded as identical with the ordinary and popular signification of the plain words. The suggested definition is precisely the one contained in the Law of 1881.

Since the court, acting according to its light in 1881, had interpreted the definition contained in the earlier statute to exclude from the class "intoxicating liquors," a class of liquors which were intoxicating, the legislature repealed the definition and substituted another, which, when read, as it must be, with § 1 of the Act of 1909, means and says this: Any spirituous, malt, vinous, or fermented liquor shall be construed and held to be intoxicating liquor, and any other liquor which is intoxicating in fact shall be deemed and held to be an intoxicating liquor. The legislature was not doing an idle thing by repealing one definition and substituting another. It intended to change the law, and the result is that the classification established by the Intoxicating Liquor Cases is abrogated. Liquors belonging to the first class there described, such as whisky, brandy, gin, wine, beer, and the like are still to be construed to be intoxicating. All other liquors belong to the third class, and the rule or test is this: If the liquor be such that the distinctive character and effect of intoxicating liquor be absent, it is outside the statute. If the distinctive character and effect of intoxicating liquor be present, it is within the statute. The fact is to be determined by the jury, or by the court when sitting as a trial of the facts.

If in any case the liquor sold or kept for sale be identified by the proof as plain whisky or brandy or gin or wine or beer, or other spirituous, malt, vinous, or fermented liquor of the kind specifically mentioned in the statute, it shall be construed and held to be intoxicating. As to such liquors the statute simply declares what the courts and everybody else know. If the liquor sold or kept for sale be not so identified, but belong by name or qualification of name to some other class, or be unclassified, its intoxicating character must be submitted to the jury, or to the court when trying the facts, as a question of fact. In such cases the evidence may relate to its nature and constituent elements, its ordinary use, its susceptibility to use as an intoxicant, the extent of such use, and all other matters which in the particular instance will aid in determining the issue.

The evidence in the cases under consideration was amply sufficient to warrant a finding that Jamaica ginger is an intoxicating liquor within the meaning of the statute.

The court has repeatedly held that the various provisions of the intoxicating liquor statutes are to be construed as a comprehensive whole directed to a common end. When the Act of 1909 became effective, the injunction statute was not amended in any

sense of the term, but the words "intoxicating liquors," used there and used elsewhere throughout the body of the prohibitory law, became impressed with the signification given them by the Statute of 1909.

The judgment in each of the three cases is affirmed.

Porter, J., dissenting:

I cannot concur in the majority opinion. All prohibitory legislation since 1881 has proceeded upon the supposition that the words "intoxicating liquors" had been defined by this court in the able opinion rendered by Justice Brewer, which is referred to in the majority opinion in this case. It was there held that it was not the intention of the legislature, by the term "intoxicating liquors" in the Act of 1881, to include extract of lemon and dozens of other well-known compounds that are in daily use in the household and sold everywhere by druggists. I have no reason for believing, and the majority opinion suggests no real reason why the court should say now that the legislature intended by the Amendment of 1909 to extend the scope and meaning of the words "intoxicating liquors." To my mind it is clearly manifest that the legislature merely intended to do away with the provision of the former law permitting the sale of intoxicating liquors for certain excepted purposes.

Section 1 of the original prohibitory liquor law reads as follows: "Any person or persons who shall manufacture, sell or barter any spirituous, malt, vinous, fermented or other intoxicating liquors, shall be guilty of a misdemeanor, and punished as hereinafter provided: *Provided, however, that such liquors may be sold for medical, scientific and mechanical purposes, as provided in this act.*" Gen. Stat. 1901, § 2451.

The only change in this section by the Act of 1909 was to omit the proviso that liquors might be sold for the three excepted purposes. The original act (Gen. Stat. 1901, § 2460) defined intoxicating liquors in the following language: "All liquors mentioned in § one of this act, and all other liquors or mixtures thereof, by whatever name called, that will produce intoxication, shall be considered and held to be intoxicating liquors within the meaning of this act."

This section was in the law when Judge Brewer wrote the opinion for the court declaring that the legislature never intended such a sweeping prohibition as to include standard articles, which, while containing alcohol, are never classed as containing intoxicating beverages. The legislature of 1909 amended § 2460 and took away even the restricted definition of the Act of 1881.

Section 4 of the Act of 1909, reads: "That § 2460 of the General Statutes of Kansas 1901, be amended so as to read as follows: Sec. 2460. All liquors mentioned in § 1 of this act shall be construed and held to be intoxicating liquors within the meaning of this act." Laws 1909, chap. 164, § 4, Gen. Stat. 1909, § 4364.

The decision in this case may work substantial justice to the particular druggist who is the defendant, but it renders any druggist in the state liable to prosecution if he has in best of faith sold bay rum, extract of lemon, Jamaica ginger, or numerous other tinctures which contain a large percentage of alcohol. My objection to the decision is that it legislates. A condition may have arisen which calls for the enactment of a law making it a misdemeanor to sell any tinctures and compounds that contain a certain percentage of alcohol, but

that is a question for the legislature. The prohibitory law should be, and always has been by this court, liberally construed for the purpose of preventing its violation by any shift or device. The legislature has always responded quickly to any demand of the people for amendments to the law intended to aid in its vigorous enforcement. If they had intended by the Act of 1909 to overturn the decision rendered by Judge Brewer in the Intoxicating Liquor Cases, 25 Kan. 751, 37 Am. Rep. 284, which has stood unchallenged ever since, I think the legislature could have found appropriate words for expressing such an intention, and that, having failed so to amend the law, this court cannot legislate and change it notwithstanding the necessity for an amendment.

Petition for rehearing denied.

Annotation—Alcoholic liquids not ostensibly intended for beverages as within prohibitory or regulatory statute.

As the title suggests, the distinctive characteristic of the cases falling within the scope of the present note is that the liquor involved, irrespective of its alcoholic content, is not, ostensibly at least, intended to be sold as a beverage; and the note is not concerned with liquids, e. g., "near beer," which are commonly sold as beverages, "soft" or otherwise.

Many other questions regarding the character of liquid within the prohibitory or regulatory statutes are discussed in the notes cited in the L.R.A. Indexes under the title, "Intoxicating Liquor," subtitle, "Character of liquor."

General principles.

The question whether a liquid with an alcoholic content and capable of producing intoxication, but not ostensibly intended or commonly sold as a beverage, is within the prohibitory or regulatory statute depends, of course, to a great extent, upon the question whether the statute in describing the liquors or liquids within its scope employs merely general descriptive terms, such as alcoholic liquors, intoxicating liquors, spirituous, vinous, or malt liquors, etc., or uses in addition specific terms like "alcoholic decoctions," "bitters," etc. Obviously, the employment of such specific terms militates strongly against the contention, plausibly made, when only the general terms are employed, that the mischief aimed at by the statute is confined to the sale of beverages. Again, the force of such a contention is in some in-

stances weakened by the fact that the statute contemplates a special license for the sale of alcoholic medicines, etc.

The quantity of alcohol which a liquid contains does not necessarily determine whether or not it is intoxicating within the contemplation of a prohibitory law, but the object for which it is used and its effects when used must aid in determining whether or not its sale is prohibited. *State v. Coulter* (1888) 40 Kan. 87, 19 Pac. 368.

It is proper to prove that an article was bought and used for a beverage, and drank as such by many persons in the community or elsewhere, its nature being illustrated by the uses to which it is put. *Carl v. State* (1888) 87 Ala. 17, 4 L.R.A. 380, 6 So. 118, 8 Am. Crim. Rep. 404.

A compound is an intoxicating liquor when it is intended for use as a beverage, or is capable of being so used, and contains alcohol obtained by fermentation or the additional process of distillation, in such a proportion that it will produce intoxication when taken in such quantities as may practically be drunk. *Malone v. State* (1899) — Tex. Crim. Rep. —, 51 S. W. 381.

If the quantity of a concoction requisite to a state of intoxication may be safely used, it is a compound reasonably liable to be used as an intoxicating beverage, as the quantity alone required to produce intoxication is immaterial so long as the compound is agreeable to the taste and the necessary quantity may be

safely taken. *Wadsworth v. Dunnam* (1892) 98 Ala. 610, 13 So. 597.

If an alcoholic preparation is so denatured as to render the mixture totally incapable of being used as a beverage, it will not come within the purview of laws against a sale of intoxicating liquors, and whether such is the fact is a question for the jury. *Mason v. State* (1907) 1 Ga. App. 534, 58 S. E. 139.

—intent.

Ordinarily, the intent with which a preparation designed as a medicine or food, but also capable of producing intoxication, is sold, is material. *Goode v. State* (1905) 87 Miss. 495, 40 So. 12; *State v. Lillard* (1883) 78 Mo. 136; *State v. Costa* (1905) 78 Vt. 198, 62 Atl. 38.

So, in *Walker v. Dailey* (1901) 101 Ill. App. 575, an action for damages against a merchant for the sale of intoxicating liquors to plaintiff's husband, causing his death, the intoxicating liquor being lemon extract, the court said that in the case of such a merchant they regarded the question whether the sale was a shift or device to evade the law as being of controlling importance, and that, if defendant kept and sold the extract for culinary purposes only, and if the sale was made without knowledge by defendant or his clerk that it was bought for the purpose of using it as an intoxicating beverage, he should not be held liable for the use made of the article after it left the store.

In *State v. Hastings* (1911) 2 Boyce (Del.) 482, 81 Atl. 403, it is held that a sale of Jamaica ginger is not a violation of a liquor statute, if it is sold in good faith as a medicine, but that, to avail himself of this special defense, the defendant must prove it to the satisfaction of the jury.

Under a statute making it unlawful for any person to sell for medicinal purposes any malt, fermented, or intoxicating liquors without first having secured a druggist's permit, with a proviso that it "shall not be construed to interfere in any manner with, . . . nor to prevent shopkeepers from dealing in or selling the commonly used medicines and poisons," nor from dealing in, and selling, patent or proprietary medicines, it is a question for the jury to determine whether a sale of patent medicines was made in good faith as medicines, or whether they were sold as intoxicating liquors as a beverage. *State v. Williams* (1905) 14 N. D. 411, 104 N. W. 546.

The uses to which a compound composed of 30 per cent alcohol and the bal-

ance of water, drugs, barks, or seeds, having medicinal qualities, is ordinarily put, the purposes for which it is usually bought, and its effects upon the system, are material facts, from which may be inferred the intention of the seller, and if, from all the facts and circumstances, it appears that the sale is of the other ingredients as a medicine, and not of the liquor as a beverage, the seller is protected. *King v. State* (1881) 58 Miss. 737, 38 Am. Rep. 344; *Bertrand v. State* (1895) 73 Miss. 51, 18 So. 545.

When medicines, bitters, and tinctures are made and sold in good faith, they will not be regarded as intoxicating liquors, though in fact intoxicating; but if intended to be used as intoxicating beverages, they will be within an intoxicating liquor statute, however disguised, the presumption being that the article is what it purports to be. *Russell v. Sloan* (1861) 33 Vt. 656.

When a medicine or other preparation containing enough alcohol to make a man drunk is sold and bought for that purpose, it is by the act of the parties given a status with intoxicating liquors. *State v. Kezer* (1901) 74 Vt. 50, 52 Atl. 116.

So Pabst Extract came within the prohibition of the sale of any malt liquor to be used as a beverage, although there was testimony that it was not suitable for use as a beverage, where it was sold to a man who had called for whisky, and not upon a physician's prescription. *Berner v. McHenry* (1915) 169 Iowa, 483, 151 N. W. 450.

But in some cases it has been held, under particular statutory provisions, that the intent with which the preparation is sold is immaterial.

Thus, in *Pike v. State* (1899) 40 Tex. Crim. Rep. 613, 51 S. W. 395, it was held, under a statute prohibiting the sale in a local option district of intoxicating liquor except upon prescription or for sacramental purposes, that, in a prosecution for the sale of Black Berry Cordial, where it was not claimed to have been sold on prescription or for sacramental purposes, the gist of the offense was selling an intoxicating liquor, and the intoxicating character of the liquor being established, and no issue of a bona fide mistake of fact as to its intoxicating character being made by defendant, the intent or purpose for which he sold the liquid was irrelevant and immaterial.

So the fact that defendant sold "Strengthening Cordial" and "Ginger Tonic" in good faith as medicine is not a defense under a statute making it un-

lawful to sell "any intoxicating decoction, mixture, compound, or bitters whatever, in any quantity or for any use or purpose." *Compton v. State* (1891) 95 Ala. 25, 11 So. 69.

And under a statute covering "any compound or preparation thereof commonly called tonics, bitters, or medicated liquors," it is no defense to say that, notwithstanding the fact that the liquor is intoxicating, it is sold for use as a medicine. *Stelle v. State* (1906) 77 Ark. 441, 92 S. W. 530.

And the sale of a medicinal preparation capable of being used as a beverage and containing such a percentage of alcohol that, if drunk to excess, it will produce intoxication, is within the meaning of an act prohibiting the sale of "spirituous, malt, or intoxicating liquors" without taking out a specified license, whether the vendor in making the sale intended that it should be used as a medicine or otherwise, and without reference to the purpose for which it was bought by the purchaser. *Chapman v. State* (1896) 100 Ga. 311, 27 S. E. 789. And the same is true under a statute prohibiting the sale without a license of "spirituous, malt, or any intoxicating liquors or liquor." *Colwell v. State* (1900) 112 Ga. 75, 37 S. E. 129.

And under a statute requiring a license to sell intoxicating liquors for medical purposes the intent with which intoxicating liquors were sold without such a license is immaterial. *State v. Benson* (1912) 154 Iowa, 313, 134 N. W. 851.

In *Com. v. Hallett* (1869) 103 Mass. 452, it was held that, in a prosecution for the unlawful sale of intoxicating liquors, the defendant might show that the article sold was a medicine, or that it was not intoxicating liquor, but that upon its being established that the article sold was in fact an intoxicating liquor, the fact that he sold it in good faith as a medicine, or did not know the Plantation Bitters which he sold was intoxicating, was immaterial.

And in *King v. State* (1889) 66 Miss. 502, 6 So. 188, it was held, under a statute providing that it shall be unlawful "for any person to sell or give away in any public place, or for the purpose of inducing trade, any intoxicating or malt liquors or any kind of bitters in any quantity whatever," that proof of sale of an article known as Pineapple Balm, and of its intoxicating nature, makes a prima facie case against defendant, and it then devolves upon him to show that it was a medicine, and not a liquor, and *L.R.A.1917F.*

it is immaterial that he sold the article in good faith as a medicine or that he did not know that it was intoxicating.

The fact that defendant sold strengthening cordial and ginger tonic in good faith as a medicine is not a defense under a statute making it unlawful to sell "any intoxicating decoction, mixture, compound, or bitters whatever in any quantity or for any use or purpose." *Compton v. State* (1891) 95 Ala. 25, 11 So. 69.

And, in *Petteway v. State* (1896) 36 Tex. Crim. Rep. 97, 35 S. W. 646, where defendant was charged with pursuing the occupation of selling spirituous, vinous, and malt liquors and medicated bitters in quantities of a gallon and less without having previously paid the occupation tax due thereon, the particular liquor he was charged with selling being brandy cherries, the court said that proof as to the question of intent on the part of the seller was inadmissible, as there was no contention that he was mistaken as to the fact that that he was selling brandy cherries, and it was a simple question of fact as to whether the sale of brandy cherries was a sale of spirituous liquors.

See also in *McDaniel v. State* (1901) — Tex. Crim. Rep. —, 65 S. W. 1068, where defendant was charged with selling Peruna and Lemon Ginger in violation of the local option law, and there was no question that the liquors were intoxicating and the purchasers became very much intoxicated from drinking it. An offer by defendant to prove by a third party from whom he bought the Peruna that he told defendant it was not violative of the local option law to handle and sell it, for the purpose of showing his intent, was properly excluded.

Medicinal compounds — in general.

So long as liquors retain their intoxicating character and are capable of use as a beverage, notwithstanding other ingredients may have been mixed therewith, they fall under the ban of the law; but when they are so compounded with other substitutes as to lose the distinctive character of intoxicating liquors and be no longer desirable for use as a stimulating beverage, and are in fact medicine, then their sale is not prohibited. *Carl v. State* (1889) 89 Ala. 93, 8 So. 156.

A medicinal preparation capable of being used as a beverage, which contains such a percentage of alcohol that if drunk to excess will produce intoxica-

tion, is within the meaning of an act which prohibits the sale of spirituous, malt, or intoxicating liquors without a license. *Chapman v. State* (1896) 100 Ga. 311, 27 S. E. 789; this case is followed in *Coldwell v. State* (1900) 112 Ga. 75, 37 S. E. 129, under a statute which adds the words "or bitters" after the word "liquors."

If spirituous or vinous liquor be present as a predominant element, the fact is immaterial that the bitters or other beverage may be qualified by other ingredients distinguishing it as a tonic or medicine. *Wall v. State* (1885) 78 Ala. 417.

And the mere fact that a mixture may have medicinal virtues does not take it from under the ban of the law against the sale of intoxicants. *Mason v. State* (1907) 1 Ga. App. 534, 58 S. E. 139.

So the sale of malt extract may come within an intoxicating liquor statute, although it is ordinarily used as a medicine, if it is sold for the purpose of being used as a beverage. *State v. Costa* (1905) 78 Vt. 198, 62 Atl. 38.

But a druggist or other dealer having lawful authority to sell proprietary and medicinal preparations is not guilty of a crime on every occasion when he makes a sale, even though the purchaser through a morbid craving for alcoholic stimulants may convert the medicinal preparation into a medium to produce a drunken debauch. *Goode v. State* (1905) 87 Miss. 495, 40 So. 12.

If the article sold was a medical compound with only sufficient gin included to preserve it or to extract the medicinal properties from the ingredients, and was not usually sold as a beverage, but as a medicine, it would not come within an intoxicating liquor statute. *Pearce v. State* (1905) 48 Tex. Crim. Rep. 352, 88 S. W. 234, 13 Ann. Cas. 636.

If the liquor sold is a medicinal preparation, and not intoxicating when taken in such quantities as could be practically drunk, it will not come within the statute. *Arbuthnot v. State* (1909) 56 Tex. Crim. Rep. 517, 120 S. W. 478.

If a preparation is not intended as a beverage, but is put up in good faith as a medical preparation and is advertised and sold only as such, and there are reasonable grounds to believe that it possesses curative qualities, and no more spirits are used in its preparation than are reasonably necessary to extract and hold in solution the medicinal properties of the various drugs employed, such preparation is medicinal, and does not lose its character as such, although it is L.R.A.1917F.

intoxicating when used to excess. *United States v. Stubblefield* (1889) 40 Fed 454.

One charged with the sale of a preparation put up in sealed bottles and known as "tolu," under a statute prohibiting the sale of any intoxicating liquor whatever, was entitled to present evidence as to the ingredients of the preparation and the effect of it upon a witness when he had taken it according to prescription. *Prather v. State* (1882) 12 Tex. App. 401.

Evidence that a preparation is classed by the Treasury Department under the internal revenue law as a proprietary medicinal preparation is irrelevant, being mere hearsay, and having no tendency to rebut the fact that the beverage contained spirituous liquor in sufficient quantities to produce intoxication. *Wall v. State* (Ala.) supra.

Evidence as to how certain bitters were labeled was irrelevant, as it rendered them neither more nor less intoxicating. *Carson v. State* (1881) 69 Ala. 235.

Testimony of a prosecuting witness that the bitters he bought from defendant tasted or smelt like whisky, but he did not think there was any spirituous liquor in it, and that he took it for bitters and never got drunk on it, was sufficient to warrant the jury in finding that it was whisky or a mixture thereof. *Rush v. Com.* (1898) 20 Ky. L. Rep. 673, 47 S. W. 585.

Proof of the sale of an article known as "Pineapple Balm," and that it was intoxicating, made a prima facie case against defendant, and it then devolved upon him to show that it was a medicine, and not a liquor. *King v. State* (1889) 66 Miss. 502, 6 So. 188.

Where the liquid sold was in a bottle marked "Hostetters Bitters" and "Patent Medicine," it was competent to prove that the contents were intoxicating and tasted like whisky. *Parrott v. Com.* (1884) 6 Ky. L. Rep. 221 (abstract).

But where the indictment only charged the sale of spirituous, vinous, or malt liquors, it must be shown by the evidence that the liquid sold, known as Harter's Wild Cherry Tonic, contained such liquors, and testimony by persons who had tasted it, that it tasted like whisky and had a similar effect, would not be conclusive upon the question. *Brantley v. State* (1890) 91 Ala. 47, 8 So. 816.

—specific compounds held within statutes.

Intoxicating Liquor Cases (1881) 25 Kan. 751, 37 Am. Rep. 284, involving the

selling of bay rum, tincture of gentian, essence of lemon, McLean's cordial, a preparation of whisky, tolu, and wild cherry, and a preparation of whisky and prickly-ash bitters, is set out with sufficient particularity in *STATE v. MILLER*, ante, 238.

The sale of intoxicating bitters is specifically prohibited by some statutes. *Berney v. State* (1881) 69 *Ala.* 233; *Gostorf v. State* (1882) 39 *Ark.* 450; *Howell v. State* (1883) 71 *Ga.* 224, 51 *Am. Rep.* 259; *Mason v. State* (1907) 1 *Ga. App.* 534, 58 *S. E.* 139; *State v. Wilson* (1883) 80 *Mo.* 303; *State v. Meese* (1893) 38 *S. C.* 261, 16 *S. E.* 893; *Cousins v. State* (1904) 46 *Tex. Crim. Rep.* 87, 79 *S. W.* 549; *State v. Haymond* (1882) 20 *W. Va.* 18, 43 *Am. Rep.* 787.

In *Allred v. State* (1889) 89 *Ala.* 112, 8 *So.* 56, it was held that an indictment charging the sale of intoxicating bitters does not charge an offense under a statute requiring a license for engaging in the business of selling "vinous, spirituous, or malt liquors," and that whether the bitters, although shown by the evidence to be intoxicating, were spirituous, vinous, or malt liquors, is a question for the jury. But this case was overruled in *Brantley v. State* (1890) 91 *Ala.* 47, 8 *So.* 816, on the ground that there was a statutory provision covering intoxicating bitters which apparently was overlooked by the court in that case.

Busby's Bitters or Busby's Improved System Invigorant, purchased to be drunk as a beverage, and when so drunk producing intoxication, came within a statute prohibiting the sale of "vinous or spirituous liquors of any kind." *Ryall v. State* (1885) 78 *Ala.* 410.

Fitzpatrick's Bitters, containing certain drugs and extracts known to materia medica, and also containing 58 per cent proof spirits, is a preparation of ardent spirits or medicated liquors within a statute. *Foster v. State* (1880) 36 *Ark.* 258.

Home Stomach Bitters and Home Sanitive Cordial containing a number of medicinal extracts, tonics, and bitters and 22½ per cent of alcohol, together with flavoring substances, are within a statute prohibiting the sale of ardent spirits and any compound or preparation thereof commonly called tonics, bitters, or medicated liquors. *Gostorf v. State* (1882) 39 *Ark.* 450.

Centennial Tonic Bitters, a compound consisting of water and 30 per cent alcohol medicated with a few bitter herbs and rock candy, comes within an intoxicating liquor statute, the testimony as a *L.R.A.* 1917F.

whole showing that it was capable of being used as a beverage and was actually so used. *McNeil v. Horan* (1912) 153 *Iowa*, 630, 133 *N. W.* 1070.

Dewitt's Stomach Bitters was held to be intoxicating liquor upon its being shown by a witness that he had taken three drinks of it and was made intoxicated thereby, which testimony was corroborated by other witnesses. *People v. Seeley* (1905) 105 *App. Div.* 149, 93 *N. Y. Supp.* 982, affirmed without opinion in (1905) 183 *N. Y.* 544, 76 *N. E.* 1102.

Bitters sold by the bottle, in which spirituous liquors form the principal ingredient, come within a statute prohibiting the sale of bitters or other beverages of which spirituous liquor forms an ingredient. *State v. Neese* (1893) 38 *S. C.* 261, 16 *S. E.* 893.

Medicated bitters producing intoxication are intoxicating liquors within a constitutional provision. *James v. State* (1886) 21 *Tex. App.* 353, 17 *S. W.* 422; *Prinzel v. State* (1895) 35 *Tex. Crim. Rep.* 274, 33 *S. W.* 350.

Doctor Wilson's Rocky Mountains Herb Bitters, containing alcohol and also certain medicines giving it genuine medicinal properties, is within a statute prohibiting the sale of any "intoxicating liquors and medicated bitters containing alcohol," and is not excepted by a provision as to liquors of any kind when prescribed by a regular physician or used solely in the admixture of necessary remedial compounds. *State v. Wilson* (1883) 80 *Mo.* 303.

Rochester Tonic, a malt liquid, comes within a prohibition of the sale of any vinous, malt, or fermented liquors, or any other intoxicating drinks of any kind whatsoever, whether or not it is in fact intoxicating. *United States v. Cohn* (1899) 2 *Ind. Terr.* 474, 62 *S. W.* 38.

Diggs' Appetizer, a preparation composed of 30 per cent of pure alcohol, water, glucose, and some aromatic flavor to give it color, and sold under circumstances which would charge a reasonable man with knowledge that it was being purchased and used as an intoxicating beverage, is an intoxicating liquor, and not a medicine. *United States v. Bray* (1902) 113 *Fed.* 1008.

Quinine and whisky, in the proportion of 10 grains of quinine and 8 ounces of whisky, is an intoxicating liquor as matter of law. *People v. Sharrar* (1910) 164 *Mich.* 267, 127 *N. W.* 801, 130 *N. W.* 693.

Phosphate Lemon Rye, claimed to have been designed as a medicine, but containing 23 per cent of alcohol, and

shown clearly to have been sold and used as a beverage, is an intoxicating liquor within a prohibitory statute. *State v. Coulter* (1888) 40 Kan. 87, 19 Pac. 368.

Strengthening cordial and ginger tonic, which contain alcohol in sufficient quantity to produce intoxication, bought and used by persons as beverages, come within the designation, "intoxicating decoction, mixture, compound, or bitters." *Compton v. State* (1891) 95 Ala. 25, 11 So. 69.

McLean's Strengthening Cordial, a compound composed in part of alcohol, which was intoxicating and could be used, and was used, as a beverage, came within a statute prohibiting the sale of tonics, bitters, or medicated liquors, though such statute was not intended to prohibit the sale of medicines. *Davis v. State* (1887) 50 Ark. 17, 6 S. W. 388.

Common cordial, which was merely sweetened and flavored whisky, came under a statute prohibiting under general terms the sale of any kind of spirituous liquor. *State v. Bennet* (1842) 3 Harr. (Del.) 565.

Blackberry Cordial, containing about 13 per cent of alcohol, and shown to have produced intoxication in specific cases, was an intoxicating liquor within a local option statute. *Pike v. State* (1899) 40 Tex. Crim. Rep. 613, 51 S. W. 395.

Jamaica ginger, though generally used as a medicine, may be classed with intoxicating liquors if it is kept and sold as a beverage rather than as a medicine. *State v. Krinski* (1905) 78 Vt. 162, 62 Atl. 37. And in *Mitchell v. Com.* (1899) 106 Ky. 602, 51 S. W. 17, it was held that the jury was justified in finding that Jamaica ginger was a spirituous liquor, upon the evidence of a druggist that the regulation requirements of Jamaica ginger was 90 per cent alcohol and 4 per cent ginger, although both the vendor and vendee swore that it was not intoxicating, the court saying that, without the druggist's evidence, it is a matter of common knowledge that Jamaica ginger is an intoxicant and spirituous liquor, and it is hardly more necessary to introduce testimony of that fact than it would be concerning whisky. See also *STATE v. MILLER*, ante, 238, holding Jamaica ginger to be an intoxicating liquor.

Peppermint essence, although used almost wholly as a carminative, but which could be used as a beverage, and was sold by a dealer knowing or acting as a prudent person, having reason to know that the purchaser wanted it to drink, and not to use as a medicine, comes within a statute. L.R.A.1917F.

ute prohibiting the sale of spirituous and intoxicating liquor, or a mixed liquor of which a part is spirituous or intoxicating. *State v. Kezer* (1901) 74 Vt. 50, 52 Atl. 116.

Essence of cinnamon was held by a divided court to come under a statute declaring that "all mixtures or preparations known as bitters or otherwise which will produce intoxication, whether intended or not, shall be deemed spirituous liquors within the meaning of this statute." *State v. Muncey* (1886) 28 W. Va. 494.

Peruna comes within the prohibition of the sale of intoxicating liquors. *Stelle v. State* (1906) 77 Ark. 441, 92 S. W. 530; *McDaniel v. State* (1901) — Tex. Crim. Rep. —, 65 S. E. 1068.

— compounds held not within statutes.

A sale by a druggist of a mixture of gum guaiacum and whisky composed of 2 ounces of the gum and 4 ounces of whisky, to be used as a medicine for rheumatism, the compound forming a powerful remedy, which, if taken in larger quantities than 1 teaspoonful at a time, and if not taken in milk, would produce extreme sickness, was not a spirituous, vinous, or malt liquor within a statute, although when the mixture was first made, if allowed to stand for a time, the whisky might have been separated from the other ingredients. *Parker v. State* (1903) 31 Ind. App. 650, 68 N. E. 912.

Grated horse radish containing no more alcohol than was prescribed in the formula laid down in the United States pharmacopœia, which was not more than was necessary to extract the strength of the drug, and which was used as a medicine, and could not have been reasonably drunk in such quantities as would produce intoxication, was not an intoxicating liquor within a local option statute. *Kincaid v. State* (1906) 49 Tex. Crim. Rep. 303, 122 Am. St. Rep. 809, 92 S. W. 415.

Gum camphor dissolved in alcohol and used exclusively as a medicine, being unpalatable as a beverage and never used as such, does not come within a statute prohibiting the sale of spirituous liquors and all mixtures or preparations known as bitters or otherwise which will produce intoxication. *State v. Haymond* (1882) 20 W. Va. 18, 43 Am. Rep. 787.

Lemon ginger and Empire Tonic Bitters, put up, advertised, and sold by manufacturers as medicinal preparations, and believed to possess curative properties, and containing a quantity of

alcohol not greater than is necessary to extract the medicinal properties of the herbs employed and hold them in solution, sold by the bottle by retail dealers, and not over the counter like ordinary intoxicating beverages, are to be classed as medicines, and not as spirituous liquors. *United States v. Stubblefield* (1889) 40 Fed. 454.

Malt extract does not come within a statute which names specifically the various common intoxicating beverages and "all other fermented and distilled liquors," although it contains about the same percentage of alcohol as beer, and would operate as an intoxicant if taken in sufficient quantities, where it was manufactured and sold exclusively by druggists, bore an internal revenue stamp as a medicine, and no liquor license had ever been required for its sale, and it was evident that it could not well be used as an intoxicant for the reason that a sufficient quantity could not be taken into the stomach to produce intoxication before nausea would result. *Mackall v. District of Columbia* (1900) 16 App. D. C. 301.

Sweet Spirits of Niter does not come within an act covering spirits. *Atty. Gen. v. Bailey* (1847) 1 Exch. 281, 154 Eng. Reprint, 119, 17 L. J. Exch. N. S. 9; *Bailey v. Harris* (1849) 12 Q. B. 905, 116 Eng. Reprint, 1109, 18 L. J. Q. B. N. S. 115, 13 Jur. 341.

In *Ing Kon v. Archibald* (1908) 17 Ont. L. Rep. 484, it was held that certain Chinese wines, known as medicine wines, came within an exception contained in an intoxicating liquor statute, that nothing in the act should prevent the sale by a chemist or by the manufacturer of any tincture, fluid, extract, essence, or medicated spirit containing alcohol, prepared according to the formula of the *British Pharmacopœia*, although they were imported as wines, and there was some evidence that they were in fact used as beverages both in China and America, where the evidence did not suggest that the plaintiff, who was seeking to recover for their unlawful seizure, ever sold such wines or had them for sale as beverages.

— question for jury.

It is a question for the jury whether a compound sold by druggists was sold in fact as a medicine, whether its distinctive character as intoxicating liquors was in fact changed into that of a medicine, or whether certain drugs or tinctures which had not in fact changed the character of the liquors had been com-

pounded therewith. *State v. Laffer* (1874) 38 Iowa, 422.

Whether ginseng cordial, which is not generally known as an intoxicating liquor, nor on the other hand generally and properly known as a medicine or a toilet or culinary article recognized by standard authority, is an intoxicating bitters or beverage within a statute, is a question of fact for the jury. *Wadsworth v. Dunnam* (1892) 98 Ala. 610, 13 So. 597.

Whether *Hastings Pepsin Bitters* is an intoxicating liquor is a question for a jury, the evidence being conflicting. *State v. Bussamus* (1899) 108 Iowa, 11, 78 N. W. 700.

Whether a compound consisting of 1 ounce of whisky and 1 ounce of cinchona, sold by a registered pharmacist, and which, according to his testimony, was a very common prescription, weaker than the average medicine, and in which the liquor taste was entirely destroyed, was a compound, intoxicating in character, that might be used as a beverage within an intoxicating liquor statute, was a question for the jury. *State v. Gregory* (1900) 110 Iowa, 624, 82 N. W. 335.

Whether *Hardy's Bitters*, into the composition of which alcohol enters, is an intoxicating liquor, is for the jury to determine, under a statute which prohibits the sale of mixed liquors, part of which were spirituous or intoxicating. *State v. Wall* (1852) 34 Me. 165.

— food products.

If brandy cherries contain whisky or other distilled spirits, and are purchased, not for the fruit in them, but on account of the distilled spirits, and for the purpose of using the same as a beverage, and obtaining the effects produced by the use of intoxicating liquors, they come within the class of intoxicating liquors requiring the payment of a special tax. *United States v. Stafford* (1883) 20 Fed. 720.

Brandy cherries put up in bottles containing one half their capacity of liquor which was intoxicating, and which the defendant sold openly, furnishing glasses to purchasers when they desired to drink the liquor on the premises, came within a license statute. *Musick v. State* (1888) 51 Ark. 165, 10 S. W. 225.

Brandy peaches and brandy cherries put up in bottles and preserved in liquor which was spirituous and intoxicating were spirituous liquors. *Ryall v. State* (1885) 78 Ala. 410.

But brandy peaches consisting of a bottle containing six peaches surrounded by 1 gill of a fluid or syrup which tasted

like strong liquors did not come within a license law for ardent liquors, although the court indicates that if a few cherries or peaches were put in a bottle of brandy to evade payment of the license, the article would come within the statute. *Rabe v. State* (1882) 39 Ark. 204.

And while one trafficking in liquors under the pretense of selling fruit would be liable under the liquor statute, an indictment for selling liquor which specified the sale of a "bottle of brandy peaches" does not state a public offense. *Holland v. Com.* (1885) 7 Ky. L. Rep. 223 (abstract).

Whether brandy cherries and brandy peaches were merely cherries and peaches preserved with a little spirituous liquor added to give them flavor, or whether they were contained in spirituous liquor that could be drunk as a beverage and would intoxicate, is simply a

question of fact. *Petteway v. State* (1896) 36 Tex. Crim. Rep. 97, 35 S. W. 646.

And where the evidence was conflicting as to whether the liquid contained on brandy peaches was brandy or a nonintoxicating syrup, the question was properly for the jury. *State v. Scott* (1895) 116 N. C. 1012, 21 S. E. 194.

Extract of lemon, an article generally and properly known and used for culinary purposes, which is recognized and a formula prescribed for its preparation in standard dispensatories prior to the enactment of the Dram Shop Acts, and not then known and classed among liquors used as a beverage, is not to be deemed an intoxicating liquor within the meaning of the enactment simply because it contains alcohol, and may, or in fact does, produce intoxication. *Holcomb v. People* (1893) 49 Ill. App. 73. R. L. S.

KENTUCKY COURT OF APPEALS.

T. K. TORIAN et al., Appts.,
v.

T. H. FUQUA.

(175 Ky. 423, 194 S. W. 350.)

Contract — restraint of trade — not to engage in business.

A contract by a vendor of a furniture and undertaking business located at a certain place, not to re-engage in such business anywhere while the vendee was engaged therein at such location, either individually or in connection with another, is void as against public policy.

For other cases, see Contracts, III. c, 2, in Dig. 1-52 N. S.

(May 4, 1917.)

APPEAL by defendants from a judgment of the Circuit Court for Trigg County in plaintiff's favor in an action brought to recover damages for alleged violation of a contract for the sale of a business. Reversed.

The facts are stated in the opinion.

Messrs. Denny P. Smith, M. M. Hanberry, and G. W. Ryan for appellants.
Mr. G. P. Thomas for appellee.

Note. — The validity of an agreement in restraint of trade, ancillary to the sale of a business or profession, as affected by its territorial scope, is considered in the notes to *Fleckenstein Bros. v. Fleckenstein*, 24 L.R.A.(N.S.) 913, and *Hall Mfg. Co. v. Western Steel & I. Works*, L.R.A.1916C, 626. L.R.A.1917F.

Hurt, J., delivered the opinion of the court:

The appellants T. K. Torian and C. R. Sumner were partners, and owned a stock of furniture and undertaker's supplies at Cadiz, in Trigg county, which they sold to the appellee, T. H. Fuqua. The following writing was executed by Torian and Sumner, and delivered to Fuqua upon the day the contract was made:

We have this day sold to T. H. Fuqua our furniture and undertaking business on the following terms: What goods we have in house at \$1.15 on the \$1 (wholesale or cost price, no carriage added). What goods bought by us and not yet received at cost and carriage. Hearse at cost and carriage. We obligate ourselves individually and as a firm not to engage in furniture or undertaking business so long as said Fuqua or any firm in whom said Fuqua is interested in is doing business in the town of Cadiz, Kentucky. In consideration of the above trade we have accepted said Fuqua's check for \$100 on trade, the balance to be paid in cash when invoice is taken. This 14th day of April, 1914.

Torian & Sumner.

About the following January, Torian and Sumner again entered into the business of selling furniture and undertaker's supplies in Cadiz. This action was instituted by Fuqua against them by which he sought an injunction to prevent them from the further continuance in the business, and the recovery of damages against them for the alleged violation of the contract. Torian

and Sumner answered and set up as a defense that the contract was against public policy, and placed an unreasonable restraint upon the right to trade and do business upon their part, and further claimed that at the time the writing was signed, which embraced the contract, they understood that they were not to engage in a business of that character only so long as Fuqua should be conducting the business in the name of Fuqua or Fuqua & Company, and that before they again entered into the business Fuqua had ceased to do business in his own name or as Fuqua & Company, and had entered into a partnership with others, and was conducting the business of selling furniture and undertaker's supplies under the partnership name of Shaw, Fuqua, & Company. They set up as a further defense that it was a part of the contract for the sale of their stock of merchandise to Fuqua, that Fuqua was to employ Sumner at a salary of \$20 per month for the remainder of the year and for three years thereafter, and should, in addition to the salary, permit him to engage in the business of a cobbler in the building in which the business was carried on at such spare times as he was not required to be attending to the duties as an employee of Fuqua, and that Fuqua had prepared a writing embracing the contract to that effect, but which he did not subscribe, but which he fraudulently induced Sumner to accept, and that Sumner was without knowledge of the fact that it had not been subscribed by Fuqua until the end of the year, when Fuqua claimed that he had no contract of that kind with Sumner, and discharged Sumner from his employment, and that the contract was within the Statute of Frauds, and not enforceable by Sumner, because it had not been signed by Fuqua, and that by reason of this fraud perpetrated upon Sumner, the contract sued on was not enforceable. These grounds of defense by Torian and Sumner were all denied by the replies of Fuqua.

The contract sued upon was prepared by Fuqua himself, and was signed by Torian for the partnership of Torian & Sumner. Neither party alleged or claimed that anything was left out of the writing upon which the action was based by either fraud or mistake, or asked for any reformation of it to conform to their claims. The writing was filed with and made part of the petition by Fuqua, who also testified that it was in exact accordance with the contract which had been entered into between them, and that nothing had been omitted from it for any reason.

It appears conclusively from the evidence that the writing sued upon was read over by Torian in the presence of Sumner before L.R.A.1917F.

it was signed, and the only reason given by Torian for executing the contract, when it contained the stipulation that he and Sumner were not to engage in the furniture or undertaker's business so long as Fuqua alone or in connection with others was engaged in such business in Cadiz, instead of the stipulation that they were not to engage in the business so long as Fuqua conducted the business alone or with his then associates, was because he had read it hurriedly, or was induced from the actions of Fuqua to believe that the writing contained the agreement as contended for by them. With regard to the contract for the employment of Sumner, Fuqua contended that it was a separate contract, and had no connection with the one made for the purchase of the goods, and was entered into on the afternoon of the day, in the forenoon, the contract sued on was entered into. Although the unsigned writing, which Fuqua delivered to Sumner, was in exact accordance with the terms of the contract for the employment of Sumner, and although Sumner worked for Fuqua until the end of the year from the making of the contract in April without any other contract between him and Fuqua, Fuqua gives no better reason for the discharge of Sumner at the end of the year than that the agreement was that he was to employ Sumner for three years thereafter if he should want him, and that he had left out of the writing which he had prepared himself and delivered to Sumner the condition that he was to only employ him for the three years thereafter if he should want him.

As to whether or not, however, the contract between Fuqua and Sumner for the employment of the latter was a part of the consideration for the sale of the goods and business of Torian & Sumner to Fuqua was a question to be determined from the weight of the evidence, and it cannot be said that the chancellor was in error in adjudging that it was a separate and independent arrangement from the contract sued on. Hence it does not appear that the claim of Torian and Sumner that the terms of the writing sued on should have only restrained them from engaging in the character of business which they had sold to Fuqua for such a time as Fuqua should be engaged in such business by himself or as Fuqua & Company seems to be without merit, as there is no allegation on their part that the writing failed to contain the agreement, as they contend, by any fraud or mistake.

The contention, however, that the contract, as embraced in the writing, and which is sought to be enforced, as written by the appellee, is void as against public policy,

presents a more serious question. A contract which is against public policy because its terms impose an unreasonable restraint upon trade is void, and hence it is void for all parties and for all purposes. The ancient rule rendered all contracts in restraint of trade void, whether the restraint was great or limited in its effect; but, according to the well-established doctrine in this state, a contract which is in general restraint of trade, or which imposes restraints which are unreasonable, is void, but an agreement in partial restraint of trade, ancillary to the sale of a business, and which is reasonable in other respects, is not void, but enforceable, if the agreement has two indispensable conditions, one of which is that the party selling the business must not be prevented by the contract from engaging in the business at all, and the other is that the restriction will not deprive the country of the benefits following his conduct of such a business. Hence agreements in restraint of trade which are ancillary to the sale of a business, and which prohibit the vendor from engaging in the business at a particular place, or for a designated time, or with particular persons, are valid and enforceable if the restrictions are reasonable. The restrictions upon engaging in a business in such instances are reasonable and will be enforced if the restriction is no more extensive than is reasonably required to protect the vendee of the business, in whose favor the restraint is given, from the competition of the vendor of the business, and the restraint is not so extensive as to affect the interest of the public. *Merchants' Ice & Cold Storage Co. v. Rohrman*, 138 Ky. 540, 30 L.R.A.(N.S.) 973, 137 Am. St. Rep. 390, 128 S. W. 599; *Barrone v. Moseley Bros.* 144 Ky. 698, 139 S. W. 869; *Linne-man v. Allison*, 142 Ky. 309, 134 S. W. 134; *Gropp v. Perkins*, 148 Ky. 183, 146 S. W. 389; *Breeding v. Tandy*, 148 Ky. 345, 146 S. W. 742; *Skaggs v. Simpson*, 33 Ky. L. Rep. 410, 110 S. W. 251; *Louisville Bd. of Fire Underwriters v. Johnson*, 133 Ky. 797, 24 L.R.A.(N.S.) 153, 119 S. W. 153; *Clemons v. Meadows*, 123 Ky. 178, 6 L.R.A.(N.S.) 847, 124 Am. St. Rep. 339, 94 S. W. 13; *Stovall v. McCutchen*, 107 Ky. 577, 47 L.R.A. 287, 92 Am. St. Rep. 373, 54 S. W. 969; 6 R. C. L. 803; *Sutton v. Head*, 86 Ky. 156, 9 Am. St. Rep. 274, 5 S. W. 410; *Grundy v. Edwards*, 7 J. J. Marsh. 368, 23 Am. Dec. 409; *Turner v. Johnson*, 7 Dana, 439; *Pike v. Thomas*, 4 Bibb, 486, 7 Am. Dec. 741; *Western Dist. Warehouse Co. v. Hobson*, 96 Ky. 550, 29 S. W. 308; *Davis v. Brown*, 98 Ky. 475, 32 S. W. 614, 36 S. W. 534; 9 Cyc. 526; *Nickell v. Johnson*, 162 Ky. 520, 172 S. W. 938.

The contract asked to be enforced in this L.R.A.1917F.

action, conceding that it is ancillary to the sale of a business, and the time within which the restraint is imposed upon appellants not to engage in a similar business so long as appellee is engaged in such business, either alone or in connection with others, in Cadiz, is not unreasonable as to the time of the restraint, if the restraint should apply within certain limits only; but the contract, according to its plain terms, restrains them from engaging in such a business anywhere while appellee is conducting or interested in such a business in Cadiz. It thus appears that the appellants are deprived of the right to engage in such a business at all, at any place, while appellee is engaged in such a business at Cadiz, and the country is deprived of any benefits which might arise from their conducting such a business at any place. Such a restraint is unreasonable in a contract with reference to such a business, according to all of the authorities. This restraint prohibits them from engaging in the business in the county in which Cadiz is situated, or, for that matter, in the state at large, and at points clear beyond where their engaging in such a business would be in competition with the appellee. The limit of the restraint would probably extend beyond the lives of either appellants, and in such case it would be the same as to restrain them during life at any place from engaging in such a business. Hence the contract was void as against public policy, and the court below erred in decreeing its enforcement. Contracts in restraint of trade have never been considered as entitled to any special indulgences in the administration of the laws, and before they are upheld it must clearly appear that they do not impose any unreasonable restraint upon trade, as such restraint can only tend toward the creation of monopolies.

The judgment is therefore reversed, and the cause remanded for proceedings consistent with this opinion.

Petition for rehearing denied.

LOUISIANA SUPREME COURT.

LARRY JACOBS, Appt.,

v.

MOSE JACOBS.

(— La. —, 74 So. 992.)

Automobile — duty to guest.

1. The driver of an automobile who has

Headnotes by O'NIELL, J.

Note.—The liability of the owner or operator of an automobile for injury to a

invited a guest to ride with him is not absolved from responsibility for negligence or imprudence merely because he is performing a gratuitous service or favor to his companion.

For other cases, see Automobiles, II. a, in Dig. 1-52 N. S.

Same — injury — liability.

2. Although an invited guest of the driver of an automobile, being a mere licensee, is not entitled to the consideration due by a carrier to a passenger for hire, he is nevertheless entitled to the benefit of the provision of the Civil Code that any act of negligence or imprudence that causes injury to another obliges him who was at fault to pay for the injury.

For other cases, see Automobiles, II. a, in Dig. 1-52 N. S.

Same — speed — duty of driver.

3. As a general rule, it is the duty of the driver of an automobile to maintain a speed sufficiently slow and to have such control of his car that he can stop within the distance in which he can plainly see an obstruction or danger ahead. But that rule does not apply to a case where a dangerous situation which the driver of the automobile had no reason to expect suddenly appeared immediately in front of the car.

For other cases, see Automobiles, II. a, in Dig. 1-52 N. S.

Highway — rights of traveler.

4. A person driving on a public highway, especially in an incorporated city, has a right to presume, and to act upon the presumption, that the way is safe for ordinary travel, even at night, and he is not required to be on the lookout for extraordinary dangers or obstructions to which his attention has not been called.

For other cases, see Highways, IV. c, in Dig. 1-52 N. S.

Negligence — imputing to guest.

5. Negligence on the part of the driver of an automobile is not imputable to his guest in the car; nor does one who accepts an invitation to ride in an automobile thereby engage in such a common enterprise or joint venture with the driver that neither would be liable to the other for an act of negligence.

For other cases, see Negligence, II. c, 1, in Dig. 1-52 N. S.

Automobile — duty to guest.

6. The driver's duty and responsibility to

guest is treated in the notes to *Beard v. Klusmeier*, 50 L.R.A.(N.S.) 1100, and *Perkins v. Galloway*, L.R.A.1916E, 1193.

Speed of automobiles, including the violation of speed limits, as negligence, is discussed generally in the note to *Lauson v. Fond du Lac*, 25 L.R.A.(N.S.) 40; and that note is supplemented so far as cases involving injuries to pedestrians are concerned, in the notes in 38 L.R.A.(N.S.) 488; 42 L.R.A.(N.S.) 1180; and 51 L.R.A.(N.S.) 993. See also on the general subject of later cases: *Schell v. Du Bois*, L.R.A.1917A, 710, and *Fisher v. O'Brien*, post, 610. L.R.A.1917F.

his guest in an automobile is merely to be careful and avoid committing any act of negligence or imprudence that might add to or increase the ordinary danger of the occupation.

For other cases, see Automobiles, II. a, in Dig. 1-52 N. S.

Same — measure of duty.

7. The responsibility of the driver of an automobile for the safety of his guest in the car is not limited to his duty to abstain from acts of gross or wilful negligence, but demands that he avoid the ordinary negligence or imprudence referred to in the Civil Code.

For other cases, see Automobiles, II. a, in Dig. 1-52 N. S.

Same — unsafe highway — accident — liability.

8. The driver of an automobile is not answerable in damages for personal injuries inflicted upon his guest in the car as a result of an accident, where the facts are: The driver had inquired about the condition of the thoroughfare before entering it and was informed that it was all right; the car, while traveling at a moderate speed on a prominent street in a city, ran into an open canal extending across the thoroughfare, without any guard rail, barrier, red light, or other warning of danger; the glare of an electric light between the driver and the canal prevented his seeing the danger until it was too late to stop his car while going at an ordinary speed; the driver had never traveled over that route before and had no knowledge of the dangerous situation; the guest in the car had traveled over that route several times before and was acquainted with the situation, but did not warn the driver or complain of the speed. *For other cases, see Automobiles, II. in Dig. 1-52 N. S.*

(March 12, 1917.)

APPEAL by plaintiff from a judgment of the Civil District Court for the Parish of Orleans in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. Robert H. Marr for appellant.

Messrs. Eraste Vidrine and A. Giffen Levy for appellee.

The question of imputed or contributory negligence of a passenger riding in an automobile driven by another as affecting recovery against a third person is treated in the annotation to *Rebillard v. Minneapolis*, St. P. & S. Ste. M. R. Co. L.R.A.1915B, 953; and see later cases, *Lynn v. Goodwin*, L.R.A. 1915E, 588, and *Knoxville R. & Light Co. v. Vangilder*, L.R.A.1916A, 1111.

The liability of co-owners of an automobile for injury caused thereby is discussed in the note to *Hamilton v. Vioue*, L.R.A. 1916E, 1301.

O'Neill, J., delivered the opinion of the court:

The plaintiff has appealed from a judgment rejecting his demand for damages for personal injuries suffered in an automobile accident.

While the defendant was driving his automobile along Banks street, in New Orleans, at night, having the plaintiff and a Mr. Fahs as his guests in the car, he ran into the Broad street canal, overturning the car, and inflicting serious injury upon himself and his guests.

The plaintiff alleges that the defendant was driving at a high rate of speed, without ordinary care or regard for safety, and that his running into the canal was the result of his gross negligence and recklessness.

The defendant denies that he was driving at a high or dangerous rate of speed, or was guilty of any negligence or carelessness. He avers that the accident was caused entirely by the dangerous situation of the open canal extending across Banks street, unprotected by guard rails, barriers, danger signals, or warnings of any kind; that, before going into Banks street on the night of the accident, never having traveled over that route before, he inquired about the condition of the street, in the presence and hearing of the plaintiff, and was told that the street was all right, paved all the way; that, when he approached the open canal, it had the appearance of a wet streak on the smooth paved street; and that he did not realize the danger until he was too close to the canal to stop his car or change its course to avoid the accident.

On the night of the occurrence the defendant, with Fahs as his guest in his automobile, drove by another route than Banks street to a park on Carrollton avenue, where they attended a prize fight, and met the plaintiff, who resided in the same apartments with the defendant. When the fight was over, the defendant invited the plaintiff to ride home with him. There were so many automobiles leaving the amphitheater going via Carrollton avenue and Canal street to the central part of the city, that the defendant thought of avoiding the congestion and confusion by taking Banks street, which was a convenient route for his return. When he and the plaintiff and Fahs were seated in the car, he asked a bystander what was the condition of Banks street, and was told that it was "all right, paved all the way." It was then about 11 o'clock and the plaintiff's automobile was among the last to leave the park.

Banks street is a prominent thoroughfare, having neutral grounds 21 feet wide through its center and a paved driveway 20 feet wide on either side. Broad street crosses

Banks street at right angles. The canal where the accident occurred extends through or along the center of Broad street and across Banks street. On either side of the canal along Broad street is a paved driveway 30 feet wide, crossing Banks street and on the same grade or level with it. At the time of the accident the canal was open at the intersection or ends of the driveway along Banks street. The canal was about 25 or 30 feet wide at the top, the banks sloping to a depth of about 6 feet. There was little or no water in the canal. It was spanned by a bridge 36 feet wide, the center of which was in line with the center of the neutral grounds extending along Banks street. The floor of the bridge was level and even with the surface or grade of Broad street and Banks street, and was built on steel I-beams, with no superstructure except the railings on either side of the bridge. They were constructed of gas pipe, about 3 inches in diameter, there being two horizontal rails on 6 standards 4 feet high, the end posts being about 6 inches in diameter. The driveway in the center of the bridge was 22 feet wide, on either side of which was a footpath 6 feet wide and 6 inches higher than the surface of the driveway, the floor of the footpath extending 12 inches beyond the railings on each side of the bridge. The 6-inch curbing at the edge of the footpath on the bridge curved around the ends of the footpath and continued along the bank of the canal, separating it from the driveway on Broad street. The distance from the ends of the neutral ground on Banks street to the edge of the bridge on the canal was only 40 feet.

From the foregoing description of the intersection of Broad street and Banks street it will be observed that a vehicle traveling to or from the central part of the city on the right driveway along Banks street, when it came to the intersection of Broad street, had to turn rather abruptly to the left, at the end of the neutral ground on Banks street, then turn immediately to the right, cross the 22-foot driveway on the bridge, turn again to the right to avoid the neutral ground on the other side of the bridge, then to the left into the right driveway along Banks street, and proceed on its original course.

The evidence shows, and it is not contradicted, that it was not safe—if in fact it was possible—for a vehicle to negotiate the compound curves necessary to cross the Broad street bridge at Banks street, except at a slow or moderate speed.

At the time of the accident there were no guard rails or barriers on the banks of the canal opposite the ends of the driveway on Banks street, nor was there a red light

or other warning of danger there. The only light near the bridge was an electric arc lamp hanging 14 feet above the ground, between the canal and the end of the driveway on which the defendant approached the canal that night. The electric lamp was on the right side of the driveway, only 5 or 6 feet from the line of the sidewalk on Banks street, and the curbing along the bank of the canal was 22 feet beyond the lamp, in the direction in which the defendant was traveling. There were small trees on the sidewalk on the right of the driveway between the lamp and a person approaching on Banks street as the defendant did that night. Of the other electric lights on Banks street the two nearest to the bridge were about 600 feet away, one on each side of the canal.

The testimony of expert and nonexpert witnesses on the effect of lights shows conclusively—and it is not disputed—that the location of the electric light at the intersection of the driveway on Banks and Broad streets contributed more than any other element to the danger of the situation. In fact, we need no expert testimony or other evidence to prove that the glare of an electric arc light has a blinding effect that makes it impossible to see an object beyond it, in or near the line of vision.

A series of photographs taken from the viewpoint of a person in an automobile at different points along the driveway on which the defendant approached the canal on the night of the accident corroborates the testimony of the witnesses on the following facts: At a distance of 520 feet from the canal the trees on the sidewalk did away with the glare of the electric light near the canal, but the banks of the canal could not be seen at that distance. At a distance of 320 feet from the canal a small tree on the sidewalk yet prevented the glare of the electric light near the canal, but nothing could be seen of the canal at that distance, except the 6-inch concrete curbing, which was hardly noticeable. At a distance of 110 feet from the canal the glare of the electric light rendered it impossible to recognize the canal, which had the appearance of a shadow or wet place on the paved street beyond the light. That condition prevailed up to a distance of 25 or 30 feet from the edge of the canal, or until the traveler came under or nearly under the lamp. The expert and nonexpert testimony shows—and it is not contradicted—that the dirt banks of the canal did not reflect, but absorbed, the light, so that to a traveler approaching the canal and coming under the electric lamp it had the appearance of a shadow or wet streak across the paved driveway until he came too close

to stop his vehicle or turn aside to avoid an accident.

The description we have given of the situation refers to the time of the accident. Thereafter, on account of that accident and four or five other automobile accidents that occurred there, the municipal authorities placed barriers at the edge of the canal and red lights on the bridge, and they have since covered the canal at the intersection of Banks street.

The plaintiff's automobile was a one-seat runabout. The top was folded back and the wind shield was lowered, out of commission. The weather being very warm, the defendant had removed his hat. He had the full benefit of whatever light was favorable to his view and had all of the blinding effect of that which glared in his face. He had no knowledge or warning of the dangerous situation of the Broad street canal; nor had his guest Faba, as far as the record shows.

The plaintiff, testifying in his own behalf, admitted that he had traveled over that route several times before, in other automobiles, and had a general knowledge of the situation of the bridge over the Broad street canal, but said he had had no experience or knowledge of the operation of an automobile. He did not know the difference between a speedometer and a carburetor, as he expressed it. He said he was no judge of the speed of an automobile, couldn't tell whether a car was going 20 miles or 60 miles an hour; but he afterward said that he could judge the speed between 10 miles and 20 miles an hour. When asked why he blamed the defendant for the accident, he replied that the latter was driving at a rapid rate of speed. He said that his only reason for thinking the speed was excessive was that the defendant's car passed several others, but none passed him, on the road from the park to the place of the accident. He did not deny, but, on the contrary, in effect admitted, that he did not at any time before the accident consider the speed at which the plaintiff was driving dangerous or excessive. He said he had ridden with the plaintiff several times before, had never had cause to complain of his manner of driving, regarded him as a safe and careful driver, and trusted entirely in his skill and judgment on the night of the accident. He admitted that it did not occur to him at any time during the drive that resulted in the accident that there was any danger in the speed or manner of the defendant's driving, or that the defendant was doing anything that he should not do. He did not inform the defendant of the location of the bridge or the open canal, and, in effect, he admitted that

he did not think of those conditions before the accident. His explanation as to why he did not warn the defendant of the danger is given in the following excerpt from his testimony on cross-examination, viz.:

Q. Did you see anything of this canal before you struck it?

A. I saw it. That's all I can remember about it.

Q. You saw the canal before you struck it?

A. I presume I saw it.

Q. You didn't tell Mr. Mose Jacobs that you saw anything ahead?

A. I never dictate to a driver what I see. I didn't want to disturb Mr. Mose Jacobs or any other driver.

The plaintiff denied having heard the defendant inquire about the condition of Banks street before leaving the park. But the defendant and Fahs testified that the conversation took place while the three men were seated together in the automobile.

The plaintiff was rendered unconscious by the accident and did not regain consciousness until 7:30 the next morning. He testified that a few days after the accident, while he and the defendant were at the infirmary, he was taken on an invalid chair to the defendant's room or ward, and in their conversation the defendant said he did not know how the accident had happened, but that he saw so many machines ahead of him at the time that he must have got puzzled and lost his wits.

The defendant testified that he did not remember making that admission, and denied that he had got puzzled or rattled when he approached the canal. He said he had traveled at a speed varying from 14 to 18 miles an hour on his return from the park; that he passed one or two or perhaps three automobiles on the road; and that one passed him a short time before he went into the canal. He testified that the accident was due entirely to the fact that he did not know of the dangerous situation, of the bridge being out of the line of the driveway, or of the open canal across the driveway; that the electric light in front of him gave the canal the appearance of a wet place, as if the street had been sprinkled there, and he did not realize the danger until he was within 10 feet from the bank of the canal, when it was too late to avoid the accident.

Mr. Fahs testified that the car was traveling at a rate of about 15 miles an hour at the time of the accident, and that he did not see the canal until the instant when the car plunged into it.

A professional chauffeur, as a witness for the plaintiff, testified that the defendant's L.R.A.1917F.

automobile passed his a short time before the accident, traveling at such a high rate of speed that the witness said to himself, "That fellow will do some humbug." He said he thought the speed was then about 30 or 35 miles an hour, but that he did not know at what speed the car was traveling when it ran into the canal; that he was then four or five blocks from the canal. From which we assume either that the witness's car was going very slow or that he was very far from the scene of the accident when the defendant's car passed his. He said the dust of the street prevented his seeing the defendant's car after it passed, but that he heard the blow-out or explosion of the tires and the smashing of the wind shield when the car went into the canal. As a matter of fact, the tires did not burst, nor was the wind shield broken. Strange to say, the car was not very badly damaged; it was pulled into town on its own wheels that night.

Two other witnesses who had returned from the prize fight together in an automobile testified that the defendant's car passed their car before the accident. One of them testified that the defendant's car was going at a speed of 25 or 30 miles an hour when it passed. He said, and insisted, that he was 800 or 1,000 feet from the canal when the defendant's car passed, and that he was about 300 feet from the canal when the accident occurred. His traveling companion, however, said, and insisted, that he was only about 100 feet from the canal when the defendant's car passed, and that he, the witness, was only 40 or 50 feet from the canal when the accident happened. He said he did not know how fast the defendant's car was going when it passed, but that his (the witness's) car was traveling at about 20 miles an hour. The conflict in the testimony of the two witnesses last referred to as to the place at which they were when the defendant's car passed them, and as to where they were when the accident occurred, detracts somewhat from the reliability of their estimates of the speed.

We are informed by the testimony in this case that, according to a well-recognized rule of ethics, an automobile driver always speeds up his car after he has signaled his desire to pass a car in front of him and the latter has steered to the right of the road; the object being to avoid dusting the occupants of the other car unnecessarily, and to avoid keeping it crowded to the side of the road any longer than is necessary. Hence the witnesses who testified to the speed at which the defendant's car passed the other two cars on the road saw it perhaps speeding faster than it traveled at other times that night.

Another professional chauffeur, as a witness for the defendant, testified that he passed the defendant's car coming from the prize fight at a point about seven blocks from the scene of the accident, and that the defendant's speed was then only about 12 or 15 miles an hour.

We have given a synopsis of all of the testimony on the subject of the speed at which the defendant was driving before and at the time of the accident. The preponderance of the evidence is, in our opinion, not that the speed was excessive, but to the contrary, that it was moderate. The testimony of the plaintiff on that subject is rather favorable to the defendant, and that of the latter is entitled to as much consideration as is that of any other disinterested witness, because the record discloses that, on account of his indemnity insurance, the defendant has little or no financial interest in the defense of this suit. The fact that the car went into the canal is not a case where *res ipsa loquitur* with regard to the speed at which the car was going, because the evidence shows conclusively that the defendant could not have avoided running into the canal, although he was going at a moderate speed when he discovered the danger.

Our conclusion from the evidence is that the defendant was not at fault for failing to see the canal sooner than he did.

The question of law to be decided is whether the defendant was guilty of negligence in his failure to maintain such a slow speed that he might have avoided the accident when he saw the danger. If the defendant was guilty of negligence in that respect, was the plaintiff's acquiescence in the speed at which the car was going such contributory negligence on his part as to prevent his recovering damages for the injury he suffered?

We agree with the learned counsel for the plaintiff that one who invites another to ride with him as his guest in an automobile is not absolved from responsibility for negligence or imprudence merely because he is performing a gratuitous service or favor to his guest.

Although an invited guest of the driver in an automobile, being a mere licensee, is not entitled to the consideration due by a carrier to a passenger for hire, he is nevertheless entitled to the benefit of the provision of our Civil Code that any act of negligence or imprudence that causes injury or loss to another obliges him who was at fault to pay for the injury or loss. Rev. Civ. Code, arts. 2315, 2316. That provision of the Code, however, is controlled by the word "fault." If there was no fault in the defendant's driving at the speed he maintained,—if that speed was not in itself a

matter of negligence or imprudence, under the circumstances and conditions prevailing,—he is not responsible for the unfortunate result.

We are referred to the decision of the supreme court of Wisconsin in the case of *Lauson v. Fond du Lac*, 141 Wis. 57, 25 L.R.A. (N.S.) 40, 135 Am. St. Rep. 30, 123 N. W. 629, to support the general proposition that it is the duty of the driver of an automobile to maintain a speed sufficiently slow, and maintain such control of his car, that he can stop within the distance in which he can plainly see an object or obstruction ahead of him. That rule is subject to certain modifications. It cannot apply to a case where an object or obstruction which the driver of an automobile has no reason to expect appears suddenly immediately in front of his automobile. In the case cited the plaintiff was denied the right to recover damages from the municipality for injuries sustained by his running into an excavation in the highway, because he was guilty of contributory negligence. He was driving over a strange road on a dark, rainy night. He had only one lamp on his automobile, and it was tilted downward so as to throw the light into the wheel tracks in the road. He could not see an object more than 10 or 12 feet ahead of him, and his speed was such that he could not stop his machine within a distance less than 15 or twenty feet. It was held that, although the speed at which the plaintiff was traveling when the accident occurred would have been a safe and moderate speed under other circumstances, it was dangerous speed under the conditions prevailing. The sound principle of law invoked and applied in that case has no application to the facts of the case before us.

The rule is well established in the jurisprudence of this state that a person using a public highway, especially in an incorporated city, has a right to presume, and to act upon the presumption, that the way is safe for ordinary travel, even at night, and he is not required to be on the lookout for extraordinary dangers or obstructions to which his attention has not been called. *Nessen v. New Orleans*, 134 La. 455, 51 L.R.A. (N.S.) 324, 64 So. 286; *Stern v. Davies*, 128 La. 182, 54 So. 712; *McCormack v. Robin*, 126 La. 594, 139 Am. St. Rep. 549, 52 So. 779; *Rock v. American Constr. Co.* 120 La. 831, 14 L.R.A. (N.S.) 653, 45 So. 741; *Weber v. Union Development & Constr. Co.* 118 La. 77, 42 So. 652, 12 Ann. Cas. 1012; *Mahnke v. New Orleans City & L. R. Co.* 104 La. 412; 29 So. 52, quoting 2 *Thomp. Neg.* 1197, and many decisions; *Shidet v. Jules Dreyfuss Co.* 50 La. Ann. 284, 23 So. 837.

As far as the defendant knew, or ordinary caution required him to know, the road ahead of him was safe. The plaintiff knew, but perhaps forgot, that there was danger ahead. His failure to remember that the bridge was out of line with the driveway and that there was an open canal ahead, and his failure to warn the defendant when he saw that the latter did not know of the danger, was the only neglect on the part of any occupant of the car that caused or contributed to the accident.

We do not hold that, if the defendant's ignorance of the condition of the road ahead of him was in itself negligence, that negligence would be imputable to the plaintiff, who was only a guest in the car; nor do we hold that the plaintiff, by accepting the defendant's invitation to ride in the car, thereby engaged in a common enterprise or joint venture with him in which neither would be liable to the other for an act of negligence.

What we maintain in this case is that a man who, possessed of all his faculties and knowing that there is always some danger in traveling in an automobile, accepts an invitation to ride as the guest of the driver, assumes the risk of the ordinary dangers of which he is aware, and cannot hold the driver of the car responsible in damages for an accident, if there was no fault or negligence or imprudence on the driver's part. The driver's duty and responsibility is merely to be careful and avoid committing any act of negligence or imprudence that might add to or increase the ordinary danger of the occupation. With regard to the care due by the driver of an automobile for the safety of a passenger riding as his guest, we do not recognize the distinction referred to in some jurisdictions between gross or wilful negligence and the ordinary negligence or imprudence referred to in the provisions of our Civil Code, arts. 2315 and 2316. We agree with the doctrine recognized by the court of appeals of Kentucky in *Beard v. Klusmeier*, 158 Ky. 153, 50 L.R.A. (N.S.) 1100, 164 S. W. 319, Ann. Cas. 1915D, 342, and approved by the court of appeals of Maryland in *Fitzjarrell v. Boyd*, 123 Md. 497, 91 Atl. 547, that a guest in an automobile is entitled to demand that his host shall exercise ordinary care for safety in driving the car, and that the latter's liability is not confined to acts of gross negligence or wilful recklessness.

Our review of the decisions cited by the learned counsel for the plaintiff discloses that in every case referred to in which the driver of a vehicle was held liable in damages for an accident resulting in injury to his guest in the vehicle the accident was the result of negligence on the part of the

driver, and the guest was not guilty of contributory negligence. For example, in *Pigeon v. Lane* (decided by the supreme court of errors of Connecticut), 80 Conn. 237, 67 Atl. 886, 11 Ann. Cas. 371, the defendant undertook to convey in a sleigh a boy fourteen years of age, an employee of the defendant, to the place where he was to work for the defendant. The driver who was put in charge of the sleigh by the defendant was guilty of negligence in overloading the sleigh and recklessly and negligently running into a bridge and injuring the boy. In *Beard v. Klusmeier*, supra, the defendant had invited the plaintiff and another woman and two men to ride with him in his automobile at night. He drove the car at a high rate of speed, and, when another automobile driver attempted to pass him, he raced with the other car at a very dangerous speed. The plaintiff protested and begged him to stop and permit her to get out of the car, but he refused. He ran into a pile of building material stacked in the street, wrecking the car and seriously injuring the plaintiff. In *Mayberry v. Sivey*, 18 Kan. 291, the defendant invited the plaintiff to ride with him in his buggy. The defendant, who was driving the horse, challenged another driver for a race, and whipped up his horse to pass the other. The plaintiff, in great fear, begged the defendant to stop and let him get out, but the defendant continued the race at a reckless speed until he ran into a stone fence, overturning the buggy and injuring the plaintiff. In *Lochhead v. Jensen*, 42 Utah, 99, 129 Pac. 347, the act of negligence complained of was the defendant's running his automobile at a high and dangerous rate of speed, resulting in an accident in which *Lochhead*, who was riding with the defendant as his invited guest, was killed. The trial judge charged the jury that, if the defendant did not use due diligence in driving the car, he was liable in damages for the resulting accident, and that the jury was to consider the manner of the defendant's driving the car and determine whether he had exercised reasonable care. On appeal the charge was condemned, not because the appellate court did not approve the doctrine requiring the defendant to exercise ordinary care, but because the charge presented a question of negligence far beyond that charged in the complaint, and permitted the jury to base a verdict upon a mere failure to keep a reasonable lookout for obstructions or dangers in the road. We do not understand that the appellate court would have condemned the charge if the complaint on which the suit was founded had charged a lack of ordinary care. In *Patnode v. Foote* (appellate division of the supreme court of New

York), 153 App. Div. 494, 138 N. Y. Supp. 221, the plaintiff, who was traveling as a guest in the defendant's buggy, protested against the reckless speed at which the defendant drove the horse; but the defendant continued the reckless driving until he collided with a wagon, throwing the plaintiff to the ground and injuring him. The only contention of the defendant in that case appears to have been that he owed no duty or care for the plaintiff's safety, because he was rendering him a gratuitous service at the time of the accident. The verdict awarding damages to the plaintiff was affirmed on appeal, on the doctrine of *Pigeon v. Lane*, supra. In *Fitzjarrell v. Boyd*, supra, the complaint was that the defendant drove his automobile with recklessness, negligence, and want of care, as a result of which it skidded and struck a telegraph pole, overturned, and inflicted personal injuries upon the plaintiff, who was the defendant's invited guest in the car. The plaintiff's declaration contained the allegation that he had at the time protested against the defendant's reckless driving; and we assume that that allegation was borne out by the evidence, from the fact that the court found that the facts of the case were very similar to those in the case of *Beard v. Klusmeier*. In *Routledge v. Rambler Automobile Co.* — Tex. Civ. App. —, 95 S. W. 749, the plaintiff was the invited guest of a party of men and women who had hired an automobile from the defendant company for a joy ride. The chauffeur was the defendant's employee. In his testimony he virtually admitted that he was entirely at fault for the accident that resulted in injury to the plaintiff. He admitted that he was traveling at such a high rate of speed that he knew he could not negotiate a turn in the road which he knew was ahead; that he did not slow up

for the curve because at the time he did not know where he was. The car dashed into a wire fence. The passengers who had hired the car and had invited the plaintiff to ride with them were unacquainted with the road and did not know of the turn or curve ahead of them. They had urged the chauffeur to increase his speed and "burn the air." The plaintiff sat on the front seat with the chauffeur, but did not urge or request the chauffeur to drive fast, nor did he protest against the fast driving. The court found, however, that the plaintiff had not acquiesced in the orders given to the chauffeur by those who had hired the automobile and whose guest the plaintiff was. On appeal the Texas court said that, if it had appeared that the plaintiff had urged the driver of the automobile to go at a high rate of speed, or if he had acquiesced in the demand of his comrades for a high rate of speed, and if the chauffeur had thereby been induced to go at an unsafe rate of speed, and the accident occurred by reason of such high rate of speed, then the plaintiff's negligence would have contributed to the result, and he could not recover. In that case the plaintiff was not aware of the dangerous condition of the road ahead, but the chauffeur, for whose negligence the defendant was responsible, did know of the danger. In the present case the plaintiff knew of the dangerous condition of the road ahead, but the defendant was unaware of it.

Our conclusion is that the defendant was not guilty of any negligence, and that he is not liable in damages for the injuries which the plaintiff suffered from the accident.

The judgment appealed from is affirmed at the cost of the appellant.

Sommerville, J., concurs.

Petition for rehearing denied April 16, 1917.

LOUISIANA SUPREME COURT.

MRS. ANNIE ROSS, Impleaded, etc., Appt.,
v.

SISTERS OF CHARITY OF THE INCARNATE WORD.

(— La. —, 75 So. 425.)

Elevator — passenger — duty of owner.

1. The owner of a passenger elevator operated in a business building for carrying

Headnotes by SOMMERVILLE, J.

Note. — The general subject of liability for injury to elevator passengers is considered in the notes to *Edwards v. Manufacturers' Bldg. Co.* 2 L.R.A.(N.S.) 744, and *Tippecanoe Loan & T. Co. v. Jester*, L.R.A. 1915E, 722, and other notes referred to L.R.A.1917F.

passengers may not be a carrier of passengers in the sense that he is bound to serve the public; yet his duty is to protect the passengers, and he is bound to do all that human care, vigilance, and foresight can reasonably suggest under the circumstances, and, in view of the mode of conveyance adopted, to guard against injuries and accidents resulting therefrom, and a failure in this respect will constitute negligence rendering him liable.

For other cases, see *Elevators*, II. in Dig. 1-52 N. S.

therein. See also later cases, *Elsey v. Hudson Co.* L.R.A.1916B, 1284 (store elevator); *Rumetsch v. Wanamaker*, L.R.A.1916C, 1245 (store elevator); and *Jacobi v. Builders' Realty Co.* L.R.A.1917E, 696 (automatic elevator in apartment house).

Same — absence of operator — effect.

2. Failure to employ an operator for a single automatic push button elevator in a hospital or asylum is not actionable by any passenger, except a child of such tender years that it cannot know and appreciate the risk.

For other cases, see Elevators, II. in Dig. 1-52 N. S.

Same — establishment of negligence.

3. A person of mature years using such elevator under those circumstances would have to establish other facts to recover damages for injuries sustained by him in such an elevator.

For other cases, see Elevators, II. in Dig. 1-52 N. S.

(May 14, 1917.)

APPREAL by plaintiff, Mrs. Ross, from a judgment of the Judicial District Court for the Parish of Caddo dismissing an action brought to recover damages for personal injuries sustained by her while in the elevator of the defendant corporation. Affirmed.

The facts are stated in the opinion.

Messrs. Mabry & Foster and John F. Phillips, for appellant:

Owners of passenger elevators, although not strictly common carriers of passengers, owe the same duty to those who, by invitation, express or implied, are transported in the cars of such elevators, to exercise the highest care in view of the character of the mode of conveyance adopted, as to the safety of the car and all appliances.

6 Cyc. 622; *Yarbrough v. Swift & Co.* 119 La. 344, 44 So. 121; *Farmers' & M. Nat. Bank v. Hanks*, 104 Tex. 320, 137 S. W. 1120, Ann. Cas. 1914B, 368.

The owner of premises who invites others to enter owes them the duty of inspecting the premises to see that they are in a reasonably safe condition; and failure to guard or protect dangerous places or instrumentalities for the safety of those rightfully there is negligence.

29 Cyc. 471, 472; *Tucker v. Illinois C. R. Co.* 42 La. Ann. 114, 7 So. 124; *Stucke v. Orleans R. Co.* 50 La. Ann. 172, 23 So. 342; *Lawson v. Shreveport Waterworks Co.* 111 La. 74, 35 So. 390; *Bell v. Houston & S. R. Co.* 132 La. 88, 43 L.R.A. (N.S.) 740, 60 So. 1029; *Emery v. Minneapolis Industrial Exposition*, 56 Minn. 460, 57 N. W. 1132; *Ford v. Crigler*, 25 Ky. L. Rep. 56, 74 S. W. 661; *Goodsell v. Taylor*, 41 Minn. 207, 4 L.R.A. 673, 16 Am. St. Rep. 700, 42 N. W. 873; *Baucum v. Pine Woods Lumber Co.* 130 La. 39, 57 So. 577; *Cristadoro v. Von Behren*, 119 La. 1025, 17 L.R.A. (N.S.) 1161, 44 So. 852.

The law imposes upon the owners of passenger elevators a great degree of care and L.R.A. 1917F.

skill with respect to their inspection, safe condition, and operation.

Yarbrough v. Swift & Co. 119 La. 344, 44 So. 121; *Russo v. Morris Bldg. & Land Improv. Asso.* 104 La. 426, 29 So. 46; *Treadwell v. Whittier*, 80 Cal. 574, 5 L.R.A. 498, 13 Am. St. Rep. 175, 22 Pac. 266.

In case of an injury to a passenger the burden of proof is on him to show the contract of carriage and the injury; and then it is on the carrier to show, by a preponderance of evidence, that it was not at fault in producing the injury.

Wilkinson, Personal Injuries, pp 64, 103; *Patton v. Pickles*, 50 La. Ann. 857, 24 So. 290.

In actions for personal injuries the burden of proof is on defendant to show that plaintiff was guilty of contributory negligence.

Buechner v. New Orleans, 112 La. 599, 66 L.R.A. 334, 104 Am. St. Rep. 455, 36 So. 603; *Inland & S. Coasting Co. v. Tolson*, 139 U. S. 551, 35 L. ed. 270, 11 Sup. Ct. Rep. 653; *Ferringer v. Crowley Oil & Mineral Co.* 122 La. 441, 47 So. 763; *Smith v. Minden Lumber Co.* 114 La. 1035, 38 So. 821; *Godfrey v. Illinois C. R. Co.* 117 La. 1095, 42 So. 571.

The passenger has the right to rely confidently on the care and watchfulness of the carrier to make all things safe for his transportation, with its incidents.

Clerc v. Morgan's L. & T. R. & S. S. Co. 107 La. 370, 90 Am. St. Rep. 319, 31 So. 886; *Leveret v. Shreveport Belt R. Co.* 110 La. 399, 34 So. 579; *Delisle v. Bourriague*, 105 La. 78, 54 L.R.A. 420, 29 So. 731.

The doctrine of contributory negligence is not applicable unless the facts show that the contributory acts of negligence alleged were the proximate cause of the injury.

Wilkinson, Personal Injuries, p. 64, § 64.

The owner of an elevator has no right to assume that an elevator continues in a safe condition because it has been used with safety for years, and his duty extends to a tenant's family, guests, employees, and other persons passing to the apartment of the tenant by actual or implied invitation.

Southern Bldg. & L. Asso. v. Lawson, 97 Tenn. 367, 56 Am. St. Rep. 804, 37 S. W. 86.

The law holds owners and operators of elevators to the exercise of the utmost care in and about their elevators, and in the construction and inspection thereof.

Griffen v. Manice, 166 N. Y. 188, 52 L.R.A. 922, 82 Am. St. Rep. 630, 59 N. E. 925, 9 Am. Neg. Rep. 336; *Treadwell v. Whittier*, 80 Cal. 574, 5 L.R.A. 498, 13 Am. St. Rep. 175, 22 Pac. 266.

Messrs. Alexander & Wilkinson for appellee.

Sommerville, J., delivered the opinion of the court:

Mrs. Ross, assisted by her husband, Robert L. Ross, and Mr. Ross, in his own interest, sue the defendant for \$5,000 for injuries sustained by Mrs. Ross and \$50 for personal expenses incurred by Mrs. Ross because of said injuries.

Plaintiffs alleged that while Mrs. Ross was on a visit to the sanitarium in charge of the defendant she was injured while descending from the third floor to the first floor in a single automatic push button elevator, which was in such condition and repair as to endanger the lives of those who used the same, and that it was not in a normal state of repair when she used said elevator; that the electricity was not safely or properly applied; that the defendant knew of the treacherous and unsafe condition of said elevator; that its brakes were not safe; and that, prior to that time, under the eyes of the officers, agents, and employees of the defendant, the dangerous and unsafe condition of said elevator had been demonstrated; but that it withheld from plaintiff any information on the subject, and, knowing the condition of said elevator, permitted her to enter same unaccompanied and unadvised as to its dangerous condition.

Defendant answered that there was no negligence on its part, and that whatever injuries were sustained by the plaintiff were through her own fault and negligence in attempting, as defendant believes, to leave the elevator before it reached the floor where it was to stop. There was judgment in favor of defendant, dismissing plaintiffs' demands. Mrs. Ross has appealed.

It was admitted that the defendant had in its hospital, and which was known as the T. E. Schumpert Memorial, a single automatic push button elevator, as described in plaintiffs' petition, and that plaintiff was injured at the time and in the elevator, as stated by her.

While the owner of a passenger elevator operated in a business building for carrying passengers up and down may not be a carrier of passengers in the sense that he is bound to serve the public, yet his duty as to protecting the passengers in his elevator from danger is the same as that applicable for the carrier of passengers by other means, and he is bound to do all that human care, vigilance, and foresight can reasonably suggest under the circumstances, and, in view of the character of the mode of conveyance adopted, to guard against accidents and injuries resulting therefrom; and a failure in this respect will constitute negligence rendering him liable. He owes the same duty to those who, by invitation, L.R.A.1917F.

express or implied, are transported in the cars of such elevator, to exercise the highest care, in view of the character of the mode of conveyance adopted, as to the safety of the car and all appliances. 6 Cyc. 596 and 622; Yarbrough v. Swift & Co. 119 La. 344, 44 So. 121.

The evidence shows that the elevator used by the defendants was a comparatively new one; that it had required some slight repairs to be made at different times; that it was in good order and condition, and at the time of the accident it was being used without any trouble or indication of trouble; and that, subsequent to the accident, the same use was being made of the elevator as had been made before, without the necessity of repairing same in any way. It was manufactured by the Otis Elevator Company, and was one of a type which is in general use in hospitals, asylums, etc., and it was operated by the means of push buttons, the use of which was easily understood and of easy application.

Mrs. Ross testified that, on leaving the third floor of the building, she was instructed by a nurse how to operate the car and cause it to stop at the first floor, and that she followed the instructions, by pushing the necessary button for that floor, and that when the elevator got to the first floor, where she wished to leave it, it did stop, and while she was trying to open the door which was attached to the shaft, the elevator descended to the basement, and that she was injured and crushed through the faulty operation of said elevator, and without any fault on her part.

The evidence is not clear that the elevator stopped at the floor where plaintiff desired to alight. She evidently thought that it did stop there, when she undertook to open the door, which she said was hard to open and would not yield to her endeavors. But she is not sustained in this assertion. One of her witnesses said that the elevator seemed to stop at the office floor, where he was standing, but he could not say whether it really stopped or not. He was uncertain. The only other witness of the accident was a man who was on the same floor, and who testified on behalf of plaintiff. He said very positively that the elevator did not stop at the first floor.

It therefore appears that the plaintiff, who desired to stop at the office floor, and who had arrived at that floor, thought that the elevator came to a stop, and undertook to open the door and leave the elevator while it, the elevator, was still in motion. In so doing she stood on a ledge, or sill, which was stationary; and the descending elevator caught and crushed her, very severely injuring her. As the elevator did not

stop at the office floor, when plaintiff desired to leave it, she should have remained in the elevator, which was a perfectly safe and sane thing to have done until it did stop. It is possible that, in preparing to descend, plaintiff pushed the wrong button, and that that mistake caused the elevator to descend to the basement instead of to the office floor. If so, the fault was entirely her own, and not the defendant's.

Plaintiff claims and argues that the elevator should have been in charge of someone who was placed there to operate it. But the evidence is that the elevator was so easy to manage that a child might have done it in safety; and a failure to employ an operator on an elevator of that character is not actionable by any passenger, except a child of such tender years that he cannot know and appreciate the risk he is running by exposing himself unnecessarily. Plaintiff could have no right of recovery unless the evidence established other facts than that she was permitted to use the

elevator, and that an injury was sustained by her. *Shellabarger v. Fisher*, 5 L.R.A. (N.S.) 250, 75 C. C. A. 9, 143 Fed. 937.

Plaintiff has failed to prove any fault or negligence on the part of defendants through which she was injured, and she cannot therefore recover damages from them.

The district judge found:

That the plaintiff could not be excused for "exposing herself to the descending car when it does not appear that it was necessary to have exposed herself in order to have opened the shaft door, and that the car had not stopped.

"Had she remained in the car, she would not have sustained any injury even though there was negligence on the part of the defendants; her negligence was a contributing cause to her injury, and she was not in the exercise of ordinary care."

Judgment affirmed.

O'Niell, J., concurs in the decree.

MISSISSIPPI SUPREME COURT. (In Banc.)

DAVID MORELAND et al., Appts.,
v.
PEOPLE'S BANK OF WAYNESBORO.

(— Miss. —, 74 So. 828.)

Bills and notes — failure to apply deposit account on note — release of surety.

1. A bank holding a note payable at its place of business owes the surety no duty to apply the maker's deposit account upon the note at maturity, failure to perform which will release the surety.

For other cases, see Principal and Surety, I. b, in Dig. 1-52 N. S.

Pleading — allegation of insolvency.

2. An allegation that one is likely to become fully insolvent at any time is not an allegation of his insolvency.

For other cases, see Pleading, II. p, in Dig. 1-52 N. S.

(April 23, 1917.)

APPEAL by defendants from a judgment of the Circuit Court for Wayne County in plaintiff's favor in an action brought to recover the amount alleged to be due on a promissory note. Affirmed.

The facts are stated in the opinion.

Mr. L. K. Saul for appellants.

Note. — As to effect upon surety or indorser of bank's failure to apply principal's deposit account upon note, see annotation following this case, post, 266.
L.R.A.1917F.

Messrs. Heidelberg & Johnston for appellee.

Sykes, J., delivered the opinion of the court:

The appellee bank instituted writ in the circuit court of Wayne county against David Moreland and Rufus P. Cook upon a promissory note for \$350, payable to the order of the said bank and signed by the two appellants. The appellant Moreland filed a special plea in the case, admitting the execution of the note, but claiming: That he signed the note merely as surety for his co-defendant, Cook, which fact was known to the bank. That the defendant Cook had an account with the bank which continued until the maturity of the note and for some time thereafter. That on the date of the maturity of the note Cook had on general deposit to his credit in the bank the sum of \$215.66, and at various times thereafter had money to his credit in said bank. A copy of this bank account is attached to the special plea and shows that at several different times after the maturity of the note the said Cook had on deposit in the bank an amount in excess of the amount owed the bank on said note. That the bank went into liquidation on the 19th day of November, 1914, which was before the institution of this suit. That the defendant Moreland had no notice that this note had not been paid until after the bank went into liquidation. That the bank, by virtue of having the money on deposit to the credit of the defendant Cook, became a trustee of this money and held it as a trust

fund, and that it was the duty of the bank to have appropriated these funds, or so much of them as was necessary, to the payment of this note. That the note was made payable at the bank and was in its possession, which was tantamount to a draft on the bank to pay the same out of the funds on deposit to the credit of the said Cook. That the bank knew that Cook's account with it varied by overdrafts for large amounts and that the said Cook was likely to become wholly insolvent at any time and defeat any contribution by the defendant. That, because of all of these reasons, it was the duty of the bank under the circumstances to protect the defendant Moreland, who was a surety, and that, because of the alleged negligence and bad faith in not so doing, the bank has relinquished and released the defendant Moreland from any liability on this note. The bank demurred to this special plea, alleging in its demurrer: First, that the plea was not sufficient to release the defendant Moreland; also, that the plea shows affirmatively that the defendant Cook did not have, at the time of the maturity of the note, a sufficient sum on deposit with the plaintiff to liquidate said note; and, further, that the plaintiff bank was never under any legal obligation to apply any of the funds on deposit with it to the credit of the said Cook to the payment of the note sued on. This demurrer was sustained by the court. There were also two other pleas filed by the defendant to which demurrers were sustained. The defendant declining to plead further, judgment was entered in favor of the bank for the amount due on the note, from which judgment this appeal is prosecuted.

In this court the only error argued by the appellant is the action of the court below in sustaining the demurrer to the special plea above mentioned. It is the contention of the appellant that, while the note is signed by Cook and Moreland on its face as comakers, as a matter of fact, and one which the plea alleges, Moreland was only a surety of Cook, and as such surety was released when the bank failed to apply the amount to Cook's credit on deposit in bank on the day the note fell due to the payment of this note. It is the contention of the appellee that the appellant Moreland is not a surety, but a principal on the note; and, further, that, even if he be considered a surety, then he was not released by the failure of the bank to apply any amount Cook might have had on deposit in the bank to this note on the day of, or after, its maturity.

It is not necessary for us to pass upon the question of whether or not the appellant Moreland was a principal or a surety, be-

cause we are of the opinion that, even if he be treated as a surety, he was not released from his liability on this note because of the failure of the bank to credit the note with any amount Cook may have had on deposit with it on the day of its maturity or thereafter. The decisions of the various states differ as to whether or not a bank is under any duty to a surety to credit a note at the day of, or after, its maturity with any amount the principal of said note may have on general deposit in the bank. A careful examination of the authorities on this question leads us to believe that the great weight of authority is to the effect that the bank is under no duty whatever to the surety to make any such application. A majority of the decisions holding the contrary view hold that at the time of the maturity of the note, if the principal of the note have on deposit an amount equal to or greater than that called for in the note, then it is the duty of the bank to apply a sum sufficient to pay the note in full; that, if it fails to do this, then the surety on said note is released. These cases further hold, however, that, if the amount on deposit the day of the maturity of the note is not sufficient to satisfy the note in full, then the bank is under no duty to the surety whatever to apply pro tanto to a credit on the note the amount on deposit in said bank at that time. There are a few states which hold that it is the duty of the bank to apply whatever amount it has on hand at the maturity of the note, and also whatever amount it may have on deposit at a later date to a payment on the note.

It is well settled that the bank itself has a right, if it so desires, to apply whatever amount the maker of the note has on deposit with it to a payment on the note. Or, in other words, the bank itself has the right to set off the amount it owes the depositor against the amount owed it by the depositor. The relation existing between a bank and a depositor is simply one of debtor and creditor. Most of the authorities holding that the surety is discharged in this character of cases predicate this right on the fact that the bank has this right of set-off if it so desires. As one court has expressed it: "When a creditor has in his hands the means of paying his debt out of the property of his principal debtor, and does not use it, but gives it up, the surety is discharged."

Because the principal of the note has on deposit funds in the bank in no way gives the bank a lien on these funds for the payment of its note. If it did, then it would be the duty of the bank to hold all funds deposited there before the maturity of the note as well as those deposited at and after

its maturity. As is well settled, by virtue of these deposits the relation only of debtor and creditor exists. This deposit is not treated as a trust fund or anything of that nature. The bank, by failing to credit the note with any amount due the principal, in no way releases any security which it holds or any valuable right of any kind to which the surety could be subrogated. It is a well-known fact in the commercial world that many customers of banks have balances to their general credit on deposit with the bank and at the same time owe the bank large sums of money for which they have given notes with sureties, falling due at different times. It would seriously interfere with the banking business and would be an injustice to the banks and to their depositors, if the banks before cashing their checks, should always be compelled to consult their books and notes to see if any notes of these depositors were falling due on that date with sureties thereon, thereby to keep from releasing these sureties. On the other hand, it is the duty of the surety to know when the note of his principal falls due, and, if he so desire, to take proper steps to see that he is protected at that time. In addition: to whatever common-law remedies sureties have, they have statutory remedies under chapter 112 of the Code of 1906.

In the case of *National Mahaiwe Bank v. Peck*, 127 Mass. 298, 34 Am. Rep. 368, the court said: "Money deposited in a bank does not remain the property of the depositor, upon which the bank has a lien only; but it becomes the absolute property of the bank, and the bank is merely a debtor to the depositor in an equal amount. [Citing cases.] So long as the balance of account to the credit of the depositor exceeds the amount on any debts due and payable by him to the bank, the bank is bound to honor his checks, and liable to an action by him if it does not. When he owes to the bank independent debts, already due and payable, the bank has the right to apply the balance of his general account to the satisfaction of any such debts of his. But if the bank, instead of so applying the balance, sees fit to allow him to draw it out, neither the depositor nor any other person can afterwards insist that it should have been so applied. The bank, being the absolute owner of the money deposited, and being a mere debtor to the depositor for his balance of account, holds no property in which the depositor has any title or right of which a surety on an independent debt from him to the bank can avail himself by way of subrogation, as in *Baker v. Briggs*, 8 Pick. 122, 19 Am. Dec. 311, and *American Bank v. Baker*, 4 Met. 164, cited for the defendant. The right of L.R.A.1917F.

the bank to apply the balance of account to the satisfaction of such a debt is rather in the nature of a set-off, or of an application of payments, neither of which, in the absence of express agreement or appropriation, will be required by the law to be so made as to benefit the surety."

This idea has been very well expressed in the case of *People's Bank v. Legrand*, 103 Pa. 309, 49 Am. Rep. 126: "While it is true that a bank is a mere debtor to its depositor for the amount of his deposit, and therefore, in an action by the bank against the depositor, on a note upon which he is liable, the latter may set off his deposit, yet we do not think the bank is bound to hold a deposit for the protection of an indorser of the depositor. A bank deposit is different from an ordinary debt, in this: that from its very nature it is constantly subject to the check of the depositor, and is always payable on demand. The convenience of the commercial world, the enormous amount of transactions by means of bank checks, occurring on every business day in all parts of the country, require that the greatest facilities should be afforded for the use of bank deposits by means of checks drawn against them. The free use of checks for commercial purposes would be greatly impaired if the banks could only honor them on peril of relieving indorsers, without an investigation of the state of the depositor's liabilities upon discounted paper.

. . . It is beyond question that the bank, in the absence of any special appropriation of the deposit by the depositor, would have the right to apply a general deposit to the payment of any existing, matured indebtedness of the depositor. But that privilege is a right which the bank may or may not exercise, in its discretion. . . . We fully recognize the rule that, where a principal creditor has the means of satisfaction actually or potentially within his grasp, he must retain them for the benefit of the surety; but we regard the case of bank deposits as an exception to the rule."

In the case of *First Nat. Bank v. Peltz*, 176 Pa. 513, 36 L.R.A. 832, 53 Am. St. Rep. 686, 35 Atl. 218, in speaking of this same subject, the court uses the following language: "While money deposited becomes the property of the bank, yet that result flows from the nature of money, which is to be measured by amount, and not by physical identity. Hence a deposit of \$100 is returned by another \$100 without regard to the identity of the notes or the coin, because legally they are the same. Except for this characteristic, a deposit of money to be returned on demand would be, like the deposit of any other article, a mere bailment. But though for this reason the title

to money deposited passes to the bank, yet the whole business of banking is founded on the faith of the immediate availability of the deposit, as money, for the use of the depositor, and any rule that interfered with the freedom of action of either bank or customer, by compelling a stop of their dealings with each other to examine the relations of other parties to the deposit, would go far towards destroying that instant convertibility which is the essence of the business."

This question was ably and exhaustively considered in the opinion of the court in the case of *Davenport v. State Bkg. Co.* 126 Ga. 136, 8 L.R.A.(N.S.) 944, 115 Am. St. Rep. 68, 54 S. E. 977, 7 Ann. Cas. 1000, in which opinion all the leading authorities are reviewed and discussed. There are found in 115 Am. St. Rep. and 8 L.R.A. (N.S.) exhaustive notes to this case discussing and reviewing all of the authorities.

We therefore conclude that a bank does not owe a surety on a note the duty to apply, or credit, the note with any amount the principal may have on deposit in the

bank at or after the maturity of the note, whether or not this amount be sufficient to satisfy the note.

The appellant in his brief contends that, because of the allegations in his special plea to the effect that the defendant E. P. Cook was likely to become wholly insolvent at any time and defeat an action for contribution, then this is equivalent to charging that he was insolvent at the time of the maturity of the note, and that the bank knew of his insolvency, and because of this insolvency it was the duty of the bank to have applied whatever amount it owed Cook to this note. This is not an allegation of insolvency. This allegation might be made of anyone. It is therefore not necessary for us to consider the question of whether or not, if the defendant Cook had been insolvent at the time of the maturity of the note, and this fact had been known to the appellee bank, this would have made any difference in the duty of the bank.

The lower court was correct in sustaining the demurrer, and its judgment is therefore affirmed.

Annotation—Effect upon surety or indorser of bank's failure to apply principal's deposit account upon note.

The earlier cases upon this question are collected in a note to *Davenport v. State Bkg. Co.* 8 L.R.A.(N.S.) 944.

The decision in *MORELAND v. PEOPLE'S BANK*, ante, 263, that a bank is under no duty to a surety on a note to credit the note on the day of or after its maturity with any amount the principal may have on general deposit in the bank, is in accordance with the weight of authority, as shown by the earlier note above referred to, and is also sustained by later cases. *Patterson v. State Bank* (1913) 55 Ind. App. 331, 102 N. E. 880; *National Bank v. Gilvin* (1912) — *Tex. Civ. App.* —, 152 S. W. 652; *First Nat. Bank v. Powell* (1912) — *Tex. Civ. App.* —, 149 S. W. 1096.

So, although, by the terms of a note, a bank might have applied the deposit of the principal maker to its payment, its failure to do so did not discharge the surety. *Highland Park State Bank v. Sheahan* (1909) 149 Ill. App. 225.

And this is the rule although there was evidence of fraud on the part of the maker, and the bank had notice of such fraud. *Solomon v. Merchants' & P. Nat. Bank* (1914) — *Tex. Civ. App.* —, 168 S. W. 1029.

And even in a jurisdiction in which it is recognized that failure of a bank to apply a deposit of a principal upon a

note will discharge a surety thereon, the rule will not apply as to a sum of money deposited under an agreement that it should be paid to certain creditors of the principal. *Royse v. Winchester Bank* (1912) 148 Ky. 368, 146 S. W. 738.

And in *Eades v. Muhlenberg County Sav. Bank* (1914) 157 Ky. 416, 163 S. W. 494, it is held that there was no error in rejecting evidence as to money deposited in the bank by the debtor, inasmuch as no effort was made to show the state of the account at the time of the maturity of the note, or to show that any deposit which he may have had on hand was not appropriated for a different purpose; the court stating that it is well settled that the deposit must be sufficient at the time of the maturity of the note, and must not have been previously appropriated to any other purpose, and that subsequent deposits will not raise a duty on the part of the bank to appropriate the money in payment of the note. The court does not discuss the point, merely citing certain Pennsylvania cases, but apparently overlooking earlier cases in its own state (*Bank of Taylorsville v. Hardesty* (1906) 23 Ky. L. Rep. 1285, 91 S. W. 729, and *Burgess v. Deposit Bank* (1906) 30 Ky. L. Rep. 177, 97 S. W. 761, cited at pages 947 and 948 of the earlier note), holding that there is no

distinction in this respect between deposits made before and those made after maturity.

In *Guernsey v. Marks* (1910) 55 Or. 323, 106 Pac. 334, a suit by a surety, who had paid the note, to foreclose a mortgage given by the principal as indemnity, the court observed that the answer, which alleged that on or before the note was paid the bank had become

indebted to the principal in a sum in excess of the note, did not state when the bank became indebted to the principal; and said that if the bank, at the maturity of the note, did not have sufficient of the principal's funds with which to discharge the note, subsequent deposits made by him were not required to be credited thereon without his demand.

R. L. S.

CALIFORNIA SUPREME COURT. (Department No. 2.)

JOHN E. McDOUGALD, Treasurer, Appt.,
v.

ALICE M. LILIENTHAL et al.

(— Cal. —, 164 Pac. 387.)

Tax — inheritance — stock owned by nonresident.

1. Stock in a domestic corporation held by a nonresident at his domicile at the time of his decease is subject to an inheritance tax under a statute providing that all property which shall pass by will or the intestate laws of this state from any person who may die seised or possessed of the same while a resident of this state, or if such decedent was not a resident of this state at the time of his death, which property, or any part thereof, shall be within this state, shall be subject to tax, although the aid of the local courts is not necessary to effect the transfer.

For other cases, see *Taxes*, V. c, in *Dig.* 1-52 N. S.

Judgment — full faith and credit — distribution of property — inheritance tax.

2. The full faith and credit clause of the Federal Constitution does not prevent a state in which property of a nonresident is located from imposing an inheritance tax thereon, even though the property has been distributed by the courts of testator's domicile without provision for the tax.

For other cases, see *Judgment*, IV. b, 1, in *Dig.* 1-52 N. S.

(March 26, 1917.)

APPEAL by plaintiff from a judgment of the Superior Court for the City and County of San Francisco in defendants'

Note.—As to liability to pay transfer or inheritance tax in respect of stock in a domestic corporation belonging to the estate of a nonresident, see annotation following this case, post, 270.

Other questions in relation to succession, inheritance, or transfer tax in respect of property belonging to the estate of a nonresident are discussed in notes cited in L.R.A. Indexes, under the title, "Taxes," subtitle, "Succession tax." L.R.A.1917F.

favor in a proceeding to enforce an inheritance tax upon the transmission of property of Albert Lilienthal, deceased. Reversed.

The facts are stated in the opinion.

Messrs. U. S. Webb, Attorney General, and Albert H. Elliot, with Messrs. Hartley F. Peart and Gus L. Baraty, for appellant:

The property is subject to an inheritance tax.

McDougal v. Low, 164 Cal. 107, 127 Pac. 1027; *Re Romaine*, 127 N. Y. 80, 12 L.R.A. 401, 27 N. E. 759; *People v. Griffith*, 245 Ill. 532, 92 N. E. 313; *State ex rel. Floyd v. District Ct.* 41 Mont. 357, 109 Pac. 438; *State v. Dalrymple*, 70 Md. 294, 3 L.R.A. 372, 17 Atl. 82.

Shares of stock of a California corporation are taxable in this state, irrespective of the physical location of the certificates representing such stock.

Re Cooley, 186 N. Y. 220, 10 L.R.A. (N.S.) 1010, 78 N. E. 939; 37 Cyc. 1562, subd. b.; *Blakemore & B. Inheritance Taxn.* § 200, p. 158; *Ross, Inheritance Taxn.* p. 246, ¶ 182; *Dos Passos, Inheritance Tax Law*, pp. 192-195; *Murphy v. Crouse*, 135 Cal. 14, 87 Am. St. Rep. 90, 66 Pac. 971; *Re James*, 144 N. Y. 6, 38 N. E. 961; *Re Bronson*, 150 N. Y. 1, 34 L.R.A. 238, 55 Am. St. Rep. 632, 44 N. E. 707; *Re Whiting*, 150 N. Y. 27, 34 L.R.A. 232, 55 Am. St. Rep. 640, 44 N. E. 715; *Re Fitch*, 160 N. Y. 87, 54 N. E. 701; *Re Bushnell*, 73 App. Div. 325, 77 N. Y. Supp. 4; *Re Palmer*, 183 N. Y. 238, 76 N. E. 16; *Re Pullman*, 46 App. Div. 574, 62 N. Y. Supp. 395; *Re Cushing*, 40 Misc. 505, 82 N. Y. Supp. 795; *Greves v. Shaw*, 173 Mass. 205, 53 N. E. 372; *Morrow v. Gould*, 145 Iowa, 1, 25 L.R.A. (N.S.) 384, 123 N. W. 743; *Douglas County v. Kountze*, 84 Neb. 506, 121 N. W. 593; *McDougal v. Low*, 164 Cal. 107, 127 Pac. 1027; *Re Romaine*, 127 N. Y. 80, 12 L.R.A. 401, 27 N. E. 759; *Gardiner v. Carter*, 74 N. H. 507, 69 Atl. 939; *People v. Griffith*, 245 Ill. 532, 92 N. E. 313; *Moody v. Shaw*, 173 Mass. 375, 53 N. E. 891; *Callahan v. Woodbridge*, 171 Mass. 595, 51 N. E. 176; *Blackstone v. Miller*, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; *Re Houdayer*,

150 N. Y. 37, 34 L.R.A. 235, 55 Am. St. Rep. 642, 44 N. E. 718.

No title passes to property situate in California by virtue of probate proceedings taken in New York.

Murphy v. Crouse, 135 Cal. 14, 87 Am. St. Rep. 90, 66 Pac. 971; McCully v. Cooper, 114 Cal. 258, 35 L.R.A. 492, 55 Am. St. Rep. 66, 46 Pac. 82; Richards v. Blaisdell, 12 Cal. App. 101, 106 Pac. 732; Montgomery v. Gilbretson, 134 Iowa, 291, 10 L.R.A. (N.S.) 986, 111 N. W. 964; Cross v. Superior Ct. 2 Cal. App. 342, 83 Pac. 815; Gardiner v. Carter, 74 N. H. 507, 69 Atl. 939; Greves v. Shaw, 173 Mass. 205, 63 N. E. 372.

Messrs. Lillienthal, McKinstry, & Raymond, for respondents:

Where the statute is not clear, the levy should not be made.

Re Bull, 153 Cal. 715, 96 Pac. 366; McDaniel v. Byrnett, 120 Ark. 295, 179 S. W. 491; Re Enston (People v. Sherwood) 113 N. Y. 174, 3 L.R.A. 464, 21 N. E. 88; Re Durfee, 79 Misc. 655, 140 N. Y. Supp. 596; Re Harbeck, 161 N. Y. 211, 55 N. E. 851.

The construction of the New York statute sought to be applied is decisively shown by a much later case in the same court.

Re Wise, 84 Misc. 663, 146 N. Y. Supp. 789.

While there is always a presumption that the legislature, in adopting a statute of another state, intended to adopt also its judicial interpretation, yet the force of this presumption must always depend on the extent to which the terms of the statute have acquired a settled meaning and a definite application at the time of its adoption in the courts of the jurisdiction from which it is taken.

Whitney v. Fox, 166 U. S. 637, 41 L. ed. 1145, 17 Sup. Ct. Rep. 713; Re Reynolds, 169 Cal. 600, 147 Pac. 288; Black, Interpretation of Laws, 598; Pratt v. Miller, 109 Mo. 78, 32 Am. St. Rep. 656, 18 S. W. 965; Re Bronson, 150 N. Y. 11, 34 L.R.A. 238, 55 Am. St. Rep. 632, 44 N. E. 707.

The Romaine Case (127 N. Y. 80, 12 L.R.A. 401, 27 N. E. 759) is opposed to well-considered cases in other states, construing the same language.

Kintzing v. Hutchinson, 7 W. N. C. 226, Fed. Cas. No. 7,834; Re Joyslin, 76 Vt. 88, 56 Atl. 281; Re Kennedy, 157 Cal. 517, 29 L.R.A. (N.S.) 428, 108 Pac. 280; Neilson v. Russell, 76 N. J. L. 655, 19 L.R.A. (N.S.) 887, 131 Am. St. Rep. 673, 71 Atl. 286; Astor v. State, 75 N. J. Eq. 303, 72 Atl. 78; Dixon v. Russell, 79 N. J. L. 490, 76 Atl. 982; Moss v. Edwards, 83 N. J. L. 280, 84 Atl. 198.

Where a statute is not peculiar to the state from which it is adopted, but other states have substantially the same statute, L.R.A.1917F.

which their courts have construed differently, the construction of the state from which it was adopted, being opposed to the weight of authority, will not be followed.

Ex parte Bowes, 8 Okla. Crim. Rep. 201, 127 Pac. 20; Re Kennedy, 157 Cal. 517, 29 L.R.A. (N.S.) 428, 108 Pac. 280.

The state of adoption is not bound by such construction, where not in harmony with the spirit of its legislation and decisions.

F. M. Davis Iron Works Co. v. White, 31 Colo. 82, 71 Pac. 384; Bowers v. Smith, 111 Mo. 45, 16 L.R.A. 754, 33 Am. St. Rep. 491, 20 S. W. 101; Oleson v. Wilson, 20 Mont. 544, 63 Am. St. Rep. 639, 52 Pac. 372; Smith v. Dayton Coal & I. Co. 115 Tenn. 543, 4 L.R.A. (N.S.) 1180, 92 S. W. 62; Dixon v. Ricketts, 26 Utah, 215, 72 Pac. 947; State v. Mortensen, 26 Utah, 312, 73 Pac. 562, 633; Coad v. Cowhick, 9 Wyo. 316, 87 Am. St. Rep. 953, 63 Pac. 584; State ex rel. Dawson v. Davis, 88 Kan. 849, 129 Pac. 1198, Ann. Cas. 1914B, 688.

Unless the legislature has shown a clear legislative intent to impose this tax, a court cannot superadd anything to the terms of the statute.

Re Johnson, 139 Cal. 538, 96 Am. St. Rep. 161, 73 Pac. 424; Tilt v. Kelsey, 207 U. S. 43, 52 L. ed. 96, 28 Sup. Ct. Rep. 1.

Henshaw, J., delivered the opinion of the court:

Albert Lillienthal, a nonresident of this state and a resident of the state of New York, died intestate in the city and state of New York. At the time of his death he was the owner of 1,286 shares of the capital stock of the Lillienthal Company, a California corporation, having its principal place of business in the city and county of San Francisco. The certificates representing his ownership in the capital stock of the corporation were, at the time of the decedent's death, in the city of New York. This property was distributed in probate proceedings by the courts of the state of New York, and these shares were distributed to the respondents upon this appeal, who are, respectively, one the widow, the other the son, of the deceased. The inheritance tax imposed through the succession of ownership of this stock under the laws of the state of New York was duly paid. No probate proceedings upon the estate of the deceased have been had in the state of California. The Inheritance Tax Law of 1905 (Stat. 1905, p. 341) is the California law which was in force at the time of the death of the decedent. The treasurer of the city and county of San Francisco, appellant herein, filed a petition, as contemplated by the law, looking to the exaction of a tax upon this personal property under our law. The

respondents herein answered, hearing was had, and the court gave judgment against the treasurer's contention. From that judgment this appeal is taken.

Section 1 of the Act of 1905 is the section defining the property for whose transfer by act or by operation of law a tax is imposed. The construction of this section gives rise to the principal controversy between these parties. The section, in so far as it is here necessary to quote it, provides as follows: "All property which shall pass, by will or by the intestate laws of this state, from any person who may die seised or possessed of the same while a resident of this state, or if such decedent was not a resident of this state at the time of death, which property, or any part thereof, shall be within this state . . . shall be and is subject to a tax hereinafter provided for. . . ."

Respondents' interpretation of this language, which was adopted by the trial court, is that the state has imposed this tax only on "all property which shall pass, by will or by the intestate laws of this state;" that in the succeeding part of the sentence, grammatically and by necessary construction (since this tax proceeding is admittedly one in invitum), the words "which property" have direct reference to and in their meaning are limited by the opening words of the act; that, consequently, the state has declared its intention to tax only property which shall pass by will or by the intestate laws of this state, which property, if the property of a resident, shall be taxed wherever situated, but which property, if the property of a nonresident, shall not be taxed unless situated in this state. As the property here under consideration is unquestionably personal property, and as it did not pass to these respondents either by will or by the intestate laws of this state (propositions which may not be controverted), it is not subject to the tax here sought to be imposed. Such is respondents' position.

Indisputably, if respondents' construction of the section is sound, the conclusion drawn from that construction is unanswerable. But with that construction we cannot agree. It may be at once conceded that the language lacks the clearness which should be found in every law, and especially in a law imposing the burden of a tax. But it is taken bodily from the statute of New York, and had been construed by the highest court of that state before its adoption into the law of this state, and the meaning given to it was, in effect, that the grammatical construction of the sentence was faulty, and that it meant to impose a tax, first, upon all property passing by will or by the in-

testate laws of this state, and, second, upon all property of a nonresident, which, regardless of its mode of transfer or succession, shall be within the state. Such is not only the interpretation of the highest court of New York, but is likewise the interpretation of the highest court of Illinois under its statute identical in this respect with our own. *People v. Griffith*, 245 Ill. 532, 92 N. E. 313. The declaration of this court in *Re Kennedy*, 167 Cal. 517, 29 L.R.A. (N.S.) 428, 108 Pac. 280, to the effect that the language in the first lines of the section, "pass by will or by the intestate laws of this state," means to pass by virtue and effect of the law of this state governing testacy or intestacy, is, of course, perfectly sound. But this court was not there called upon to review the language of the whole section. It was dealing with the much narrower question, namely, whether a homestead set apart by the probate court constituted property passing by will or by the intestate laws. The unescapable conclusion that our law designs to tax all of the property of a nonresident deceased which is within the state carries with it the additional determination that the imposition of this tax is in no wise dependent upon any proceedings in probate, ancillary or otherwise, had within the state. Without regard to such proceedings, the state has exercised its unquestioned power to tax property, within its territorial limits and jurisdiction, over which it has extended the protection of its laws.

We are thus brought to the second and subordinate question, namely: is the property, within the meaning of our inheritance tax law, within the state? The familiar maxim, *Mobilia sequuntur personam*, is one, it may not be questioned, which the state in its taxing laws may modify or reverse. In the case of the statute under consideration it is declared that all the property of a nonresident within the state shall be subject to the tax. It has (§ 28) defined property very broadly to include real and personal property and interests therein.

Our next consideration is whether this ownership by the deceased of a portion of the capital stock of a California corporation, which ownership was evidenced by printed and written certificates, which certificates in turn were in the state of New York, is of property within this state. Of this our own decisions as well as those of other jurisdictions remove all doubt. The proposition is thus stated in 37 Cyc. 1562, subd. "b.": "Shares of stock in a domestic corporation are subject to the tax at the domicile of the corporation on their transfer by will or under the intestate laws, although the decedent was a nonresident, and

this without regard to the place where the certificate may be kept."

To the same effect are our own cases of *Murphy v. Crouse*, 135 Cal. 14, 87 Am. St. Rep. 90, 66 Pac. 971; *McDougald v. Low*, 164 Cal. 107, 127 Pac. 1027; *Re James*, 144 N. Y. 6, 38 N. E. 961; *Re Bronson*, 150 N. Y. 1, 34 L.R.A. 238, 55 Am. St. Rep. 632, 44 N. E. 707; *Re Fitch*, 160 N. Y. 87, 54 N. E. 701; *Re Palmer*, 183 N. Y. 238, 76 N. E. 16; *Greves v. Shaw*, 173 Mass. 205, 53 N. E. 372; *Gardiner v. Carter*, 74 N. H. 507, 69 Atl. 939; *Douglas County v. Kountze*, 84 Neb. 506, 121 N. W. 593; *Morrow v. Gould*, 145 Iowa, 1, 25 L.R.A. (N.S.) 384, 123 N. W. 743.

It is finally contended that under the full faith and credit clause of the Constitution of the United States the decree of distribution in the probate court of New York precludes the right of the state to tax this property, and in support thereof is cited *Tilt v. Kelsey*, 207 U. S. 43, 52 L. ed. 95, 28 Sup. Ct. Rep. 1. It may be conceded that

the law of the domicile controls the disposition of personal property, where the law of the place of the location of the property is not in conflict therewith. But we do not understand that the full faith and credit clause imposes any limitation upon the sovereign right of a state to tax any and all property within it, nor is this right, we think, for a moment denied by respondents. This general right to tax includes the right to impose a tax on succession, known as an inheritance tax, and the effect of our law is that those to whom the property has gone by virtue of the distribution awarded by the courts of New York cannot take full title to and enjoyment of their property until payment of the tax imposed by the state of California, in which state the property is located.

The judgment appealed from is therefore reversed.

We concur: Lorigan, J.; Melvin, J.

Annotation—Liability to pay transfer or inheritance tax in respect of stock in a domestic corporation belonging to estate of nonresident.

The earlier cases on this question are discussed in the notes to *Neilson v. Russell*, 19 L.R.A. (N.S.) 887, and *Re Culver*, 25 L.R.A. (N.S.) 384.

The question of physical presence or absence of personal property, or evidence thereof, as affecting liability to succession tax, is discussed in the note to *Re Helena*, 46 L.R.A. (N.S.) 1167.

The power of the state to impose an inheritance tax upon stock in a domestic corporation upon the death of a non-resident owner is sustained in the cases passing upon that question within the period covered by the present note. *State ex rel. Graff v. Probate Ct.* (1915) 128 Minn. 371, L.R.A.1916A, 901, 150 N. W. 1094 (see *infra*, for quotation from this case); *Welch v. Burrill* (1916) 223 Mass. 87, 111 N. E. 774; *Carr v. Edwards* (1913) 84 N. J. L. 667, 87 Atl. 132 (see *infra*, for theory of this case); *Security Trust Co. v. Edwards*, post, 273. This is true of a majority of the previous cases discussed in the earlier notes, as will be seen by reference thereto. But see *Neilson v. Russell*, 19 L.R.A. (N.S.) 887. The court in *Dixon v. Russell* (1910) 79 N. J. L. 490, 76 Atl. 982, a case involving a succession by a legatee to stock in a domestic corporation, states: "We do not doubt the power of the state to impose a succession tax, where the succession is by reason of death, without regard to the domi-

cile of the decedent from whom the property passes, provided that the property which is the subject of the succession is within the jurisdiction of the state." This decision, which was by the court of errors and appeals, was rendered subsequent to the date of the note in 25 L.R.A. (N.S.) 384, and reverses *Dixon v. Russell* (1909) 78 N. J. L. 296, 73 Atl. 51, discussed in that note, on the ground of the invalidity of the statute involved because the title thereof did not express the object of the law. The general question of the constitutionality of succession taxes is discussed in the note to *Rodman v. Com.* 33 L.R.A. (N.S.) 592, and *State ex rel. Ise v. Cline*, 50 L.R.A. (N.S.) 991. See L.R.A. Indexes, under the title, "Constitutional law," subtitle, "Succession tax," for references to other notes dealing with the constitutionality of such taxation.

The question that has received the most consideration is the one considered in *McDougald v. Lilienthal*, ante, 267; that is, whether the statute does tax such stock. The answer to the question depends in a large measure upon the form of the statute.

That stock of a nonresident testator in a domestic corporation, passing under the residuary clause of his will, is subject to the inheritance tax, is recognized in *McDougald v. Low* (1912) 164 Cal. 107, 127 Pac. 1027, but the principal

question in that case was whether there should have been deducted from the amount on which the tax was payable debts proved and expenses incurred in the probate proceedings of the testator's domicile.

While recognizing that stock in a domestic corporation, owned by a nonresident decedent, is properly situated in the state, such stock was held not subject to the inheritance tax, in *State ex rel. Dawson v. Davis* (1913) 88 Kan. 849, 129 Pac. 1197, Ann. Cas. 1914B, 688; *Bliss v. Bliss* (1915) 221 Mass. 201, L.R.A.1916A, 889, 109 N. E. 14; *Borden v. Burrill* (1915) 221 Mass. 212, 109 N. E. 153, because of a reciprocity provision in the statutes.

In *State ex rel. Graff v. Probate Ct.* (1915) 128 Minn. 371, L.R.A.1916A, 901, 150 N. W. 1094, the reciprocity provision of the statute was held inapplicable and stock in a domestic corporation, passing under the will of a nonresident testator, was held subject to the inheritance tax, under a statute containing, among other provisions, a provision imposing a tax upon any transfer of property when the "transfer is by will or intestate law, of property within the state or within its jurisdiction, and the decedent was a nonresident of the state at the time of his death." The court states that there are several other provisions in the statute too lengthy to quote, but the statute, taken as a whole, leaves no room for doubt that the legislature intended to and did impose a tax upon the right of succession to the personal property of nonresident decedents in all cases in which such property is within this state or subject to the laws of the state. That the stock is thus liable to the inheritance tax is held true notwithstanding the fact that the decedent may never have been a resident of the state, and that the devolution of his property is governed by the law of his domicile, the court stating that while it is usually true that the right to succeed to the ownership of the personal property of a decedent is governed by the law of the domicile of the decedent, and is subject to taxation at the place of such domicile, "yet, if the one who succeeds to such ownership must invoke the law of another state before he can reduce such property to possession, or secure the beneficial enjoyment thereof, it is generally, although not universally, held that such other state also has power to exact a tax upon the privilege of taking over and securing the beneficial enjoyment of such property." L.R.A.1917F.

Stock in a domestic corporation was held to be "property" within the meaning of a transfer tax statute taxing "all property which shall pass by will or by the intestate laws of this territory, from any person who may die seised or possessed of the same while a resident of this territory, or which, being within this territory, shall so pass from any person who may so die while not a resident of this territory," and therefore subject to tax upon a transfer under the will of a nonresident decedent. *Re Hall* (1909) 19 Haw. 531. The liability of the stock to a tax was made particularly clear in this case by a further provision of the statute that no corporation shall "deliver or transfer any securities, deposits, or other assets of the estate of a nonresident decedent, including the shares of the capital stock of . . . the . . . corporation . . . without retaining a sufficient" amount to pay the tax assessed on the transfer of such shares.

The New Jersey Act of May 15, 1894, was held, in *Neilson v. Russell* (1908) 76 N. J. L. 655, 19 L.R.A.(N.S.) 887, 131 Am. St. Rep. 673, 71 Atl. 286, not to impose an inheritance tax in the case of stock in a New Jersey corporation passing by the will of a nonresident testator. The New Jersey statute was subsequently amended (Pub. Laws 1906, p. 432), and it was then held to impose a tax in such a case. *Dixon v. Russell* (1909) 78 N. J. L. 296, 73 Atl. 51. But upon appeal of this case, the court of errors and appeals (1910) 79 N. J. L. 490, 76 Atl. 982, declared the amendment invalid (see *supra*). In the subsequent case of *Moss v. Edwards* (1912) 83 N. J. L. 280, 84 Atl. 198, the question arose as to whether stock in a domestic corporation, belonging to a nonresident who died intestate, was subject to the tax. It was claimed that since the stock passed by virtue of the intestate laws, the case was not governed by the previous decisions, which involved stock passing under wills. The court, however, held that there was no distinction and that no tax could be assessed. The New Jersey statute was subsequently changed. It is assumed in *Beers v. Edwards* (1913) 84 N. J. L. 32, 85 Atl. 1022 that the changed act (Transfer Tax Act 1909, Pub. Laws, p. 325) imposed a tax upon stock in a New Jersey corporation owned by a nonresident decedent, the only question in that case being as to the method of computation of the tax.

In *Carr v. Edwards* (1913) 84 N. J. L. 667, 87 Atl. 132, the Act of 1909 is

discussed and a tax sustained in the case of stocks in a domestic corporation owned by a nonresident decedent, passing to legatees who were of the class subject to the tax. The court, after stating that it is clear that the legislature meant by the Act of 1909 to reach all transfers from a decedent to his successors, refers to *Neilson v. Russell* (1908) 76 N. J. L. 655, 19 L.R.A. (N.S.) 887, 131 Am. St. Rep. 673, 71 Atl. 286, and says that it was there "held that a legacy under a nonresident's will was not taxable here because, among other reasons, it depended for its validity and amount upon the law of the testator's domicile. We said that the justification of special taxes of this character, imposed without regard to the limitation contained in our Constitution upon property taxes, was found in the fact that the rights of testamentary disposition and of succession were creatures of law upon the exercise and operation of which the lawmaker might impose terms, and that it followed logically that the only law that could impose the terms was the law that created the right. The only special right given by the New Jersey law in case of a nonresident decedent is the right of an executor or administrator to succeed to the property having its situs in New Jersey. Unless, therefore, the legislature meant by the Act of 1909 to tax this right,—the transfer by grace of our law, from the decedent to his representative, of the property having its situs here,—its enactment was futile as far as the estates of nonresidents are concerned. We cannot attribute such futility to a legislative act. The intent apparent on its face was to overcome the effect of our decision in *Neilson v. Russell* (N. J.) supra, which we must assume, as the fact undoubtedly was, the legislature had in mind."

The general liability to an inheritance tax is again assumed in *Penfold v. Edwards* (1915) 87 N. J. L. 461, 95 Atl. 128, in the case of a transfer of stock in a domestic corporation upon the death of a nonresident; but domestic stock which was accepted by the executors of a nonresident residuary legatee (who died subsequent to testator) in lieu of cash was held not again taxable as a transfer under the will of the legatee.

Shares of stock in a bank which had its head office in Quebec, where its stock register and transfer books were kept, belonging to a resident of Ontario, were held not subject to the Quebec succession tax upon the death of the owner, L.R.A.1917F.

in *Lambe v. Manuel* [1903] A. C. (Eng.) 68, 72 L. J. P. C. N. S. 17, 87 L. T. N. S. 460, 19 Times L. R. 68, the court stating that the Quebec succession act applies only "to transmissions of property resulting from the devolution of a succession in the province of Quebec, . . . in the present case the several items in respect of which succession taxes are claimed form part of a succession devolving under the law of Ontario." The same was held with reference to shares of stock in a bank which had a branch office in Quebec, where the decedent's shares were registered.

It is assumed in *Re Duncan* (1916) 160 N. Y. Supp. 527, that shares of stock in a domestic corporation are taxable under the Inheritance Tax Law where they are transferred under the will of a decedent. The shares of stock involved in this case were included in a trust fund in which the decedent, who was a nonresident, had a vested interest, and which, under the trust, upon the death of the decedent, the executors of her estate became entitled to receive and did receive and transfer under her will to legatees therein mentioned, and the question was whether there was a transfer of the shares effected by the will of the decedent. The court held that the transfer was effected by the will of the decedent, and that the shares were subject to tax. In *Re Phelps* (1917) 100 Misc. 87, 165 N. Y. Supp. 75, shares of stock in a domestic corporation, held under a trust under which the decedent was a cestui que trust, were held not taxable; but not for the reason that shares of stock in a domestic corporation owned by a nonresident decedent are not taxable, but for the reason that the trust was of such a nature that the interest of the decedent in the trust fund was a right to an accounting, not a right to any specific part of the assets of the estate.

Shares in a domestic real estate trust, owned by a nonresident decedent, were held to be property "within the jurisdiction of the commonwealth," within the meaning of those words as used in a statute imposing an inheritance tax, and therefore subject to the tax, although the certificates were not within the commonwealth. *Peabody v. The Treasurer* (1913) 215 Mass. 129, 102 N. E. 435. The details of the several trusts are not given; it is stated in general that the subscribers joined for the purpose of purchasing and developing certain real estate, and agreed to contribute money therefor; the legal title to all of the property of each of the trusts is in the

trustees, who have control over the property, with power to invest and hold personal property and to distribute net earnings among the shareholders, but no power to bind the shareholders personally; the trustees are subject to a limited direction on the part of the shareholders. Two of the trusts in question contained the further provision that the shares represented by the certificates were to be and remain, as to title, personal property only, and to be held, bequeathed, assigned, and distributed as personal estate. The court stated that the right of the shareholders did not constitute a chose in action, but was a substantial property right, and in this respect the right of the shareholders was indistinguishable in principle from that of shareholders in a domestic corporation.

In re Willmer (1912) 153 App. Div. 804, 138 N. Y. Supp. 649, shares in a joint stock association having its head

office or principal place of business in the city of New York, owned by a non-resident decedent, were held subject to the transfer tax to the extent that the association owned property within the state of New York; that is, "they were taxable upon that proportion of their value which the property within the state bore to the entire property of the association at the time of the decedent's death." A joint stock association is stated not to exist as an entity, distinct from its members, although it may have some of the rights of a corporation, and may sue and be sued in the name of its president.

See Security Trust Co. v. Edwards, infra, and Re Ames (1913) 141 N. Y. Supp. 793, discussed in the note to Security Trust Co. v. Edwards, as to the taxability of stock in a domestic corporation, owned by a nonresident, where the stock is pledged. W. A. E.

NEW JERSEY COURT OF ERRORS AND APPEALS.

SECURITY TRUST COMPANY, Exr., etc.,
of Leonard Morse, Deceased, Resp.,
v.

EDWARD I. EDWARDS, State Comptroller, Appt.

(— N. J. —, 101 Atl. 384.)

Tax — transfer — nonresident pledgeor of stock.

The interest of a nonresident deceased pledgeor of stock of a New Jersey corporation in such stock is subject to the transfer tax imposed by the Act of 1909 as amended in 1914.

For other cases, see *Taxes*, V. c, in Dig. 1-52 N. S.

(June 18, 1917.)

APPEAL by defendant from a judgment of the Supreme Court setting aside an inheritance tax. Reversed.

The facts are stated in the opinion.

Messrs. John W. Wescott, Attorney General, and John R. Hardin, for appellant: The interest of a nonresident deceased pledgeor of stock of a New Jersey corporation in such stock is subject to the transfer tax imposed by our statute.

Headnote by TRENCHARD, J.

Note. — As to succession or inheritance tax on interest of pledgeor or pledgee, see annotation following this case, post, 278. L.R.A.1917F.

Jones, Collateral Security, 3d ed. § 7; 31 Cyc. 787; 3 Pom. Eq. Jur. § 1229; Schouler, Bailm. & Carr. 2d ed. § 168; Story, Bailm. 9th ed. §§ 303, 345, 350, 352; 2 Bl. Com. pp. 452, 453; Mores v. Conham, Owan, 123, 74 Eng. Reprint, 946; Coggs v. Bernard, 2 Ld. Raym. 909, 92 Eng. Reprint, 107, 1 Smith, Lead. Cas. (Hare & W.) 199; Donald v. Suckling, L. R. 1 Q. B. 585, 35 L. J. Q. B. N. S. 232, 7 Best & S. 783, 12 Jur. N. S. 795, 14 L. T. N. S. 772, 15 Week. Rep. 13, 21 Eng. Rul. Cas. 301; Sewell v. Burdick, L. R. 10 App. Cas. 74, 54 L. J. Q. B. N. S. 150, 52 L. T. N. S. 445, 33 Week. Rep. 461, 5 Asp. Mar. L. Cas. 376, 4 Eng. Rul. Cas. 758; Re Morritt, L. R. 18 Q. B. Div. 222, 56 L. J. Q. B. N. S. 139, 56 L. T. N. S. 42, 35 Week. Rep. 277; The Odessa [1916] 1 A. C. 145, 5 B. R. C. 979, 85 L. J. Prob. N. S. 49, 114 L. T. N. S. 10, 32 Times L. R. 103, 60 Sol. Jo. 292, 18 Asp. Mar. L. Cas. 215, affirming L. R. [1915] P. 52, 84 L. J. Prob. N. S. 112, 112 L. T. N. S. 473, 31 Times L. R. 148, 59 Sol. Jo. 189; Donnell v. Wyckoff, 49 N. J. L. 48, 7 Atl. 672; Broadway Bank v. McElrath, 13 N. J. Eq. 24; Meisel v. Merchants' Nat. Bank, 85 N. J. L. 253, 88 Atl. 1067; McCrea v. Yule, 68 N. J. L. 465, 53 Atl. 210; Mechanics Bldg. & L. Asso. v. Conover, 14 N. J. Eq. 219; Herbert v. Mechanics Bldg. & L. Asso. 17 N. J. Eq. 497, 90 Am. Dec. 601; Warren v. Pim, 66 N. J. Eq. 353, 59 Atl. 773; Thomas v. International Silver Co. 72 N. J. Eq. 224, 73 Atl. 833; Dirigo Tool Co. v. Woodruff, 41 N. J. Eq. 330, 7 Atl. 125; Morris Canal & Bkg. Co. v. Fisher, 9 N. J.

Eq. 667, 64 Am. Dec. 423; *Dale v. Pattison*, 234 U. S. 399, 405, 58 L. ed. 1370, 1374, 52 L.R.A.(N.S.) 764, 34 Sup. Ct. Rep. 785; *Robertson v. Wilcox*, 36 Conn. 426.

The legislature intended to tax the general property of the nonresident deceased pledgeor in the stock.

Smelting Co. v. Inland Revenue Comrs. [1896] 2 Q. B. 179, 65 L. J. Q. B. N. S. 513, affirmed in [1897] 1 Q. B. 175, 66 L. J. Q. B. N. S. 137, 75 L. T. N. S. 534, 45 Week. Rep. 203, 61 J. P. 116; *Re Whiting*, 150 N. Y. 27, 34 L.R.A. 232, 55 Am. St. Rep. 640, 44 N. E. 715; *Inland Revenue Comrs. v. Muller & Co's Margarine* [1901] A. C. 217, 70 L. J. K. B. N. S. 677, 49 Week. Rep. 603, 84 L. T. N. S. 729, 17 Times L. R. 53; *Rogers v. Hennepin County*, 240 U. S. 184, 189, 60 L. ed. 594, 598, 36 Sup. Ct. Rep. 265; *Hopper v. Edwards*, 88 N. J. L. 471, 96 Atl. 667; *Bliss v. Bliss*, 221 Mass. 201, L.R.A.1916A, 889, 109 N. E. 148.

Messrs. Lum, Tamblin, & Colyer, Ralph E. Lum, and Joseph F. McCloy, for respondent:

The situs of the property, the transfer of which has been subjected to tax herein, is not within the state of New Jersey, and the tax as imposed is illegal, unconstitutional, and void.

Carr v. Edwards, 84 N. J. L. 667, 87 Atl. 132; *Sawter v. Shoenenthal*, 83 N. J. L. 500, 83 Atl. 1004; *Eastwood v. Russell*, 81 N. J. L. 672, 81 Atl. 108; *Howell v. Edwards*, 88 N. J. L. 134, 96 Atl. 186; *Schouler, Bailm. & Carr* 3d ed. pp. 242, 243; *Lawson, Bailm.* p. 105; *Penfold v. Edwards*, 87 N. J. L. 462, 95 Atl. 128; *Miller v. Edwards*, 85 N. J. L. 517, 98 Atl. 987; *Neilson v. Russell*, 76 N. J. L. 655, 19 L.R.A.(N.S.) 887, 131 Am. St. Rep. 673, 71 Atl. 286.

Trenchard, J., delivered the opinion of the court:

This is an appeal by the state comptroller, defendant in certiorari, from a judgment of the supreme court setting aside an inheritance tax levied under the Act of 1909 (Pamph. Laws, p. 325; Comp. Stat. p. 5301), as amended in 1914 (Pamph. Laws, p. 267). The prosecutor below, Security Trust Company, a Connecticut corporation, is the executor of the will of Leonard Morse, who died resident in Hartford, Connecticut, on April 2, 1915. Morse left no real estate whatever, either within or without New Jersey. His gross estate amounted to \$64,523.85, and by the will went entirely to collaterals or those unrelated to the testator. The estate consisted largely of certain securities; viz., corporate stock and four bonds appraised in the aggregate at \$63,285.50. All of these securities had been

pledged by Morse in his lifetime, accompanied by a power of attorney in blank, to the Phoenix National Bank of Hartford, Connecticut, to secure his promissory note of \$37,500, upon which there was due \$5.21 of interest, together with all of the principal amount, at the time of his death. It does not appear that this note had been called prior to the death of Morse, or that the pledgee had caused any of the securities to be transferred to it, or that any demand had been made upon him prior to death for the payment of the note. Among the securities so pledged were New Jersey stocks appraised in the aggregate at \$28,249. The comptroller appraised the New Jersey stocks at the figures above mentioned, and the decedent's interest in the New Jersey stocks at the sum of \$11,507. This amount was obtained by prorating the amount of the loan together with such portion of the general deductions as the other assets were insufficient to meet, over all of the stocks pledged. The value of the equity in the New Jersey stocks was arrived at by applying to the equity in all of the stocks the fraction represented by the value of the New Jersey stocks over the value of all the securities pledged. Treating the gross estate for the purpose of taxation as the value of the equity in all of the stocks, plus the value of the other assets, the comptroller arrived at the proportion demanded by the method of computation prescribed for nonresident estates in § 12 of the act (namely, the ratio of the New Jersey property to the total property wherever situate), which proportion was found to be 42.6 per cent. The tax was then calculated in the manner prescribed in that section, and found to be \$527.55. The comptroller refused to consent to the transfer of the New Jersey stocks to the executor of the decedent, unless such tax upon the decedent's equity therein was paid, and accordingly it was paid. The amount of the tax, i. e., the method of computation, is not challenged, and with that we are not concerned.

The only question presented by the record, and indeed the only question argued, is that decided by the supreme court; namely, Is the interest of a nonresident deceased pledgeor of stock of a New Jersey corporation in such stock subject to the transfer tax imposed by Pamph. Laws, 1909, p. 325, as amended by Pamph. Laws, 1914, p. 267? We are of the opinion that that question must be answered in the affirmative. The view of the supreme court was that Morse had ceased to be the owner before his death; hence there was no succession. The court does indeed refer to his "interest" in the stock, but the tenor of the opinion appears to be that there is no taxable succession if

the decedent owned anything less than the entire legal and beneficial interest in the stock. Such a view ignores the language of the statute (Pamph. Laws, 1909, p. 325, as amended by Pamph. Laws, 1914, p. 267) taxing "... the transfer of any property ... or of any interest therein or income therefrom, in trust or otherwise. ... When the transfer is by will ... of shares of stock of corporations of this state, ... and the decedent was a non-resident of the state at the time of his death. ..." Section 1.

"26. The words 'estate' and 'property' wherever used in this act ... shall be construed to mean the interest of the testator ... passing or transferred to the [successors]. ... The word 'transfer' as used in this act, shall be taken to include the passing of property or any interest therein, in possession or enjoyment, present or future," etc. Section 26.

The only authority cited by the court below is that of Surrogate Fowler of New York county in *Re Ames*, 141 N. Y. Supp. 793 (1913). But that decision is in conflict with the doctrines of the highest court of New York, as we shall show.

We think that a nonresident pledgeor's interest in New Jersey stocks is a property interest which has a situs here for the purpose of succession taxation. As between the pledgeor and pledgee, the pledgeor is still the general owner. The pledgee has a special property only and upon payment of the debt this is extinguished. That rule has been frequently stated and applied without challenge by English judges. In the early case of *Mores v. Conham*, Owen, 123, 74 Eng. Reprint, 946 (1610), the court recognized that the right of the pledgee was but a special interest. In *Cogga v. Bernard*, 1 Smith, Lead. Cas. (Hare & W.) *199 (1702), Chief Justice Holt stated the same principle. The learned annotator at page *228 says: "A pawn never conveys the general property to the pawnee, but only a special property in the thing pawned; and the effect of a default in payment of the debt by the pawner is not to vest the entire property of the thing pledged in the pawnee, but to give him a power to dispose of it, accounting for the surplus, which power, if he neglected to use the general property of the thing pawned, continues in the pawner, who has a right at any time to redeem it."

Another leading case is *Donald v. Suckling*, L. R. 1 Q. B. 585, 35 L. J. Q. B. N. S. 232, 7 Best & S. 783, 12 Jur. N. S. 795, 14 L. T. N. S. 772, 15 Week. Rep. 13, 21 Eng. Rul. Cas. 301. Another famous case is *Sewell v. Burdick*, L. R. 10 App. Cas. 74, (1884) where Lord Fitzgerald says that the pledgees "acquired a special property in the

goods, with a right to take actual possession should it be necessary to do so for their protection or for the realization of their security. They acquired no more, and, subject thereto, the general property remained in the pledgeor."

A very recent opinion by the Privy Council in a prize case is *The Odessa*, [1916] 1 A. C. 145, 5 B. R. C. 979, affirming L. R. [1915] ¶ 52. Prior to the outbreak of the European war German owners of the cargo had, by assignment of the bills of lading, pledged the cargo to British bankers for advances made prior to the outbreak of the war. After the war began and while the vessel was on the high seas the cargo was seized and condemned as a prize. The contest was between the British pledgees and the Crown. Lord Mersey, speaking for the court, says: "All the world knows what ownership is, and that it is not lost by the creation of a security upon the thing owned."

Our own decisions are uniformly to the same effect. In *Donnell v. Wyckoff*, 49 N. J. L. 48, 7 Atl. 672 (supreme court, 1886), wherein the subject-matter of the pledge was corporate stock, Justice Depue said (49 N. J. L. page 49): "Upon a pledge of property as security for a debt, the pledgee has only a special property. The general property is in the pledgeor, subject to the rights of the pledgee."

In *Broadway Bank v. McElrath*, 13 N. J. Eq. 24 (Chancellor Green, 1860), the conflicting rights of a pledgee of stock and the attaching creditors of the pledgeor were dealt with. It would appear from the opinion that the court entertained no doubt that the interest of a nonresident pledgeor in stock of a New Jersey corporation pledged to a nonresident was subject to attachment, under the New Jersey statute, and the court, on page 26, says that the rights of the creditors were unquestioned except so far as they conflict with the rights of the pledgee. And speaking of the effect of a pledge, says: "The absolute ownership of the stock, it is true, was not transferred, nor was it intended it should be."

In *Meisel v. Merchants' Nat. Bank*, 85 N. J. L. 253, 88 Atl. 1067 (court of errors, 1913), it was said, in effect, that the pledgeor has the right to bring a possessory action against the pledgee to recover the stock itself, providing only he makes and keeps good a tender of the debt.

In *McCrea v. Yule*, 68 N. J. L. 465, 53 Atl. 210, the supreme court, in 1902, in a case of an assignment of a chose in action as collateral security, said (68 N. J. L. page 467): "A pledgee of personal property assigned as collateral security has the right to collect the interest, dividends, and income

accruing on the collateral assigned, accounting to the pledgeor upon the redemption of the pledge. In making such collections the pledgee is a trustee of the pledgeor to see to the proper application of the funds collected or to refund the same to the pledgeor if the debt be otherwise paid."

In *Mechanics Bldg. & L. Asso. v. Conover*, 14 N. J. Eq. 219 (reversed on other grounds in *Herbert v. Mechanics Bldg. & L. Asso.* 17 N. J. Eq. 497, 90 Am. Dec. 601), the court said that when shares of stock are pledged, they "remain the property of the shareholder for every purpose excepting that of defeating the lien" of the pledgee.

In the United States Supreme Court, drawing the familiar distinction between a chattel mortgage and a pledge, Mr. Justice Pitney says, in *Dale v. Pattison*, 234 U. S. 399, 405, 58 L. ed. 1370, 1374, 52 L.R.A. (N.S.) 754, 34 Sup. Ct. Rep. 788: "On the other hand, where title to the property is not presently transferred, but possession only is given, with power to sell upon default in the performance of a condition, the transaction is a pledge, and not a mortgage."

The law of Connecticut appears to be to the same effect. In *Robertson v. Wilcox*, 36 Conn. 426 (1870), the highest court of that state, 36 Conn. at page 430, said: "A pledge of property does not carry with it the title to the thing pledged. The title remains as before. All that passes to the pledgee is the right of possession, coupled with a special interest in the property, in order to protect the right."

It is this intangible proprietary interest of the pledgeor in the corporate property that the pledgeor's executor succeeds to.

Now the doctrine is too well established to need discussion that the stock of a New Jersey corporation has a situs in this state and is subject to succession taxation here. *Dixon v. Russell*, 79 N. J. L. 490, 76 Atl. 982 (court of errors); *Carr v. Edwards*, 84 N. J. L. 667, 87 Atl. 132; *Hopper v. Edwards*, 88 N. J. L. 471, 96 Atl. 667.

The matter is nowhere more fully and ably discussed than in the opinion of Mr. Justice Garrison in the supreme court in *Neilson v. Russell*, 76 N. J. L. 27, 69 Atl. 476 (1908), reversed on another point in 76 N. J. L. 655, 19 L.R.A. (N.S.) 887, 131 Am. St. Rep. 673, 71 Atl. 286 (1908). The following is quoted therefrom, not for the purpose of supporting this elementary proposition, but as illuminating the precise question under review in the present case (76 N. J. L. page 35): "In this country, where the general doctrine of the state courts is that the situs of property governs its liability to succession taxes, the weight of authority is that stock in a corporation is subject to the imposition of succession L.R.A.1917F.

taxes by the state that created the corporation, and that in this regard the place of residence of the deceased stockholder is immaterial."

The case of *Amparo Min. Co. v. Fidelity Trust Co.* 75 N. J. Eq. 555, 73 Atl. 249 (court of errors, 1909), affirming opinion of Vice Chancellor Stevenson in 74 N. J. Eq. 197, 71 Atl. 605, is also instructive. There the jurisdiction of the courts of the state of incorporation over the enforcement of property interests in stock as against non-residents was upheld.

It being firmly established that the stock is subject to succession taxation by the state, it necessarily follows that not only is the entire legal interest in the stock subject to taxation by the state, but as well every undivided or fractional interest in any such given share of stock, and as well any proprietary interest in such share of stock, though it be an interest of a quality different in character from a mere fractional or other legal interest less than the whole. The interest of a pledgeor of a share of stock being such a proprietary interest in the share of stock itself, and the stock being taxable, it follows that the pledgeor's interest is taxable, whether it be called an equity of redemption or by some other name.

We need not dwell on the distinctions which exist in respect to situs for the purpose of property taxes, on the one hand, and succession taxes, on the other. The argument of respondent is not forwarded by calling the pledgeor's right an equity of redemption, or chose in action, or an intangible. The stock itself is a chose, and intangible. While an intangible right has really no locality, it must, in the nature of things, have ascribed to it a situs for legal purposes. The situs is based on the power of the sovereign, and if the sovereign has power to deal with it effectively as a property right, it may tax it as having an ascribed situs within its jurisdiction.

The *Amparo Min. Case*, supra, at once suggests such power. We note especially the attitude of the court towards the rights of bona fide holders. If any one class of such holders was more prominently in the mind of the court than another, it was probably that of pledgees. But the court did not turn aside from rendering judgment because of the possibility that a nonresident owner had pledged his stock to a nonresident, which, if respondent's argument be sound, would at once have ousted the court of jurisdiction.

It can hardly be doubted that the pledgeor could resort to our courts to enforce a conflicting property right in respect to his stock, and that because he could obtain effective relief nowhere but in the domicile of the

corporation. To be more concrete, suppose that Morse, a resident of Connecticut, had pledged New Jersey stock to residents of Massachusetts and New York jointly, and that the latter wrongfully delivered the same to a resident of Oregon, and that the stock had no market value. See *Safford v. Barber*, 74 N. J. Eq. 352, 70 Atl. 371. Where could he obtain relief except in New Jersey? *Gregory v. New York, L. E. & W. R. Co.* 40 N. J. Eq. 38. Who would doubt that such a suit would be quasi in rem?

The New York courts recognize that the pledgeor has a residuary interest. In *Warner v. Fourth Nat. Bank*, 115 N. Y. 251, 22 N. E. 172, the interest of a nonresident pledgeor of notes held in pledge by a resident was held to be subject to attachment in New York state. Judge Gray says: "The title to property may remain in the pledgeor, but the pledgee has a lien or special property in the pledge, which entitles him to its possession against the world."

And, further: "The pledgeor's residuary interest in the pledge constitutes a claim or demand upon the pledgee, which is property, and hence may become the subject of attachment."

And again: "We think the attachment in question here operated to secure to the [attaching creditor] a lien upon the pledged property, to the extent of the interest of the [pledgeor], and that interest was the right to the pledged property, or so much of it or of its proceeds from any collection as remained after the satisfaction of the pledgee's claim for advances."

See also opinion of the same judge in *Simpson v. Jersey City Contracting Co.* 165 N. Y. 193, 55 L.R.A. 796, 58 N. E. 896, where it is said: "The pledgee obtains a special property in the thing pledged, while the pledgeor remains general owner."

The most distinguished New York judge of all times, Chancellor Kent, expressly held in *Cortelyou v. Lansing*, 2 Cai. Cas. 200 (1805), that the legal property in a pledge does not pass as in the case of a mortgage with defeasance; that the general ownership remained with the pledgeor, and only a special property passed to the pledgee, and, further, that the pledgeor's interest passed to his administrators.

If the stock has a situs here, where else can be the situs of the residuum? If the interest of the pledgee is less than absolute and unqualified ownership, how can the residuary interest of the pledgeor have a situs other than that of the subject of the pledge? The stock never ceases to have a situs in this state, whoever may be the owner. *Neilson v. Russell*, supra. If the transfer of full ownership does not change the situs of the property, how can the transfer of a

limited right take out of the jurisdiction or affect the situs of what of the rights of ownership remain after such partial transfer? The tax is in rem; the res is the succession to the proprietary right that a stockholder has in a corporation of this state. Unless the whole of the proprietary right be transferred, the remainder must be taxable here as property of the pledgeor having a situs here, to which his executor succeeds. Of course, the stock has a situs here; and the general property in the thing pledged must continue, notwithstanding the pledge, to have a legal situs here for the purpose of the taxation of the succession to such general property.

The power to tax being established, we have no difficulty in finding in the statute the intention to do so. It is clear that every proprietary interest of whatever nature in those species of property subject to tax is included. The fourth subdivision of § 1 imposes tax "upon the clear market value" of the property, which impliedly recognizes that the property taxed may be encumbered. Sections 2 and 3 tax future and contingent estates of every character. Section 12 forbids the transfer by a corporation, without the comptroller's waiver, of shares of stock of, "or other interests in," the corporation. The last paragraph of § 12 (the ratio provision) necessarily contemplates that every kind of property interest be brought into hotchpot, and puts the nonresident on the same footing as the resident. Section 26 says that the word "transfer" shall be taken to include the passing of "any interest" in property, present or future. Such words as "property" and "interest" are ordinarily used in a revenue act in a popular sense, and should be broadly construed. *Smelting Co. v. Inland Revenue Comrs.* [1896] 2 Q. B. 179, 65 L. J. Q. B. N. S. 513, affirmed in [1897] 1 Q. B. 175, 66 L. J. Q. B. N. S. 137, 75 L. T. N. S. 534, 45 Week. Rep. 203, 61 J. P. 116. In *Re Whiting*, 150 N. Y. 27, 34 L.R.A. 232, 55 Am. St. Rep. 640, 44 N. E. 715. The pledgeor's "equity" certainly is property in a popular sense. It has value; it may be sold; it may be encumbered; it may be made the basis of extending credit. See also, as to the extensive application of the language of the act, *Hopper v. Edwards*, 88 N. J. L. 471, 96 Atl. 667.

Some stress is laid below by the respondent on the rights of the pledgee, and their supposed infringement by the comptroller, but they are not here involved. No pretense is made by the state that its lien on the stock is other than inferior to that of the pledgee. The latter is not before the court, and there appears in the case nothing of interference with his rights. Certain practical difficulties in the collection of such

a tax as this may be compassed within the imagination, but the present case is free therefrom.

It is enough for the decision of this case that the comptroller's consent to transfer was requested by the executor of the decedent's will; that he refused unless payment of the tax was forthcoming; that the tax was paid, the waivers issued, and the stock transferred. The only question before the court is, Had the legislature the power to authorize the assessment and did it do it?

In the opinion of the supreme court (but whether it was the basis of the decision we cannot tell) mention is made of the possibility that the "equity of redemption" be rendered valueless by a resort to the security after the pledgee's death. This possibility would, with equal force, support the proposition that no tax should be levied on an equity in real estate, since that might be foreclosed. This might be due to the owner's neglect to pay the encumbrance, or for other reasons. Likewise a house might be destroyed by wind or flood; a chattel burnt or lost; the assets of the estate might be embezzled; a debt become uncollectable by incompetent management; a security valueless by fluctuations in the market or the receipt of "news from abroad." The tax is on the succession, which occurs at death; and is then due and payable. Section 1. If the subject-matter of the succession be of value at that time, and the universal or particular successors choose to accept the succession, the state may then levy, as of the situation then existing, a premium upon the privilege so to succeed. What becomes of the thing after the state has admitted the successors to the succession is not of its concern. And so hold the authorities. See *Tilford v. Dickinson*, 79 N. J. L. 302, 305, 75 Atl. 574 (reversed on another point in 81 N. J. L. 576, 79 Atl. 1119); *McCurdy v. Mc-*

Curdy, 197 Mass. 248, 16 L.R.A. (N.S.) 329, 83 N. E. 881, 14 Ann. Cas. 859; *Re Penfold*, 216 N. Y. 172, 110 N. E. 499.

The argument of respondent that due prudence and caution require that assessment be withheld pending realization on the pledge is self-destructive. It will not do to say that the state should take into computation the loss or shrinkage, if any, which has taken place in the meantime. It would not be argued that if there be an increase in value, a tax should be laid on this. Of course, the state is not bound to stay the exercise of the taxing power at the pleasure of the pledgee, and chance the collection of a tax on his judgment and honesty, and on the variability of the market's demand for the thing to be sold.

In the case at bar it appears that certain of the New Jersey stocks were sold by the pledgee shortly after Morse's death, at a price in excess of the appraisement. Certainly this did not render valueless the "equity" in these stocks. It was a realization of their value. While the proceeds were applied in reduction of the principal of the debt, this increased correspondingly the "equity" in the other stocks. It is as if the proceeds of the Bethlehem steel preferred which was sold were paid to the respondent, and by it applied to the payment of the testator's legal obligation. The validity of the tax, therefore, is not affected by any of the foregoing matters.

Upon the whole, our conclusion is that the interest of a nonresident deceased pledgee of stock of a New Jersey corporation in such stock is subject to the transfer tax imposed by the Act of 1909 (Pamph. Laws, p. 325; Comp. Stat. p. 5301) as amended in 1914 (Pamph. Laws, p. 267).

The judgment below will be reversed, with costs, with direction for the entry of an order below affirming the assessment and tax.

Annotation—Succession or inheritance tax on interest of pledgee or pledgee.

It will be noted that under the decision in *SECURITY TRUST CO. v. EDWARDS*, ante, 273, only the interest which the pledgee or has in the stock is taxable. It is the doctrine of some New York cases that as long as the stock is pledged, that is, until the debt has been paid, the security of the pledgee cannot be affected by the inheritance tax. Thus, in *Re Pullman* (1900) 46 App. Div. 574, 62 N. Y. Supp. 395, stocks and bonds of New York corporations, belonging to the estate of a nonresident decedent, held in pledge to secure debts of the decedent in New

York, were held not taxable for the reason that "the title to them is in the pledgee, and they are not in a situation to be taxed now as property of the estate of Mr. Pullman. All of their amount may be required to pay the debts to which these bonds and stocks are collateral, and the creditors' security should not be diminished at this time."

Where the executor of the decedent has redeemed stock pledged as collateral security by the decedent, it then becomes taxable. *Re Hurcomb* (1902) 36 Misc. 755, 74 N. Y. Supp. 475. The court

refers to *Re Pullman* (N. Y.) *supra*, and states that while the debt secured by the pledge as collateral is unliquidated, and the extent of the equity is unascertainable, it may be well that the taxation of any equity therein would be postponed until the transaction had been completed and the value of the decedent's interest therein determined, but after the transaction has been closed, and the interest of the estate therein fixed by redemption of the collateral, those securities are no longer liable to be resorted to by creditors, the title to them has reverted to the estate of the pledgeor, and they are in a situation to be classed as property of the estate. They can no longer be required to pay the debt for which they were pledged as collateral, and there is no longer a necessity for protecting the creditor's security, his relation to the matter having terminated.

Stock purchased for the decedent by a broker who advanced the purchase price, the stock together with other stock being held as collateral security, is not taxable as a part of the estate of the decedent, where, after his death, the stock was sold at a loss, and the loss

made good out of the estate. *Re Have-meyer* (1900) 32 Misc. 416, 66 N. Y. Supp. 722.

It is held in *Re Ames* (1913) 141 N. Y. Supp. 793, that stock in a domestic corporation pledged with foreign creditors for the payment of loans made by them to a nonresident decedent was not taxable. The court said that "there was no proof before the appraiser that the loans had been paid, or that the collateral had been sold by the foreign creditors. Therefore at the time of a decedent's death his interest in such collateral consisted of a right to redeem, and as this was not a right to any share or shares of stock of the General Electric Company, but merely a chose in action, it was not taxable under the Transfer Tax Law of this state." The stock in the Ames Case was pledged to a resident of the state of decedent's domicile. This decision was approved by the supreme court of New Jersey in a decision which is reversed in *SECURITY TRUST CO. v. EDWARDS*, ante, 273. See comment on *Re Ames* in opinion of court of errors and appeals. W. A. E.

UNITED STATES SUPREME COURT.

H. SNOWDEN MARSHALL, Appt.,
v.

ROBERT B. GORDON, Sergeant at Arms.

(243 U. S. 521, 61 L. ed. 881, 37 Sup. Ct. Rep. 448.)

Contempt — of Congress — power to punish.

1. The distinction between legislative, executive, and judicial powers, recognized by the Federal Constitution, and the express limitations in such Constitution, negative any implication of the possession by Congress of the commingled legislative-judicial authority as to contempts which is exerted in the English House of Commons.

For other cases, see Congress, in Dig. 1-52 N. S.

Same — implication from necessity.

2. Power to deal directly by way of contempt without criminal prosecution may be implied from the constitutional grant of legislative power to Congress in so far, and so far only, as such authority is necessary to preserve and to carry out the legislative power granted.

For other cases, see Congress, in Dig. 1-52 N. S.

Note. — The power of a legislative body to punish for contempt is discussed in the annotation following this case, post, 288. L.R.A.1917F.

Same — punishment.

3. Punishment for contempt as punishment for the offense was not embraced in the authority to deal directly by way of contempt without criminal prosecution, implied from the constitutional grant of legislative power to Congress, since such power rests only upon the right of self-preservation, i. e., the right to prevent acts which, in and of themselves, inherently obstruct or prevent the discharge of legislative duty, or the refusal to do something which there is an inherent legislative power to compel, in order that legislative functions may be performed.

For other cases, see Congress, in Dig. 1-52 N. S.

Same — extent of punishment.

4. Imprisonment only, and for a term not exceeding the session of the body in which the contempt occurred, is the limit of the authority to deal directly by way of contempt without criminal prosecution, implied from the constitutional grant of legislative power to Congress in so far as such authority is necessary to preserve and to carry out the legislative power granted.

For other cases, see Congress, in Dig. 1-52 N. S.

Same — past conduct.

5. Congressional authority to deal directly by way of contempt without criminal prosecution with acts which interfere with the preservation of its legislative authority does not cease to exist merely because the

act complained of may have been committed before the authority is exerted.

For other cases, see Congress, in Dig. 1-52 N. S.

Same — publication of defamatory letter.

6. The implied power of the House of Representatives to deal directly by way of contempt, without criminal prosecution, with acts, the prevention of which is necessary to preserve and to carry out its legislative authority, does not embrace the punishment, as for a contempt, of the action of a Federal district attorney in writing and publishing a letter addressed to the chairman of a subcommittee of the House, containing matter defamatory to the House or the committee, even conceding that the House was considering, and its committee contemplating, impeachment proceedings.

For other cases, see Congress, in Dig. 1-52 N. S.

(April 23, 1917.)

APPEAL by petitioner from an order of the District Court of the United States for the Southern District of New York refusing to grant a writ of habeas corpus to secure his discharge from the custody to which he had been committed for an alleged contempt of the House of Representatives. Reversed.

The facts are stated in the opinion.

Messrs. Charles P. Spooner, Jesse C. Adkins, and John C. Spooner, for appellant:

The House of Representatives of the United States has no general power to punish any act as a crime. No such power is expressly given to it by the Constitution.

Kilbourn v. Thompson, 103 U. S. 168, 182, 26 L. ed. 377, 384; 1 Tucker, Const. § 205, p. 437.

The House of Representatives has not the same powers as the House of Commons.

Kilbourn v. Thompson, *supra*; Kielley v. Carson, 4 Moore, P. C. C. 63, 13 Eng. Reprint, 225, 7 Jur. 137.

The power to punish a breach of its privileges or any other act as a criminal offense is not necessary to enable the House of Representatives to perform its duties or exercise the powers expressly conferred on it by the Constitution.

M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; *Ex parte Yarbrough*, 110 U. S. 651, 658, 28 L. ed. 274, 276, 4 Sup. Ct. Rep. 152; Kilbourn v. Thompson, 103 U. S. 168, 26 L. ed. 377; Interstate Commerce Commission v. Brimson, 154 U. S. 447, 38 L. ed. 1057, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; *Re Chapman*, 166 U. S. 661, 41 L. ed. 1154, 17 Sup. Ct. Rep. 677.

The English cases hold that the power to punish as a criminal act is not supported by the plea of necessity.

L.R.A.1917F.

Kielley v. Carson, *supra*; Fenton v. Hampton, 11 Moore, P. C. C. 347, 14 Eng. Reprint, 727, 6 Week. Rep. 341; Doyle v. Falconer, L. R. 1 P. C. 328, 4 Moore, P. C. C. N. S. 203, 16 Eng. Reprint, 293, 36 L. J. P. C. N. S. 34, 15 Week. Rep. 366; Hill v. Weldon, 5 N. B. 1.

The sole ground of the power asserted here cannot be necessity. Historically it has never existed as to all the English courts.

Rinehart v. Lance, 43 N. J. L. 311, 39 Am. Rep. 592; *Re Mason*, 43 Fed. 510; *Reg. v. Lefroy*, L. R. 8 Q. B. 134, 42 L. J. Q. B. N. S. 121, 28 L. T. N. S. 132, 21 Week. Rep. 332.

In this case there is an attempt on the part of the House of Representatives to take jurisdiction of and punish an alleged criminal offense. The proceedings are wholly to punish a past transaction, and appellant is entitled to a procedure according to due process of law.

Gompers v. Buck's Stove & Range Co. 221 U. S. 418, 55 L. ed. 797, 34 L.R.A.(N.S.) 874, 31 Sup. Ct. Rep. 492.

Not every court has the power to punish for contempt out if its presence.

Reinhart v. Lance, 43 N. J. L. 311, 39 Am. Rep. 592; 24 Law Quarterly Rev. pp. 184, 266; Trial of Judge J. H. Peck by Stansbury (1833) p. 372.

It is at least doubtful whether even the district courts of the United States would have power to punish as a contempt the appellant's act.

Ex parte Poulson, Fed. Cas. No. 11,350; *Re Daniels*, 131 Fed. 95; *United States v. Toledo Newspaper Co.* 220 Fed. 458; *United States v. Huff*, 206 Fed. 715; *Re Independent Pub. Co.* 228 Fed. 787; *Re Buell*, 3 Dill. 116, Fed. Cas. No. 2,102; *Re Dana*, 68 Fed. 886; *United States v. Smith*, 173 Fed. 227.

Messrs. D-Cady Herrick, Martin W. Littleton, and Henry M. Goldfogle, for appellee:

Congress has the power to punish for contempts committed against it when engaged in any matter within its jurisdiction.

2 Hinds, Precedents of House of Representatives, pp. 1047-1052, 1110; Story, Const. §§ 847, 848, pp. 614, 615; *Anderson v. Dunn*, 6 Wheat. 204, 5 L. ed. 242; *Ex parte Nugent*, Fed. Cas. No. 10,375; *Ex parte Dalton*, 44 Ohio St. 142, 58 Am. Rep. 800, 5 N. E. 136; Rawle, Const. chap. 4, p. 48; 2 Hare, Am. Const. Law, pp. 850, 851.

If the House of Representatives, through its committee, was engaged in a judicial proceeding at the time of the commission of the alleged contempt, then, within the reasoning of the case of Kilbourn v. Thompson, 103 U. S. 168, 26 L. ed. 377, the House

had power and jurisdiction to punish for contempt.

People ex rel. Hackley v. Kelly, 24 N. Y. 74; Percival v. State, 50 Am. St. Rep. 575, note.

Impeachments are judicial proceedings.

2 Wilson's Works, p. 45; 2 Hale, P. C. 150; 4 Bl. Com. 256.

The House of Representatives has jurisdiction to punish for contempt, as an exercise of power necessary to enable it to fully exercise the powers expressly conferred.

United States v. Fisher, 2 Cranch, 358, 396, 2 L. ed. 304, 316; McCulloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Legal Tender Cases, 12 Wall. 457, 583, 20 L. ed. 287, 322; United States v. Gettysburg Electric R. Co. 160 U. S. 668, 40 L. ed. 576, 16 Sup. Ct. Rep. 427; Yates v. Lansing, 9 Johns. 416, 6 Am. Dec. 290; Anderson v. Dunn, 6 Wheat. 204, 5 L. ed. 242; Re Chapman, 166 U. S. 661, 668, 41 L. ed. 1154, 1158, 17 Sup. Ct. Rep. 677; Interstate Commerce Commission v. Brimson, 154 U. S. 447, 486, 38 L. ed. 1047, 1060, 4 Intern. Com. Rep. 545, 14 Sup. Ct. Rep. 1125.

Mr. Chief Justice White delivered the opinion of the court:

These are the facts: A member of the House of Representatives on the floor charged the appellant, who was the district attorney of the southern district of New York, with many acts of misfeasance and nonfeasance. When this was done the grand jury in the southern district of New York was engaged in investigating alleged illegal conduct of the member in relation to the Sherman Anti-trust Law and asserted illegal activities of an organization known as Labor's National Peace Council to which the member belonged. The investigation as to the latter subject not having been yet reported upon by the grand jury, that body found an indictment against the member for a violation of the Sherman Law. Subsequently calling attention to his previous charges and stating others, the member requested that the judiciary committee be directed to inquire and report concerning the charges against the appellant in so far as they constituted impeachable offenses. After the adoption of this resolution a subcommittee was appointed which proceeded to New York to take testimony. Friction there arose between the subcommittee and the office of the district attorney, based upon the assertion that the subcommittee was seeking to unlawfully penetrate the proceedings of the grand jury relating to the indictment and the investigations in question. In a daily newspaper an article appeared charging that the writer was informed that the subcommittee was endeavor-

ing rather to investigate and frustrate the action of the grand jury than to investigate the conduct of the district attorney. When called upon by the subcommittee to disclose the name of his informant, the writer declined to do so and proceedings for contempt of the House were threatened. The district attorney thereupon addressed a letter to the chairman of the subcommittee, avowing that he was the informant referred to in the article, averring that the charges were true, and repeating them in amplified form in language which was certainly unparliamentary and manifestly ill-tempered, and which was well calculated to arouse the indignation not only of the members of the subcommittee, but of those of the House generally. This letter was given to the press so that it might be published contemporaneously with its receipt by the chairman of the subcommittee. The judiciary committee reported the matter to the House and a select committee was appointed to consider the subject. The district attorney was called before that committee and reasserted the charges made in the letter, averring that they were justified by the circumstances, and stating that they would, under the same conditions, be made again. Thereupon the select committee made a report and stated its conclusions and recommendations to the House as follows:

"We conclude and find that the aforesaid letter written and published by said H. Snowden Marshall to Hon. C. C. Carlin, chairman of the subcommittee of the judiciary committee of the House of Representatives, on March 4, 1916, . . . is as a whole and in several of the separate sentences defamatory and insulting and tends to bring the House into public contempt and ridicule, and that the said H. Snowden Marshall, by writing and publishing the same, is guilty of contempt of the House of Representatives of the United States because of the violation of its privileges, its honor, and its dignity."

Upon the adoption of this report, under the authority of the House a formal warrant for arrest was issued and its execution by the Sergeant at Arms in New York was followed by an application for discharge on habeas corpus; and the correctness of the judgment of the court below, refusing the same, is the matter before us on this direct appeal.

Whether the House had power under the Constitution to deal with the conduct of the district attorney in writing the letter as a contempt of its authority, and to inflict punishment upon the writer for such contempt as a matter of legislative power, that is, without subjecting him to the statutory modes of trial provided for criminal

offenses, protected by the limitations and safeguards which the Constitution imposes as to such subject, is the question which is before us. There is unity between the parties only in one respect; that is, that the existence of constitutional power is the sole matter to be decided. As to all else there is entire discord, every premise of law or authority relied upon by the one side being challenged in some respects by the other. We consider, therefore, that the shortest way to meet and dispose of the issue is to treat the subject as one of first impression, and we proceed to do so.

Undoubtedly what went before the adoption of the Constitution may be resorted to for the purpose of throwing light on its provisions. Certain is it that authority was possessed by the House of Commons in England to punish for contempt directly, that is, without the intervention of courts, and that such power included a variety of acts and many forms of punishment, including the right to fix a prolonged term of imprisonment. Indubitable also is it, however, that this power rested upon an assumed blending of legislative and judicial authority possessed by the Parliament when the Lords and Commons were one, and continued to operate after the division of the Parliament into two houses, either because the interblended power was thought to continue to reside in the Commons, or by the force of routine the mere reminiscence of the commingled powers led to a continued exercise of the wide authority as to contempt formerly existing long after the foundation of judicial-legislative power upon which it rested had ceased to exist. That this exercise of the right of legislative-judicial power to exert the authority stated prevailed in England at the time of the adoption of the Constitution and for some time after has been so often recognized by the decided cases relied upon and by decisions of this court, some of which are in the margin,¹ as to make it too certain for anything but statement.

Clear also is it, however, that in the state governments prior to the formation of the Constitution the incompatibility of the intermixture of the legislative and judicial power was recognized and the duty of sepa-

rating the two was felt, as was manifested by provisions contained in some of the state Constitutions enacted prior to the adoption of the Constitution of the United States, as illustrated by the following articles in the Constitution of Maryland and Massachusetts:

"That the house of delegates may punish, by imprisonment, any person who shall be guilty of a contempt in their view, by any disorderly or riotous behaviour, or by threats to, or abuse of their members, or by any obstruction to their proceedings. They may also punish, by imprisonment, any person who shall be guilty of a breach of privilege, by arresting on civil process, or by assaulting any of their members, during their sitting, or on their way to, or return from the house of delegates, or by any assault of, or obstruction to their officers, in the execution of any order or process, or by assaulting or obstructing any witness, or any other person, attending on, or on their way to or from the house, or by rescuing any person committed by the house: and the senate may exercise the same power, in similar cases." Md. Const. 1776, art. 12.

"They [the house of representatives] shall have authority to punish by imprisonment every person, not a member, who shall be guilty of disrespect to the house, by any disorderly or contemptuous behavior in its presence; or who, in the town where the general court is setting, and during the time of its sitting, shall threaten harm to the body or estate of any of its members, for anything said or done in the house; or who shall assault any of them therefor; or who shall assault or arrest any witness, or other person, ordered to attend the house, in his way in going or returning; or who shall rescue any person arrested by the order of the house.

"And no member of the house of representatives shall be arrested, or held to bail on mean process, during his going unto, returning from, or his attending the general assembly.

"The senate shall have the same powers in the like cases; and the governor and council shall have the same authority to punish in like cases: Provided, That no imprisonment, on the warrant or order of the governor, council, senate or house of representatives, for either of the above-described offenses, be for a term exceeding thirty days." Const. Mass. 1780, pt. 2, chap. 1, § 3, arts. 10 and 11.

The similarity of the provisions points to the identity of the evil which they were intended to reach. Clearly they operate to destroy the admixture of judicial and legislative power as prevailing in the House of Commons, since the provisions in both the

¹ *Crosby's Case*, 3 Wils. 188, 95 Eng. Reprint, 1005, 2 W. Bl. 754; *Burdett v. Abbot*, 14 East. 1, 104 Eng. Reprint, 501, 5 Dow. P. C. 165, 3 Eng. Reprint, 1289, 4 Taunt. 401, 128 Eng. Reprint, 384, 12 Revised Rep. 450; *Stockdale v. Hansard*, 9 Ad. & El. 1, 112 Eng. Reprint, 1112, 2 Perry & D. 1, 8 L. J. Q. B. N. S. 294, 3 Jur. 905; *Anderson v. Dunn*, 6 Wheat. 204, 5 L. ed. 242; *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. ed. 377. L.R.A.1917F.

state Constitutions and the limitations accompanying them are wholly incompatible with judicial authority. Moreover, as under state Constitutions all governmental power not denied is possessed, the provisions were clearly not intended to give legislative power as such, for full legislative power to deal with the enumerated acts as criminal offenses and provide for their punishment accordingly already obtained. The object, therefore, of the provisions, could only have been to recognize the right of the legislative power to deal with the particular acts without reference to their violation of the criminal law and their susceptibility of being punished under that law because of the necessity of such a legislative authority to prevent or punish the acts independently, because of the destruction of legislative power which would arise from such acts if such authority was not possessed.

How dominant these views were can be measured by the fact that in various other states almost contemporaneously with the adoption of the Constitution similar provisions were written into their Constitutions and continued to be adopted until it is true to say that they became, if not universal, certainly largely predominant in the states.²

No power was expressly conferred by the Constitution of the United States on the subject except that given to the House to deal with contempt committed by its own members. Article 1, § 5. As the rule concerning the Constitution of the United States is that powers not delegated were reserved to the people or the states, it follows that no other express authority to deal with contempt can be conceived of. It comes, then, to this: was such an authority implied from the powers granted? As it is unthinkable that in any case from a power expressly granted there can be implied the authority to destroy the grant made, and as the possession by Congress of the commingled legislative-judicial authority as to contempts which was exerted in the House of Commons would be absolutely destructive of the distinction between legislative, executive, and judicial authority which is interwoven in the very fabric of the Constitution, and would disregard express limitations therein, it must follow that there is no ground whatever for assuming that any im-

plication as to such a power may be deduced from any grant of authority made to Congress by the Constitution. This conclusion has long since been authoritatively settled and is not open to be disputed. *Anderson v. Dunn*, 6 Wheat. 204, 5 L. ed. 242; *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. ed. 377. Whether the right to deal with contempt in the limited way provided in the state Constitutions may be implied in Congress as the result of the legislative power granted must depend upon how far such limited power is ancillary or incidental to the power granted to Congress,—a subject which we shall hereafter approach.

The rule of constitutional interpretation announced in *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579, that that which was reasonably appropriate and relevant to the exercise of a granted power was to be considered as accompanying the grant, has been so universally applied that it suffices merely to state it. And as there is nothing in the inherent nature of the power to deal with contempt which causes it to be an exception to such rule, there can be no reason for refusing to apply it to that subject.

Thus, in *Anderson v. Dunn*, *supra*, which was an action for false imprisonment against the Sergeant at Arms of the House for having executed a warrant for arrest issued by that body in a contempt proceeding, after holding, as we have already said, that the power possessed by the House of Commons was incompatible with the Constitution and could not be exerted by the House, it was yet explicitly decided that from the power to legislate given by the Constitution to Congress there was to be implied the right of Congress to preserve itself; that is, to deal by way of contempt with direct obstructions to its legislative duties. In *Kilbourn v. Thompson*, *supra*, which was also a case of false imprisonment for arrest under a warrant issued by order of the House in a contempt proceeding, although the want of right of the House of Representatives to exert the judicial-legislative power possessed by the House of Commons was expressly reiterated, the question was reserved as to the right to imply an authority in the House of Representatives to deal with contempt as to a subject-matter within its jurisdiction, the particular case having been decided on the ground that the subject with which the contempt proceedings were concerned was totally beyond the jurisdiction of the House to investigate. But in *Re Chapman*, 166 U. S. 661, 41 L. ed. 1154, 17 Sup. Ct. Rep. 677, the principle of the existence of an implied legislative authority under certain conditions to deal with contempt was again con-

² 1790, South Carolina, art. 1, § 13; 1792, New Hampshire, pt. 2, §§ 22 and 23; 1796, Tennessee, art. 1, § 11; 1798, Georgia, art. 1, § 13; 1802, Ohio, art. 1, § 14; 1816, Indiana, art. 3, § 14; 1817, Mississippi, art. 3, § 20; 1818, Illinois, art. 2, § 13; 1820, Maine, art. 4, pt. 3, § 6; 1820, Missouri, art. 3, § 19.
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sidered and upheld. The case was this: Chapman had refused to testify in a Senate proceeding, and was indicted under § 102 of the Revised Statutes (Comp. Stat. 1913, § 157) making such refusal criminal. He sued out a habeas corpus on the ground that the subject of the refusal was exclusively cognizable by the Senate, and that therefore the statute was unconstitutional as a wrongful delegation by the Senate of its authority, and because to subject him to prosecution under the statute might submit him to double jeopardy; that is, leave him after punishment under the statute to be dealt with by the Senate as for contempt. After demonstrating the want of merit in the argument as to delegation of authority, the proposition was held to be unsound and the contention as to double jeopardy was also adversely disposed of on the ground of the distinction between the implied right to punish for contempt and the authority to provide by statute for punishment for wrongful acts and to prosecute under the same for a failure to testify, the court saying that "the two being diverso intuitu and capable of standing together," they were susceptible of being separately exercised.

And light is thrown upon the right to imply legislative power to deal directly by way of contempt without criminal prosecution with acts the prevention of which is necessary to preserve legislative authority, by the decision of the Privy Council in *Kielley v. Carson*, 4 Moore, P. C. C. 63, 13 Eng. Reprint, 226, which was fully stated in *Kilbourn v. Thompson*, *supra*, but which we again state. The case was this: *Kielley* was adjudged by the House of Assembly of Newfoundland guilty of contempt for having reproached a member "in coarse and threatening language" for words spoken in debate in the House. A warrant was issued and *Kielley* was arrested. When brought before the House he refused to apologize and indulged in further violent language toward the member and was committed. Having been discharged on habeas corpus proceedings, he brought an action for false imprisonment against the Speaker and other members of the House. As a justification the defendants pleaded that they had acted under the authority of the House. A demurrer to the plea was overruled and there was a judgment for the defendants. The appeal was twice heard by the Privy Council, the court on the second argument having been composed of the Lord Chancellor (*Lyndhurst*), Lords *Brougham Denman*, *Abinger*, *Cottenham*, and *Campbell*, the Vice Chancellor (*Shadwell*), the Lord Chief Justice of the Common Pleas (*Tindal*), Mr. L.R.A.1917F.

Justice *Erskine*, *Lushington*, and *Baron Parke*.

The opinion on reversal was written by *Parke, B.*, who said:

"The main question raised by the pleadings, . . . was whether the House of Assembly had the power to arrest and bring before them, with a view to punishment, a person charged by one of its members with having used insolent language to him out of the doors of the House, in reference to his conduct as a member of the Assembly, —in other words, whether the House had the power, such as is possessed by both Houses of Parliament in England, to adjudicate upon a complaint of contempt or breach of privilege."

After pointing out that the power was not expressly granted to the local legislature by the Crown, it was said the question was "whether by law, the power of committing for a contempt, not in the presence of the Assembly, is incident to every local legislature."

"The statute law on this subject being silent, the common law is to govern it; and what is the common law depends upon principle and precedent.

"Their Lordships see no reason to think that in the principle of the common law any other powers are given them than such as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute. These powers are granted by the very act of its establishment,—an act which, on both sides, it is admitted, it was competent for the Crown to perform. This is the principle which governs all legal incidents." And after quoting the aphorism of the Roman law to the effect that the conferring of a given power carried with it by implication the right to do those things which were necessary to the carrying out of the power given, the opinion proceeded: "In conformity to this principle we feel no doubt that such an Assembly has the right of protecting itself from all impediments to the due course of its proceeding. To the full extent of every measure which it may be really necessary to adopt, to secure the free exercise of their legislative functions, they are justified in acting by the principle of the common law. But the power of punishing anyone for past misconduct as a contempt of its authority, and adjudicating upon the fact of such contempt, and the measure of punishment as a judicial body, irresponsible to the party accused, whatever the real facts may be, is of a very different character, and by no means essentially necessary for the exercise of its functions by a local legislature, whether representative or not. All these functions may be well

performed without this extraordinary power; and with the aid of the ordinary tribunals to investigate and punish contemptuous insults and interruptions."

There can be no doubt that the ruling in the case just stated upheld the existence of the implied power to punish for contempt as distinct from legislative authority and yet flowing from it. It thus becomes apparent that from a doctrinal point of view the English rule concerning legislative bodies generally came to be in exact accord with that which was recognized in *Anderson v. Dunn*, 6 Wheat. 204, 5 L. ed. 242, as belonging to Congress; that is, that in virtue of the grant of legislative authority there would be a power implied to deal with contempt in so far as that authority was necessary to preserve and carry out the legislative authority given. While the doctrine of *Kielley v. Carson* was thus in substantive principle the same as that announced in *Anderson v. Dunn*, we must not be understood as accepting the application which was made of the rule to the particular case there in question, since, as we shall hereafter have occasion to show, we think that the application was not consistent with the rule which the case announced, and would, if applied, unwarrantedly limit the implied power of Congress to deal with contempt.

What does this implied power embrace? is thus the question. In answering, it must be borne in mind that the power rests simply upon the implication that the right has been given to do that which is essential to the execution of some other and substantive authority expressly conferred. The power is therefore but a force implied to bring into existence the conditions to which constitutional limitations apply. It is a means to an end, and not the end itself. Hence it rests solely upon the right of self-preservation to enable the public powers given to be exerted.

These principles are plainly the result of what was decided in *Anderson v. Dunn*, supra, since in that case, in answering the question what was the rule by which the extent of the implied power of legislative assemblies to deal with contempt was controlled, it was declared to be "*the least possible power adequate to the end proposed*" (6 Wheat. 231, 5 L. ed. 248), which was but a form of stating that as it resulted from implication, and not from legislative will, the legislative will was powerless to extend it further than implication would justify. The concrete application of the definition and the principle upon which it rests were aptly illustrated in *Re Chapman*, 166 U. S. 661; 41 L. ed. 1154, 17 Sup. Ct. Rep. 677, where, because of the distinction existing between the two which was drawn, L.R.A.1917F.

the implied power was decided not to come under the operation of a constitutional limitation applicable to a case resting upon the exercise of substantive legislative power.

Without undertaking to inclusively mention the subjects embraced in the implied power, we think from the very nature of that power it is clear that it does not embrace punishment for contempt as punishment, since it rests only upon the right of self-preservation; that is, the right to prevent acts which, in and of themselves, inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed. And the essential nature of the power also makes clear the cogency and application of the two limitations which were expressly pointed out in *Anderson v. Dunn*, supra; that is, that the power, even when applied to subjects which justified its exercise, is limited to imprisonment, and such imprisonment may not be extended beyond the session of the body in which the contempt occurred. Not only the adjudged cases, but congressional action in enacting legislation as well as in exerting the implied power, conclusively sustain the views just stated. Take, for instance, the statute referred to in *Re Chapman*, where, not at all interfering with the implied congressional power to deal with the refusal to give testimony in a matter where there was a right to exact it, the substantive power had been exerted to make such refusal a crime, the two being distinct the one from the other. So, also, when the difference between the judicial and legislative powers is considered and the divergent elements which, in the nature of things, enter into the determination of what is self-preservation in the two cases, the same result is established by the statutory provisions dealing with the judicial authority to summarily punish for contempt; that is, without resorting to the modes of trial required by constitutional limitations or otherwise for substantive offenses under the criminal law. Act of March 2, 1831 (4 Stat. at L. 487, chap. 99, Comp. Stat. 1913, § 1245). The legislative history of the exertion of the implied power to deal with contempt by the Senate or House of Representatives when viewed comprehensively from the beginning points to the distinction upon which the power rests, and sustains the limitations inhering in it which we have stated. The principal instances are mentioned in the margin,³ and they all, except two or three,

³ 1795, attempt to bribe members of the House; 1800, publication of criticism of the Senate; 1809, assault on a member of the House; 1818, attempt to bribe a member

deal with either physical obstruction of the legislative body in the discharge of its duties, or physical assault upon its members for action taken or words spoken in the body, or obstruction of its officers in the performance of their official duties, or the prevention of members from attending so that their duties might be performed, or finally with contumacy in refusing to obey orders to produce documents or give testimony which there was a right to compel. In the two or three instances not embraced in the classes we think it plainly appears that for the moment the distinction was overlooked which existed between the legislative power to make criminal every form of act which can constitute a contempt, to be punished according to the orderly process of law, and the accessory implied power to deal with particular acts as contempts outside of the ordinary process of law because of the effect such particular acts may have in preventing the exercise of legislative authority. And in the debates which ensued when the various cases were under consideration it would seem that the difference between the legislative and the judicial power was also sometimes forgotten; that is to say, the legislative right to exercise discretion was confounded with the want of judicial power to interfere with the legislative discretion when lawfully exerted. But these considerations are accidental and do not change the concrete result manifested by considering the subject from the beginning. Thus we have been able to discover no single instance where, in the exertion of the power to compel testimony, restraint was ever made to extend beyond the time when the witness should signify his willingness to testify, the penalty or punishment for the refusal remaining controlled by the general criminal law. So, again, we have been able to discover no instance, except the two or three above referred to, where acts of physical interference were treated as within the implied power unless they possessed the obstructive or preventive characteristics which we have stated, or any case where any restraint was imposed after it became manifest that there was no room for a legislative judgment as to the virtual continuance of the wrongful interference which was the subject of consideration. And this latter statement causes us to say, referring to *Kielley v. Carson*, 4 Moore, P. C. C. 63, 13 Eng. Reprint, 225, 7 Jur. 137, that where

a particular act, because of its interference with the right of self-preservation, comes within the jurisdiction of the House to deal with directly under its implied power to preserve its functions, and therefore without resort to judicial proceedings under the general criminal law, we are of opinion that authority does not cease to exist because the act complained of had been committed when the authority was exerted, for to so hold would be to admit the authority and at the same time to deny it. On the contrary, when an act is of such a character as to subject it to be dealt with as a contempt under the implied authority, we are of opinion that jurisdiction is acquired by Congress to act on the subject, and therefore there necessarily results from this power the right to determine, in the use of legitimate and fair discretion, how far from the nature and character of the act there is necessity for repression to prevent immediate recurrence; that is to say, the continued existence of the interference or obstruction to the exercise of the legislative power. And of course in such case, as in every other, unless there be manifest an absolute disregard of discretion and a mere exertion of arbitrary power coming within the reach of constitutional limitations, the exercise of the authority is not subject to judicial interference.

It remains only to consider whether the acts which were dealt with in the case in hand were of such a character as to bring them within the implied power to deal with contempt; that is, the accessory power possessed to prevent the right to exert the powers given from being obstructed and virtually destroyed. That they were not would seem to be demonstrated by the fact that the contentions relied upon in the elaborate arguments at bar to sustain the authority were principally rested not upon such assumption, but upon the application and controlling force of the rule governing in the House of Commons. But aside from this, coming to test the question by a consideration of the conclusion upon which the contempt proceedings were based as expressed in the report of the select committee which we have previously quoted, and the action of the House of Representatives, based on it, there is room only for the conclusion that the contempt was deemed to result from the writing of the letter, not because of any obstruction to the perform-

of the House; 1828, assault on the Secretary to the President in the Capitol; 1832, assault on a member of the House; 1835, assault on a member of the House; 1842, contumacious witness; 1857, contumacious witness; 1858, contumacious witness; 1859, contumacious witness; 1865, assault on a L.R.A.1917F.

member of the House; 1866, assault on a clerk of a committee of the House; 1870, assault on a member of the House; 1871, contumacious witness; 1874, contumacious witness; 1876, contumacious witness; 1894, contumacious witness; 1913, assault on a member of the House.

ance of legislative duty resulting from the letter, or because the preservation of the power of the House to carry out its legislative authority was endangered by its writing, but because of the effect and operation which the irritating and ill-tempered statements made in the letter would produce upon the public mind, or because of the sense of indignation which it may be assumed was produced by the letter upon the members of the committee and of the House generally. But to state this situation is to demonstrate that the contempt relied upon was not intrinsic to the right of the House to preserve the means of discharging its legislative duties, but was extrinsic to the discharge of such duties, and related only to the presumed operation which the letter might have upon the public mind and the indignation naturally felt by members of the committee on the subject. But these considerations plainly serve to mark the broad boundary line which separates the limited implied power to deal with classes of acts as contempts for self-preservation and the comprehensive legislative power to provide by law for punishment for wrongful acts.

The conclusions which we have stated bring about a concordant operation of all the powers of the legislative and judicial departments of the government, express or implied, as contemplated by the Constitution. And as this is considered, the reverent thought may not be repressed that the result is due to the wise foresight of the fathers, manifested in state Constitutions even before the adoption of the Constitution of the United States, by which they substituted for the intermingling of the legislative and judicial power to deal with contempt as it existed in the House of Commons a system permitting the dealing with that subject in such a way as to prevent the obstruction of the legislative powers granted and secure their free exertion, and yet, at the same time, not substantially interfere with the great guaranties and limitations concerning the exertion of the power to criminally punish,—a beneficent result which additionally arises from the golden silence by which the framers of the Constitution left the subject to be controlled by the implication of authority resulting from the powers granted.

It is suggested in argument that whatever be the general rule, it is here not applicable because the House was considering and its committee contemplating impeachment proceedings. The argument is irrelevant because we are of opinion that the premise upon which it rests is unfounded. But indulging in the assumption to the contrary, L.R.A.1917F.

we think it is wholly without merit, as we see no reason for holding that if the situation suggested be assumed, it authorized a disregard of the plain purposes and objects of the Constitution as we have stated them. Besides, it must be apparent that the suggestion could not be accepted without the conclusion that, under the hypothesis stated, the implied power to deal with contempt as ancillary to the legislative power had been transformed into judicial authority and become subject to all the restrictions and limitations imposed by the Constitution upon that authority,—a conclusion which would frustrate and destroy the very purpose which the proposition is advanced to accomplish and would create a worse evil than that which the wisdom of the fathers corrected before the Constitution of the United States was adopted. How can this be escaped, since it is manifest that if the argument were to be sustained those things which, as pointed out in *Re Chapman*, 168 U. S. 661, 41 L. ed. 1154, 17 Sup. Ct. Rep. 677, were distinct and did not therefore the one frustrate the other,—the implied legislative authority to compel the giving of testimony and the right criminally to punish for failure to do so,—would become one and the same and the exercise of one would therefore be the exertion of, and the exhausting of the right to resort to, the other. Again, accepting the proposition, by what process of reasoning could the conclusion be escaped that the right to exert implied authority by way of contempt proceedings in so far as essential to preserve legislative power would become itself an exertion of legislative power and thus at once be subject to the limitations as to modes of trial exacted by the guaranty of the Constitution on that subject? We repeat, out of abundance of precaution, we are called upon to consider not the legislative power of Congress to provide for punishment and prosecution under the criminal laws in the amplest degree for any and every wrongful act, since we are alone called upon to determine the limits and extent of an ancillary and implied authority essential to preserve the fullest legislative power, which would necessarily perish by operation of the Constitution if not confined to the particular ancillary atmosphere from which alone the power arises and upon which its existence depends.

It follows from what we have said that the court below erred in refusing to grant the writ of habeas corpus, and its action must be and it is, therefore, reversed, and the case remanded with directions to discharge the relator from custody.

And it is so ordered.

Annotation—Power of legislative body to punish for contempt.

The opinion of the court in *MARSHALL v. GORDON*, ante, 279, refers to the fundamental questions involved in the commitment for contempt by American legislative bodies, both national and state. The matter of the power of these bodies to punish for contempt has usually come before the courts in relation to the punishment of contumacious witnesses called before a committee of a legislative house. Perhaps the most frequent objection to the commitment is that it involved an arrogation of judicial power which is in general not possessed by our legislative bodies, except in relation to the qualifications and elections of their own members. The reader will recognize from the nature of the subject that the obiter dicta in the cases thereon are not likely to be much regarded by the courts.

In *Anderson v. Dunn*¹ it was held

that the courts must respect the power and authority of acts done under a resolution of the House of Representatives which recites that a certain person has been guilty of a breach of the privileges of the House and of a high contempt of its dignity and authority, and directs that he be taken into custody. The court said, *inter alia*: "The present question is, What is the extent of the punishing power which the deliberative assemblies of the Union may assume and exercise on the principle of self-preservation? Analogy and the nature of the case furnish the answer,—*The least possible power adequate to the end proposed*;" which is the power of imprisonment" terminating on dissolution of the legislative body. This was the law of the land for fifty-nine years.²

¹ (1821) 6 Wheat. (U. S.) 204, 5 L. ed. 242.

The action was brought for assault and battery and false imprisonment, and the Supreme Court affirmed a judgment for the defendant, overruling a demurrer to his plea which had alleged that he was the Sergeant at Arms of the United States House of Representatives, that the House had resolved that the plaintiff had been guilty of a breach of the privileges of the House and of a high contempt of the dignity and authority of the same, etc., that the Speaker as directed by the House issued his warrant to the defendant, reciting the resolution and directing the defendant to take the plaintiff and bring him to the bar to answer the charge, etc., that he brought the plaintiff to the bar, and that the matter was continued and adjourned from day to day for several days, when the House found the plaintiff guilty of the charge, and he was forthwith reprimanded and discharged from custody.

² In *Ex parte Nugent* (1848) Fed. Cas. No. 10,375, the circuit court of the District of Columbia remanded one imprisoned by the United States Senate for contempt in refusing to answer questions put to him by the Senate. The court apparently follows the theory of the English cases as to the power of the House of Commons, and reviews the authorities at length.

It was held to be a good plea in an action for assault and false imprisonment against the Speaker of the House of Representatives that the House ordered the arrest of the plaintiff for contempt in refusing to answer questions put by a committee of the House. *Stewart v. Blaine* (1874) 1 MacArth. (D. C.) 453, citing *Anderson v. Dunn* (U. S.) supra. The same was held as to a plea of the Sergeant at Arms of the House. *Stewart v. Ordway* cited in (1874) 1 MacArth. (D. C.) 458. L.R.A.1917F.

In *Wilckens v. Willet* (1864) 4 Abb. App. Dec. (N. Y.) 596, 1 Keyes, 521, the court gave judgment for the defendant, the sheriff, in an action against him for the escape of a prisoner in a civil action who was taken from the sheriff's custody under a warrant of the United States House of Representatives requiring the prisoner to answer a charge of contempt of such House. The court said: "Any extended examination of the question of the general power of the House of Representatives of the United States Congress to subpoena witnesses to testify before it, or before one of its committees, and to compel their attendance from any portion of the territorial limits of the United States, is rendered unnecessary in this case by the full and unreserved concession of the learned counsel for the plaintiff of the existence of such a power in that body. That the power exists there admits of no doubt whatever. It is a necessary incident to the sovereign power of making laws; and its exercise is often indispensable to the great end of enlightened, judicious, and wholesome legislation. The power is rather judicial in its nature, but in a legislative body exists as an auxiliary to the legislative power only."

It may be noted in this connection that it has been held that a state court will release a prisoner in custody of one whom the Sergeant at Arms of the United States Senate has deputized to execute a warrant of the Senate, directed to the Sergeant at Arms, commanding him to bring such person before the Senate, and not authorizing anyone else to do so. *Sanborn v. Carleton* (1860) 15 Gray (Mass.) 399.

In *Whitcomb's Case* (1876) 120 Mass. 118, 21 Am. Rep. 502, a case without the scope of this note, Gray, Ch. J., said obiter: "In the United States, each branch of a supreme legislature has the same power to commit for contempt as either House of

In *Kilbourn v. Thompson*³ the plaintiff sued for false imprisonment certain members of a committee of the House of Representatives and the Sergeant at Arms, who pleaded in justification that the House by resolution committed the plaintiff for contempt for contumacy as a witness, setting up fully in detail the matter under investigation and the conduct of the plaintiff. The Supreme Court in reversing a judgment for the defendants held that the matter under investigation, which was certain affairs of a debtor of the United States, was beyond the power of the House in that such an investigation was of a judicial character, and that consequently the Sergeant at Arms was not protected by the resolution of the House, but that the members of the committee could not be questioned in another place than the House for their acts, which were limited to advising and directing in the matter. The court refers to *Anderson v. Dunn*, as having been decided under pressure of the strong rulings of the English courts in favor of the privileges of the two Houses of Parliament, and before the decisions in *Stockdale v. Hansard*⁴ and *Kielley v. Carson*.⁵

The case of *Re Chapman*⁶ is sufficiently dealt with in *MARSHALL v. GORDON*, ante, 273, except that it appears that the investigation by the Senate related to charges against Senators.

It will be seen that the *MARSHALL CASE* follows *Kilbourn v. Thompson*, and holds that the courts will review the act of a House of Congress in committing for contempt, at least where the facts constituting the contempt appear.

Parliament. Such a power has been adjudged to be inherent in the Federal Senate and House of Representatives, although not expressed in the Constitution. *Anderson v. Dunn* (1821) 6 Wheat. (U. S.) 204, 5 L. ed. 242.

³ (1880) 103 U. S. 168, 26 L. ed. 377.

⁴ (1839) 9 Ad. & El. 1, 112 Eng. Reprint, 1112, 2 Perry & D. 1, 8 L. J. Q. B. N. S. 294, 3 Jur. 905.

⁵ (1841) 4 Moore P. C. C. 63, 13 Eng. Reprint, 225, 7 Jur. 137.

The court in the *Kilbourn Case* also specially refers to the opinion of Hoar, J., in *Burnham v. Morrissey* (1859) 14 Gray (Mass.) 226, 74 Am. Dec. 676, quoted from *infra*, and further states that *Anderson v. Dunn* "is no precedent for a case where the plea establishes, as we have shown it does in this case by its recital of the facts, that the House has exceeded its authority."

⁶ (1896) 166 U. S. 661, 41 L. ed. 1154, 17 Sup. Ct. Rep. 677.

⁷ See *Ellenborough, Ch. J.*, in *Burdett v. L.R.A.1917F.*

Houses of English Parliament.

The power over contempt of the English Houses of Parliament is ancient and arose prior to the separation of the two Houses.⁷

"The reason why the House of Commons has this power is not because it is a representative body with legislative functions, but by virtue of ancient usage and prescription,—the *lex et consuetudo Parliamenti*, which forms a part of the common law of the land, and according to which the High Court of Parliament before its division, and the Houses of Lords and Commons since, are invested with many peculiar privileges, that of punishing for contempt being one."⁸

In *Shaftsbury's Case*⁹ it was held that during the session the court will remand a member imprisoned by the House of Lords, the warrant declaring simply "for the high contempt of this House." This was the first instance of a *habeas corpus* upon a commitment by the House of Lords.¹⁰ In *Rex v. Flower*¹¹ the court remanded one committed by the House of Lords for high breach of privileges of the House in publishing a libel on a bishop, the House having fined him £100 and ordered him to be imprisoned for six months and until he paid the fine. It was argued that the House could not fine, and that imprisonment for six months was illegal, as it might exceed the term of the Session of Parliament. But it was held that the House in this case was sitting in a judicial capacity, and as such was a court of record, and might fine as a court of record might.

The first *habeas corpus* ever brought by persons committed by the House of Commons was in *Reg. v. Paty*,¹² where

Abbot (1811) 14 East, 1, 104 Eng. Reprint, 501, 12 Revised Rep. 450; *Parke, B.*, in *Kielley v. Carson* (Eng.) and *Miller, J.*, in *Kilbourn v. Thompson* (U. S.) *supra*, and the opinion in *MARSHALL v. GORDON*.

In *Tracey's Case* (1832) *Stuart* (L. C.) 478, *Kerr, J.*, said: "In regard to the two branches of the imperial Parliament there can be no doubt that the privileges which they now enjoy, and the functions they exercise, were claimed, enjoyed, and exercised by them previously to the separation of the two Houses, so early as the close of the reign of Henry III."

⁸ *Parke, B.*, in *Kielley v. Carson* (Eng.) *supra*.

⁹ (1677) 1 Mod. 144, 86 Eng. Reprint, 792.

¹⁰ *Gould, J.*, in *Reg. v. Paty* (1705) 2 Ld. Raym. 1105, 92 Eng. Reprint, 232.

¹¹ (1799) 8 T. R. 314, 101 Eng. Reprint, 1408, 4 Revised Rep. 662.

¹² (Eng.) *supra*.

the court remanded one imprisoned by that House for committing a breach of its privileges in that he had brought an action at common law against constables for not allowing his vote in an election of members of the House.

The courts would not review the act of the House of Commons in committing for contempt, although the nature of the contempt did not appear.¹³

Some of the best known cases were those of punishment of members where the court declined to interfere.¹⁴ But its power was also sustained to send for witnesses to be examined at the bar of

the House.¹⁵ The court and House of Commons both visited punishment upon the sheriff in the *Hansard Case*, but the court declined to review his punishment by the House.¹⁶

It was the theory that commitments by the House of Commons for contempt were not to extend beyond the prorogation or dissolution of Parliament.¹⁷

English colonial houses.

The earlier decisions held that British colonial legislatures had powers over contempt similar to the English House of Commons. This was held in Canada¹⁸ and in England.¹⁹

¹³ *Murray's Case* (1751) 1 Wils. 299, 95 Eng. Reprint, 629, declining to bail one committed. Wright, J., said: "It need not appear to us what the contempt was, for if it did appear, we could not judge thereof. . . . No case has been cited wherever this court interposed."

In *Hobhouse's Case* (1820) 3 Barn. & Ald. 420, 106 Eng. Reprint, 716, the court remanded one imprisoned under a warrant of the Speaker of the House of Commons, on the ground that the court could not interfere, but the form of the warrant is not reported.

¹⁴ In *Crosby's Case* (1771) 3 Wils. 188, 95 Eng. Reprint, 1005, 2 W. Bl. 754, 96 Eng. Reprint, 441, the court declined to release the lord mayor of London, a member of the House of Commons imprisoned by that House for committing a breach of its privileges in that he discharged a printer in custody of a messenger of the house, signed a warrant for the commitment of such messenger, and held him to bail.

In *Burdett v. Abbot* (1811) 14 East, 1, 104 Eng. Reprint, 501, 12 Revised Rep. 450, the court ordered judgment for the defendant, the Speaker of the House of Commons, who was sued in trespass by a member of the House, in that the defendant had sent a force to the plaintiff's house, had broken in and taken the plaintiff and imprisoned him, it appearing that the plaintiff was ordered committed by the House for having published a paper reflecting on the rights and privileges of the House. Affirmed in (1812) 4 Taunt. 401, 128 Eng. Reprint, 384, which is affirmed in House of Lords (1817) 5 Dow. P. C. 165, 3 Eng. Reprint, 1289.

¹⁵ *Gosset v. Howard* (1845) 10 Q. B. 411, 116 Eng. Reprint, 158, reversing (1845) 10 Q. B. 359, 116 Eng. Reprint, 139, 16 L. J. Q. B. N. S. 345, 11 Jur. 750.

¹⁶ *Stockdale v. Hansard* (1839) 9 Ad. & El. 1, 112 Eng. Reprint, 1112, 2 Perry & D. 1, 8 L. J. Q. B. N. S. 294, 3 Jur. 905, cited in *MARSHALL v. GORDON*, ante, 273, was an action of libel for publishing a certain report of the inspectors of prisons, printed by order of the House of Commons, and judgment was for the plaintiff. Thereafter the sheriff levied an execution on the judgment and collected the L.R.A.1917F.

money, and was ordered to show cause why he should not pay it over to the plaintiff. He showed that he was imprisoned by the House of Commons for contempt and was in custody (claiming that the contempt was his action in collecting the judgment), which was held no excuse, and the court ordered him to pay the money over to the plaintiff. (1840) 11 Ad. & El. 253, 113 Eng. Reprint, 411. The sheriff thereupon sued out a writ of habeas corpus, but the court remanded him on his custodian showing that he held him on a warrant of the Speaker for contempt and breach of the privileges of the House. *Middlesex's Case* (1840) 11 Ad. & El. 273, 113 Eng. Reprint, 419.

¹⁷ In *Stockdale v. Hansard* (Eng.) supra, Denman, Ch. J., said: "The House of Commons can only commit till the close of the existing session."

The Quebec court after Parliament was prorogued discharged one committed for contempt by the Assembly "during pleasure," as all orders of Parliament except writs of error and impeachments are determined by a dissolution or prorogation. Ex parte Monk (1817) Stuart (L. C.) 120.

It was held in *Rex v. Flower* (1799) 8 T. R. 314, 101 Eng. Reprint, 1408, 4 Revised Rep. 662, supra, that the power of the House of Lords was not confined to commitments ending with the session, as, being a court of record, it might fine. But as early as 1665 one arrested after prorogation by prior order of the House of Lords was discharged, as every session was a new parliament. *Pritchard's Case* (1665) T. Raym. 120, 83 Eng. Reprint, 64.

¹⁸ In *McNab v. Bidwell* (1830) Draper (U. C.) 144, it was held that an action does not lie against the Speaker and members of the House of Assembly (Upper Can.) for the plaintiff's imprisonment by the House for contempt in refusing to answer questions put to him by a committee of the House. The court seemed to think the right inherent.

In *Tracey's Case* (1832) Stuart's (L. C.) 478, the Quebec court remanded one committed by the legislative council for publishing a libel against that house.

¹⁹ *Beaumont v. Barrett* (1836) 1 Moore, P. C. C. 59, 12 Eng. Reprint, 733, where the court affirmed a judgment for the defend-

But this doctrine was overthrown in *Kielley v. Carson*,²⁰ which is fully referred to in *MARSHALL v. GORDON*, ante, 273. And following that case the courts have reviewed the action of parliamentary bodies out of England in imprisoning persons for contempt in libeling members for the part taken by them in debate,²¹ in publishing a paper reflecting upon the parliamentary body and its privileges,²² and in refusing to

attend as a witness before a committee.²³ There has even been denied to such a body the power to commit a member for contempt,²⁴ or the power of removing a member out of the presence of the House.²⁵

The imperial Parliament may, however, by statute, confer upon a colonial house the same power over contempt as is possessed by the English House of Commons.²⁶

ants, the Speaker of the House of Assembly of Jamaica and others, in an action of trespass and false imprisonment by one committed by the House for issuing a publication containing a paragraph which was a breach of the privileges of the House, which possessed supreme legislative authority over the island. Parke, B., said: "It would appear, I think, to be inherent in every assembly that possesses a supreme legislative authority, to have the power of punishing contempts, and not merely such as are a direct obstruction to its due course of proceeding, but such also as have a tendency indirectly to produce such an obstruction, in the same way as courts of record may not only remove or punish persons who actually are interrupting their functions, but may also repress those who indirectly impede the administration of justice, by disparaging and weakening their authority." (But this statement was disapproved in *Kielley v. Carson* (1836) 4 Moore, P. C. C. 63, 13 Eng. Reprint, 225, 7 Jur. 137, infra).

²⁰ (Eng.) supra.

²¹ *Hill v. Weldon* (1845) 5 N. B. 1, following *Kielley v. Carson*, and sustaining an action of trespass against the Speaker and Sergeant at Arms of the House of Assembly of New Brunswick for taking and imprisoning the plaintiff, as ordered by the House, for contempt in libeling members for the part taken by them in debate.

²² In *Ex parte Brown* (1864) 5 Beat & S. 270, 122 Eng. Reprint, 835, where the court, on an order to show cause why a writ of habeas corpus should not issue, held that the House of Keys of the Isle of Man had no power to commit one for publishing a paper in contempt of the House and its privileges, as it had been decided by the judicial committee of the privy council that when a local legislature had not by prescription or by statute the power of committing for contempt, that power was not necessarily inherent in it, and it was conceded that the House of Keys in its legislative capacity had never before exercised the power of committing for contempt.

²³ In *Fenton v. Hampton* (1858) 11 Moore, P. C. C. 347, 14 Eng. Reprint, 727, 6 Week. Rep. 341, the court affirmed a judgment for the plaintiff in trespass against the Speaker and Sergeant at Arms of the legislative council of Van Diemen's Land, in that they had imprisoned him according to a resolution of the council finding him in contempt for refusing to attend as a witness before a committee of the council which L.R.A.1917F.

was authorized to send for persons. The court followed *Kielley v. Carson* (Eng.) supra, and held that the arrest was with a view to punish for an act alleged to be a contempt, but committed away from the council.

²⁴ In *Doyle v. Falconer* (1866) 4 Moore, P. C. C. N. S. 203, 16 Eng. Reprint, 293, 36 L. J. P. C. N. S. 33, L. R. 1 P. C. 328, 15 Week. Rep. 366, it was held the House of Assembly of Dominica could not commit a member for contempt for disorder in the House, and he was successful in an action of trespass, although a member might be removed or even expelled by the House.

²⁵ In *Landers v. Woodworth* (1878) 2 Can. S. C. 158, the court sustained an action for assault against the Sergeant at Arms of the Nova Scotia Assembly and members thereof, in that he was, because of contempt, removed from the House of Assembly, the trial court having left it to the jury to say whether the plaintiff was an obstruction to the business of the House. The plaintiff had refused to make an apology ordered by the House for accusing without sufficient cause another member of a serious offense.

²⁶ The legislative assembly of a colony may commit for contempt in publishing a paper which is a breach of its privileges, where the imperial Parliament authorized the Parliament of the colony (Victoria) to define its privileges and powers not to exceed those of the British House of Commons, and the colonial parliament thereupon declared that the privileges, immunities, and powers of its legislative council and legislative assembly respectively should be those enjoyed by the British House of Commons. *Dill v. Murphy* (1864) 1 Moore, P. C. C. N. S. 487, 15 Eng. Reprint, 784, 10 Jur. N. S. 549, 10 L. T. N. S. 170, 12 Week. Rep. 491.

This case was followed in *Speaker v. Glass* (1871) L. R. 3 P. C. 560, 7 Moore P. C. C. N. S. 449, 17 Eng. Reprint, 170, 40 L. J. P. C. N. S. 17, 24 L. T. N. S. 317, 20 Week. Rep. 42, as to one imprisoned by the same House for contempt, holding that the warrant of the Speaker stating that the House had resolved on a certain date that the respondent was guilty of a contempt and breach of the privileges of the Assembly was sufficient. Lord Cairns said the House of Commons had the privilege of committing for contempt and to be the judge of what was contempt.

And the provincial statutes may confer upon the legislative bodies the power over contempt in particular matters. Thus it has been held that a colonial house might commit a returning officer for fraud where the provincial statute gave to that house judiciary powers in regard to investigating elections of its members.²⁷ So the court declined to release one sent for by such a house, where the provincial statute authorized that house to compel attendance upon it.²⁸

State legislative bodies.

In some states the Constitution contains an express grant of power to the separate houses of the legislature to punish for contempt in particular cases. In all there is an express or implied separation of power into three branches, and in some there is an express prohibition against the other branches exercising judiciary powers. In some states contempt of a legislative body is a statutory crime; in some the legislative bodies have by statute power to commit in a certain class of cases. Under these circumstances the question of inherent power of a particular legislative body is likely to be difficult of determination.

It may well be that the influence of *Anderson v. Dunn*²⁹ may have promoted a general feeling throughout the country that the state legislative bodies had inherent power to commit for contempt similar to that of the House of Commons.³⁰ And this may have resulted in acts by such legislative bodies, but the cases in the courts involving the ques-

tion of broad inherent powers over contempt have been few.

With a single exception, the cases have arisen in relation to the contumacy of witnesses called before committees of the house in question.

In *Canfield v. Gresham*,³¹ it was held that no action lies for false imprisonment against members of a house of a state legislature nor its sergeant at arms for imprisonment of the plaintiff forty-eight hours for obstructing its proceedings, where the Constitution declares that such house may punish by imprisonment during its sessions any person not a member for obstructing any of its proceedings, such imprisonment not to exceed forty-eight hours, and that no member shall be questioned in any other place for words spoken in debate. The plaintiff, a reporter, attempted to enter the house against its order, and was gently touched by the sergeant at arms. He then walked out, and later swore out a warrant of arrest for assault against the speaker and sergeant at arms, under which they were both arrested, the speaker not being subject to arrest, as he had not committed treason, felony, or a breach of the peace. The court observed: "The house had unquestionably the right to determine whether or not the acts of plaintiff were an obstruction to its proceedings within the meaning of the Constitution, and, having so determined, to cause him to be imprisoned as he was."

In but two of the cases of contumacious witnesses has the court omitted to go into the question of the nature of the

²⁷ *Ex parte Lavoie* (1855) 5 Lower Can. Rep. (Dec. des Tribunaux) 99, where the court remanded one imprisoned by the legislative assembly of the Province of Canada, for a gross breach of privilege committed outside the House; to wit, in that he, a returning officer in an election of members of the house, committed frauds.

²⁸ *Ex parte Dansereau* (1875) 10 Lower Can. Jur. 210, where the warrant did not show the reason for the imprisonment or that it was for contempt. It was held that the statute was valid, and that it was to be considered that the old powers of the Quebec Assembly were not taken away by the British North American Act of 1867.

²⁹ (1821) 6 Wheat. (U. S.) 204, 5 L. ed. 242.

³⁰ In *State v. Matthews* (1850) 37 N. H. 453, Fowler, J., said obiter: "The authority to punish contempt is a necessary incident, inherent in the very organization of all legislative bodies."

In *Neel v. State* (1840) 9 Ark. 259, 50 Am. Dec. 209, a case of contempt of court, Scott, J., said: "The right to punish for L.R.A.1917F.

contempts in a summary manner has been long admitted as inherent in all courts of justice, and in legislative assemblies."

See also the extreme view expressed by Gray, Ch. J., obiter in *Whitcomb's Case* (1876) 120 Mass. 118, 21 Am. Rep. 502, a case without the scope of this note, where he said: "In the United States, each branch of a supreme legislature has the same power to commit for contempt as either House of Parliament. Such a power has been adjudged to be inherent in the Federal Senate and House of Representatives, although not expressed in the Constitution. *Anderson v. Dunn* (U. S.) supra. A like power doubtless exists in each branch of the general court of Massachusetts, and of other state legislatures, which are supreme within their sphere, and not, like the colonial assemblies of Great Britain, created by and subordinate to the national legislature." This opinion is by no means justified by the decision in *Burnham v. Morrissey* (1859) 14 Gray (Mass.) 226, 74 Am. Dec. 676, infra.

³¹ (1861) 82 Tex. 10, 17 S. W. 390.

matter under investigation by the legislative body.

In *Burnham v. Morrissey*,³² the court remanded one arrested by a state house of representatives for contempt for failure to produce books, etc., demanded by a committee, and to answer questions put him by the house, holding that he was "guilty of disrespect to the house by contemptuous behavior in its presence," within the meaning of the state Constitution.³³ The court opened its opinion with the following statement as to the reviewing power of the court, which was afterwards quoted with approval in *Kilbourn v. Thompson*:³⁴ "The house of representatives is not the final judge of its own powers and privileges in cases in which the rights and liberties of the subject are concerned; but the legality of its action may be examined and determined by this court. That house is not the legislature, but only a part of it, and is therefore subject in its action to the laws, in common with all other bodies, officers, and tribunals within the commonwealth. Especially is it competent and proper for this court to consider whether its proceedings are in conformity with the Constitution and laws, because, living under a written Constitution, no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine, in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void." The court continued: "The house of representatives has the power, under the Constitution, to imprison for contempt; but this power is limited to cases expressly provided for by the Constitution, or to cases where the power is necessarily implied from those constitutional functions and duties to the proper performance of which it

is essential. The power is directly conferred by the Constitution, . . . and the cases there enumerated are the only ones in which a sentence of imprisonment for a term extending beyond the session of the house can be imposed as a punishment. We consider the object of these provisions to have been twofold: 1st. To extend the power beyond the limit which it had by common parliamentary law and custom, by authorizing the imposition of a sentence of imprisonment for a definite period, which should not be terminated by the ending of the session of the house; and 2d, to limit the power of punishing for constructive contempts, by expressly defining the cases in which it might be exercised. But we do not consider it as affecting the power of the house to secure by proper means the free and full performance of all its constitutional duties, and to exercise whatever powers are necessary to that end. . . . We . . . think it clear that it has the constitutional right to take evidence, to summon witnesses, and to compel them to attend and to testify. This power to summon and examine witnesses it may exercise by means of committees."

In *Lowe v. Summers*³⁵ the court remanded one arrested by a state house of representatives for contempt for refusing to answer questions put by a committee, holding that such power over contempt was an inherent power, and not impliedly excluded by the express declaration of the Constitution that the house "may arrest and punish by fine not exceeding \$300, or imprisonment in a county jail not exceeding ten days, or both, any person not a member, who shall be guilty of disrespect to the house by any disorderly or contemptuous behavior in its presence during its sessions." The court quoted *Cooley* on Constitutional Limitations, in part as follows, as to American constitutional bodies: "As incidental to their legislative authority, they have the power to punish as contempts those acts of mem-

³² (*Mass.*) *supra*.

³³ The Constitution in question (Const. Mass. chap. 1. § 3) provided that the house of representatives "shall have authority to punish by imprisonment every person, not a member, who shall be guilty of disrespect to the house, by any disorderly or contemptuous behavior in its presence," or who threatens or assaults members, etc., or assaults or arrests witnesses, etc., ordered to attend it, or rescues any person arrested by it. "The senate shall have the same powers in the like cases, 'provided that no imprisonment on the warrant or order of L.R.A.1917F.

the senate or house of representatives for either of the above-described offenses, be for a term exceeding thirty days. And the senate and house of representatives may try and determine all cases where their rights and privileges are concerned, and which, by the Constitution, they have authority to try and determine, by committees of their own members, or in such other way as they may respectively think best."

³⁴ (1880) 103 U. S. 168, 26 L. ed. 377, *supra*.

³⁵ (1897) 69 Mo. App. 637.

bers or others which tend to obstruct the performance of legislative duty, or to defeat, impede, or embarrass the exercise of legislative power. . . . Each house must also be allowed to proceed in its own way in the collection of such information as may seem important to a proper discharge of its functions; and whenever it is deemed desirable that witnesses should be examined, the power and authority to do so is very properly referred to a committee with any such powers short of final legislative or judicial action as may seem necessary or expedient in the particular case. . . . A refusal to appear or to testify before such committee, or to produce books or papers, would be a contempt of the house; but the committee cannot punish for contempts; it can only report the conduct of the offending party to the house for its action."³⁶

The other cases consider the question whether the matter under investigation was a fit subject of investigation by the legislature. And here it may be said that in general an American legislative body has power to enforce by imprisonment its commands to a contumacious witness, when the investigation in which he was called is carried on in good faith for the purpose of getting information with a view to future legislation.

In *Ex parte Parker*³⁷ the court remanded a witness imprisoned by a joint committee of a state legislature appointed to investigate the affairs of a state dispensary, the committee having by special statute power to punish for contempt in refusing to answer questions, etc. The witness, having testified that a statement had been made to him by a person who said he had dealt with the dispensary, refused to say whether the statement was to the effect that the person making it had given rebates or graft or money in some improper way, or had improperly influenced the board of directors to give him business. The contentions of the witness were that he could not violate a private confidence, and that the evidence was hearsay, but the court held that these could not be

sustained. The court said: "The power of the general assembly to obtain information on any subject upon which it has power to legislate, with a view to its enlightenment and guidance, is so obviously essential to the performance of legislative functions that it has always been exercised without question." And after referring to *Kilbourn v. Thompson*³⁸ and *Re Chapman*,³⁹ supra, it said: "The case now under consideration is much stronger than the Chapman Case. In the first place, it is to be observed the Congress possesses no powers of legislation except those conferred by the Constitution of the United States, while the general assembly is invested with all the legislative power of the state except that denied by the Constitution."

Where a statute limited the power of the legislative houses to punish by imprisonment for contempt to offenses named, including that of "refusing to attend or be examined as a witness either before the house or by a committee to take testimony in legislative proceedings," the court sustained the validity of the statute, and considered within its terms an investigation of a city's department of public works as a necessary and proper means of procuring information for legislative action.⁴⁰ On the other hand it was held that an investigation as to the manner in which a committee of a past legislature had performed its duties in making a certain contract was not a "legislative proceeding" within the meaning of the same statute.⁴¹

Investigation into charges of corruption of members of a house is considered peculiarly within its cognizance. Most of the Constitutions make each house the judge of the qualifications, etc., of its members. Thus, it has been held that a house had power to punish for contempt a witness refusing to answer a question put by a committee investigating such charges, where there was a general statute authorizing either house to commit for contempt a contumacious witness, the court considering that the statute confirmed the common parliamentary

³⁶ Cooley, *Const. Lim.* p. 160.

³⁷ (1916) 74 S. C. 466, 114 Am. St. Rep. 1011, 55 S. E. 122, 7 Ann. Cas. 874.

³⁸ (1880) 103 U. S. 168, 26 L. ed. 377, supra.

³⁹ (1897) 166 U. S. 661, 41 L. ed. 1154, 17 Sup. Ct. Rep. 677, supra.

⁴⁰ *People ex rel. McDonald v. Keeler* (1885) 99 N. Y. 463, 52 Am. Rep. 49, 2 N. E. 615, sustaining an order remanding one imprisoned by the state senate for contempt L.R.A.1917F.

in refusing to answer questions put by a committee of such senate on such an investigation.

⁴¹ *People ex rel. Sabold v. Webb* (1889) 23 N. Y. S. R. 324, 5 N. Y. Supp. 855, where the court released the superintendent of a telegraph company imprisoned by the state assembly for refusing to answer a question put by its committee and for refusing to produce certain telegrams.

law.⁴³ So where a joint committee was appointed to investigate charges of corruption against members of the present and of the preceding legislature touching lands granted to the state by Congress for a certain purpose, and there was a special statute making the refusal of a witness to appear before such joint committee a contempt of the house whose process was disobeyed, the court remanded a witness imprisoned by such house for failure to appear before such committee, considering that the honor of the state was involved as regards its administration of the trust.⁴³

So also it is generally considered that a house may commit a witness guilty of contumacy in an investigation into an election of members of that house.⁴⁴

In a case in Texas the judges were not agreed whether a constitutional provision declaring that a house may punish

by imprisonment during its sessions any person not a member for obstructing any of its proceedings would justify commitment for refusal to answer questions put by a committee investigating an election concerning prohibition.⁴⁵

There seems but one case where the question directly arose as to the right of a witness before a legislative committee to refuse to answer incriminating questions. There the court discharged one imprisoned for contempt by a state senate for refusing to testify fully before a joint committee of the two houses, his reasons given to the senate being that the answer would accuse him of an indictable offense, and would furnish evidence against him by which he could be convicted of such an offense, the Constitution declaring that no subject shall "be compelled to accuse or furnish evidence against himself."⁴⁶

⁴³ *Ex parte McCarthy* (1886) 29 Cal. 395, remanding one committed by a state senate for contempt in refusing to answer questions put to him by the senate touching charges of corruption against unknown members of that body. The same was held in *Ex parte Lawrence* (1899) 116 Cal. 298, 48 Pac. 124.

In *Sullivan v. Hill* (1913) 73 W. Va. 49, 79 S. E. 670, Ann. Cas. 1916B, 1115, it was held that a joint committee investigating charges of bribery against members of the legislature might imprison a witness for contempt in refusing to answer a question, when a general statute gave joint committees sitting in recess of the legislature power to enforce obedience to its summonses. We are probably to understand that the committee was sitting in recess.

⁴³ *Re Falvey* (1858) 7 Wis. 630.

⁴⁴ In *Re Gunn* (1893) 50 Kan. 155, 19 L.R.A. 519, 32 Pac. 470, 948, it seems to have been considered that the court was acting according to general law in remanding one arrested for contempt in refusing to obey a subpoena to appear and testify before a committee of a state house of representatives in an election contest.

In *Ex parte Dalton* (1886) 44 Ohio St. 142, 58 Am. Rep. 800, 5 N. E. 136, where the court stated that the power of a house to commit for contumacy in election contests was statutory, the court remanded the clerk of the court of common pleas, imprisoned by a state house of representatives for contempt in refusing to produce before the house's committee investigating the election, etc., of members of the house a certain poll book and tally sheet.

⁴⁵ In *Ex parte Wolters* (1911) 64 Tex. Crim. Rep. 238, 144 S. W. 531, Ann. Cas. 1916B, 1071, the court released one imprisoned by a house of a state legislature for contempt in refusing to answer questions put to him by a committee investigating an election as to prohibiting liquor, L.R.A.1917F.

such committee having been appointed at a special session of the legislature, and neither such election nor its subject having been designated or presented by the governor, the Constitution declaring that when the legislature is convened in a special session, there shall be no legislation upon other subjects than those so designated or presented. Davidson, P. J., held that the house had no power to create the committee and that the questions were not pertinent. Harper, J., held that the house had the power to appoint the committee, and that questions to a chairman of a campaign committee as to the character of his expenses in a general way and as to the amount spent in preparing, mailing, and distributing campaign matter were pertinent, but that the refusal to answer the questions put by the committee was not "obstructing the proceedings of the legislature" within the constitutional power to punish for contempt "any person not a member for disrespectful or disorderly conduct in its presence, or for obstructing any of its proceedings." Prendergast, J., dissented.

In the companion case of *Ex parte Gray* (1912) 64 Tex. Crim. Rep. 311, 144 S. W. 569, Harper, J., held that the house had the right to appoint the committee and to ask at least some of the questions, but that the power to punish for contempt was a judicial power, not inherent in the legislative department, there being a constitutional prohibition against persons in one of the departments exercising any power properly attached to either of the others "except in the instances herein expressly provided," and that the acts committed here were not within the constitutional grant of power. Prendergast, J., dissented.

⁴⁶ *Emery's Case* (1871) 107 Mass. 172, 9 Am. Rep. 22. In *ex parte Parker* (1906) 74 S. C. 466, 114 Am. St. Rep. 1011, 55 S. E. 122, 7 Ann. Cas. 874, supra, the court stated

It has been held that the Federal courts could not release on habeas corpus one imprisoned by order of a committee of a state house of delegates sitting after adjournment, with statutory authority to enforce obedience to its summons during recess, for refusing to appear as a witness before such committee, as "jurisdiction of courts of the United States to issue writs of habeas corpus is limited to cases of persons alleged to be restrained of their liberty in violation of the Constitution or of some law or treaty of the United States, and cases arising under the law of nations."⁴⁷

For the general question of the power

of legislature or branch thereof to appoint a committee to sit after close of session, see the notes to 10 L.R.A.(N.S.) 172 and L.R.A.1915E, 496. In *Sullivan v. Hill*,⁴⁸ cited supra, it was held that a statute empowered a joint committee to sit in recess and to punish witnesses for contumacy. Other cases relating to the punishment of witnesses for contumacy after adjournment of the legislature are referred to in the footnote.⁴⁹

This note does not include cases where by statute the legislative body may refer the matter of a contumacious witness to a court of justice, who may require the witness to answer in a proper case.⁵⁰

obiter "that a witness could not be compelled to answer questions when such compulsion would be in derogation of a constitutional right."

In *Re Falvey* (1858) 7 Wis. 630, supra, the court said obiter that a statute providing that no person examined and testifying before either house of the legislature or a committee of either house, or a joint committee of the two houses, shall be held to answer criminally in any court of justice, or be subject to any penalty or forfeiture for any fact or act touching which he shall be required to testify, etc., was a full protection to a witness in the courts of the state, and that "if the answer would tend to criminate or expose the witness to a criminal prosecution in the courts of another state, or in the courts of the United States, he might not be compelled to answer."

⁴⁷ *Carfer v. Caldwell* (1906) 200 U. S. 293, 50 L. ed. 488, 26 Sup. Ct. Rep. 264, reversing (1905) 138 Fed. 487. See *Ex parte Caldwell* (1906) 61 W. Va. 49, 10 L.R.A.(N.S.) 172, 55 S. E. 910, 11 Ann. Cas. 646, *infra*.

⁴⁸ (1913) 73 W. Va. 49, 79 S. E. 670, Ann. Cas. 1916B, 1115.

⁴⁹ In *Ex parte Caldwell* (W. Va.) supra, the court discharged one imprisoned by a committee of a state house of delegates sitting after the adjournment of the legislature, for contempt in refusing to attend as a witness before such committee after such adjournment, the court holding that the statute authorizing the enforcement of the attendance, etc., of witnesses by fine or imprisonment by such committee in recess did not relate to matters after adjournment of the legislature.
L.R.A.1917F.

In *Re Davis* (1898) 58 Kan. 368, 49 Pac. 160, the court discharged one arrested for refusing to testify under a warrant of a majority of a joint committee of the houses of a state legislature appointed to investigate charges of bribery against members of the legislature, and sitting after the adjournment of the legislature under a mere joint resolution, not signed by the governor and not a law, giving the power to send for persons and papers and to fully investigate, etc., but stating nothing about sitting after adjournment of the legislature, although the court considered that clauses in the appropriation bill of the year implied the right of the committee to sit after such adjournment, and there was a statute declaring that committees "shall have the power to issue subpoenas in the name of the state, to compel the attendance of witnesses from any part of this state, the production of any book or papers, and generally shall have the same power with reference to procuring testimony bearing upon the subject-matter under investigation as the district court would have in any case on trial in such court." The court held that the statute did not confer the power to punish for contempt upon committees, and considered that the legislative power to punish for contempt did not include power to inflict punishment continuing beyond the session, and seems to have considered that the power to punish for contempt could not be delegated to a committee.

⁵⁰ See *Re Barnes* (1912) 204 N. Y. 108, 97 N. E. 508. B. B. B.

WASHINGTON SUPREME COURT.
(Department No. 2.)

E. G. LA BRECK et al., Resp'ts.,
v.

CITY OF HOQUIAM, Appt.

(95 Wash. 463, 164 Pac. 67.)

Municipal corporation — private walk — liability for defect.

A municipal corporation is not liable for injury to a pedestrian from a defect in a cross walk built by a citizen for his own convenience without direction from the city, upon an unimproved street.

For other cases, see *Highways*, IV. a, 2, in Dig. 1-52 N. S.

(April 3, 1917.)

APPEAL by defendant from a judgment of the Superior Court for Grays Harbor County in favor of plaintiffs in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Sidney Moor Heath and James P. H. Callahan, for appellant:

Plaintiffs cannot recover damages from defendant for the injury sustained by the plaintiff's wife.

Fortune v. St. Joseph, — Mo. —, 1 S. W. 287; *Ruppenthal v. St. Louis*, 190 Mo. 213, 88 S. W. 612; *Crawford v. Griffin*, 113 Ga. 562, 38 S. E. 988, 10 Am. Neg. Rep. 26; *Ottolengui v. Seattle*, 59 Wash. 37, 109 Pac. 206; *Nelson v. Spokane*, 45 Wash. 31, 8 L.R.A.(N.S.) 636, 122 Am. St. Rep. 881, 87 Pac. 1048, 13 Ann. Cas. 280; *Wilton v. Spokane*, 73 Wash. 622, L.R.A.1917D, 234, 132 Pac. 404.

Plaintiff was guilty of contributory negligence in using the plank crossing, knowing its defective condition, when a sufficient and safe way was provided, which did not lengthen the distance.

4 Dill. Mun. Corp. 2970; *Rome v. Baker*, 107 Ga. 347, 33 S. E. 406; *Bowman v. Ogden City*, 33 Utah, 196, 93 Pac. 561; *McQuillan v. Seattle*, 10 Wash. 466, 45 Am. St. Rep. 799, 38 Pac. 1119; *Cowie v. Seattle*, 22 Wash. 668, 62 Pac. 121; *Hobert v. Seattle*, 32 Wash. 830, 78 Pac. 383; *Chase v. Seattle*, 80 Wash. 63, 141 Pac. 180; *Lerner v. Philadelphia*, 221 Pa. 294, 21 L.R.A.(N.S.) 614, 70 Atl. 755; *Wilson v. Atlanta*, 63 Ga. 291; *Kewanee v. Depew*, 80

Ill. 119; *Hentz v. Somerset*, 2 Pa. Super. Ct. 225; *Tucker v. Salt Lake City*, 10 Utah, 173, 37 Pac. 261; *Kendall v. Albia*, 73 Iowa, 241, 34 N. W. 833; *Collins v. Janesville*, 111 Wis. 348, 87 N. W. 241, 1087, 10 Am. Neg. Rep. 520.

Messrs. W. H. Abel, T. H. McKay, and F. M. Cook, for respondents:

The city is liable, even though it did not lay the planks, nor specifically authorize them to be laid.

McKnight v. Seattle, 39 Wash. 519, 81 Pac. 908; *Tait v. King County*, 85 Wash. 491, 148 Pac. 586; *Oliver v. Kansas*, 60 Mo. 79; *Boucher v. New Haven*, 40 Conn. 456; *Plattsmouth v. Mitchell*, 20 Neb. 228, 29 N. W. 593; *Hiller v. Sharon Springs*, 28 Hun, 344; *Hill v. Fond du Lac*, 56 Wis. 242, 14 N. W. 25; *Furnell v. St. Paul*, 20 Minn. 117, Gil. 101; *Flora v. Naney*, 136 Ill. 45, 26 N. E. 645; *Colby v. Beaver Dam*, 34 Wis. 285; *Saulsbury v. Ithaca*, 94 N. Y. 27, 46 Am. Rep. 122; *Ponca v. Crawford*, 23 Neb. 662, 8 Am. St. Rep. 144, 37 N. W. 609; *Fuller v. Jackson*, 82 Mich. 480, 46 N. W. 721; *Champaign v. McInnis*, 26 Ill. App. 338.

The question of contributory negligence is for the jury under all the facts and circumstances shown.

Jordon v. Seattle, 26 Wash. 61, 66 Pac. 114, 30 Wash. 298, 70 Pac. 743; *Shannon v. Tacoma*, 41 Wash. 220, 83 Pac. 186; *Blankenship v. King County*, 68 Wash. 84, 40 L.R.A.(N.S.) 182, 122 Pac. 616; *Cady v. Seattle*, 42 Wash. 402, 85 Pac. 19; *Lautenschlager v. Seattle*, 77 Wash. 12, 137 Pac. 323; *McQuillan v. Seattle*, 10 Wash. 464, 45 Am. St. Rep. 799, 38 Pac. 1119; *Cowie v. Seattle*, 22 Wash. 660, 62 Pac. 121; *Mosheuvell v. District of Columbia*, 191 U. S. 247, 48 L. ed. 170, 24 Sup. Ct. Rep. 57, 15 Am. Neg. Rep. 246.

Mount, J., delivered the opinion of the court:

The plaintiffs brought this action to recover damages for personal injuries alleged to have been received by Mrs. La Breck, by reason of falling upon a defective walk. On issues joined, the case was tried to the court and a jury, and resulted in a verdict and judgment in favor of the plaintiffs for \$1,625.

The facts, as shown by the evidence, are substantially as follows: Pacific avenue, in the city of Hoquiam, is a street 80 feet in

Note. — The note to *Elam v. Mt. Sterling*, 20 L.R.A.(N.S.) 513, on the general subject of liability of municipal corporation for defects or obstructions in streets, deals at pages 553 et seq. with the ways for defects or obstructions in which a municipality is liable, and that branch of the general subject is supplemented in the note to *De Long* L.R.A.1917F.

v. Oklahoma City, L.R.A.1915E, 597; and see also later case, *Wilton v. Spokane*, L.R.A.1917D, 234. Various other phases of the general note have been supplemented by later notes which may be found by consulting the L.R.A. Indexes under the title "Highways," subtitle, "Liability of municipality."

width. This street runs east and west. The center of the street, to the width of 20 feet, was paved to the east line of Twenty-Ninth street, which runs north and south. Twenty-Ninth street is 60 feet wide, and has never been improved, or used as a street, except 16 feet in width in the center, at its crossing with Pacific avenue. At about the center of Twenty-Ninth street, a plank road, 16 feet in width, extended eastward on Pacific avenue. About 100 feet east of the west line of Twenty-Ninth street, Pacific avenue was closed. One Mr. Price resides upon property owned by him at the southeast corner of Twenty-Ninth street and Pacific avenue. In the year 1914, he obtained permission from the city to lay a plank roadway on the east side of Twenty-Ninth street, in order that he might haul wood to his property. This plank roadway was built of boards, 16 feet in length, which had been used previously upon Pacific avenue. Twenty-Ninth street had not been improved by the city, except upon the west side, where a sidewalk had been laid, running to the south. Mr. Price, for his own convenience, and without permission from the city, placed two boards across Twenty-Ninth street, over a ditch, or slough, on the west side of Twenty-Ninth street, to the sidewalk on the opposite side of the street from his house. These two boards were 2½ inches thick, by 12 inches wide, and 20 feet long. They were placed about 4 inches apart. Where the boards crossed the ditch, they were about 3 or 4 feet above the bottom of the ditch. In order to brace these boards, Mr. Price drove a stake into the mud, under each board, at about the middle of the ditch, so as to prevent these boards from sagging when they were walked upon. These boards were laid across Twenty-Ninth street at about the line of the intersection of Pacific avenue where that avenue was unimproved. Mrs. La Breck, on August 5, 1915, in the daytime, went to Mr. Price's house, and, in crossing these boards, one of them swayed down with her, she fell and caught her leg between the boards, and was injured. This action was brought on account of that injury. At the close of the respondents' evidence the appellant moved the court for a directed verdict, and, at the close of all the evidence, renewed the motion. These motions were denied, and the case was submitted to the jury.

The principal, and, we think, the controlling question in the case is whether the city is liable for a walkway built by a property owner, for his private convenience, upon an unimproved street. The respondents rely upon the cases of McKnight v. Seattle, 39 Wash. 516, 81 Pac. 998, and Tait v. King County, 85 Wash. 491, 148 Pac. 586. In L.R.A.1917F.

the first of these cases, we said: "The walk was not built by the city, but by private parties, and it is claimed that there was no sufficient evidence to the effect that the city had accepted it as a part of the highway. But this street was a public street of the appellant city, opened to the use of the public, and the city was bound to keep it in a reasonably safe condition for use by the public. If this sidewalk rendered the street unsafe, it was the duty of the city to remove it or repair it, and its duty in this regard is not affected by the fact that it may not have constructed the walk."

In that case, it appears that the street was open to the use of the public. In this case, Twenty-Ninth street, south of Pacific avenue, was not open to the public. It was an unimproved street, so far as the city was concerned, except upon the west side, where there was a sidewalk. A large ditch ran south, down near the middle of this street. Mr. Price, on the opposite side of the street, had obtained permission from the city to build a private roadway to his wood-house on the east side of the street. There is no claim, in the evidence, that Twenty-Ninth street, south of the improved part of Pacific avenue, was open to the public for any purpose. Apparently it was an unusable street, and not open to the public. The case of Tait v. King County, supra, was a case where a roadway had been adopted by the county, and had been permitted to become out of repair. We held, in that case, that it was the duty of the county to repair the road, and that the failure of the county so to do constituted negligence, for which a recovery might be had. Neither of those cases decides the point presented here.

The respondent relies upon a number of cases from other jurisdictions, generally to the effect that a municipality is liable for the defective condition of a street or sidewalk, even though built by private parties. We think there can be no doubt of this rule, in so far as it applies to streets which have been thrown open to public use, or have been improved by the city, or by private owners along the street, at the direction of the city. In the case of Saulesbury v. Ithaca, 24 Hun, 12, where one Turner, who owned a house and lot on the east side of Brindley street, had built a sidewalk to enable his tenants to go thereby to and from State street, which sidewalk was elevated 3 or 4 feet above an old cellar or excavation, into which the plaintiff fell, after first falling upon the sidewalk, and where it was conceded that the city never aided or contributed to the building, maintenance, or repair of the sidewalk, or any other sidewalk at that place, and had never ordered the sidewalk to be built, the court said: "Under these

facts, the defendant claims that the building of a sidewalk along Brindley street was within its discretion, and that it is not liable in a private action for omission to exercise discretionary functions for the benefit of the public at large. Or, to use the language of Judge Dillon (2 Mun. Corp. § 753): "Where a corporation has a discretion as to the time and manner of making corporate improvements, . . . a private action will not lie against the corporation for omitting or neglecting to act; and the reason is that such powers are conferred to be exercised or not, as the public interest is deemed to require."

Then, after determining that the power to improve streets is of a judicial nature, the court said: "The act of Turner in building a walk to his tenant house from State street was his act, and not the act of defendant. It was not an obstruction to the street calling for the action of the trustees to remove it. It was not an illegal use of the street on the part of Turner to which defendant could object. If the work was unskillfully or negligently done, or if it was allowed to remain in an unsafe condition, it was not the fault of defendant. The defendant is not connected with the walk so as to create any liability by reason of its condition. A liability for negligence can be established against a municipality only by showing negligence, actual or constructive, by its officers or authority. In this case it is not shown."

And in *Hiller v. Sharon Springs*, 28 Hun, 344, in referring to the *Saulsbury Case*, above quoted, it was said: "In *Saulsbury v. Ithaca*, above cited, it was claimed to be the absolute duty of the village to build sidewalks wherever it had streets. And this, it was held, was incorrect. Nor can it be said that whenever a street is opened in any part of a city or village, no matter how unfrequented, if an occupant lays down stones or planks along the side of his property, the city or village at once becomes liable to keep them in repair. In country roads there are usually no sidewalks; and evidently it must be left to the judgment of the municipal authorities to say where sidewalks are needed, and how wide they should be. But if an occupant has constructed a suitable sidewalk, not for his own use merely, but for the public, and if, for many years the public have used it, then the municipal authorities may be considered to have practically adopted it."

In *Crawford v. Griffin*, 113 Ga. 562, 38 S. E. 988, 10 Am. Neg. Rep. 26, where a private property owner built a bridge from the street to the sidewalk, over a gutter or ditch, for his private convenience, and where the bridge was afterwards removed by the L.R.A.1917F.

city, and replaced, the court said: "It was a mere private bridge, built solely for the convenience of an individual. It was not shown that the city built it. The mere fact that the city took it up and replaced it, and made some repairs upon it, did not constitute it a public bridge. The city being under no duty to keep up the bridge, its failure to do so was not negligence, and the plaintiff could not recover."

In the case of *Ruppenthal v. St. Louis*, 190 Mo. 213, 88 S. W. 612, where an 80-foot street had been improved and opened to the public, in the center thereof, and the city had not invited the public to use the strips on each side of the street, it was held that the city was not liable for injuries to a pedestrian caused by a defect in a sidewalk, which was constructed without the consent or authority of the city, the condition of which walk was such as to indicate to a person exercising ordinary care that the sidewalk portion of the street had not been improved.

It is not the duty of cities to improve all streets which are platted within the boundaries thereof. It is the duty of cities to improve only streets which are necessary, and to the extent necessary. The city, of course, is the judge of such necessity. It would be impossible for any city, except one which is thickly populated, to improve all its streets within its boundaries. Where a city has improved its streets, of course it must keep such streets in reasonable repair for the uses for which they are intended. Sidewalks built by the city, or under the direction of the city, must, of course, be kept in reasonable repair, but the city ought not to be held responsible for sidewalks, or walks of any kind, built by private individuals, for private convenience, in remote, outlying districts of the city, without notice to the city.

In this case there is no dispute as to the fact that Twenty-Ninth street, south of Pacific avenue, was in a remote part of the city. That portion of the street was not open to public use. It had never been improved. A large ditch, or slough, ran down near the center of the street. Mr. Price, who owned property on the east side of the street, had obtained permission from the city to build a private way from Pacific avenue to the rear of his premises, for the purpose of hauling wood to his premises. Without the permission of the city, and without notice to the city, he had built this two-board plankway, for his own convenience, across the street, to connect with the sidewalk on the opposite side. It was not shown that the city had notice that this walkway was built or being used. It is claimed that the walkway had remained

there for a sufficient length of time that the city should have known it; but the mere fact that the city should have known, or the fact that the city did know it, did not render the city liable, because the walk was a private way, for the private convenience of Mr. Price, who built it.

It is true, one or two neighbors and the mail carrier testified that they had used the walkway. Probably other persons had used it for the purpose of going to Mr. Price's home, as the respondent herself did, but clearly that would not render this private way a public use. It was a private walk

for a private person, notwithstanding the fact that a few neighbors frequently used it to go to Mr. Price's house.

We are satisfied, for these reasons, that there was no liability on the part of the city, and that the motion for a directed verdict should have been sustained.

The judgment is therefore reversed, and the cause ordered dismissed.

Ellis, Ch. J., and Holcomb, Fullerton, and Parker, JJ., concur.

Petition for rehearing denied.

OREGON SUPREME COURT. (Department No. 2.)

W. E. CHAPMAN, Respt.,
v.

FIRST NATIONAL BANK OF ROSE-
BURG, OREGON, Appt.

(72 Or. 492, 143 Pac. 630.)

Bank — misappropriation by president — liability.

1. A bank which honors a memorandum check by its president in his own favor upon the account of a customer is answerable to the customer for the amount thereby withdrawn from the account, although the check was signed by the name of the customer, accompanied by the president's initials, and the customer had requested the president to loan for him part of the money which he had on deposit.

For other cases, see Banks, IV. a, §, in Dig.
1-52 N. S.

Notice — knowledge of bank president — liability of bank.

2. A bank is chargeable with the knowledge of its president with respect to the misappropriation by the president of a deposit account of a customer to his own use.

For other cases, see Notice, II. a, in Dig.
1-52 N. S.

(July 31, 1914.)

APPEAL by defendant from a judgment of the Circuit Court for Douglas County in plaintiff's favor in an action to recover a bank deposit. Affirmed.

The facts are stated in the opinion.

Note. — Generally as to imputation of knowledge of bank officers to bank, where officers are personally interested, see notes to *Lilly v. Hamilton Bank*, 29 L.R.A. (N.S.) 558, and *First Nat. Bank v. Burns*, 40 L.R.A. (N.S.) 764.

The question whether knowledge possessed by an officer of a corporation who is its sole representative in the transaction in question is chargeable to it, notwithstanding that he is interested adversely to it in the transaction, is discussed in the note to *Brookhouse v. Union Pub. Co.* 2 L.R.A. (N.S.) 993; and see later case, *Tatum v. Commercial Bank & T. Co.* L.R.A. 1916C, 767, and other cases cited in the footnote thereto.

Mr. O. P. Coshow, for appellant:

If the president of the bank exceeded his authority or negligently loaned plaintiff's money, he was liable to plaintiff therefor. The bank was not authorized, nor did it have the power, to follow the money or to direct the manner in which the president should loan the same for plaintiff.

5 Cyc. 524 (2); *Isaham v. Post*, 141 N. Y. 100, 23 L.R.A. 90, 38 Am. St. Rep. 766, 35 N. E. 1084; *Watson v. Fagner*, 208 Ill. 136, 70 N. E. 23, 105 Ill. App. 52; *Western U. Teleg. Co. v. Holcomb*, — Tex. Civ. App. —, 152 S. W. 190.

A bank is not responsible for the act of an officer, though done within the bank, who is acting for himself or as agent for another.

1 Bolles, Bkg. 407; *State Sav. Bank v. Montgomery*, 126 Mich. 327, 85 N. W. 879; *Manhattan Co. v. Lydig*, 4 Johns. 377, 4 Am. Dec. 289; *School Dist. v. De Weese*, 100 Fed. 705; *Ellis v. First Nat. Bank*, 22 R. I. 565, 48 Atl. 936.

A bank may pay the money upon oral order or transfer it from one account to another, and such oral order will be sufficient authority and justification for so doing.

McEwen v. Davis, 39 Ind. 109; *Ellis v. First Nat. Bank*, 22 R. I. 565, 48 Atl. 936; *Neff v. Green County Nat. Bank*, 89 Mo. 581, 1 S. W. 747; 1 Morse, Banks & Bkg. 2d ed. § 313.

A banking corporation acts through its official agents and is held strictly to the contracts made in behalf of the corporation,

tion, is discussed in the note to *Brookhouse v. Union Pub. Co.* 2 L.R.A. (N.S.) 993; and see later case, *Tatum v. Commercial Bank & T. Co.* L.R.A. 1916C, 767, and other cases cited in the footnote thereto.

The question whether a bank officer's knowledge of the insolvency of the bank, resulting from his own misconduct, is chargeable to the bank, is treated in the note to *Pennington v. Third Nat. Bank*, 45 L.R.A. (N.S.) 781.

but the acts of such officers must be in the line of their duty or agency.

Winsor v. Lafayette County Bank, 18 Mo. App. 685; *Burriss v. Bank of Buffalo*, 70 Mo. App. 675.

Mr. Carl E. Wimberly, for respondent:

Upon the principle that no person can act as agent for another in making a contract for himself, the president could not act for the bank, for plaintiff, and for himself in the same transaction.

1 *Clark & S. Agency*, 1; *Hier v. Miller*, 68 Kan. 258, 63 L.R.A. 952, 75 Pac. 77; *Chrystie v. Foster*, 9 C. C. A. 606, 26 U. S. App. 67, 61 Fed. 551.

The bank had no sufficient authority to pay out the plaintiff's money. Authority to loan is not authority to withdraw it from a bank.

Hier v. Miller, supra; *Dixon v. Jackson Exch. Bank*, 140 Mo. App. 585, 129 S. W. 481.

The existence of an agent's authority is one of the facts to be determined by the jury, but what acts come within the conferred power is a question of law for the court's determination.

Anderson v. Adams, 43 Or. 622, 74 Pac. 215; *Wollenberg v. Sykes*, 49 Or. 163, 80 Pac. 148; *Neppach v. Oregon & C. R. Co.* 43 Or. 374, 80 Pac. 482, 7 Ann. Cas. 1035.

Before a principal can be charged with having ratified an unauthorized act of his agent, it must be shown that the principal had full knowledge of all the facts.

1 *Clark & S. Agency*, 338, § 141b; *Valley Bank v. Brown*, 9 Ariz. 311, 83 Pac. 362; *Reid v. Alaska Packing Co.* 47 Or. 215, 83 Pac. 139.

McNary, J., delivered the opinion of the court:

This is an action to recover a deposit of \$600. During the time covered by the transaction defendant was a corporation engaged in banking, having its place of business at Roseburg. Plaintiff avows that between the months of October, 1909, and January, 1911, he deposited with defendant, for his own use, benefit, and account, the sum of \$782.05, and that during the intervening time, he withdrew from the bank \$182.05, leaving a balance of \$600, which defendant refuses to pay. Defendant in its answer denies the indebtedness and alleges: "That the plaintiff withdrew from said bank the total sum of his deposits therein, to wit, \$782.05." Plaintiff's reply, in legal effect, consists of a reaffirmation of the matters asserted in his complaint. At the conclusion of the testimony offered by defendant, the trial

judge, in response to a motion interposed by counsel for plaintiff, directed the jury to return a verdict in favor of plaintiff for the full amount demanded. Crystallized, the assignments of error present but one grievance; namely, that the trial court committed a legal wrong in allowing plaintiff's motion for a directed verdict. Having the laboring oar, defendant offered in evidence a deposition of T. R. Sheridan, president of the bank through whom the transaction occurred.

After being asked if plaintiff said anything about the money on deposit with the bank, the witness said:

He told me that he did not need all the money in the bank, and if I could loan it, naming the amount,—I cannot just now remember how much,—that he wanted me to do so.

Q. What did you do with the money?

A. I took it and placed my note in an envelop and addressed it in his name and put it in the letter "C" in the bank vault, just as I did for others for whom I made loans.

Q. Did the plaintiff know that you had loaned his money for him prior to May 1, 1913?

A. Yes; for he asked me when we were in the First National Bank Building, and after we removed to the Douglas County National Building he came in and asked me two or three times if I had collected the interest on his money. I told him, "No," but I would get it for him.

The witness further deposed that the plaintiff made no objection to the loan, but appeared satisfied when told that the money would draw interest. Defendant's evidence further reveals the fact that the president of the bank drew the money by means of a memorandum check to which he signed plaintiff's name, appending thereunder the letter "T," which is the first initial of his name.

On behalf of defendant, S. A. Sanford was called as a witness, and declares that he was cashier of the bank during the time covered by the controversy, and in answer to the question, "Do you know what was done with the money?" said:

Yes; it was loaned to Mr. Sheridan.

Q. Now you may state whether or not any evidence of that loan was given by Mr. Sheridan.

A. The note of Mr. Sheridan for \$600 in an envelop. . . .

Q. Who had control of that envelop in

which that note of \$600 was placed? Where was it, in the First National Bank?

A. It was in a pigeonhole where we file all of our customers' papers, under the letter "C."

Q. Who had control of it?

A. It was placed in the bank.

Mr. Sanford further stated that, as cashier of the bank, he did not pay the money over to the president on the memorandum check, and that he had no knowledge of the payment of the money until a few months prior to the institution of the action, when plaintiff presented a check drawn against the deposit and demanded payment thereof. As a concluding witness, Mr. Harry Stapleton testified that he was clerk in the bank at the time of the proceedings in question, and that he talked with plaintiff more than a year after the occurrence, and that plaintiff inquired concerning the return of Mr. Sheridan, and said that "he (Sheridan) had some of his money, and he did not have anything to show for it." On cross-examination the witness said: "Plaintiff did not say that Sheridan had borrowed the money from him." Upon this state of the record, the circuit court directed a verdict in favor of plaintiff.

The touchstone by which we determine the liability of the defendant is the legal effect of the acts of the president of the defendant bank. Therefore the matter of greatest import in this case is the location of the boundary between individual liability and corporate responsibility. Was the transaction merely a private affair of Mr. Sheridan, the president of the bank, or was his act that of the bank? The doctrine is proverbial that, if money is left with a bank to be loaned, the bank is an agent of, and not a debtor to, the depositor; but, if the bank lends the money in good faith and exercises due care, it is not liable to the customer in the event of a pecuniary loss. 5 Cyc. 524; *Squires v. First Nat. Bank*, 59 Ill. App. 134.

In this case all admit that the money was on deposit with the defendant bank at the time plaintiff requested that a "loan" be effected, thereby creating the relation between the parties litigant of debtor and creditor. The money being on deposit at the time of its appropriation by the president, the board of directors, as the "mind" of the corporation, having a general superintendency over and the management of the business affairs and transactions of the bank, was bound to know of the relation existing between plaintiff and defendant and the incidental duties flowing therefrom. L.R.A.1917F.

So defendant, in honoring the memorandum check bearing the name of plaintiff as signed by Sheridan, president of the bank, made the act of the president the act of itself. If Sheridan had converted the money without the bank having received it or without credit being given to plaintiff on its books, the bank would not then be liable. But when it receives funds which go into the bank, it is chargeable with all the knowledge possessed by the president, and is liable for any misappropriation by that officer. The testimony produced on behalf of defendant further shows that the note of the president, executed as evidence of the withdrawals of the deposit, was placed in a "pigeonhole" where were filed the papers of other customers of the bank.

Surely the declaration of the depositor to the president of the bank "that he did not need all the money in the bank, and if the president would loan it that he wanted him to do so," would not be authority sufficient for the president to sign to a memorandum check the name of the depositor and contemporaneously appropriate the money to his own private use.

Had the character of the loan been unbosomed to plaintiff, a failure to repudiate the transaction may have constituted a ratification; yet no principle of law is better settled than that the ratification of an act of an agent previously unauthorized must, in order to bind the principal, be with full knowledge of all material facts. If the essential facts are either suppressed or unknown, the ratification is treated as invalid, because founded in mistake or fraud. *Valley Bank v. Brown*, 9 Ariz. 311, 83 Pac. 362; *Owings v. Hull*, 9 Pet. 607, 9 L. ed. 246; *Combs v. Scott*, 12 Allen, 493. In this case ratification is neither pleaded nor proven. We think that, where a person occupying the position of president of a bank appropriates money on deposit to his use, that the knowledge of the officer should be treated as that of the bank, and that the bank is liable to the depositor therefor; otherwise those dealing with the bank would be remediless in case of fraud or misappropriation on the part of an officer. *Smith v. Anderson*, 57 Hun, 72, 10 N. Y. Supp. 278; *Concord v. Concord Bank*, 16 N. H. 26; 1 Michie, Banks & Bkg. § 112.

The judgment must be affirmed.

McBride, Ch. J., and Eakin and Bean, JJ., concur.

Petition for rehearing denied October 6, 1914.

VIRGINIA SUPREME COURT OF APPEALS.

K. M. BAKER et al., Appts.,
v.

BERRY HILL MINERAL SPRINGS COMPANY OF VIRGINIA et al.

(112 Va. 280, 71 S. E. 626.)

Principal and agent — fraudulent transaction of agent — knowledge of principal.

1. A bank is not charged with the knowledge of its president and managing officer that he is perpetrating a fraud on a customer, so as to prevent its enforcing payment of his note, given to it as part of the transaction, where the president induces the customer to surrender stock and securities of a corporation to facilitate a reorganization, in consideration of stock in the new company and a promise that the bank will discount and carry his note for a certain amount until the president can sell a portion of the stock given him, to enable him to take up the note.

For other cases, see Notice, II. in Dig. 1-52 N. S.

Same — discount of note — ratification of promise.

2. The discounting by a bank of a note for one to whom its president has promised such discount as part of a fraudulent scheme to induce him to part with securities is not such a ratification of the promise of the president as to require it to carry the note until a certain time, according to the president's agreement.

For other cases, see Banks, III. b, in Dig. 1-52 N. S.

Pleading — motion to dissolve injunction — failure to answer amended bill.

3. That an answer has not been filed to an amended bill before the filing of a motion to dissolve an injunction which had been granted on the original bill, which thereafter was held to be insufficient, will not prevent the consideration of the motion, if there was nothing new in the amended bill.

For other cases, see Pleading, I. n, in Dig. 1-52 N. S.

(June 8, 1911.)

APPEAL by complainants from a decree of the Circuit Court for Culpeper County dissolving an injunction against the defendant bank, restraining it from collecting from complainants certain negotiable notes executed by them, which were alleged to have been discounted by said bank. Affirmed.

The facts are stated in the opinion.

Note. — As to imputation of knowledge of bank officer to bank, where officer is personally interested, see footnote to Chapman v. First Nat. Bank, ante, 300. L.R.A.1917F.

Messrs. Rixey & Hiden, John S. Barbour, and E. Hilton Jackson for appellants.

Messrs. Grimsley & Miller, for appellees:

If the lower court is of the opinion, on the showing made on the motion to dissolve an injunction, that the plaintiffs in the injunction bill will not be able to make out their case on final hearing, the injunction will be dissolved.

Ingles v. Straus, 91 Va. 209, 21 S. E. 490; *Clinch River Mineral Co. v. Harrison*, 91 Va. 122, 21 S. E. 660.

The defendant bank had no power to enter into the alleged contract.

Head v. Providence Ins. Co. 2 Cranch, 127, 2 L. ed. 229; *Morse, Banks & Bkg.* § 56; *Dresser v. Traders' Nat. Bank*, 165 Mass. 120, 42 N. E. 567; *First Nat. Bank v. Hoch*, 89 Pa. 324, 33 Am. Rep. 769; *Matthews v. Skinker*, 62 Mo. 329, 21 Am. Rep. 425; *First Nat. Bank v. Pierson*, 24 Minn. 140, 31 Am. Rep. 341; *Hood v. New York & N. H. R. Co.* 22 Conn. 502, 9 Am. Neg. Cas. 149; *Weckler v. First Nat. Bank*, 42 Md. 581, 20 Am. Rep. 95.

S. R. Smith possessed no inherent power, as president of the bank, to make the contract.

Hodge v. First Nat. Bank, 22 Gratt. 58; 1 *Morse, Banks & Bkg.* § 143; 10 Cyc. 907, 911; *Minnesota Lumber Co. v. Hobbs*, 122 Ga. 20, 49 S. E. 783; *Swindell v. Bainbridge State Bank*, 3 Ga. App. 364, 60 S. E. 13.

There was no ratification by the bank of Smith's acts.

Swindell v. Bainbridge State Bank, supra.

The answer to the original bill is also an answer to the amended bills subsequently filed, and a plea to a declaration is also a plea to an amended declaration.

Power v. Ivie, 7 Leigh, 161; *Throckmorton v. Throckmerton*, 86 Va. 770, 11 S. E. 289.

Notice to the bank, when fraud is connected with the transaction, cannot be imputed through its president, because he was engaged in accomplishing something for his own benefit, and was acting adversely to the interest of the bank.

Brookhouse v. Union Pub. Co. 73 N. H. 368, 2 L.R.A.(N.S.) 993, 111 Am. St. Rep. 623, 62 Atl. 219, 6 Ann. Cas. 679; *Victor Gold & S. Min. Co. v. National Bank*, 15 Utah, 301, 49 Pac. 826; *Allen v. South Boston R. Co.* 150 Mass. 200, 5 L.R.A. 716, 15 Am. St. Rep. 185, 22 N. E. 919; *Indian Head Nat. Bank v. Clark*, 166 Mass. 27, 43 N. E. 912; *Gunster v. Scranton Illuminating, H. & P. Co.* 181 Pa. 327, 59 Am. St. Rep. 650, 37 Atl. 550; 2 Pom. Eq. Jur. 3d ed. § 675;

1 Am. & Eng. Enc. Law, 2d ed. 1145 and notes; *Martin v. South Salem Land Co.* 94 Va. 58, 26 S. E. 591; *Seaverns v. Presbyterian Hospital*, 173 Ill. 414, 64 Am. St. Rep. 125, 50 N. E. 1079; *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 52 Am. Rep. 710, 1 N. E. 282; *Franklin Min. Co. v. O'Brien*, 22 Colo. 129, 55 Am. St. Rep. 118, 43 Pac. 1016, 18 Mor. Min. Rep. 331.

Messrs. Waite & Perry also for appellees.

Cardwell, J., delivered the opinion of the court:

This is a second appeal of this case to this court. The original and amended bills filed by appellants seek a rescission of a contract which it is alleged they were fraudulently induced to enter into by S. R. Smith and W. E. Coons, and to enjoin the Culpeper National Bank, Virginia, from collecting by suit certain negotiable notes executed by the appellants as a part of the alleged fraudulent scheme, and which notes, according to the allegations of the bill, were discounted by said bank with actual notice and actual participation of the bank in the wrong and fraud perpetrated by Smith and Coons upon appellants.

The facts and circumstances alleged in the original and first amended bills, and all that had been done to the injury of appellants pursuant to the alleged fraudulent purposes of Smith and Coons, are fully and clearly set out in the opinion of this court by Whittle, J., on the former appeal (109 Va. 776, 65 S. E. 656), and need not be repeated at length here. The decree entered by this court at the former hearing of the cause reversed the decree of the circuit court sustaining the demurrer of the Culpeper National Bank to the original and first amended bills, dismissing the same as to the bank, and dissolving the injunction theretofore awarded, and remanded the cause for further proceedings therein to be had not in conflict with the views expressed in this court's opinion.

The cause having been remanded, the defendant bank gave notice to appellants of a motion to dissolve the injunction which had been granted against it on the original bill, which injunction restrained the bank from collecting of complainants the notes above referred to, aggregating about \$4,500, discounted by the bank, and which were then due and payable. This motion, according to the notice, was to be made before the circuit court on the 26th day of June, 1909; but by a consent decree entered on that day the motion was ordered to be docketed and the hearing thereof continued to the 4th day of September, 1909, when it was heard upon the notice, the original and two

amended bills of the complainants, the answer of the defendant bank to the original and first amended bills, and its answer to the second amended bill, filed over the objection of the complainants, said answer being substantially the same as its answer to the original and first amended bills, the affidavits of complainants and others as to the value of certain lands involved in the litigation, and upon an agreed statement of facts and certain record evidence—the complainants, appellants here, relying also on the answers of S. Russell Smith, W. E. Coons, the defendant bank, and the Berry Hill Mineral Springs Company; the defendant bank, appellee here, upon the answers of Smith, Coons, and the Berry Hill Mineral Springs Company, affidavits of the present cashier of the bank and all of its directors, except T. C. Smith, and other affidavits as to value of the land, etc., tender of stock, and certain statements agreed upon. Whereupon the case was fully argued and by consent submitted to the court for decision in vacation, and at the December term, 1909, the decree from which this appeal is taken was entered, dissolving the injunction which had been theretofore awarded against the defendant bank.

Quite a number of questions have been raised and argued on this appeal; but in the view we take of the case it is only necessary for us to consider the relation of the appellee to the appellants with respect to the transaction which it is alleged the latter had with S. Russell Smith and W. E. Coons, and by which it is claimed they were defrauded, of which fraud appellee had knowledge and in which it participated.

The original and amended bills contain substantially the same allegations, and the affidavits read by appellants in resisting the motion to dissolve the injunctions practically reiterate the allegations of the original and amended bills. The facts charged in the bills and stated in the affidavits are that appellants were, prior to and during the year 1904, the owners of three notes, aggregating \$45,000, which were secured by a deed of trust on 169½ acres of land in Culpeper county, Virginia, belonging to the Berry Hill Mineral Springs Company of Virginia, a corporation, and 600 shares of stock in said corporation, and that on the last-named date S. Russell Smith, who was president of the appellee bank, and treasurer of Culpeper county, and W. E. Coons, clerk of the circuit court of Culpeper county, both of whom are well known and prominent men, called upon appellants at their home in Culpeper county, Virginia, for the purpose of fraudulently inducing them to enter into a reorganization scheme, whereby the Berry Hill Mineral Springs Company would

be reorganized upon a certain plan, which is set out in appellants' original bill; that in order to induce appellants to accept the proposed scheme, and to mark satisfied the deed of trust securing their said notes, aggregating \$45,000, and to surrender the 600 shares of stock in the company, the said Smith and Coons made the representations and promises set out in the original bill, and which are stated in the opinion on the former appeal of this case, *supra*; that appellants, relying and acting solely upon said representations, during the month of March, 1905, surrendered their stock and the notes, and marked the said deed of trust satisfied; that the new company, which Smith and Coons were to organize, was afterwards organized, and \$40,000 worth of its stock issued to appellants; that Smith and Coons, and each of them, expressly represented and promised that within two years all the stock to be issued to appellants in the new company would be redeemed or purchased at its par value by Smith personally, and he reserved the right to do so, none of which promises made by Smith and Coons were kept, but were all broken, and appellants were deceived and defrauded out of their property. With respect to the appellee bank's connection with and participation in the fraud charged against Smith and Coons, it is charged in the amended bills and stated in the affidavits for appellants, read on the motion to dissolve the injunction, that appellee, through the said S. Russell Smith, its president, agreed that if appellants would go into this reorganization scheme with Smith and Coons, and surrender their 600 shares of stock in the old company, and accept \$40,000 worth of stock in the new company which Smith and Coons proposed to organize, to lend them (appellants) \$4,500 and accept their notes for that amount, and to carry the said notes upon renewals of the same from time to time until Smith, in his individual capacity, sold for appellants enough of their \$40,000 worth of stock in the new company at par to pay off the loan of the \$4,500 by the bank.

Practically the claim made against the appellee bank is that it agreed, through Smith, its president, that if Smith were unsuccessful in selling a sufficient amount of appellant's stock in said new company to pay off the notes given by them to the appellee for the loan of the \$4,500, payment of said notes was not to be demanded of appellants. Appellee made the loan of \$4,500 to appellants, by discounting their notes for the same, which notes became due and were several times renewed; but finally appellee refused to renew the notes any longer, and demanded their payment, which being refused, a suit against appellants was instituted for the collection of the notes, and solely upon the allegation of an agreement on the part of appellee, made through Smith, its president, not to attempt to collect said notes until enough of the stock of appellants in said new company should be sold, and from the proceeds of said sale the notes could be paid off, the injunction in this cause, staying the hands of the appellee in said suit for the collection of said notes, was awarded.

The sum and substance of the relief prayed in the bills in this clause is: (1) That appellants' contract with Smith and Coons be rescinded, their deed of trust given by the old company, securing them, re-established, and that their stock in the old company be given back to them (i. e., that they be placed in *statu quo*); and (2) failing in their demand to be placed in *statu quo*, they ask that their contract with Smith and Coons be specifically enforced (i. e., that, with respect to appellee, its hands shall be stayed as to any effort on its part to collect the notes given for the loan of the \$4,500 until Smith and Coons fully perform their contract with appellants).

Actual notice to appellee of the alleged fraud of Smith and Coons upon appellants is not even claimed; but their sole reliance in resisting the dissolution of the injunction awarded in the case was that constructive notice to appellee is to be imputed, for the reason that Smith was, at the time of the alleged fraudulent transaction, appellee's president and its controlling and managing officer, and presumed to have had authority to act for appellee in his said transactions with appellants. The controlling question, therefore, for our determination, is whether or not constructive knowledge of the alleged fraud can be rightly and legally imputed to appellee from the fact that Smith was the president of the appellee bank and alleged to be the sole manager of its affairs, and, in order to carry out the alleged fraud on the appellants, it became necessary, on Smith's account, to discount the notes in question for appellants in the bank, in which latter transaction a fraud was also perpetrated on the bank.

Undoubtedly it is a well-established general rule that knowledge of the agent is knowledge of the principal, and that the principal is ordinarily chargeable with the knowledge acquired by his agent in executing his agency, and is subject to the liabilities which such knowledge imposes; and by some authorities it is maintained that this rule is especially applicable to corporations, which can deal alone with the public through their officers and agents, and could not otherwise be affected with notice; but this rule has its exceptions, one of which

applies to this case. The agent here is alleged, and by the affidavits and agreed facts is proved, to have engaged in an independent fraudulent transaction on a third person for his own benefit, and, at the same time, in order to accomplish the fraud, has also perpetrated a fraud upon his own principal.

In Pomeroy's Eq. Jur. vol. 2, 3d ed. § 675, the author says: "It is now settled, by a series of decisions possessing the highest authority, that when an agent or attorney has, in the course of his employment, been guilty of actual fraud, contrived and carried out for his own benefit, by which he intended to defraud, and did defraud, his own principal or client, as well as, perhaps, the other party, and the very perpetration of such fraud involved the necessity of his concealing the facts from his own client, then, under such circumstances, the principal is not charged with constructive notice of facts known by the attorney, and thus fraudulently concealed. In other words, if, in the course of the same transaction in which he is employed, the agent commits an independent fraud for his own benefit, and designedly against his principal, and it is essential to the very existence or possibility of such fraud that he should conceal the real facts from his principal, then the ordinary presumption of a communication from the agent to his principal fails. On the contrary, a presumption arises that no communication was made, and consequently the principal is not affected with constructive notice. The courts have carefully confined the operation of this exception to the condition described, where a presumption necessarily arises that the agent did not disclose the real facts to his principal, because he was committing such an independent fraud that concealment was essential to its perpetration."

In *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 52 Am. Rep. 710, 1 N. E. 282, the opinion says: "While the knowledge of an agent is ordinarily to be imputed to the principal, it would appear now to be well established that there is an exception to the construction or imputation of notice from the agent to the principal in cases of such conduct by the agent as raises a clear presumption that he would not communicate the fact in controversy, as where the communication of such a fact would necessarily prevent the consummation of a fraudulent scheme which the agent was engaged in perpetrating."

There are cases which seemingly sanction the view that the exception to the general rule does not apply to directors, presidents, and other such managing officers of a corporation, through whom alone the corpora-

tion can act; but in the well-considered case of *Barnes v. Trenton Gaslight Co.* 27 N. J. Eq. 33, the opinion says: The rule based on the presumption that the agent has communicated the facts to his principal does not apply where the agent's (though an officer of a corporation) interest is opposed to that of his principal, for in such a transaction the officer stands as a stranger to the company. His interest being opposed to the interest of the company, the presumption is not that he will communicate his knowledge to the company, but that he will conceal it; that where an officer of a corporation is dealing in his own interest, opposed to theirs, he must be held not to represent them in the transaction, so as to charge them with the knowledge he may possess, but which he has not communicated to them, and which they do not otherwise possess,—citing a number of decisions by both English and American courts.

Another instructive case in point is that of *Brookhouse v. Union Pub. Co.* 73 N. H. 308, 2 L.R.A.(N.S.) 993, 111 Am. St. Rep. 623, 62 Atl. 219, 6 Ann. Cas. 675, to which there is an extended note in the last-named publication reviewing a great number of decided cases; the conclusion being that the exception to the broad proposition that notice to the agent is notice to the principal, viz., where the knowledge is acquired by an officer of a corporation, while not acting for the corporation, but while acting for himself, is not imputable to the corporation, finds support in the decisions of the highest courts of England, the United States courts, and the courts of twenty-seven states of the Union, citing the cases.

In *Gunster v. Scrantom Illuminating H. & P. Co.* 181 Pa. 327, 59 Am. St. Rep. 650, 37 Atl. 550, the question is elaborately and ably discussed, and a number of the cases relied on by counsel for appellants to sustain their side of the question are criticized.

The opinion of this court in *Martin v. South Salem Land Co.* 94 Va. 58, 26 S. E. 600, is in line with the long list of cases to which the above cited belong, and says: "A corporation is not affected by the knowledge of an agent, when he himself contracts with it, or otherwise deals with it in a transaction in which his interests are opposed to the interests of the company, for in such a transaction he could not represent the company."

It is believed that no case can be found deciding that when the agent was acting for himself in a transaction, and in that same transaction defrauded his principal, and the principal received no advantage from the transaction, notice to the agent was notice to the principal.

Upon the allegations of the bills in this

cause, leaving out of view the denial of Smith in his answer and his affidavit, and in the affidavits of all the officers and directors of the appellee bank, of the truth of the allegations with respect to the knowledge of appellee of the fraud charged against Smith and Coons, it is made clearly to appear that Smith, in the transaction, was dealing in his own interest, which was distinctly antagonistic to the interest of the appellee. Assuming it to be true that, in perpetrating the alleged fraud upon appellants, Smith told them, "as an inducement to get us to go into this fraudulent scheme, the bank would let us have \$4,500, and not require us to pay it back until Mr. Smith sold certain stock for us and from the proceeds of the sale paid off the notes,"—i. e., if the stock was never sold by Smith, then this money was never to be paid back,—can the doctrine that knowledge of the agent is to be imputed to his principal be carried to the extent of holding appellee bound by such a contract, especially when it had no actual knowledge of the transaction, and received no benefits from it? Surely not.

The argument that appellee has ratified Smith's alleged unauthorized agreement is unsound; for there was nothing for appellee to ratify. It has obtained no advantage over appellants; but, to the contrary, they received a quid pro quo for everything appellee has received from them.

In *Swindell v. Bainbridge State Bank*, 3 Ga. App. 364, 60 S. E. 13, it is said: "Before a corporation should be held as having ratified a verbal agreement of its agent to relieve the makers from the payment of notes amounting to \$10,000, both knowledge and specific acts of, ratification ought to be alleged and proved." "When ratification by the bank of an unauthorized agreement; made by its president, to relieve its debtor, is relied upon, some specific act or acts of ratification should be alleged. If acquiescence in and benefit from such unauthorized agreement are relied upon as an estoppel, knowledge of such agreement by the directors of the bank, and the beneficial results accruing to the bank under the agreement, must be alleged and proved."

The actual transaction in this case between appellee and appellants is simply this: The latter presented their notes to the former for discount, attaching thereto 60 shares of stock as security for the notes, which notes were taken by the appellee bank in the usual course of business, and appellants received therefor the face value of the notes, less the ordinary discount upon the loan of the money. It has a number of times renewed the said notes, and finally demanded their payment, tendering the return of the stock deposited as security for the

notes, and appellee is claiming nothing of appellants for which it has not rendered a full and fair equivalent. On the other hand, appellants refuse to pay back the money they have received of appellee in this transaction, decline to receive back their 60 shares of stock, proven to be worthless, and say that the hand of appellee should be stayed in its efforts to collect the money loaned them until appellants can litigate to an end the controversy as to whether or not appellants are entitled to the relief they are asking as against Smith and Coons and the Berry Hill Mineral Springs Company, which relief is that the alleged fraudulent contract be rescinded or reformed, when in either event a court of equity could not grant the relief asked without requiring all parties to the transaction to be put in statu quo.

Appellants cannot succeed in this litigation unless they succeed against Smith and Coons; and, even if they make a case against Smith and Coons, it does not follow that they will succeed against appellee, as to whom the injunction awarded in the cause alone applies; on the contrary, the record, as we have seen, negatives the right of appellants to the relief they are asking as against appellee. Under these conditions and circumstances, it would be manifestly unjust and inequitable to hold that appellee shall not collect of appellants the money it lent them in an ordinary banking transaction, until they have litigated with other parties matters of which appellee had no knowledge and with which it is not concerned.

There is no merit in the contention of appellants that the motion to dissolve the injunction awarded in the cause was heard as upon a demurrer to appellants' bills, and therefore the decision of this court upon the first appeal was conclusive and binding upon the lower court, and it should have overruled the motion and declined to dissolve the injunction. This contention is made upon the ground that, although appellee had answered the original and first amended bills, it had not, when the motion to dissolve the injunction was made, answered the second amended and supplemental bill. We have observed that, while appellee had not, previous to the hearing of the motion, formally filed its answer to the second amended bill, it was presented and filed at the time the motion was heard, though over the objection of appellants; but if such were not the case, the three bills are practically the same in their averments, there being nothing new in either of the amended bills, and therefore the answer of appellee, already in the record, put in issue all the matters set up in both the original and amended

bills. The motion to dissolve the injunction was made and heard in accordance with the general practice in the courts of the state, upon the pleadings and affidavits read

as depositions on behalf of the respective parties.

The decree of the Circuit Court is right, and therefore is affirmed.

WEST VIRGINIA SUPREME COURT OF APPEALS.

WALTER S. GOODIN
v.

DIXIE PORTLAND CEMENT COMPANY,
Plff. in Err.

(— W. Va. —, 90 S. E. 544.)

Corporation — compensation of officer.

1. An officer of a corporation who is also a director, in the absence of a special contract, is not entitled, unless under some special circumstances, to recover as upon an implied contract, compensation for services rendered in discharge of his official duties. *For other cases, see Corporations, IV, g, 3, in Dig. 1-52 N. S.*

Same — stockholder.

2. This general rule, however, applicable to directors, does not apply to an officer who is also a stockholder, for as such stockholder he stands in no such trust relationship to the corporation as to preclude his right to compensation for services rendered pursuant to corporate authority. *For other cases, see Corporations, IV, g, 3, in Dig. 1-52 N. S.*

Same — ministerial officer.

3. But a ministerial officer, as assistant secretary of a corporation, when elected and serving under such circumstances and conditions as to negative any implied contract to pay him for the services pertaining to his office, and such as a stockholder would ordinarily be expected to perform without compensation, will not, in the absence of a special contract, be permitted to recover compensation therefor, as upon an implied contract.

For other cases, see Corporations, IV, g, 3, in Dig. 1-52 N. S.

(October 24, 1916.)

ERROR to the Circuit Court for Kanawha County to review a judgment in plaintiff's favor in an action brought to recover compensation for services rendered as assistant secretary of the defendant company. Reversed.

The facts are stated in the opinion.

Headnotes by MILLER, J.

Note. — As to right of officer, director, or stockholder, in the absence of special contract, to compensation for services to corporation, see annotation following this case, post, 310.
L.R.A.1917F.

Messrs. J. Howard Hundley, Charles M. Alderson, and Charles C. Moore, for plaintiff in error:

An officer of a corporation, especially when he is a stockholder, cannot recover on quantum meruit or implied contract for services performed as such officer.

10 Cyc. 952; 21 Am. & Eng. Enc. Law, 2d ed. 905; Myers v. Equitable Bldg. & L. Soc. 92 Ill. App. 27; Kilpatrick v. Peurose Ferry Bridge Co. 49 Pa. 118, 88 Am. Dec. 497; Cheeney v. Lafayette, B. & M. R. Co. 68 Ill. 570, 18 Am. Rep. 584; Santa Clara Min. Asso. v. Meredith, 49 Md. 389, 33 Am. Rep. 264, 4 Mor. Min. Rep. 44; Citizens' Nat. Bank v. Elliott, 55 Iowa, 104, 39 Am. Rep. 167, 7 N. W. 470; New York & N. H. R. Co. v. Ketchum, 27 Conn. 170; Gridley v. Lafayette, B. & M. R. Co. 71 Ill. 200; Ellis v. Ward, 137 Ill. 509, 25 N. E. 530; St. Louis, A. & S. R. Co. v. O'Hara, 177 Ill. 525, 52 N. E. 734, 53 N. E. 118; Holland v. Lewiston Falls Bank, 52 Me. 564; Sawyer v. Pawner's Bank, 6 Allen, 207; Pew v. First Nat. Bank, 130 Mass. 391; Adlets v. Progressive Shoe Co. 84 Mo. App. 288; Farmers' Loan & T. Co. v. Housatonic R. Co. 152 N. Y. 251, 46 N. E. 504; Martindale v. Wilson-Cass Co. 134 Pa. 348, 19 Am. St. Rep. 706, 19 Atl. 680; Fritze v. Equitable Bldg. & L. Soc. 186 Ill. 185, 57 N. E. 873; Blue v. Capital Nat. Bank, 145 Ind. 518, 43 N. E. 655; Mather v. Eureka Mower Co. 118 N. Y. 629, 23 N. E. 993; Crumlish v. Central Improv. Co. 38 W. Va. 390, 23 L.R.A. 120, 45 Am. St. Rep. 872, 18 S. E. 456; Ravenswood, S. & G. R. Co. v. Woodyard, 46 W. Va. 562, 33 S. E. 285; Butts v. Woods, 37 N. Y. 317.

An officer of a corporation is presumed to know its by-laws.

Darrah v. Wheeling Ice & Storage Co. 50 W. Va. 417, 40 S. E. 373; Mung v. Wellsburg Bkg. & T. Co. 66 W. Va. 204, 135 Am. St. Rep. 1024, 66 S. E. 230.

Messrs. Brown, Jackson, & Knight and George S. Couch for defendant in error.

Miller, J., delivered the opinion of the court:

Plaintiff's action, assumpsit on the common counts, is to recover for services rendered as assistant secretary of defendant, between October, 1906, and January, 1912.

Upon defendant's plea of the Statute of Limitations, plaintiff's recovery was limited

to the period between May 12, 1910, and January 17, 1912.

The verdict of the jury upon which the judgment complained of was pronounced was for \$1,000, substantially at the rate of \$50 per month for the period of twenty months.

Plaintiff when originally elected assistant secretary was both a stockholder and a director of the defendant company. During the period covered by his claim for services he was also employed by sundry other allied companies, and later, when most of these companies were absorbed or taken over by the United Kansas Portland Cement Company, a company organized and controlled by the same persons who owned and controlled the other companies, plaintiff was paid a salary of \$250. per month for his services. The business of all these companies was for the most part transacted in the same offices. The principal stockholder in all of them was one Nicholson, who was also the president, including the United Kansas Portland Cement Company, and he was the special friend and patron of plaintiff. Plaintiff held a small amount of stock in most, if not all, of these companies, and was secretary or assistant secretary or treasurer of all of them. Nicholson failed, and the management and control of these companies passed into other hands, and plaintiff's connection therewith was also severed about 1912. During his connection with the defendant company he never at any time rendered any bill or made any claim for salary or services as assistant secretary, except that he claims to have talked with his friend Nicholson about compensation. He swears that, on account of the financial condition of the company, Nicholson requested him not to present any claim for salary, but that it was his understanding that when the company got in financial condition the matter of his salary would be taken up and adjusted. It is conceded, however, that although the by-laws of the corporation would have permitted it, no salary was ever voted or authorized by the directors, and no salary was paid plaintiff. And it is shown in evidence that on May 26, 1910, at a meeting of the directors of the United Kansas Portland Cement Company, at which plaintiff was present, and kept the minutes, it was resolved that bills for services rendered by any of the employees of said company, employed at a salary, and who were to give their exclusive attention to the business of said company, and who should perform services for the Dixie Portland Cement Company or the Iowa Portland Cement Company, should be made out and presented to and collected from the latter companies; and it is also

shown that thereafter, in accordance with said resolution, a bill for \$150 per month was so made out, presented to and paid by the defendant company. It is claimed by plaintiff that this bill did not cover his salary, but the bills are not produced, and the best evidence of what those bills covered is not presented by the record. Moreover, it is claimed that whether plaintiff's services were covered thereby or not, he was fully paid therefor, and any claim against the defendant company therefor would be due the United Kansas Portland Cement Company. Plaintiff admits in his evidence that after the formation of the United Kansas Portland Cement Company his salary was made equal to what had been previously paid him for his services in the other companies, and he practically concedes that his election to the office of assistant secretary of the defendant company, and to official positions in the allied companies, was because of his relationship to Mr. Nicholson, as president and general manager of all of them. The evidence satisfies us that the plaintiff performed no services for the defendant company, other than the duties appertaining to the office of assistant secretary, such as issuing stock certificates, transfers thereof, and keeping the minutes of the meetings of stockholders and directors, and conducting the usual correspondence relating thereto. In his testimony he was unable to specify any other kind of service rendered, although he stated there may have been other services rendered which he could not recall.

The main proposition relied on to reverse the judgment, and sought to be presented by instructions to the jury, given and refused, and by the motion of defendant for a new trial, is, that an officer of a private corporation, when a director or a stockholder, cannot recover as upon an implied contract, for services performed as such officer. Our statute (Code 1913, chap. 53, § 2885, ¶ 53) provides, among other things, that "the board of directors may, subject to the provisions of law and the by-laws, appoint such officers and agents of the corporation as they may deem proper, and also an executive committee from their own number, and may prescribe the duties and compensation of such, but there shall be no compensation for services rendered by the president or any director as such, unless it be allowed or authorized by the stockholders."

And, independently of any statute, it seems to be well settled law, except under some special or extraordinary circumstances, that no officer who is also a director, in the absence of special contract, duly authorized by by-law of the stockholders or with proper action of the directors, can, upon an im-

plied contract, recover for the unusual services rendered the corporation in his official capacity. *Ravenswood, S. & G. R. Co. v. Woodyard*, 46 W. Va. 558, 562, 33 S. E. 285; *Crumlish v. Central Improv. Co.* 38 W. Va. 390, 23 L.R.A. 120, 45 Am. St. Rep. 872, 18 S. E. 456; 2 *Thomp. Corp.* §§ 1728-1730; 3 *Clark & M. Priv. Corp.* §§ 670, 671; 21 *Am. & Eng. Enc. Law*, 905; 10 *Cyc.* 952.

Whether this general rule applies to an officer who is only a stockholder, and not a director, is a question upon which the authorities are divided. The principle underlying the rule respecting directors is that they are trustees for the stockholders, and that, in the absence of express contract, they should not be permitted to recover for services rendered in the performance of the ordinary duties pertaining to their offices upon any implied contract therefor; but the reason for this rule is not generally applicable to stockholders. They stand in no fiduciary relation to the corporation, and we hold, with the great weight of authority, that when the circumstances of the employment do not negative such implication, and a stockholder is called upon by corporate authority to perform some special service, whether of an official character or otherwise, a contract is raised by implication to pay him what his services are reasonably worth. 2 *Thomp. Corp.* § 1730; 3 *Clark & M. Priv. Corp.* 2055; 2 *Machen, Corp.* § 1673; *Rogers v. Hastings & D. R. Co.* 22 Minn. 25; *Holder v. Lafayette, B. & M. R. Co.* 71 Ill. 106, 22 Am. Rep. 89; *Cheaney v. Lafayette, B. & M. R. Co.* 68 Ill. 570, 18 Am. Rep. 584; *National Loan & Invest. Co. v. Rockland Co.* 36 C. C. A. 370, 94 Fed. 335; *Santa Clara Min. Asso. v. Meredith*, 49 Md. 380, 33 Am. Rep. 264; *Mather v. Eureka Mower Co.* 118 N. Y. 629, 23 N. E. 993. Such certainly is the law of Kansas, where the principal office of the defendant company was located, where the plaintiff resided, and where he was elected assistant secretary, and performed his duties as such. *Missouri River R. Co. v. Richards*, 8 Kan. 101; *St. Louis, Ft. S. & W. R. Co. v. Tier-*

nan, 37 Kan. 606, 15 Pac. 544; *First Nat. Bank v. Drake*, 29 Kan. 311, 44 Am. Rep. 646; and according to *Crumlish v. Central Improv. Co.* 38 W. Va. 390, 23 L.R.A. 120, 45 Am. St. Rep. 872, 18 S. E. 456, the law of Kansas should control. The decisions cited and relied upon by counsel for the defendant for the most part do not support the contrary view. They are mainly cases involving the question whether an officer or agent of a corporation can recover as upon an implied contract for performing the duties usually appertaining to his particular office when no compensation has been provided therefor by any by-law or corporate action of the directors.

But the question remains, do the conditions and circumstances surrounding the plaintiff negative or repel any implication of a contract on the part of the defendant company to pay him for his services as assistant secretary? Our conclusion from the facts appearing in the record is that they do. The by-laws of the corporation would have permitted the directors to allow him a salary, but they never did so. The duties performed by him were those pertaining to his office, and were, so far as we can see, simply ministerial, and those which such officer, being a stockholder, would usually be expected to perform without compensation; and the time employed by him in performing these services was time covered by his salary received from the other allied corporations. We have carefully considered the evidence upon this subject. There is no substantial conflict in the evidence, and we are clearly of opinion, that, under the authorities, plaintiff has not shown himself entitled to the verdict and judgment complained of.

We are asked to enter judgment for defendant here, but we cannot say that a different case may not be presented on another trial, and, under the rule of practice adopted here, we can only reverse the judgment, set aside the verdict, and award the defendant a new trial. Judgment reversed and a new trial awarded.

Annotation—Right of officer, director, or stockholder, in absence of special contract, to compensation for services to corporation.

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III. Right of stockholder to compensation:**a. Where stockholder is officer:**

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I. Scope.

As indicated by the title, this note deals only with cases involving private corporations.

The question of the right of officers, directors, or stockholders to recover compensation for services rendered under illegal contracts is not within the scope of this note; and cases involving such matters are not discussed, except in instances in which the court regards the illegal contract as leaving the parties in the same position as if no contract at all had been made.

Questions as to the rights of *de facto* officers as such, the rights of officers holding over after the expiration of

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their contracts, and as to the rights of directors to vote themselves compensation for past services, are also without the scope of this note.

II. Right of director to compensation.**a. For services as director.**

It is a rule of universal application that, in the absence of express contract created either by the by-laws, articles of incorporation, or charter of a corporation, or by resolution of the stockholders, board of directors, or other body empowered to enter into such contracts, the directors, of a corporation are presumed to serve without compensation.¹

¹ *Green v. Felton* (1908) 42 Ind. App. 675, 84 N. E. 186; *Carrothers v. Newton Mineral Spring Co.* (1883) 61 Iowa, 681, 17 N. W. 43; *Santa Clara Min. Asso. v. Meredith* (1878) 49 Md. 389, 33 Am. Rep. 264, 4 Mor. Min. Rep. 44; *Wiano Land & Improv. Co. v. Webster* (1895) 75 Mo. App. 457; *Jackson v. New York C. R. Co.* (1874) 2 Thomp. & C. (N. Y.) 653, affirmed in (1874) 58 N. Y. 623; *Lewis v. Matthews* (1914) 161 App. Div. 107, 146 N. Y. Supp. 424; *Sargent v. Sargent Granite Co.* (1893) 3 Misc. 325, 23 N. Y. Supp. 886, reversed in (1894) 6 Misc. 384, 26 N. Y. Supp. 737; *Stout v. Security Trust & L. Ins. Co.* (1903) 82 App. Div. 129, 81 N. Y. Supp. 708; *Accommodation Loan & Sav. Fund Asso. v. Stonemetz* (1858) 29 Pa. 534; *Althouse v. Cobaugh Colliery Co.* (1910) 227 Pa. 580, 136 Am. St. Rep. 908, 76 Atl. 316; *Field v. Union Box Co.* (1876) 2 W. N. C. (Pa.) 426; *Kutztown Water Co. v. Dietrich* (1905) 18 Pa. Dist. R. 911; *Toponce v. Corinne Mill, Canal & Stock Co.* (1890) 6 Utah, 439, 24 Pac. 534, affirmed in (1894) 152 U. S. 405, 38 L. ed. 493, 14 Sup. Ct. Rep. 632; *Hall v. Vermont & M. R. Co.* (1856) 28 Vt. 401 (obiter); *Monmouth Invest. Co. v. Means* (1906) 80 C. C. A. 527, 151 Fed. 159; *Hayes v. Canada, A. & P. S. S. Co.* (1910) 104 C. C. A. 271, 181 Fed. 289, infra, note 5; *Dunlap v. Montana-Tonopah Min. Co.* (1911) 102 Fed. 704, affirmed in (1912) 116 C. C. A. 286, 196 Fed. 612; *Earle v. Burland* (1900) 27 Ont. App. Rep. 540 (managing director); *Roray v. Howe Sound* (1915) — B. C. —, 31 West. L. R. 409, 22 D. L. R. 855; *Dunston v. Imperial Gaslight Co.* L.R.A.1917F.

(1832) 3 Barn. & Ad. 125, 110 Eng. Reprint, 47, 1 L. J. K. B. 40; *Hutton v. West Cork R. Co.* (1883) L. R. 23 Ch. Div. (Eng.) 654, 52 L. J. Ch. N. S. 689, 49 L. T. N. S. 420, 31 Week. Rep. 827; *Re Newman & Co.* [1895] 1 Ch. (Eng.) 674, 64 L. J. Ch. N. S. 407, 12 Reports, 228, 72 L. T. N. S. 697, 43 Week. Rep. 483, 2 Manson, 267.

"From the employment of an ordinary servant, the law implies a contract to pay him. From the service of a director, the implication is that he serves gratuitously." *National Loan & Invest. Co. v. Rockland Co.* (1899) 36 C. C. A. 370, 94 Fed. 335.

Where, in *Burns v. Commencement Bay Land & Implement Co.* (1892) 4 Wash. 558, 30 Pac. 668, a trustee was seeking to recover for services in superintending the construction of the company's wharf, the court, after holding such services to be within the scope of his duties as officer of the company, says: "There are some cases which hold that, in the absence of any express prohibition in the articles or by-laws of the corporation preventing its officers from receiving any pay, that they may recover pay on an implied contract for services rendered, although such services were within their duties as officers of the corporation. It seems to us, however, that the better authority is the other way, and that a trustee or officer of a corporation cannot recover pay for such services without an express provision therefor, and this must come from the articles of agreement or by-laws, or from some other source or authority than the action of the trustees themselves. Where a trustee of a corpora-

Recovery in such cases would, of course, have to be based upon implied contract, and the courts refuse to view the rendition of services by a director as raising an implication of contract. If a director expects compensation, it is incumbent upon him to see that such is provided

by express contract, properly executed. The reason for this rule is the trusteeship of the directors for the benefit of the stockholders.² It is the sense of the courts that good faith will not permit a trustee to take compensation for services, although rendered for the benefit

tion performs services which are clearly outside of his duties as trustee, as, for instance, where he is an attorney at law, and attends to the litigation of the company, he may recover pay for such services."

And it is said in *Bagley v. Carthage, W. & S. H. R. Co.* (1900) 165 N. Y. 179, 58 N. E. 895, affirming (1898) 25 App. Div. 475, 45 N. Y. Supp. 718, that "it is the general rule that a director, assuming office as such without any agreement as to compensation, is presumed to render his official services gratuitously; for he assumes thereby, in a sense, a trust relation towards the company, and it would be against sound policy to permit him to assert claims for services which were within the line of his duties."

In *Smith v. Putnam* (1882) 61 N. H. 632, an action involving the right of certain directors of a corporation to compensation, it is said: "It is not claimed that there was any express contract on its part to pay them anything for their services, and the law will imply none. The rule is not only that directors are not entitled to compensation for their services in the absence of any agreement on the part of the corporation to pay for the same, but, on the contrary, such services are presumed to be rendered gratuitously, and they must consequently look either to a statute or to a contract for the right to receive compensation."

"Directors are not entitled to compensation for their services in discharge of their official duties unless compensation is provided for by the charter or by-laws; nor are they entitled to payment on a quantum meruit for the performance of services previously rendered by them within the line of their duty as directors." *Huffaker v. Krieger* (1899) 107 Ky. 200, 46 L.R.A. 384, 53 S. W. 288.

In *Newport & M. R. Co. v. Hay* (1886) 8 Ky. L. Rep. 115, it is said: "The president and directors of a corporation are trustees for the shareholders, and have no power to waste, destroy, misapply, or give away the funds or other property intrusted to their keeping. Having accepted and filled their positions without any provision having been made for their compensation, the stockholders have the right to suppose that they are acting under the common-law rule by which trustees cannot claim compensation for their services."

So, it is held in *Maux Ferry Gravel Road Co. v. Branegan* (1872) 40 Ind. 361, that where there is no provision made in the law under which a corporation is organized, or in a by-law of the company, or in a contract of the company, by which compensation is to be made for the services of the directors thereof, no such compensation may be claimed or recovered.
L.R.A.1917F.

"That directors have no right to charge for performing official duty is a principle universally admitted to be sound law." *New York & N. H. R. Co. v. Ketchum* (1858) 27 Conn. 170. The services involved in this case were the procuring of stock subscriptions.

"A director in a corporation is not entitled to compensation for his services as director, in the absence of any agreement in advance that he shall receive such compensation." *Obiter in Wickersham v. Crittenden* (1892) 93 Cal. 17, 28 Pac. 788.

The foregoing is quoted with approval in *Brown v. Valley View Min. Co.* (1900) 127 Cal. 630, 60 Pac. 424, in which it is held that, if a director cannot charge the corporation for such services rendered by himself, a substitute employed by him to perform such services for him would be in no better position.

Where, in *Grafner v. Pittsburg, N. I. & C. Street R. Co.* (1903) 207 Pa. 217, 56 Atl. 426, the directors of a corporation had issued stock to themselves in payment of services, it is held that, in the absence of a prior agreement to pay for such services or any by-law authorizing such payment, they were not entitled to such stock.

In *Beaudry v. Read* (1907) 10 Ont. Week. Rep. 622, involving the right of directors to stock voted to them for past services, it is said: "Prima facie, directors of a company are not entitled to any remuneration in the absence of statutory authority."

So, in *American C. R. Co. v. Miles* (1869) 52 Ill. 174, it is said that "in England and this country railway directors cannot recover compensation unless allowed by a by-law in the former, or by a resolution in the latter."

The preceding case is cited and followed in *Rockford, R. I. & St. L. R. Co. v. Sage* (1872) 65 Ill. 328, 16 Am. Rep. 587, and *Cheeny v. Lafayette, B. & M. R. Co.* (1873) 68 Ill. 570, 18 Am. Rep. 584, on subsequent appeal in (1877) 87 Ill. 446.

It is said *obiter* in *Mather v. Eureka Mower Co.* (1890) 118 N. Y. 629, 23 N. E. 993, affirming (1887) 44 Hun, 333: "It is well settled that a director of a corporation is not entitled to compensation for services performed by him, as such, without the aid of a pre-existing provision expressly giving the right to it. They are the trustees for the stockholders, and, as such have the management of the corporate affairs."

And in *Brannin v. Loving* (1884) 82 Ky. 370, it is said *obiter*: "The services of directors are . . . usually gratuitous; they are entitled to no compensation in the absence of a contract for it."

² *Newport & M. R. Co. v. Hay* (1886) 8

of his *cestuis qui trustent*, where there has been no express agreement to that effect. This rule protects the stockholders and operates as no hardship upon directors, who may demand an express contract before entering upon the performance of their duties.

In one jurisdiction, at least, the common-law rule has been adopted by statute,² and the authority to make contracts for compensation limited to the stockholders.³

b. For services as officer.

1. In general.

The rule against the recovery of com-

pensation by a director of a corporation, in the absence of an express contract, applies to the services rendered by a director as an officer of the board of directors, as well as to the ordinary services rendered by a director as such.⁴ This is on the theory that services rendered as officer of the board of directors are part of the services of a director within the scope of his official duties. In numerous cases compensation has, in the absence of express contract therefor, been denied directors of corporations for services rendered as president,⁵ vice president,⁶ secretary,⁷ and

Ky. L. Rep. 115, *supra*, note 1; Bagley v. Carthage, W. & S. H. R. Co. (1900) 165 N. Y. 179, 58 N. E. 895, affirming (1898) 25 App. Div. 475, 49 N. Y. Supp. 718, *supra*, note 1; Mather v. Eureka Mower Co. (1890) 118 N. Y. 629, 23 N. E. 993, affirming (1887) 44 Hun, 333, *supra*, note 1; Ravenswood, S. & G. R. Co. v. Woodyard (1899) 46 W. Va. 558, 33 S. E. 285, *infra*, note 3.

And see *infra*, II. b, 1, note 9, and the accompanying text.

² "The general rule everywhere denies compensation to the president of a private corporation, unless it be authorized by the proper authority of the corporation, and the law raises no implied promise to pay compensation to directors or president, in the absence of provision in by-law or order, they being trustees, and not entitled, as such, to compensation." Ravenswood, S. & G. R. Co. v. Woodyard (1899) 46 W. Va. 558, 33 S. E. 285. In West Virginia, however, the matter is governed by a statute providing that "there shall be no compensation for services rendered by the president or any director, unless it be allowed by the stockholders."

And see, in this connection, *infra*, note 11.

⁴ It is said in *GOODIN v. DIXIE PORTLAND CEMENT Co.* *ante*, 308, that, "independently of any statute, it seems to be well settled law, except under some special or extraordinary circumstances, that no officer who is also a director, in the absence of special contract, duly authorized by by-law of the stockholders or with proper action of the directors, can, upon an implied contract, recover for the unusual services rendered the corporation in his official capacity."

⁵ *St. Louis, A. & S. R. Co. v. O'Hara* (1899) 177 Ill. 525, 52 N. E. 734, 53 N. E. 118, affirming (1897) 75 Ill. App. 496; *Chicago Macaroni Mfg. Co. v. Boggiano* (1903) 202 Ill. 312, 67 N. E. 17; *Chicago Porter Home Invest. Co. v. Biddison* (1892) 46 Ill. App. 423; *Barry v. Coffeen Coal & Copper Co.* (1893) 52 Ill. App. 183; *Winfield Mortg. & T. Co. v. Robinson* (1913) 89 L.R.A.1917F.

Kan. 842, 132 Pac. 979, *Ann. Cas.* 1915A, 451; *Santa Clara Min. Asso. v. Meredith* (1878) 49 Md. 389, 33 Am. Rep. 264, 4 Mor. Min. Rep. 44; *Henry Wood's Sons Co. v. Schaefer* (1899) 173 Mass. 443, 73 Am. St. Rep. 305, 53 N. E. 881; *Bussell Trimmer Co. v. Coburn* (1905) 188 Mass. 254, 69 L.R.A. 821, 74 N. E. 334; *Adelts v. Progressive Shoe Co.* (1900) 84 Mo. App. 288; *McConnell v. Combination Min. & Mill. Co.* (1904) 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194; *Barril v. Calender Insulating & Water Proofing Co.* (1888) 50 Hun, 257, 2 N. Y. Supp. 758; *Farmers' Loan & T. Co. v. Housatonic R. Co.* (1897) 152 N. Y. 251, 46 N. E. 504; *Gaul v. Kiel & A. Co.* (1910) 199 N. Y. 472, 92 N. E. 1069, modifying (1909) 133 App. Div. 621, 118 N. Y. Supp. 225; *Leavitt v. Beers* (1843) Hill & D. Supp. (N. Y.) 221; *Lewis v. Matthews* (1914) 161 App. Div. 107, 146 N. Y. Supp. 424; *Starbuck v. Housatonic R. Co.* (1895) 83 Hun, 534, 32 N. Y. Supp. 87, affirmed in (1897) 152 N. Y. 251, 46 N. E. 504; *Caho v. Norfolk & S. R. Co.* (1908) 147 N. C. 20, 60 S. E. 640; *Wood v. Lost Lake Mfg. Co.* (1890) 23 Or. 20, 37 Am. St. Rep. 651, 23 Pac. 848; *Barrenstecher v. Hof Brau* (1913) 67 Or. 194, 135 Pac. 518; *Althouse v. Coughlin Colliery Co.* (1910) 227 Pa. 580, 136 Am. St. Rep. 908, 76 Atl. 316; *Bagaley v. Pitts & L. S. Iron Co.* (1892) 146 Pa. 478, 23 Atl. 837; *Bair & G. Mfg. Co. v. Vandersaal* (1908) 36 Pa. Super. Ct. 615; *Danville, H. & W. B. R. Co. v. Kase* (1885) 41 W. N. C. (Pa.) 411, 39 Atl. 301; *Martindale v. Wilson-Cass Co.* (1890) 134 Pa. 348, 19 Am. St. Rep. 706, 19 Atl. 680; *Olney v. Chadsey* (1862) 7 R. I. 224; *Flynn v. Columbus Club* (1890) 21 R. I. 534, 45 Atl. 551; *Austin City R. Co. v. Swisher* (1880) 1 Tex. App. Civ. Cas. (White & W.) 33; *Blom v. Blom Codfish Co.* (1912) 71 Wash. 41, 127 Pac. 596; *Ravenswood, S. & G. R. Co. v. Woodyard* (1899) 46 W. Va. 558, 33 S. E. 285; *National Loan & Invest. Co. v. Rockland Co.* (1899) 36 C. C. A. 370, 94 Fed. 335; *Monmouth Invest. Co. v. Means* (1906) 80 C. C. A. 527, 151 Fed. 159; *Ebner v. Alaska Mildred Gold Min. Co.* (1909) 93 C. C. A.

92, 167 Fed. 456; *Re Dr. Voorhees Awning Hood Co.* (1911) 187 Fed. 611, reversed on another point in (1911) 110 C. C. A. 215, 188 Fed. 425; *Pacific Improv. Co. v. Chattanooga Southern R. Co.* (1911) 189 Fed. 161; *Title Ins. & Trust Co. v. Home Teleph. Co.* (1912) 200 Fed. 263.

"The cases on the subject very generally hold that an officer of a corporation, for services in the course and scope of his official duties, can only recover when compensation therefor has been authoritatively agreed upon in advance. It is not always required that a definite sum be fixed upon, but there must be a previous agreement for compensation existent or in some way expressed so as to bind the company. For such services there can be no recovery on a quantum meruit, as ordinarily understood and applied." *Chiles v. United States Furniture Mfg. Co.* (1914) 167 N. C. 574, 83 S. C. 812, an action involving the right of the president of a corporation to compensation.

In *Hayes v. Canada, A. & P. S. S. Co.* (1910) 104 C. C. A. 271, 181 Fed. 289, an action involving the right of a president and director of a Canadian corporation to compensation, it is said: "We should here observe, for the general purposes of this opinion, that, so far as appears in this record, the law of the domicile of the corporation is the common law established alike in the United States and in England, in that neither the president nor any director of a corporation is entitled to any salary unless there is an authoritative vote granting it and establishing the amount of the same."

So, in applying the Pennsylvania law, compensation for services by the president and secretary and treasurer of a corporation, who were also directors of the corporation, was held in *Crumlish v. Central Improv. Co.* (1893) 38 W. Va. 390, 23 L.R.A. 120, 45 Am. St. Rep. 872, 18 S. E. 456, not to be recoverable, in the absence of an express contract to pay for such services. The court continues: "Though not necessary to go further, my examination has led me to the conclusion that the decisions in Pennsylvania reflect the true rule applicable nearly everywhere, in denying pay without express provision or contract, not only to the president, but a treasurer or secretary, when stockholders or directors. The authorities have led my mind to the conclusion that the law raises no implied promise to pay compensation to directors, president or vice president of a private corporation, in the absence of provision in by-law or order of the directors. They are trustees charged with the funds, and cannot recover on a quantum meruit."

In *Kilpatrick v. Penrose Ferry Bridge Co.* (1865) 49 Pa. 118, 88 Am. Dec. 497, an action by the president and treasurer of a corporation to recover for services rendered in their official capacities, it is said: "The salary or compensation of corporate officers is usually fixed by a by-law or by L.R.A.1917F.

a resolution either of the directors or stockholders; but where no salary has been fixed, none can be recovered. Corporate offices are usually filled by the chief promoters of the corporation, whose interest in the stock and in other incidental advantages is supposed to be a motive for executing the duties of the office without compensation, and this presumption prevails until overcome by an express prearrangement of salary . . . It is well that the rule of law is so. Corporate officers have ample opportunities to adjust and fix their compensation before they render their services, and no great mischief is likely to result from compelling them to do so. But if, on the other hand, actions are to be maintained by corporate officers for services, which, however faithful and valuable, were not rendered on the foot of an express contract, there would be no limitation to corporate liabilities, and stockholders would be devoured by officers."

And it is said in *Starbuck v. Housatonic R. Co.* (1895) 83 Hun, 534, 32 N. Y. Supp. 87, affirmed in (1897) 152 N. Y. 251, 46 N. E. 504, that "a president of a corporation, if a stockholder or director, can make good his claim for salary only by showing a contract therefor. Inferences of a contract from services performed by request which obtained between individuals are not allowed, between a president and his corporation. On the contrary, the legal inference from these facts is that services as president are to be rendered without compensation."

So, where there is no by-law fixing any salary for the president, vice president, and treasurer of a corporation, and the resolution adopted by the directors is void because of the participation of the officers concerned therein, the court has no authority to fix a reasonable compensation for such officers, it being the rule that "he who serves as the officer of a corporation when no salary has been provided must render his official services gratuitously." *Luthy v. Ream* (1914) 190 Ill. App. 315.

In *Ellis v. Ward* (1890) 137 Ill. 509, 25 N. E. 530, involving the right of the president of a corporation to compensation, it is said. "The doctrine is well settled in this court, that the law will not imply a promise on the part of a private corporation to pay its officers for the performance of their usual duties. In order that such officers may legally demand and recover for such services, or that the corporation legally makes allowance and payment therefor, it must appear that a by-law or resolution had been adopted authorizing and fixing such allowance before the services were rendered."

And following the case of *Holder v. Lafayette, B. & M. R. Co.* (1873) 71 Ill. 106, 22 Am. Rep. 89, *infra*, note 8, it is held in *Gridley v. Lafayette, B. & M. R. Co.* (1873) 71 Ill. 200, that the president of a corporation is not entitled, in the

absence of express provision therefor, to compensation for services rendered within his duties as president.

In *Merriek v. Peru Coal Co.* (1871) 61 Ill. 472, 3 Mor. Min. Rep. 583, it is held that the president of a railroad cannot, in the absence of a by-law or resolution providing compensation, set up any claim therefor.

"It is well settled in all jurisdictions," says the court in *Home Mixture Guano Co. v. Tillman* (1906) 125 Ga. 172, 53 S. E. 1019, an action involving the right of the president of a corporation to compensation, "that the directors of a private corporation are not entitled to salary or other compensation for performing the usual and ordinary duties pertaining to their office, as defined by the charter or by-laws, or by custom, unless there is an express agreement or provision for compensation when the services are performed." And, quoting from 3 Clark & M. on Private Corporations, § 671a, the court adds that "it can make no difference in the application of this rule that the services were performed with the expectation of compensation, or with the general understanding among the directors themselves that they should receive compensation."

While admitting in *Red Bud Realty Co. v. South* (1910) 96 Ark. 281, 131 S. W. 340, that a contract may be implied on the part of a corporation to pay its president for special services, it is said that the "president of a corporation is not entitled to any compensation for performing the ordinary duties of his office unless a contract to that effect is made with him by its governing body."

And where, as in *Lowe v. Ring* (1904) 123 Wis. 370, 101 N. W. 698, 3 Ann. Cas. 731, the claims of the president of a bank for compensation for services rendered in the scope of his official duties are involved, the court says that "a president of a corporation cannot sue upon an implied contract to enforce a claim for services of an officer, when he is a stockholder or director."

The president of a corporation is not entitled to compensation for services rendered as such in the absence of express contract; and where a resolution fixing his salary is not legally passed by the directors, he cannot recover for the rendition of his services. *Steele v. Gold Fisure Gold Min. Co.* (1908) 42 Colo. 529, 126 Am. St. Rep. 177, 95 Pac. 349.

But see *Rosborough v. Shasta River Canal Co.* (1863) 22 Cal. 556, as referred to *infra*, note 12.

See *Fritz v. Equitable Bldg. & L. Soc.* (1900) 186 Ill. 183, 57 N. E. 873; *Luthy v. Ream* (1914) 190 Ill. App. 315, *supra*, note 5; *Blue v. Capital Nat. Bank* (1906) 145 Ind. 518, 43 N. E. 655; *Selley v. American Lubricator Co.* (1903) 119 Iowa, 591, 93 N. W. 590; *O'Brien v. John O'Brien Boiler Works Co.* (1910) 154 Mo. App. 183, 133 S. W. 347; *Gaul v. Kiel & A. Co.* (1910) L.R.A.1917F.

199 N. Y. 472, 92 N. E. 1069, modifying (1900) 133 App. Div. 621, 118 N. Y. Supp. 225; *Dunlap v. Montana Tonopah Min. Co.* (1911) 192 Fed. 714, affirmed in (1912) 116 C. C. A. 286, 196 Fed. 612; *Earle v. Burland* (1900) 27 Ont. App. Rep. 540.

In *Remmers v. Seky* (1897) 70 Mo. App. 364, an action involving the claim of the vice president of a corporation for services, it is said: "In the absence of a by-law or resolution of the board of directors, legally and regularly passed, providing for the payment of salaries to the officers of a corporation, they are presumed to serve without compensation."

So in *Citizen's Nat. Bank v. Elliott* (1880) 55 Iowa, 104, 39 Am. Rep. 167, 7 N. W. 470, an action involving the right of the vice president of a bank to compensation for services, it is said: "We understand the rule to be when an officer of a corporation performs the usual and ordinary duties of his office, as defined by the charter or by-laws, he cannot recover compensation therefor unless it has been so specially agreed. He cannot, in such case, recover what the services are reasonably worth."

And an instruction that plaintiff, being vice president and director of the defendant corporation, could not recover for services rendered as such director or officer in the absence of an express contract providing compensation for such services, is held properly to state the law in *Toponce v. Corinne Mill Canal & Stock Co.* (1890) 6 Utah, 439, 24 Pac. 534, affirmed in (1894) 152 U. S. 405, 38 L. ed. 493, 14 Sup. Ct. Rep. 632.

⁷*Brown v. De Young* (1897) 167 Ill. 549, 47 N. E. 863, *infra*, note 8; *Myers v. Equitable Bldg. & L. Soc.* (1900) 92 Ill. App. 27, *infra*, note 13; *Jones v. Vance Shoe Co.* (1900) 92 Ill. App. 158, *infra*, note 16; *West Point Teleph. & Teleg. Co. v. Rose* (1898) 76 Miss. 61, 23 So. 629; *Tausig v. St. Louis & K. R. Co.* (1901) 166 Mo. 28, 89 Am. St. Rep. 674, 65 S. W. 969, on subsequent appeal in (1905) 186 Mo. 269, 85 S. W. 378; *Pfeiffer v. Lansberg Brake Co.* (1891) 44 Mo. App. 59; *Felton v. West Iron Mt. Min. Co.* (1895) 16 Mont. 81, 40 Pac. 70; *Kleinschmidt v. American Min. Co.* (1914) 49 Mont. 7, 139 Pac. 785; *Baines v. Coos Bay Nav. Co.* (1902) 41 Or. 135, 68 Pac. 397; *Crumlish v. Central Improv. Co.* (1893) 38 W. Va. 390, 23 L.R.A. 120, 45 Am. St. Rep. 872, 18 S. E. 456, *supra*, note 5; *Michie v. Erie & H. R. Co.* (1876) 26 U. C. C. P. 566.

In *Takott v. Olcott Mfg. Co.* (1880) 11 N. Y. Week. Dig. 141, an action by the secretary of a corporation for services, it is said that "the law will not imply a promise on the part of corporations to pay their officers for official services."

And it is held in *Silverton Min. Co. v. Haughwout* (1908) 44 Colo. 173, 96 Pac. 975, that a director of a corporation, who holds the office of secretary of the corporation, is not entitled to compensation for his services as secretary, in the absence of any provision in the charter or by-laws,

treasurer⁸ of the board of directors. Such officers are still trustees for the stockholders, and, as such, entitled only to such compensation as is expressly provided for.⁹ This rule is especially true where the corporation is, in its nature, a charitable organization.¹⁰ In one case a distinction is sought to be made on behalf of merely ministerial officers, such as secretaries,^{10a} but no other authority is found for such a rule, and it does not appear clearly from the case that the officer there involved was

indeed a director, and, as such, bore a trust relation to the stockholders.

In one jurisdiction the common-law rule, as far as it is applicable to the president, has been adopted by statute; and the authority to make contracts for his compensation is limited to the stockholders.¹¹

Two cases seem to be authority for the rule that officers who are directors of a corporation may recover upon implied contract for services rendered as officers.¹² These cases, however, are

resolution or contract, providing for the payment of such compensation.

⁸ *Luthy v. Ream* (1914) 190 Ill. App. 315, supra, note 5; *Taussig v. St. Louis & K. R. Co.* (1901) 166 Mo. 28, 89 Am. St. Rep. 674, 65 S. W. 969, on subsequent appeal in (1905) 186 Mo. 269, 85 S. W. 378; *Bevier Black Diamond Coal Co. v. Watson* (1904) 107 Mo. App. 451, 80 S. W. 287; *Kleinschmidt v. American Min. Co.* (1914) 49 Mont. 7, 139 Pac. 785; *Lewis v. Matthews* (1914) 161 App. Div. 107, 146 N. Y. Supp. 424; *Baines v. Coos Bay Nav. Co.* (1902) 41 Or. 135, 68 Pac. 397; *Barrenstecher v. Hof Brau* (1913) 67 Or. 194, 135 Pac. 518; *Kilpatrick v. Penrose Ferry Bridge Co.* (1865) 49 Pa. 118, 88 Am. Dec. 497, supra, note 5; *Crumlish v. Central Improv. Co.* (1893) 38 W. Va. 390, 23 L.R.A. 120, 45 Am. St. Rep. 872, 18 S. E. 456, supra, note 5; *Michie v. Erie & H. R. Co.* (U. C.) supra.

A director of a corporation, elected to the office of treasurer, is, in the absence of provision for his compensation, entitled to none as upon implied contract. *Holder v. Lafayette B. & M. R. Co.* (1873) 71 Ill. 106, 23 Am. Rep. 89.

And it is held in *Brown v. De Young* (1897) 167 Ill. 549, 47 N. E. 863, that, at the suit of nonassenting stockholders, recovery may be had of salaries paid a director for his services as secretary and treasurer of the corporation, where the payment of such compensation is not authorized by the by-laws or by a resolution of the board of directors.

The abstract of the decision in *Spruhan v. Searchlight Gas Co.* (1914) 185 Ill. App. 380, is as follows: "In an action against a corporation to recover a salary as treasurer alleged to be due pursuant to an agreement recorded in the minutes of defendant's board of directors, a judgment for defendant was sustained, it appearing that no such salary was provided by the corporation's by-laws, nor by any resolution passed by the board of directors; that the minutes of the board did not disclose any provision for a salary, and that no contract of any kind for such salary was proved by plaintiff."

But see *Dalton v. Brush Electric Light Co.* (1897) 13 Ohio C. C. 505, 7 Ohio C. D. 141, infra, note 12.

⁹ *Crumlish v. Central Improv. Co.* (1893) L.R.A. 1917F.

38 W. Va. 390, 23 L.R.A. 120, 45 Am. St. Rep. 872, 18 S. E. 456, supra, note 5.

And see supra, II. a, note 2, and the accompanying text.

¹⁰ The rendition of valuable services as president of a bank raises no implied contract charging the bank to pay therefor, although he states to some of the directors during the time of rendering such services that he expects to be paid therefor, especially where the bank is, in its nature, a charitable institution. *Sawyer v. Pawnners' Bank* (1863) 6 Allen (Mass.) 207.

^{10a} In *Newport & M. R. Co. v. Hay* (1886) 8 Ky. L. Rep. 115, an action involving the right of the secretary of a corporation to compensation, the court, after setting forth and approving the doctrine prohibiting the compensation of directors in the absence of express contract, continues: "This healthy doctrine, which is based upon the relation of trustee and cestuis que trust existing between the parties, should not be extended to any officer or agent with whom the relation does not exist. A mere ministerial officer, like the secretary, who has no voice in the management of the corporation's property, does not come within the rule, although some courts, through inadvertence, have held the contrary. The doctrine should only be applied to those who have the disposal of the property, and may be tempted to misapply the funds for their personal benefit." Whether or not the secretary in this case was also a director of the corporation does not appear.

¹¹ In accordance with a statute providing that "there shall be no compensation for services rendered by the president or any director unless it be allowed by the stockholders," the president of a corporation who was never voted any compensation by the stockholders is held, in *Maxon v. Maxon-Miller Co.* (1903) 53 W. Va. 150, 44 S. E. 131, to be entitled to nothing for his official services.

And see, in this connection, supra, note 3.

¹² In *Dalton v. Brush Electric Light Co.* (Ohio) supra, the court is of the opinion that the fact that plaintiff was a director of the corporation "when he was elected as treasurer thereof, and while he served as such, and that he had no express contract with the company at the time of his elec-

entitled to but little consideration, the Ohio case being the decision of an intermediate court and the California case going apparently on the ground that the president was merely a stockholder, the fact of his being a director not being discussed.

2. Under unexecuted provision of statute or by-law authorizing or directing compensation to be fixed.

In some jurisdictions there are statutes which specifically empower or direct the directors or stockholders of a corporation to fix the compensation of various of its officers. And in some instances the charter or by-laws make similar provisions. Where the body thus empowered or directed to fix the compensation does so, an express contract is created, upon which the holder of the office concerned may bring action. But where the body empowered or ordered thus to fix the compensation fails to do so, the resulting situation is not so clear, and the courts are not in agreement as to the right to recover in quantum meruit. In such cases the right of recovery must depend largely upon the wording and apparent meaning of the statute or by-law in question. The true rule would seem to be that

where the wording is such that a promise of payment is inferable therefrom, recovery may be had upon quantum meruit. In accordance with this rule, it seems that in the case of a statute or by-law which merely provides that designated officers shall receive such compensation as shall be determined or provided at some future date, the failure to fix the rate or amount of compensation will deprive the officer of all right of recovery upon quantum meruit.¹³ Such a statute or by-law does not hold out the promise of compensation and does not make the fixing of such compensation obligatory. It may be said that, by its failure to fix the compensation, the body empowered to exercise that function has indicated its intention not to allow any compensation; or, in other words, that it has fixed the rate of compensation at nothing. As to cases of this kind, however, the courts are not entirely in harmony, some having held that, under such circumstances, recovery may be had upon quantum meruit.¹⁴

Where the charter or by-laws provide that the directors "shall fix" the compensation of certain officers of the corporation, the case seems to be stronger in favor of permitting such officers to

tion that he was to be paid for his services, would not preclude him from recovering the fair and reasonable value of his services, if they were valuable, and were rendered under such circumstances as showed that it was the intention of both parties that he was to be compensated therefor."

And see *Rosborough v. Shasta River Canal Co.* (1863) 22 Cal. 556, *infra*, note 69.

¹³ Where the by-laws of a private corporation provide that the officers thereof shall receive such compensation as shall be determined at the annual or at a special meeting of the stockholders, called for that purpose, and the compensation of the president is never so fixed, he cannot recover compensation for his services as such. *Illinois Linen Co. v. Hough* (1878) 91 Ill. 63.

So, under a by-law providing that the "officers shall receive such compensation as the board of trustees shall from time to time fix and determine," the president of a corporation who performs no services outside of the scope of his official duties as trustee is held, in *Dial v. Inland Logging Co.* (1900) 52 Wash. 81, 100 Pac. 157, to have no right to compensation in the absence of express contract.

And under a statute to the effect that "the secretary only shall be entitled to compensation, and in such amount as shall be provided for in the charter," the secretary of a corporation which fails to fix L.R.A.1917F.

such secretary's compensation by charter is not entitled to compensation, he being a director and in the same situation as if the statutory provision did not exist. *Myers v. Equitable Bldg. & L. Soc.* (1900) 92 Ill. App. 27.

So, in *Re Bolt & Iron Co.* (1887) 14 Ont. Rep. 211, affirmed without opinion in (1889) 16 Ont. App. Rep. 397, it is held that, under a by-law providing that the managing director shall be paid for his services "such sums as the company may from time to time determine at a general meeting," a managing director whose salary is fixed in accordance with the by-law to a certain date may not recover any compensation for services rendered after that date.

And see *Pfeiffer v. Lansberg Brake Co.* (1891) 44 Mo. App. 57, where it is held that a by-law of a corporation which provides that for a certain period no salary shall be paid to the officers "except to the secretary" does not in itself provide by implication for compensation to the secretary, but merely leaves the directors free to provide or not to provide such compensation.

¹⁴ Where, in *Missouri River R. Co. v. Richards* (1871) 8 Kan. 101, the by-laws of the corporation provided that the officers should receive such compensation for their services as the board of directors should fix and allow, it is held that the failure of the directors to fix any compensation for

recover upon quantum meruit, in case the directors fail to fix such compensation;¹⁵ but even in such a case there is room for doubt as to whether such is the proper rule.¹⁶ There seems to be force in the argument that the directors may fix any sum they please, and that, accordingly, they may decide not to allow any compensation at all. This argument is supported by the fact that the directors are not directed to fix a compensation that is reasonable. On the contrary, practice shows that many considerations, aside from that of reasonableness, frequently govern directors in fixing compensation. For example, it is not unusual for officers of a corporation, who render valuable services, to accept very inadequate compensation during periods of stress, it being to their advantage as stockholders and in accordance with their duty as directors not to withdraw money from

the corporation or to pile up debts against it at such times. If, from considerations of such a nature, the directors feel that a merely nominal compensation or no compensation at all should be paid the officers, there is nothing in a charter provision to the effect that they "shall fix" such compensation which makes it improper. And when a court, holding that such a provision imposes the duty of actually fixing a rate of compensation, instructs the jury to find a verdict for the officer for a sum that will constitute a reasonable compensation, it seems that it is reading into the charter provision something not only that is not there, but that was not intended to be implied therefrom. The case is much the same as if it were specifically provided that the compensation should be fixed at such sum as the directors "think reasonable." Under a statute containing such a provision, it

the secretary, who was also a director, does not deprive such secretary of his right to compensation. The court says: "The very formation of the by-law by its terms indicated that some compensation was to be fixed and allowed to the officers. The neglect to do so could not be a bar to the recovery for such services. Had the board made some allowance, however inadequate, it would probably have precluded the secretary from obtaining more than was allowed, at least for such time as he might serve after the salary was so fixed. The plaintiff below rendered certain services for which the plaintiff in error stipulated he should have such compensation as it, through its agents, should fix and allow. It cannot now escape its obligation by refusing to fix any sum."

So, it is held in *Dodge v. Lansing & Suburban Traction Co.* (1908) 152 Mich. 100, 115 N. W. 1004, that, where the by-laws of a corporation provide that the secretary shall receive such salary as the board of directors may determine, the failure of the board to fix any salary for the secretary does not deprive him of compensation, "and that in the absence of action by the board, he is entitled to recover a reasonable compensation for his services."

And see *Re Ontario Exp. & Transp. Co.* (1894) 25 Ont. Rep. 587, in which it is held that where a corporation appoints its directors to offices in the corporation without a by-law fixing the amount of the salaries, as they are empowered to do by the articles of incorporation, and such appointments are afterwards confirmed by legislation, they are entitled to recover upon quantum meruit for services rendered as such officers.

¹⁵ Although the charter of a corporation provides that the board of directors shall appoint a secretary and fix his com-
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penation, and the board fails so to fix his compensation, it is held in *Rogers v. Hastings & D. R. Co.* (1875) 22 Minn. 25, that the secretary may recover the reasonable value of his services upon quantum meruit. The court says that the provision "prescribes a duty for the directors, but does not make the secretary's right to compensation dependent upon its discharge. Having performed his duty as secretary, he is not to be deprived of his pay by the failure of the board to perform its duty by fixing the same"

Where the charter of a corporation provides that a president, agent, and treasurer shall be elected, and that the salaries of such officers shall be fixed by the trustees, one who is elected president and agent is entitled to recover on assumption a reasonable compensation for such services, although the trustees have failed to fulfil their duty to fix the compensation for such offices. *Grundy v. Pine Hill Coal Co.* (1888) 10 Ky. L. Rep. 833, 9 S. W. 414.

¹⁶ A by-law providing that the directors of the corporation shall fix the compensation of the president does not entitle the president of such corporation to compensation for his services, where the directors fail to fix such compensation. *McAvity v. Lincoln Pulp & Paper Co.* (1890) 82 Me. 504, 20 Atl. 82.

So, where the by-laws of a corporation provide that the directors shall fix the compensation of the officers of the company, a director who is elected secretary and general manager is not entitled to compensation not fixed or authorized by the directors. *Jones v. Vance Shoe Co.* (1899) 92 Ill. App. 158.

See *Georgetown Mercantile Co. v. First Nat. Bank* (1914) — Tex. Civ. App. —, 165 S. W. 73, *infra*, note 28.

has been held that the failure to fix any compensation at all deprives the officer of all claim thereto.¹⁷

Where the circumstances are such that a promise to pay is plainly inferable, the failure to fix such compensation will not, of course, deprive the officer of his right thereto; and he may recover upon quantum meruit.¹⁸ In each of the cases cited it will be noticed that there was a circumstance in addition to the mere provision for the fixing of compensation. In the one case this circumstance consists of an authorization of the treasurer to make advances up to a certain amount, and in the other it

consists of actual payment for a time under circumstances showing an understanding that the officer's services were to be compensated.

c. For extraordinary services.

1. In general.

It is almost the universal rule that a director or an officer rendering services outside the scope of his official duties may recover compensation therefor, although not provided for by express contract, if the circumstances are otherwise such as to raise an implied contract.¹⁹

¹⁷ Under a statute providing that the directors of a bank "shall choose one of their number president, and make him such compensation as they think reasonable," it is held in *Holland v. Lewiston Falls Bank* (1864) 52 Me. 564, that where the directors fail to fix any compensation for the president, he is entitled to none. It is said: "The right to and the amount of compensation is dependent upon and is limited by the will of the directors. This compensation is greater or lesser as they shall 'think reasonable,' or none may be granted. No action can be maintained upon a quantum meruit for such services. If it could be, the compensation would depend, not upon what the directors might in their discretion 'think reasonable,' but upon what the jury or some other tribunal might think reasonable."

¹⁸ Where there is a statute providing that one director of a corporation shall be appointed by the governor and compensated for his services as director by the corporation, and such director is for a time paid by the corporation and continues to act as director under circumstances showing the consent of the other directors and an understanding by them of his expectation of being paid for his services, although the board does not vote him compensation, it may be found that the corporation accepts his services under such circumstances as to raise a presumption that it expects or ought to expect that they are to be paid for, and recovery may be had upon implied contract. *Apey v. Chattel Loan Co.* (1914) 216 Mass. 364, 103 N. E. 899.

And where, in *Metropolitan Rubber Co. v. Place* (1906) 77 C. C. A. 262, 147 Fed. 90, a by-law was adopted by the corporation providing that the salary of the president for each calendar year be fixed at the annual stockholders' meeting, and authorizing the treasurer to advance during the year an amount not exceeding a certain sum in respect of such salary, it is held that, in an action by such president for salary for subsequent years for which the stockholders had failed to fix compensation, the trial court commits no error in instructing the jury that such president is entitled to be paid a salary commensurate

with the value of the services rendered, the court expressing itself as follows: "It is plain that the corporation in the present case, by its by-law, had promised that a yearly salary should be paid its president, and that the amount should be fixed after the expiration of each year of service. It was the meaning of the by-law, not that no salary should be paid unless one should be fixed at the annual meeting, but that one should be paid and the amount fixed at the annual meeting, unless it was considered that none should be allowed in excess of that which the treasurer had in the meantime advanced."

¹⁹ *Red Bud Realty Co. v. South* (1910) 96 Ark. 281, 131 S. W. 340, *infra*, note 56; *Bassett v. Fairchild* (1901) 132 Cal. 637, 52 L.R.A. 611, 64 Pac. 1082, 61 Pac. 791, *affirming* (1900) 6 Cal. Unrep. 458, 61 Pac. 791, *infra*, note 59; *Ruby Chief Min. & Mill. Co. v. Prentice* (1898) 25 Colo. 4, 52 Pac. 210, *infra*, note 37; *Gumaer v. Cripple Creek Tunnel, Transp. & Min. Co.* (1907) 40 Colo. 1, 122 Am. St. Rep. 1024, 90 Pac. 81, 13 Ann. Cas. 781, *infra*, note 54; *New York & N. H. R. Co. v. Ketchum* (1858) 27 Conn. 170, *supra*, note 4; *Rosehill Cemetery Co. v. Dempster* (1906) 223 Ill. 567, 79 N. E. 276, *affirming* (1905) 121 Ill. App. 143, *infra*, note 74; *Barry v. Coffee Coal & Copper Co.* (1893) 52 Ill. App. 183, *infra*, note 57; *Greensboro & N. C. Junction Turnp. Co. v. Stratton* (1889) 120 Ind. 294, 22 N. E. 247, *infra*, note 41; *Kenner v. Whitelock* (1899) 152 Ind. 635, 53 N. E. 232, *infra*, note 51; *Brown v. Creston Ice Co.* (1901) 113 Iowa, 615, 85 N. W. 750, *infra*, note 59; *First Nat. Bank v. Drake* (1883) 29 Kan. 311, 44 Am. Rep. 646; *Paine v. Kentucky Ref. Co.* (1914) 159 Ky. 270, 167 S. W. 375, Ann. Cas. 1915D, 389, *infra*, note 42; *McGowan v. Finola Mfg. Co.* (1913) 120 Md. 335, 87 Atl. 694; *Bartlett v. Mystic River Corp.* (1890) 151 Mass. 433, 24 N. E. 780, *infra*, note 64; *Marcy v. Shelburne Falls & C. Street R. Co.* (1911) 210 Mass. 197, 96 N. E. 130, *infra*, note 65; *Apey v. Chattel Loan Co.* (1914) 216 Mass. 364, 103 N. E. 899, *infra*, note 65; *Pew v. First Nat. Bank* (1881) 130 Mass. 391, *infra*, note 67; *Ten Eyck v. Pontiac, O. & P. A. R. Co.* (1889)

And this rule seems entirely fair and proper. It puts directors, as to

74 Mich. 226, 3 L.R.A. 378, 16 Am. St. Rep. 633, 41 N. W. 905; *Henry v. Michigan Sanitarium & Benev. Asso.* (1907) 147 Mich. 142, 110 N. W. 523, *infra*, note 64; *Dodge v. Lansing & Suburban Traction Co.* (1908) 152 Mich. 100, 115 N. W. 1004, *infra*, note 64; *Ruttle v. What Cheer Coal Min. Co.* (1908) 153 Mich. 300, 117 N. W. 168, *infra*, note 64; *Notley v. First State Bank* (1908) 154 Mich. 676, 118 N. W. 486, *infra*, note 67; *Rogers v. Hastings & D. R. Co.* (1875) 22 Minn. 25, *infra*, note 38; *Deane v. Hodge* (1886) 35 Minn. 146, 59 Am. Rep. 321, 27 N. W. 917; *Taussig v. St. Louis & K. R. Co.* (1901) 166 Mo. 28, 89 Am. St. Rep. 674, 65 S. W. 969, on subsequent appeal in (1905) 186 Mo. 269, 85 S. W. 378, *infra*, note 64; *O'Brien v. John O'Brien Boiler Works Co.* (1910) 154 Mo. App. 183, 133 S. W. 347; *Chandler v. Monmouth Bank* (1832) 13 N. J. L. 255, *infra*, note 32; *Law v. New Mexico C. R. Co.* (1914) 19 N. M. 242, 142 Pac. 145; *Barril v. Calendar Insulating & Waterproofing Co.* (1888) 50 Hun, 257, 19 N. Y. S. R. 877, 2 N. Y. Supp. 758; *Dwight v. Williams* (1898) 25 Misc. 667, 55 N. Y. Supp. 201, *infra*, note 62; *Gaul v. Kiel & A. Co.* (1910) 199 N. Y. 472, 92 N. E. 1069 modifying (1909) 133 App. Div. 621, 118 N. Y. Supp. 225; *Gill v. New York Cab Co.* (1888) 48 Hun, 524, 16 N. Y. S. R. 236, 1 N. Y. Supp. 202, *infra*, note 67; *Jackson v. New York C. R. Co.* (1874) 2 Thomp. & C. (N. Y.) 653; *McDowall v. Sheehan* (1891) 59 Hun, 618, 36 N. Y. S. R. 104, 13 N. Y. Supp. 386, reversed on other grounds in (1891) 129 N. Y. 200, 29 N. E. 209; *MacNaughton v. Osgood* (1886) 41 Hun (N. Y.) 109, reversed in (1889) 114 N. Y. 574, 21 N. E. 1044; *Wood v. Lost Lake Mfg. Co.* (1890) 23 Or. 20, 37 Am. St. Rep. 651, 23 Pac. 848; *Mitchell v. Holman* (1897) 30 Or. 280, 47 Pac. 616; *Barenstecher v. Hof Brau* (1913) 67 Or. 194, 135 Pac. 518, *infra*, note 64; *Olney v. Chadsey* (1862) 7 R. I. 224; *Flynn v. Columbus Club* (1900) 21 R. I. 534, 45 Atl. 551; *Reeve v. Harris* (1897) — *Tenn.* —, 50 S. W. 658; *Georgetown Mercantile Co. v. First Nat. Bank* (1914) — *Tex.* Civ. App. —, 165 S. W. 73, *supra*, note 28; *Merchant's Ice Co. v. Scott & Dodson* (1916) — *Tex.* Civ. App. —, 186 S. W. 418; *Burns v. Commencement Bay Land & Improv. Co.* (1892) 4 Wash. 558, 30 Pac. 668, dissenting opinion in (1892) 30 Pac. 709; *Watts v. West Virginia Southern R. Co.* (1900) 48 W. Va. 262, 37 S. E. 700, *infra*, note 38; *Hjorth Oil Co. v. Curtis* (1917) — *Wyo.* —, 163 Pac. 362; *Ebner v. Alaska Mildred Gold Min. Co.* (1909) 93 C. C. A. 92, 167 Fed. 456; *Re Gouverneur Pub. Co.* (1909) 168 Fed. 113; *Dunlap v. Montana-Tonopah Min. Co.* (1911) 192 Fed. 714, affirmed in (1912) 116 C. C. A. 286, 196 Fed. 612; *Title Ins. & T. Co. v. Home Teleph. Co.* (1912) 200 Fed. 263; *Fitzgerald & M. Constr. Co. v. Fitzgerald* (1890) 137 U. S. 98, 34 L. ed. 608, 11 Sup. Ct. Rep. 36.

"If a president or director of a corporation renders services to his corporation which are not within the scope of, and are not required of him by, his duties as president or director, but are such as are properly to be performed by an agent, broker, or attorney, he may recover compensation for such services upon an implied promise." *Santa Clara Min. Asso. v. Meredith* (1878) 49 Md. 389, 33 Am. Rep. 264, 4 Mor. Min. Rep. 44.

Thus, where the president and trustee of a corporation renders services as general manager with the full knowledge and consent of the other officers, he may recover compensation therefor upon an implied contract. *Blom v. Blom Codfish Co.* (1912) 71 Wash. 41, 127 Pac. 596.

And where the duties of one holding the positions of secretary and treasurer of a corporation are merely nominal, and he devotes his undivided time for three years to representing the corporation in various matters, such as securing rights of way, supervising the operation and location of the company's railroad, looking after its business in the absence of the general manager, and making business trips, if the jury finds that such services do not pertain to his office, he may recover compensation for the reasonable value thereof, notwithstanding that he is an officer of the corporation. *Baines v. Coos Bay Nav. Co.* (1902) 41 Or. 135, 68 Pac. 307.

So, an officer or stockholder of a corporation that has been placed in the hands of a receiver, who is appointed auctioneer to make a sale of the property, is entitled to commissions the same as any other person rendering such service. *Friedrichs v. Friedrichs, Young, Taney* (1910) 126 La. 689, 52 So. 996.

Where the secretary of a corporation who is an engineer performs services outside his duties as an officer, with the knowledge and approval of the company, in supervising the erection of its blast furnaces, he may recover for the services what they are reasonably worth, in the absence of express agreement fixing the compensation. *Talcott v. Olcott Mfg. Co.* (1880) 11 N. Y. Week. Dig. 141. "The directors of a company," it is said, "may employ one of their own number, as an agent or servant, to perform services for the company, the same as they may employ any third person. And a director is not incapacitated to discharge those duties and to receive the same compensation therefor which other agents and servants might be entitled to receive."

And where the sale of stock is not part of the duties of the vice president of a corporation, he may recover therefor reasonable compensation as upon implied contract. *Waters v. American Finance Co.* (1905) 102 Md. 212, 62 Atl. 357.

In the absence of an express contract providing for compensation, the right of a stockholder and director of a corporation to be compensated for services rendered by

services rendered by them to the corporation outside the scope of their

him as superintendent and general manager is dependent upon his ability to prove circumstances raising an implied promise to pay therefor. *McCarthy v. Mt. Tecarte Land & Water Co.* (1896) 111 Cal. 328, 43 Pac. 956. And it is held further that the exclusion of testimony tending to throw light on the relation of the parties or their intention and the usage as to the payment of compensation is error.

After holding that, in the absence of express contract, a director of a railroad cannot recover for services rendered as such, the court in *Rockford, R. I. & St. L. R. Co. v. Sage* (1872) 65 Ill. 328, 16 Am. Rep. 587, says: "There was some evidence tending to show services rendered and expenses incurred by the plaintiff, since the organization of the company, apart from his duty as a director; for all such he may recover upon a quantum meruit."

So, it is said in *Cheaney v. Lafayette, B. & M. R. Co.* (1873) 68 Ill. 570, 18 Am. Rep. 584, that if a director is "appointed to act as agent for the performance of duties outside of those devolving on him as director, it is but reasonable and just that he should be allowed to recover a fair compensation."

Where, in *Citizens' Nat. Bank v. Elliott* (1880) 55 Iowa, 104, 39 Am. Rep. 167, 7 N. W. 470, an action involving the right of the vice president of a bank to recover for services, certain evidence as to the nature of the services performed was rejected, the court says: "It may be conceded for extraordinary services, such as do not pertain to the office, there may be a recovery although it has not been so specially agreed. It would, therefore, follow that proof of the character of the services should have been admitted if there had been such allegation in the pleading filed by defendant. But the only stated ground of recovery was that the services were performed by the defendant as vice president. It was not alleged that they did not pertain to the office, or that they were extraordinary."

In *Re Matthew Guy Carriage & Automobile Co.* (1912) 26 Ont. L. Rep. 377, 3 Ont. Week. N. 1233, 22 Ont. Week. Rep. 34, 4 D. L. R. 764, an action by certain directors to recover compensation for services rendered as manual laborer, stenographer, painter, and bookkeeper, it is held that, assuming the contract under which such services were rendered to be void, recovery could still be had therefor as upon quantum meruit.

And where in *Toponce v. Corinne Mill Canal & Stock Co.* (1890) 6 Utah, 439, 24 Pac. 534, affirmed in (1894) 152 U. S. 405, 38 L. ed. 493, 14 Sup. Ct. Rep. 632, one who was director and vice president of a corporation was claiming compensation for services as manager, the court considers proper an instruction to the effect that "if the plaintiff rendered services clearly out-

side of his duties as an officer and director of the corporation, the law would imply a promise on the part of the company to pay him the reasonable value thereof, unless the circumstances under which the services were rendered negated the presumption that he was to receive compensation."

So, where, in *Sargent v. Sargent Granite Co.* (1893) 3 Misc. 325, 23 N. Y. Supp. 886, reversed in (1894) 6 Misc. 384, 26 N. Y. Supp. 737, the trustee of a corporation was suing to recover compensation for services performed as superintendent of the corporation's quarries, in sustaining a demurrer to the answer, which set up that at the time mentioned in the complaint the plaintiff was a trustee and officer of defendant, the court said: "I think it is set forth with sufficient clearness in each of the complaints that the services for which recovery is sought were not those usually performed by a trustee, and that the plaintiff was especially requested . . . to perform the services, with an expressed or implied promise to pay for the same."

In *Bogart v. New York & L. I. R. Co.* (1907) 118 App. Div. 50, 102 N. Y. Supp. 1093, affirmed in (1908) 101 N. Y. 550, 85 N. E. 1106, an action by a consulting engineer for engineering services performed for a corporation of which he was director and secretary, it is said that "it cannot be successfully maintained that, by virtue of his relation as director and secretary of the company, the plaintiff was not entitled to charge for his services."

And in *Zellerbach v. Allenberg* (1893) 99 Cal. 57, 33 Pac. 786, an action involving the right of the secretary of a corporation, who was also a director thereof, to moneys paid him for extra services, it is said that "it was proper, if Allenberg performed extra services, that he be paid a reasonable and just compensation therefor; and that he did perform such services and received only a reasonable compensation for them must be assumed, in view of the action of the board" in voting it to him.

In *Shackelford v. New Orleans, J. & G. N. R. Co.* (1859) 37 Miss. 202, a director of the railroad company set up a claim for extra services. In reversing the case and remanding it for new trial, the court says: "In the absence of charter regulations or by-laws fixing the duties of directors of a railroad company, they are without authority or power to act, in their individual character, for the corporation, as much as any stockholder. These powers and duties are conferred to their action at the meetings of the board. By resolution of the board they may be empowered to transact any business or agency for or on behalf of the corporation. And unless there is some agreement or understanding, express or implied, from the circumstances attending such appointment or agency, to the contrary, the law will imply a contract on the part of such company with their agent,

official duties, in exactly the same position as any other stockhold-

whether he be a director or a stranger, that he shall receive for such service in the business of such agency whatever compensation he reasonably deserves to have therefor."

Where, in *Outterson v. Fonda Lake Paper Co.* (1892) 66 Hun, 629, 49 N. Y. S. R. 556, 20 N. Y. Supp. 980, the referee found that the services performed by plaintiff in the general management of the corporation's business were outside his official duties as president, and that such services were not intended to be gratuitous, and that they were rendered with the knowledge and consent of the corporation, it is held that his being an officer will not prevent his recovery of compensation therefor.

And where, in *Mt. Nebo Anthracite Coal Co. v. Martin* (1908) 86 Ark. 608, 111 S. W. 1002, affirmed on rehearing in (1908) 86 Ark. 613, 112 S. W. 882, an issue was raised as to the right of a director in the coal company to receive compensation for his services as manager, the court, in holding such compensation proper, says: "Authorities are cited to show that directors are not entitled to salaries as such; but these same authorities show that when a director is acting as a manager or in any other capacity outside of his duties as director, he is entitled to receive a salary, either by contract or upon quantum meruit, according to the circumstances of the case."

In *Graves v. Mono Lake Hydraulic Min. Co.* (1899) 81 Cal. 303, 22 Pac. 665, an action to foreclose a mortgage executed to secure the payment of a note made by the corporation to its directors, the court, in the course of its argument, says: "It is not intended to decide, however, that these directors may not have recovered from the corporation . . . the value of services rendered by them outside of the duties of their office, in a proper case and upon a proper showing."

So, it is said obiter in *Wickersham v. Crittenden* (1892) 93 Cal. 17, 28 Pac. 788, that if, in the course of his office, a director "render to the corporation any unusual services, that may be the basis of a quantum meruit."

After stating, in *Huffaker v. Krieger* (*Huffaker v. German Safety Vault & T. Co.*) (1899) 107 Ky. 200, 46 L.R.A. 384, 53 S. W. 288, the rule with respect to the compensation of directors, in the absence of express contract, for ordinary services, the court continues: "But this rule does not apply where the services rendered are not within the scope of the director's duty, and the circumstances are such as to imply that both parties understood they were to be paid for." In that case, however, while there was no contract under which the services in question were performed, the stockholders afterward voted compensation therefor.

And, after holding, in *Arapahoe Invest. Co. v. Platt* (1895) 5 Colo. App. 515, 39 Pac. 584, that the services in question were L.R.A.1917F.

rendered in pursuance of contract, the court, commenting upon the instructions refused below, says: "It is true that, in the absence of express contract or some by-law, services as a director of a corporation are presumed to be rendered gratuitously; but in view of the fact that, by the terms of this contract, the plaintiff was to give his entire time [as counsel] to the company, doing whatever it required of him, it seems to us that the instruction would have been misleading, or, at least, confusing."

Brown v. Republican Mountain Silver Mines (1892) 17 Colo. 421, 16 L.R.A. 426, 30 Pac. 66, was an action by the managing director of a corporation to recover compensation for his services as such as upon implied contract. The court says: "If . . . a director render services to the corporation clearly outside of his duties as a director, in pursuance of an antecedent appointment or employment by a majority of the board, and the services be such as the company may legally contract for, he may recover compensation therefor. The more stringent rule is that, to justify a recovery of compensation under such circumstances, the employment must be by express contract, as by a resolution of the board, duly adopted and recorded before the services are rendered. . . . Some modern decisions announce a more liberal rule to the effect that, for services rendered by a director not embraced in his ordinary duties as such, his employment by the corporation and its promise to pay therefor may be implied or inferred from the facts . . . of the case, thus allowing a recovery as upon a quantum meruit. There are many reasons for adhering to the more stringent rule. Ordinarily, the directors of a corporation are intrusted with extensive powers in the management of its affairs; they occupy positions of trust and confidence with reference to the corporate body and its stockholders; the relation is of a fiduciary character; hence, in the performance of their duties as representatives of the corporation, especially in matters where their individual interests are also concerned, the law exacts of them the utmost good faith and fair dealing. But even if the more liberal rule may be resorted to in some cases, it certainly should be held that a director cannot recover compensation for services rendered by himself to his corporation upon an implied contract unless it be established by a clear preponderance of the evidence, first, that the services were clearly outside his ordinary duties as a director, and, second, that they were performed under circumstances sufficient to show that it was well understood by the proper corporate officers as well as himself that the services were to be paid for by the corporation. . . . It is unnecessary to decide . . . which of the rules above stated is to be preferred. The ruling of the trial court to the effect that

er,²⁰ or, for that matter, any person unconnected with the corporation, who performs services which he is not bound to perform and which the corporation accepts under circumstances which make it only just that it render compensation therefor. In accordance with this rule there can be no recovery for services rendered by an officer after notice from the directors to cease therefrom.²¹ In one case the language of the court might be taken to suggest that the amount of stock held by a director has some bearing upon his right of recovery,²² but it is scarcely probable that such was meant. No other case, at least, has viewed the matter in that light. An unusual distinction is made in a Canadian case, where it is held that the president of a corporation who renders extraordinary services thereto as solicitor may recover compensation only for services performed in an action or suit, and not for services rendered in matters outside of court.²³ Although the right of directors or officers

the plaintiff's evidence did not prove a sufficient case for the jury was, in our opinion, correct according to either rule."

In *Ruby Chief Min. & Mill. Co. v. Prentice* (1898) 25 Colo. 4, 52 Pac. 210, in holding a recovery upon implied contract for services rendered by a director outside the scope of his duties as director to be proper, it is said: "In *Brown v. Republican Mountain Silver Mines* (Colo.) there was no occasion to announce the rule that should govern in this jurisdiction, nor, as a matter of fact, was there any such ruling. In the absence of a controlling precedent of our own, it is a salutary general rule to follow the decision of the Supreme Court of the United States. For services clearly outside the director's duties as a director, we think there may be a recovery, as upon quantum meruit, under and in accordance with what, in *Brown v. Silver Mines* (Colo.) *supra*, is denominated the 'more liberal rule.'"

²⁰ See *infra*, III. a, 2.

²¹ Where, in *Chicago Macaroni Mfg. Co. v. Boggiano* (1903) 202 Ill. 312, 67 N. E. 17, the president of a corporation had performed services outside of his duties as president, devoting his entire time and attention to the management of the business, it was held, such services being rendered at the request, or with the acquiescence of the corporation, that he might recover compensation therefor; but that he could not recover for services rendered after notice from the directors to cease therefrom.

²² Where, in *Argo Mfg. Co. v. Parker* (1909) 52 Wash. 100, 100 Pac. 188, the director of a corporation set up a claim for services as vice president, agent, and salesman, the court, in allowing it, said: "It cannot be successfully urged that, because he was an officer and a stockholder, he

to recover for services as attorney has been involved in several cases falling within the scope of this note,²⁴ in none of them, other than the case referred to, has such a distinction been suggested.

Where the resolution providing for compensation for certain extraordinary services is repealed, a purpose not to pay for such services in the future seems, in the absence of proof to the contrary, to be inferable therefrom; and a recovery of compensation may be had upon implied contract therefor only upon proof by the director of circumstances plainly overcoming such inference.²⁵

As opposed to the multitude of cases supporting the principle which allows directors and officers of a corporation compensation upon implied contract for services performed outside the scope of official duties, some half dozen cases, in two of the states and one of the Canadian provinces, are found to support the opposite rule.²⁶ The corpora-

was not entitled to wages. As we have shown, he owned only two shares of its capital stock. This being true, there arose from the rendition of his services an implied contract that the respondent should pay him their reasonable value."

²³ Where a director who is also president of the corporation renders services as solicitor, it is held in *Re Mimico Sewer Pipe & Brick Mfg. Co.* (1895) 28 Ont. Rep. 289, that he may recover costs for causes conducted by him in court, but not for business done outside of court. The court says: "I should have been inclined to allow him his costs for business done out of court, as well as for professional services performed in an action or in a suit. But the rule is laid down in *Craddock v. Piper* (1850) 1 Macn. & G. 664, 41 Eng. Reprint, 1422, 1 Hall & Tw. 617, 47 Eng. Reprint, 1556, 19 L. J. Ch. N. S. 107, 14 Jur. 97, that where a trustee-solicitor is entitled to his costs, he is limited expressly to the costs incurred in respect of the business done in an action or in a suit."

²⁴ See *infra*, notes 38 and 51.

²⁵ Where the board of directors, which has passed a resolution allowing compensation for obtaining subscriptions to stock, passes a subsequent resolution rescinding the former, a director who afterwards obtains stock subscriptions may not recover compensation therefor, in the absence of proof that such services were rendered, and that the corporation by some act has recognized the employment, with the intention of making compensation. *Hall v. Vermont & M. R. Co.* (1856) 28 Vt. 401.

²⁶ *Althouse v. Cobough Colliery Co.* (1910) 227 Pa. 580, 136 Am. St. Rep. 908, 76 Atl. 316, was an action by a mining engineer, who was president of a corporation, against the corporation for services

tions involved in the Alabama cases are not, strictly speaking, private corporations, and, although no reason for distinction on that ground is apparent, it is not impossible that one may be found to exist. The Canadian case comes from one of the lower courts and is opposed by a case from the same jurisdiction in line with the majority rule.⁸⁷ The Pennsylvania cases, however, take their stand definitely and unmistakably against recovery for extraordinary services as upon implied contract. It is unfortunate that, with respect to a rule so nearly universal and working no injustice to anyone, one

rendered outside the scope of his duties as president, in surveying, procuring rights of way, building a railroad and bridge, and other technical services. After referring to a couple of cases holding that, in the absence of contract, corporate officers cannot recover for services within the scope of their duties, the court continues: "It is sought to distinguish the present case from these by the fact that here the services for which recovery was sought were professional, and not such as appertained to the office of president under the by-laws of the corporation. The distinction is apparent, but it marks no substantial difference with respect to rule or policy. There is quite as much reason for requiring a corporate officer to show an express contract for compensation as a condition of recovery in one case as in the other."

And where, in *Brophy v. American Brewing Co.* (1905) 211 Pa. 596, 61 Atl. 123, a director was suing to recover compensation for services as the manager or superintendent of a corporation, it was held that he came "within the reason of the settled rule that a corporate officer cannot recover compensation for services rendered the corporation unless there was an express contract of employment before the services were performed."

In *Michie v. Erie & H. R. Co.* (1876) 26 U. C. C. P. 566, a provisional director is held not to be entitled to recover compensation for services rendered in securing bonuses in aid of the railway and in advancing the interests of the corporation in various ways. It is said: "For these services, whatever benefit may have resulted therefrom to the shareholders, and whether there had been a contract or not, we must hold that no action as upon any contract, express or implied, lies against the company at the suit of the plaintiff, whom we must hold to have been a statutory trustee of the company, with a special trust imposed upon him as a provisional director during all the period within which the services for compensation of which this action has been brought were rendered."

Branch Bank v. Collins (1844) 7 Ala. 95, involves the right of a bank director, receiving the compensation provided by law L.R.A.1917F.

or two courts have been unable to follow in the footsteps of the others.

The right of recovery upon quantum meruit for extra services is not affected by the failure of the directors to fix the salary of the claimant as president, in accordance with the requirement of the by-laws.⁸⁸ In such a case it is not the salary that is sought, and what has been done in respect thereto has no bearing upon the matter.

2. Under statute or by-law prohibiting compensation.

Under a statute or by-law specifically prohibiting the officers or directors of

as such, to retain money paid him for extra services rendered during his tenure as director as member of the real estate board of the bank. *Goldthwaite, J.*, says: "We perceive a compensation as provided by positive enactment is to be paid to each director for his services in the management of the bank. The management of its real estate was as much a duty imposed by the charter upon the directors as any other matter confided to their charge; and there is no pretense for extra compensation for this which will not as well apply to any other duty. But conceding that some services could be performed by a director out of the ordinary course of his duties as such, yet he would be entitled to no compensation for them, so long as his relation with the bank in that character continued. He cannot, at the same time, be a servant of the directors and a director too. The relation of master and servant in the same individual is incompatible, and cannot exist." The bank here involved is not a private bank, but a state bank, created by the state for public purposes.

Branch Bank v. Scott (1844) 7 Ala. 107, involves the same question as that involved in the preceding case, and the judgment is based upon the opinion rendered therein.

And see *Godbold v. Branch Bank* (1847) 11 Ala. 191, 46 Am. Dec. 211, an action to recover from a director the money voted by him to another director of the bank, receiving compensation as such under the statute, for services rendered as agent of the board in traveling about for the purpose of collecting moneys and attending to the business of the bank, in which the preceding cases are cited and approved.

⁸⁷ *Re Matthew Guy Carriage & Automobile Co.* (1912) 26 Ont. L. Rep. 377, 3 Ont. Week. N. 1233, 22 Ont. Week. Rep. 34, 4 D. L. R. 764, supra, note 19.

⁸⁸ Although the by-laws of a corporation require officers' salaries to be fixed by the board of directors, and no salary for the president is so fixed, it is held in *Georgetown Mercantile Co. v. First Nat. Bank* (1914) — Tex. Civ. App. —, 165 S. W. 73, that where the president has filled the position of general manager and worked as salesman, he is entitled to compensation

a corporation from receiving compensation for all services, whether within or without the scope of their official duties, there would be no room for difference of opinion as to the right of an officer or director to recover upon quantum meruit for extraordinary services. But where statutes or by-laws merely provide that officers or directors shall not receive compensation for their services, without specifying whether the services meant are merely those within the scope of their official duties or whether they are intended to include all services, of whatever nature, the question is not so simple and the courts are not in accord in their answers to it. Some courts have apparently taken the view that statutes and by-laws of this kind are meant to include all services, both official and extraordinary, and accordingly they deny the right of recovery upon implied contract for services performed by an officer or director outside the scope of his official duties.²⁹ This view, however, seems open to criticism. While it is understandable why officers and directors should be refused compensation for the performance of official duties, which are usually not of an onerous character, it is hardly conceivable that either the

legislature or the stockholders should expect them to perform services outside the scope of their official duties without compensation. If such were the case, they would be much worse off than mere stockholders³⁰ or persons not connected with the corporation, who, according to the general rule, may recover upon quantum meruit for services rendered. And it may not be urged that advantage might be taken of the corporation by unscrupulous directors or officers for their own gain. Recovery must be based, not only upon the rendition of services, but upon the rendition of services under circumstances from which a contract to pay may be implied. And one of the elements of such implication is an understanding on the part of the corporation during the time the services are being rendered that they are to be paid for.³¹ Moreover, the bodies making such statutes and by-laws must be presumed to know the general rule of law applicable to the extraordinary services of directors and officers, and if they wish to prevent its application they may make their intention clear by specifically so providing in the regulations passed by them. This is the view taken in New Jersey.³² In only one case has anything

for such services, they being outside his duties as president.

See, in this connection, *supra*, II, b, 2.

²⁹ Under a statute prohibiting the officers of a building and loan company from receiving compensation for services rendered, it is held in *Eddy v. Barry* (1901) 99 Ill. App. 266, that a director of such a company, who is also president, cannot recover for services rendered in visiting various cities and examining and appraising the property of the company therein. The president claimed that such services were outside the scope of his duties as president, but the court ignores such claim and treats it as immaterial.

So, under a statute providing that "there shall be no compensation for services rendered by the president or any director, unless it be allowed by the stockholders," one who is president, director, and general manager of a corporation may recover no compensation for services in closing out the stock and settling up the accounts of the company, in the absence of any allowance thereof by the stockholders. *Triplett v. Fauver* (1904) 103 Va. 123, 48 S. E. 875. While it does not specifically appear that the court views such services as outside the scope of the officer's duties, it is probable that such is the case.

And see *Barstow v. City R. Co.* (1871) 42 Cal. 465, an action by a director to recover upon implied contract for services rendered in negotiating a construction contract for the corporation while on a trip

taken for his private interest, in which it is held that a by-law of the company, to the effect that directors shall receive no compensation for services as such, is admissible, and the case is reversed for its exclusion.

³⁰ See *infra*, III, a, 2.

³¹ *Infra*, II, c, 4.

³² It is held in *Chandler v. Monmouth Bank* (1832) 13 N. J. L. 255, that the director of a bank, authorized by its charter to erect a ferry, who renders services as a member of the committee appointed by the directors to contract for a boat and to superintend its building, and who also renders services in attending to the construction of the boat and in furnishing her with fuel and supplies, may recover for such services notwithstanding a provision in the charter that "no director shall be entitled to any emolument unless the same shall have been allowed by the stockholders at a general meeting," such services being outside the scope of his duties as director, and the charter provision accordingly being inapplicable thereto. It is said: "It was the intention of the legislature by inserting this clause in the charter, to prevent the directors from taking compensation for the performance of their appropriate duties; but its sound construction does not require the exclusion of the individuals of the board from a just compensation for services of a different character, merely because they were rendered *while* they were directors. Services may be wanted requiring mechan-

approaching such a clause been found, and there it is properly held that no recovery can be had for those extraordinary services for which compensation is prohibited.³³

Where a resolution merely provides that the general services of directors shall be without pay, and a rate of compensation for certain extraordinary services is fixed therein, there is, of course, no ground for denying thereunder the right of a director to recover for services outside the scope of his official duties, and not of the nature for which the rate of compensation is fixed.³⁴

3. What services are extraordinary.

(a) Must be clearly extraordinary.

Doubts as to whether or not particular services rendered by directors are

ical or professional skill; as, for instance, the engraving of the plates, the making of paper, etc. Should one of the directors be competent to perform this work, the charter was never intended to prohibit his employment for that purpose. And, again, services may be required which, although they might be performed by the whole board of directors, yet are to be transacted at distant places, or under circumstances which would make it extremely inconvenient for a body of men to attend to them, and where a proper discharge of their duties to the company would require of the directors to constitute an agency. In such cases I see no objection to their employing one of their own number as their agent. Indeed, the nature of the business may often be such as would render this highly expedient. And if they should do so, such agent may surely demand and be paid a reasonable compensation for his services. Of this description was the making of contracts for this steamboat and for her necessary supplies; and even the superintendence of her construction."

³³ Under a provision of an act of incorporation to the effect that "no trustees of such corporation shall be entitled to any compensation except under some special employment by the board or authority expressed in the original deed or instrument of trust," a trustee may not recover upon implied contract for services rendered outside his duties as trustee, the section expressly precluding "the trustee from receiving compensation for services in the rendition of which the officers have simply acquiesced, however strong the inference may be that compensation was expected." *Henry v. Michigan Sanitarium & Benev. Asso.* (1907) 147 Mich. 142, 110 N. W. 523.

But see *Bartlett v. Mystic River Corp.* (1890) 151 Mass. 433, 24 N. E. 780, *infra*, note 64.

³⁴ A resolution that the general services of directors shall be without pay, which provides a specific rate of compensation for L.R.A.1917F.

extraordinary are to be resolved in favor of the negative contention. To recover upon quantum meruit, directors must be able clearly to prove that the services for which compensation is asked are not such as fall within the scope of their duties, as fixed either by custom or regulation.³⁵ They are bound to perform their official duties without compensation other than their salaries, or, if they are accorded no salary, then without expectation of reward whatsoever. Accordingly, the courts scrutinize closely all claims for services alleged to have been rendered outside the scope of official employment.

(b) Examples.

Whether or not a particular service is outside the scope of the official duties of a director or officer depends in each

services calling the directors from home, does not operate to prevent the recovery of reasonable compensation by a director who has superintended the construction of defendant's railroad and performed various other services in connection therewith at the request of the president. *Henry v. Rutland & B. R. Co.* (1855) 27 Vt. 435. "There are services," the court says, "which may be rendered for the benefit of a corporation, the performance of which may be delegated by the directors to other persons. For that purpose the directors may employ, as their agents, those who are not members of the corporation, or they may employ one of their own number. . . . In rendering those services, the plaintiff was not acting in his official character, as director, but as the agent of the corporation; and his compensation is no more limited by that vote than it would be if the services had been rendered by others, who were not officers."

³⁵ "When services are rendered by an officer which are clearly outside of the scope of his duties as such officer, and there is nothing to show that they were to be gratuitous, he may recover compensation for them." *Flynn v. Columbus Club* (1900) 21 R. I. 534, 45 Atl. 551, an action by the president of a club to recover compensation for collecting rents of tenants occupying the club building.

So, in *Felton v. West Iron Mountain Min. Co.* (1895) 16 Mont. 81, 40 Pac. 70, an instruction is held proper that plaintiff, a trustee and secretary of defendant corporation, cannot recover for services rendered as general manager, in the absence of special contract, unless they "were clearly outside his ordinary duties as secretary or trustee; second, unless they were performed under circumstances sufficient to show that it was well understood by the proper corporate officers, as well as by himself, that the services were to be paid for by the defendant company."

And where, in *Severson v. Bi-Metallic Extension Min. & Mill. Co.* (1896) 18 Mont.

individual case upon the duties of such officer or director, as defined by the governing statutes, charters, by-laws, and regulations of the corporation. Accordingly, what may in one case be an extraordinary service for a particular officer may not be so in another case involving a corresponding officer in a corporation governed by different regulations. However, as a general thing, it will be found that corporations usually prescribe about the same duties to corresponding officers. As pointed out above,³⁶ it should be noted here that, while the duties of the various officers in the same corporation differ, and, as a rule, are somewhat broader than the duties of a director who holds no office in the board of directors, nevertheless

those duties are all imposed by reason of such officer's directorship, and are, strictly speaking, duties pertaining to the position of director. Accordingly, the rule governing the recovery upon quantum meruit of compensation by a director for services performed within the scope of his official duties has been found to apply to services performed by one as officer of the board of directors.³⁶ And it must follow that, in determining what services are without the scope of a director's official duties, not only the duties required of him as director must be considered, but also, if he is an officer of the board, those required of him as such officer.

Services rendered as manager,³⁷ attorney,³⁸ land commissioner,³⁹ bank

13, 44 Pac. 79, plaintiff was suing in quantum meruit for services rendered as superintendent while he was a trustee and vice president of the corporation, it is held that, there being evidence that the services were of value, that they were clearly outside the ordinary duties of plaintiff as director and vice president, that the directors understood that plaintiff was to perform them, and that they were services which it was understood by the corporate officers should be paid for, the trial court erred in granting a nonsuit.

See also *Brown v. Republican Mountain Silver Mines* (1892) 17 Colo. 421, 16 L.R.A. 426, 30 Pac. 66, *supra*, note 19; *Gumaer v. Cripple Creek Tunnel, Transp. & Min. Co.* (1907) 40 Colo. 1, 122 Am. St. Rep. 1024, 90 Pac. 81, 13 Ann. Cas. 781, *infra*, note 54; *New York & N. H. R. Co. v. Ketchum* (1858) 27 Conn. 170, *infra*, note 48; *Toponce v. Corinne Mill Canal & Stock Co.* (1890) 6 Utah, 439, 24 Pac. 534, affirmed in (1894) 152 U. S. 405, 38 L. ed. 493, 14 Sup. Ct. Rep. 632; *Title Ins. & T. Co. v. Home Teleph. Co.* (1912) 200 Fed. 263.

³⁶ *Supra*, II. b, 1.

³⁷ In *Ruby Chief Min. & Mill. Co. v. Prentice* (1898) 25 Colo. 4, 52 Pac. 210, it is held that a recovery may be had for services rendered by a director to a mining corporation, where such services are clearly outside his duties as director, and are in the nature of duties of a general manager or superintendent of the mine.

And see *Mt. Nebo Anthracite Coal Co. v. Martin* (1908) 86 Ark. 608, 111 S. W. 1002, affirmed on rehearing in (1908) 86 Ark. 613, 112 S. W. 882, *supra*, note 19; *Bassett v. Fairchild* (1901) 132 Cal. 637, 52 L.R.A. 611, 64 Pac. 1082, affirming on rehearing (1900) 6 Cal. Unrep. 458, 61 Pac. 791, *infra*, note 59; *Sargent v. Sargent Granite Co.* (1893) 25 Misc. 325, 23 N. Y. Supp. 886, *supra*, note 19; *Dwight v. Williams* (1898) 25 Misc. 667, 55 N. Y. Supp. 201, *infra*, note 62; *Corinne Mill Canal & Stock Co. v. Toponce* (1894) 152 U. S. 405, 38 L. ed. 493, 14 Sup. Ct. Rep. 632, affirming (1890) 6 Utah, 439, 24 Pac. 534, *infra*, note 59. L.R.A.1917F.

³⁸ In *Jackson v. New York C. R. Co.* (1874) 2 Thomp. & C. (N. Y.) 653, affirmed in (1874) 58 N. Y. 623, an action involving the right of the director of a railroad for compensation for services rendered as attorney, it is said: "In this case no doubt can exist that the professional services rendered were outside and in excess of the ordinary duties of a director; that such services were rendered with the knowledge and at the request of the defendant, as is evinced by the nature of the employment, the importance of the subject-matter involved, the action of the board of directors in reference to this claim, the partial payment thereof by defendant, alleged in the answer and admitted in the proofs, the qualified admissions of employment and retainer made upon the trial, and the several acts of the board in the nature of a recognition of an indebtedness for these services and ratification of the employment. These circumstances were sufficient to justify the referee in his conclusion that Mr. Paige [lawyer] was employed by the defendant to render such services as a lawyer, and not as a director."

So, where, in *Rogers v. Hastings & D. R. Co.* (1875) 22 Minn. 25, a director of a railroad company had served without formal appointment, but with the knowledge and at the request of the board, as attorney for the corporation for four years, it is held that he may recover upon quantum meruit, the court saying that "what has been said in reference to plaintiff's right to recover as land commissioner (see *infra*, note 39) is applicable here."

And on the ground that services rendered as attorney are not within the scope of the official duties of the director of a corporation, a law firm containing one member who was a director of a corporation was held in *Watts v. West Virginia Southern R. Co.* (1900) 48 W. Va. 262, 37 S. E. 700, to be entitled to recover for professional services rendered the corporation under circumstances sufficient to raise an implied contract to pay for the same.

And see *Kenner v. Whitelock* (1899) 152

cashier,⁴⁰ laborer,⁴¹ and auditor⁴² have been held to be outside the scope of the duties of a mere director. And a director of a bank authorized to erect a ferry, who makes contracts for the steamboat and her supplies and superintends her construction,⁴³ as well as a director of an insolvent corporation, who straightens out the affairs as between the stockholders and the creditors,⁴⁴ has been

considered to perform services which were extraordinary. On the other hand, services rendered in making efforts to contract for the construction of the corporation's railroad,⁴⁵ in detecting the perpetrator of a robbery and recovering a portion of the money stolen,⁴⁶ in superintending the construction of the company's wharf,⁴⁷ and in procuring subscriptions to stock,⁴⁸ have been

Ind. 635, 53 N. E. 232, *infra*, note 51; Merchants' Ice Co. v. Scott & Dodson (1916) — Tex. Civ. App. —, 186 S. W. 418; Re Mimico Sewer Pipe & Brick Mfg. Co. (1895) 26 Ont. Rep. 289, *supra*, note 23.

³⁹ Where, in *Rogers v. Hastings & D. R. Co.* (1875) 22 Minn. 25, a director of a railroad had served as land commissioner, the court, in referring to his claim for compensation, says: "If his services as land commissioner had been performed by him simply as a director, it might be that he could not recover for the same, since, in the absence of a special agreement for compensation, he would, according to many authorities, be presumed to have acted gratuitously. But the duties and labors of a land commissioner of a land grant railroad company do not necessarily nor presumptively pertain to a director as such. Indeed, it would be unreasonable to suppose that duties so onerous would be undertaken by one acting simply as a director, without pay. For such extraordinary services, outside of and beyond his duties as director, a party may certainly recover, notwithstanding his directorship, for the reason that even if he performs the duties of director gratuitously, these services are not a part of those duties."

⁴⁰ In sending the case back for a new trial, the court, in *First Nat. Bank v. Drake* (1883) 29 Kan. 311, 44 Am. Rep. 646, makes the following statement for the guidance of the court below: "We think the rule is, in the absence of positive restrictions, that where no salary is prescribed, one appointed to an executive office, like that of cashier, is entitled to reasonable compensation for his services." The cashier in that case was a director of the corporation.

⁴¹ Where a director of a turnpike company, by agreement with his codirectors, performs labor in completing the construction of the turnpike, he may recover reasonable compensation therefor. *Greensboro & N. C. Junction Turnp. Co. v. Stratton* (1889) 120 Ind. 294, 22 N. E. 247. The court regards the rule to be "that when a director of a corporation performs services for the corporation which are independent and outside of his duties as such director, he has the same right to recover upon an implied contract for such services as though he was not a director."

⁴² Where a director of a corporation is appointed a member of a committee to audit and investigate a great mass of books L.R.A.1917F.

and accounts, in an effort to settle a dispute between the corporation and its manager as to the amount of its net earnings, and the other members of the committee, who are salaried officers, leave the unsalaried director practically all the work, to which he devotes parts of every day and night for three months, such services are beyond the scope of his duty as director, and he may recover compensation therefor upon implied contract. *Paine v. Kentucky Ref. Co.* (1914) 159 Ky. 270, 167 S. W. 375, Ann. Cas. 1915D, 389.

⁴³ *Chandler v. Monmouth Bank* (1832) 13 N. J. L. 255, *supra*, note 32.

⁴⁴ *Rosehill Cemetery Co. v. Dempster* (1908) 223 Ill. 567, 79 N. E. 276, affirming (1905) 121 Ill. App. 143, *infra*, note 74.

⁴⁵ In *Cheaney v. Lafayette, B. & M. R. Co.* (1873) 68 Ill. 570, 18 Am. Rep. 584, an action by a director for various services rendered on behalf of the corporation, the court, in reversing the judgment of the court below, says: "It would, then, follow that, as appellant was appointed to solicit subscriptions of stock and to procure the right of way for the road, he may recover, unless that duty was imposed on him as a director by the charter or the by-laws. In performing those duties, it is more than probable that he acted as an agent, and not as a director, and should be permitted to recover for such extra service; but if this duty was imposed by the charter or the by-laws of the company as a director, then a recovery could not be had therefor. The duties he performed as a member of the executive committee in making efforts to contract for the construction of the road, including time and travel, were a part of his duty as director, and . . . he has no right to recover for them." See the subsequent appeal of this case in (1877) 87 Ill. 446, where this point is again discussed.

⁴⁶ The detection of the perpetrator of the robbery of a bank and the recovery of a portion of the money stolen are part of the duties of the director of a bank for which he may recover no part of the reward offered for the detection of the thief and the recovery of the money. *Stacy v. State Bank* (1842) 5 Ill. 91.

⁴⁷ *Burns v. Commencement Bay Land & Implement Co.* (1892) 4 Wash. 558, 30 Pac. 668, 709, *supra*, note 1.

⁴⁸ In holding, in *New York & N. H. R. Co. v. Ketchum* (1858) 27 Conn. 170, that a director is not entitled to compensation for services rendered in securing stock subscriptions, the court says: "Doubtless a

looked upon as falling properly within the scope of the duties of a director. Upon this latter point, however, there seems to be room for a difference of opinion.⁴⁹

Services performed as manager,⁵⁰ attorney,⁵¹ salesman,⁵² and rent collector⁵³ have been held to be beyond the official duties of the president of a corporation. And it has also been held that the pres-

ident may perform extra labor, and for it be justly entitled to a compensation for his time and expenses, and this may be made out even without an express promise, for a promise may be implied from the peculiar and extraordinary services rendered; but then the services must appear to be of an extraordinary character, and this beyond all question or doubt; for, as director, he agrees to give his services, and is entitled to make no charge whatever, however severe and protracted may be his labors. A different rule would lead to great abuses and corruption. We cannot but think it important in every case that where a person, holding the position of a director, expects or may be fairly entitled to expect, a compensation for his services, the services should appear to have been agreed for, or their nature and extent should appear to be such as clearly to imply that both parties understood they were to be paid for, and not rendered gratuitously within the scope of a director's duty."

⁴⁹ See *Cheaney v. Lafayette, B. & M. R. Co.* supra, note 45.

⁵⁰ *Outterson v. Fonda Lake Paper Co.* (1892) 66 Hun, 629, 20 N. Y. Supp. 980, supra, note 19; *Georgetown Mercantile Co. v. First Nat. Bank* (1914) — Tex. Civ. App. —, 165 S. W. 73, supra, note 28. *Blom v. Blom Codfish Co.* (1912) 71 Wash. 41, 127 Pac. 596, supra, note 19.

⁵¹ In *Kenner v. Whitelock* (1899) 152 Ind. 635, 63 N. E. 232, an action involving the right of one who was president and director of a corporation to compensation for services as attorney and legal adviser to the corporation, it is said: "When the claim of an officer of a corporation is for services rendered by him beyond the scope of his official duty, and no element of fraud or dishonesty is involved, it may be allowed and paid. While the courts will closely scrutinize such claims, they will not deprive an honest and meritorious creditor of moneys justly due to him, merely because he sustained an official relation to the corporation debtor when the services were performed, or the debt was contracted. The services for which compensation was claimed by appellant were not such as he was required to perform either as president or director. They were outside his official duty and he had a right to make a just and reasonable charge for them."

⁵² *Georgetown Mercantile Co. v. First Nat. Bank* (1914) — Tex. Civ. App. —, 165 S. W. 73, supra, note 28.

⁵³ In *Flynn v. Columbus Club* (1900) 21 L.R.A.1917F.

ident is not bound to render services in preventing the property of the corporation from being sold under execution, or in supervising the construction of a tunnel and in managing the disbursement of the funds and the employment of the men.⁵⁴ On the other hand, services rendered in the management of litigation,⁵⁵ the supervision of agents,⁵⁶

R. I. 534, 45 Atl. 551, an action by the president of a club to recover compensation for collecting rents of tenants occupying portions of the club building, recovery is held proper "as his services as collector do not appear to have been within his duties as president."

⁵⁴ In *Gumaer v. Cripple Creek Tunnel, Transp. & Min. Co.* (1907) 40 Colo. 1, 122 Am. St. Rep. 1024, 90 Pac. 81, 13 Ann. Cas. 781, the president of the corporation saved the company's entire property from being sold under execution; he undertook the placing of the stock of the company; he assumed the entire supervision of tunnel work and the disbursement of the funds; the employment of men and the making of contracts. Such services were held to be outside the duties of a director, and such president was held to be entitled, as against a creditor of the corporation, to compensation voted him therefor.

⁵⁵ Where, in *Winfield Mortg. & T. Co. v. Robinson* (1913) 89 Kan. 842, 132 Pac. 979, Ann. Cas. 1915A, 451, the president of the corporation claimed compensation for managing litigation carried on by him in the interest of the corporation to compel a former receiver to account for funds still in his hands, the court says: "The services for which compensation was asked were those which pertained to the office of president. In the absence of a contrary corporate provision the president is empowered to employ counsel and to manage the litigation in which the corporation is interested. This is said to be one of the inherent powers of a president of a corporation, and it has also been held that if the board of directors should employ counsel it would not deprive the president of the power to employ other counsel and control the litigation."

⁵⁶ Where there are only a few members of a corporation and all are its officers and all are rendering some character of service to promote the enterprise, and it appears that no officer is expected to receive compensation for such services, the law will not imply any contract to pay the president of such corporation for services performed by him in superintending the agents selected by him to sell the lots which the corporation has been formed to sell. *Red Bud Realty Co. v. South* (1910) 96 Ark. 281, 181 S. W. 340. The court says: "The question whether or not there was an implied contract to this effect is one of fact, rather than of law. In considering whether or not such a contract has been proved, the nature of the corporation and its business,

the equipping of the company's mine,⁵⁷ the procuring of contracts for the construction of the corporation's railroad,⁵⁸ the leasing of such railroad⁵⁸ and the procuring of local subscriptions for its aid,⁵⁸ have been looked upon as falling within the scope of the duties of the president of a corporation.

The management of the business of the corporation,⁵⁹ the settlement of ac-

cident cases,⁶⁰ and the securing of a reduction in the corporation's taxes,⁶⁰ have been held not to be within the scope of the duties of the vice president of a corporation. Likewise it has been held that the supervision of the erection of blast-furnaces is not one of the duties pertaining to the office of secretary.⁶¹ And the management of a corporation's business⁶² and also the procurement of

the nature and extent of the services rendered, the comparative amount and value of the services of other officers of the corporation, and all other circumstances of the case, must necessarily be looked at and weighed, and it must also be considered whether or not the services were performed under circumstances showing that it was understood by the proper officials of the corporation and by the officer rendering the services that they were to be paid for."

⁵⁷ A president of a corporation given by the by-laws the "general supervision of the business and affairs of the company" cannot recover for services upon implied contract upon the theory that they are outside the scope of his regular duties, where the services rendered consist in equipping the mine owned by the company and superintending such equipment. *Barry v. Coffeen Coal & Copper Co.* (1893) 52 Ill. App. 183.

⁵⁸ Where a director, who is president of a railroad corporation, as member of the executive committee, makes several trips to other states for the purpose of contracting for the construction of the railroad, aids in leasing it, and also in procuring local subscriptions by working at elections at which they are voted upon, he performs no duties outside of those pertaining to his office, and may recover, in the absence of contract, no compensation therefor. *Gridley v. Lafayette, B. & M. R. Co.* (1873) 71 Ill. 200.

⁵⁹ Although director and vice president of a corporation, a person acting as manager thereof without any express contract fixing his compensation therefor is entitled to the reasonable value of the services rendered as manager, where such services are numerous and onerous, occupy his entire time, are highly valuable, are known to the other directors, and are of such a character as to preclude any reasonable supposition that they are intended to be gratuitous. *Bassett v. Fairchild* (1901) 132 Cal. 637, 52 L.R.A. 611, 64 Pac. 1082, affirming on rehearing (1900) 6 Cal. Unrep. 458, 61 Pac. 791. The court says: "Now, it has been held that directors of corporations cannot, without previous express contract, receive compensation for such ordinary services as are usually rendered by directors without pay, for the common understanding, as declared by judicial decisions, is that such services are presumed to be rendered gratuitously. But that presumption does not apply to those onerous services performed by officers and agents of a corporation, though they be also directors, for which L.R.A.1917F.

compensation is usually demanded and allowed, and which could not reasonably be expected to be performed for nothing."

In *Corinne Mill Canal & Stock Co. v. Toponce* (1894) 152 U. S. 405, 38 L. ed. 493, 14 Sup. Ct. Rep. 632, affirming (1890) 6 Utah, 439, 24 Pac. 534, plaintiff, who was a director and vice president of defendant corporation, testified on direct examination that he had charge of the entire business, and on cross-examination that his duties consisted of "chasing fellows off the land, trying to guard the land, tending to the stock on the ranch, digging ditches, superintending putting up fences, all contracts, and so forth." The foreman of the ranch testified that plaintiff was "general manager of the business;" "made all the contracts of everything that came on the ranch;" "collected the bills;" "bought the feed, hay, and grain;" and "had general charge of everything." Neither the charter nor the by-laws cast any special duties on either the vice president or directors. "Obviously, therefore," it is said, "under the testimony which we have referred to, from the plaintiff and the foreman of the ranch, the services which the plaintiff performed were not those of a director or vice president, but outside thereof, and similar to those of a general manager;" and the verdict of the jury in favor of the plaintiff is sustained.

Where, with the knowledge of the officers and stockholders of a corporation, the vice president thereof goes actively to work to push the business, which has practically ceased, and devotes all his time thereto, he may recover the value of such services, they being outside the duties necessarily entailed upon his office. *Brown v. Creston Ice Co.* (1901) 113 Iowa, 615, 85 N. W. 750.

⁶⁰ Services rendered in the settlement of accident cases in which a corporation is involved, and in securing a reduction of the corporation's taxes, are held, in *Dunlap v. Montana-Tonopah Min. Co.* (1911) 192 Fed. 714, affirmed in (1912) 116 C. C. A. 286, 196 Fed. 612, not, strictly speaking, to be within the scope of the duties of the vice president, but "services which might very properly have been, and usually are, performed by an attorney, agent, or broker."

⁶¹ *Talcott v. Olcott Mfg. Co.* (1880) 11 N. Y. Week. Dig. 141, supra, note 19.

⁶² Where, to the knowledge of a corporation, valuable services are rendered thereto as manager by one who is also director and treasurer, such services are outside of his duties as officer of the corporation, and, in

bonuses for a construction corporation,⁶³ the procurement of its right of way,⁶³ and the superintending of the construction work,⁶³ have been held beyond the official duties of the secretary of a corporation.

4. Necessity of understanding that services be paid for.

To recover upon quantum meruit for services rendered outside the scope of his official duties a director or officer

must show, in addition to the fact that the services were extraordinary, that they were rendered under circumstances from which a promise to pay compensation may properly be implied. To raise such implication it is fairly well agreed that the circumstances must show an understanding on the part of the corporation, at the time the services were being rendered, that they were to be paid for,⁶⁴ and also an understanding on the part of the person rendering such

the absence of legal contract with respect to compensation therefor, he may recover upon quantum meruit. *Dwight v. Williams* (1898) 25 Misc. 667, 55 N. Y. Supp. 201.

⁶³ Services rendered in the procuring of money for a construction corporation, the procuring of a right of way, the superintending of the work, the hiring of men and the subletting of contracts, are held in *Fitzgerald & M. Constr. Co. v. Fitzgerald* (1890) 137 U. S. 98, 34 L. ed. 608, 11 Sup. Ct. Rep. 36, not to be within the duties of the treasurer of the corporation as prescribed by a by-law imposing upon him the duty to give bonds, to pay out money, to make a financial statement and keep an account of the stock of the company.

⁶⁴ In *Taussig v. St. Louis & K. R. Co.* (1901) 166 Mo. 28, 89 Am. St. Rep. 674, 65 S. W. 969, on subsequent appeal in (1905) 186 Mo. 269, 85 S. W. 378, an action involving the right of an attorney, who was director and secretary and treasurer of a corporation, for the value of professional services rendered the corporation, it is said: "The rule applicable to such a case, to be deduced from the modern and best considered cases, is, we think, that a party, although a director or other officer of a corporation, may recover the reasonable value of necessary services rendered to a corporation, entirely outside of the line and scope of his duties as such director or officer, performed at the instance of its officers, whose powers are of a general character, upon an implied promise to pay for such services, when they were rendered under such circumstances as to raise a fair presumption that the parties intended and understood they were to be paid for, or ought to have so intended and understood."

Quoting from another case, it is said in *Barrenstecher v. Hof Brau* (1913) 67 Or. 194, 135 Pac. 518, that, to render a corporation liable as upon implied contract for services rendered by an officer outside the scope of his duties, "it must be shown, not only that the services were valuable, but also that they were rendered under such circumstances as to raise the fair presumption that the parties intended and understood that they were to be paid for; or at least that the circumstances were such that a reasonable man, in the same situation with the person who receives and is benefited by them, would and ought to understand that compensation was to be paid for them." In that case it is held that the

evidence showed the performance of extra services under such circumstances as to raise a presumption that all persons interested in the corporation understood that compensation was to be had.

And in *Fitzgerald & M. Constr. Co. v. Fitzgerald* (U. S.) supra, the same quotation as in the preceding case is given and approved.

Where, in *Toponce v. Corinne Mill, Canal & Stock Co.* (1890) 6 Utah, 439, 24 Pac. 534, affirmed in (1894) 152 U. S. 405, 38 L. ed. 493, 14 Sup. Ct. Rep. 632, one who was director and vice president of a corporation was claiming compensation for services as manager, the court considers proper an instruction to the effect that "if it was not the intention of plaintiff to charge for such services while they were being rendered, or if it was the understanding of those engaged with him in the enterprise that the services he was rendering were simply as an incorporator, and without any expectation of compensation on his part other than would result from the success of the enterprise, and he was aware of such understanding on their part, then he could not recover therefor, even if he had a secret intention of claiming compensation for the same."

With respect to a charge given by the trial court on the question of the right of one who was director and secretary of a corporation to recover for extraordinary services rendered thereto, it is said in *Dodge v. Lansing & Suburban Traction Co.* (1908) 152 Mich. 100, 115 N. W. 1004: "The court charged the jury upon this question in brief that if . . . at the time he performed the same for the company, plaintiff intended to exact pay for these services, and that, under all the circumstances, the company or its agents as reasonable men should have understood that Mr. Dodge was not rendering the same gratuitously, but with the expectation of being paid for the same, he would be entitled, in the absence of any defense, to recover such compensation. We think no error was committed in this instruction."

It is said obiter in *Chiles v. United States Furniture Mfg. Co.* (1914) 167 N. C. 574, 83 S. E. 812: "There is a line of decisions to the effect that for services outside of an officer's regular duties he may recover for their reasonable value; but, so far as examined, the better considered cases only recognize this position when the services are

services that he was to be compensated therefor.⁶⁵ A consideration of the cases leads to the belief that the failure of

either party to have such understanding and expectation will prevent recovery upon implied contract. Indeed, in sev-

rendered to the knowledge of the general officers of the company having a right to bind it by contract, or with the knowledge and approval of the directorate having such power, or of the stockholders when in the exercise of the control and management of corporate affairs, and when the work is of a kind and under circumstances from which a promise and expectation of pay may be fairly inferred."

Where the owner of a coal company incorporates it and makes the former manager a stockholder and director for the purposes of organization, and instructs him to take general supervision under the new organization, but no salary is arranged, it is held in *Ruttle v. What Cheer Coal Min. Co.* (1908) 153 Mich. 300, 117 N. W. 168, an action against the corporation for the value of the manager's services, that the trial court would not have been justified in instructing the jury, as a matter of law, that, under the circumstances of the case, no agreement to pay for such services could be implied. This seems to be on the ground that both the manager and the owner understood that the services were to be paid for.

And in *Bartlett v. Mystic River Corp.* (1890) 151 Mass. 433, 24 N. E. 780, where the president of a corporation had performed special services none of which devolved upon him as a part of his official duty, with the knowledge of the directors, who had every reason to think he would claim compensation therefor, he was held to be entitled to recover upon implied contract, although the directors had previously voted that "no member of the corporation should thereafter receive any compensation for services rendered, unless first authorized by the board, and his compensation fixed," the president not having been a member of the board at the time the vote was passed and having had no knowledge thereof. The court holds that "the defendant accepted the services under such circumstances as to raise a presumption that it expected, or ought to have expected, that they would be paid for," and accordingly fulfils the rule applicable in such cases; and adds: "And in considering whether such an implied contract was proved or not, the nature of the corporation and of its business, the extent and character of the plaintiff's services, the comparative amount and value of the services of other officers of the defendant, as well as all the other circumstances of the case, must necessarily be looked at and weighed."

It is said obiter in *Henry v. Michigan Sanitarium & Benev. Asso.* (1907) 147 Mich. 142, 110 N. W. 523, that "it is a well understood rule that a director or trustee who claims compensation for services must make it appear, not only that such services fall outside the scope of his regular duties, but also that they were performed under

circumstances sufficient to show that it was understood by the corporate officers as well as himself that the services were to be paid for by the corporation."

So, it is held in *Wiano Land & Improv. Co. v. Webster* (1898) 75 Mo. App. 457, that a resolution appointing "Webster & Company" sole agents to prepare the land of a corporation for sale and to sell the lots indicates a purpose on the part of the directors to pay for such services, although Webster, one of the directors, is the only person comprising the firm of "Webster & Company."

And see *Red Bud Realty Co. v. South* (1910) 96 Ark. 281, 131 S. W. 340, supra, note 56; *Brown v. Republican Mountain Silver Mines* (1892) 17 Colo. 421, 16 L.R.A. 426, 30 Pac. 66, supra, note 19; *New York & N. H. R. Co. v. Ketchum* (1858) 27 Conn. 170, supra, note 48; *Felton v. West Iron Mountain Min. Co.* (1895) 16 Mont. 81, 40 Pac. 70, supra, note 35; *Severson v. Bi-Metallic Extension Min. & Mill. Co.* (1896) 18 Mont. 13, 44 Pac. 79, supra, note 35.

⁶⁵ In *Marcy v. Shelburne Falls & C. Street R. Co.* (1911) 210 Mass. 197, 96 N. E. 130, an action by the president of a corporation and member of the board of directors to recover for special services, the court, in reviewing the propriety of certain instructions refused by the trial court, says: "The other requests, directed in general to the point that an implied obligation would arise to pay for beneficial services, were properly refused, for the reason that they all omitted the material modification that there could be no recovery if the services of the plaintiff were rendered as a gratuity, and without any intention on his part to exact payment."

And, in *Apsey v. Chattel Loan Co.* (1914) 216 Mass. 364, 103 N. E. 899, it is said obiter: "The mere rendition of valuable services to a corporation by one of its directors, without evidence tending to show the circumstances under which they were rendered, does not warrant the inference of a contract for compensation. It is matter of common knowledge that officers of public and private corporations often perform service of great value without any thought of remuneration and under an implication that they shall be gratuitous. The fact that one is a director generally militates against the implication that there is an implied contract for payment for that which he does for the corporation."

And see *Red Bud Realty Co. v. South* (1910) 96 Ark. 281, 131 S. W. 340, supra, note 56; *Brown v. Republican Mountain Silver Mines* (1892) 17 Colo. 421, 16 L.R.A. 426, 30 Pac. 66, supra, note 19; *New York & N. H. R. Co. v. Ketchum* (1858) 27 Conn. 170, supra, note 48; *Henry v. Michigan Sanitarium & Benev. Asso.* (1907) 147 Mich. 142, 110 N. W. 523, supra, note 64; *Dodge v. Lansing & Suburban Traction Co.* (1908)

eral cases quantum meruit has been denied because either the officer⁶⁶ or the corporation⁶⁷ did not have such understanding.

152 Mich. 100, 115 N. W. 1004, supra, note 64; Ruttie v. What Cheer Coal Min. Co. (1908) 153 Mich. 300, 117 N. W. 168, supra, note 64; Felton v. West Iron Mountain Min. Co. (1895) 16 Mont. 81, 40 Pac. 70, supra, note 35; Severson v. Bi-Metallic Extension Min. & Mill. Co. (1896) 18 Mont. 13, 44 Pac. 79, supra, note 35; Toponce v. Corinne Mill, Canal & Stock Co. (1890) 6 Utah, 439, 24 Pac. 534, affirmed in (1894) 152 U. S. 405, 38 L. ed. 493, 14 Sup. Ct. Rep. 632, supra, note 64.

⁶⁶ Where the director of a corporation who renders extra services thereto continues as director for a period of eight years after rendering such services without presenting an account or making a claim for compensation, a contract to pay therefor will not be implied. *Utica Ins. Co. v. Bloodgood* (1830) 4 Wend. (N. Y.) 652.

And see *Stout v. Security Trust & L. Ins. Co.* (1903) 82 App. Div. 129, 81 N. Y. Supp. 708, infra, note 67; *Ritchie v. McMullen* (1897) 25 C. C. A. 50, 47 U. S. App. 470, 79 Fed. 522, affirming (1894) 64 Fed. 253, certiorari denied in (1897) 168 U. S. 710, 42 L. ed. 1212, 18 Sup. Ct. Rep. 745, infra, note 67; *Lindsey v. Pasco Power & Water Co.* (1913) 121 C. C. A. 449, 203 Fed. 251, infra, note 67.

⁶⁷ In *Pew v. First Nat. Bank* (1881) 130 Mass. 391, the directors of a bank which had purchased a building upon which extensive repairs were being made appointed the president, the cashier, and a director a committee on alterations. At a subsequent meeting of the board of directors complaint was made that no one was superintending the work, and the president consulted with the other members of the committee to find if either would oversee the work. Both refused, and the president, with the knowledge of the directors, devoted all of his time, except what was required for his duties as president, to superintending the work for six months. In denying his claim for extra services, the court assigns the following reason: "To render such party [receiving benefit of labor] liable as a debtor under an implied promise, it must be shown not only that the services were valuable, but also that they were rendered under such circumstances as to raise the fair presumption that the parties intended and understood that they were to be paid for; or, at least, that the circumstances were such that a reasonable man in the same situation with the person who receives and is benefited by them would and ought to understand that compensation was to be paid for them. . . . The directors appointed the plaintiff and two other persons a committee on repairs. They did not then or at any time afterwards appoint or recognize the plaintiff as superintendent of repairs. Nothing was said in their votes as to compensation of the committee; and there is no evidence that anything was said throughout the transaction by the L.R.A.1917F.

plaintiff or any of the directors in regard to his being entitled to or receiving any compensation. It seems to us that the only reasonable inference from all the evidence is that it was intended and understood by the parties that the plaintiff was acting throughout as a member of the committee, without compensation. There is no evidence whatever that any members of the board of directors understood, or ought to have understood, that he was acting in any other capacity, or that he then made any such claim."

So, where, in *Lindsey v. Pasco Power & Water Co.* (1913) 121 C. C. A. 449, 203 Fed. 251, a director had personal charge of the construction of the irrigating works of the corporation, it is held that, the evidence showing that such services were understood by all parties concerned to be without any other compensation than the benefit he might derive by reason of his interest in the undertaking, no compensation therefor might be had.

And where, in *Ritchie v. McMullen* (1897) 25 C. C. A. 50, 47 U. S. App. 470, 79 Fed. 522, affirming (1894) 64 Fed. 253, certiorari denied in (1897) 168 U. S. 710, 42 L. ed. 1212, 18 Sup. Ct. Rep. 945, one who was president and director of a mining corporation, and had rendered valuable services in enlarging the nickel market and in having the tariff on nickel matter reduced, claimed compensation therefor, it is held that, both he and his associates in the corporation clearly understanding at the time the services were rendered that he did not expect to be paid therefor, and he having stated over and over again that he did not expect to be paid for his labors, no contract for compensation could be implied.

Although one who is vice president and director of a life insurance company renders services outside of his duties as vice president in the management of the real estate of the company in pursuance of a resolution passed by the board of directors, he is not entitled, in the absence of a stipulation in the resolution providing therefor, to compensation, where such services were not performed with any expectation on the part of the company that they were to be paid for, and were not originally undertaken by the man himself with the expectation of compensation. *Stout v. Security Trust & L. Ins. Co.* (1903) 82 App. Div. 129, 81 N. Y. Supp. 708.

And where the by-laws of a corporation limit the duties of the vice president to supervising the cheap cab service of the corporation, compensation for his services rendered to the corporation in connection with the livery department is not recoverable, where the evidence fails to show that there was any understanding upon the part of the directors that he was to receive any compensation for such extra services. *Gill v. New York Cab Co.* (1888) 48 Hun, 524 16 N. Y. S. R. 226, 1 N. Y. Supp. 202. The

III. Right of stockholder to compensation.

a. Where stockholder is officer.

1. For services as officer.

The reason for the rule denying recovery for official services upon quantum meruit to officers who are directors⁶⁸ does not apply to officers who are merely stockholders, there being no relationship of trust between a stockholder and a

corporation. Accordingly, there seems to be no ground for stretching that rule so as to cover officers who are mere stockholders; and what seems to be the better and more logically reasoned line of cases holds that the mere holding of stock in a corporation is no bar to recovery upon implied contract of compensation for services rendered by an officer as such.⁶⁹ There are cases holding the other way,⁷⁰ but, with the exception of the New York case, they seem

court says: "As to the authorities which have been cited in support of plaintiff's claim, it is sufficient to say that in each one of these cases the prominent features which were made to appear were that the services by the director were out of the course of his ordinary duties, and that there was an expectation upon the part of the corporation to pay for the same."

So, where there is no evidence that the directors of a bank, either as a board or individually, had any knowledge of the amount of time that the president of the bank spent in the bank during banking hours, or that he was performing any services outside those imposed upon him as president, or that they expected him to spend his time there, he cannot recover compensation for such services. *Notley v. First State Bank* (1908) 154 Mich. 676, 118 N. W. 486.

In *Levisse v. Shreveport City R. Co.* (1875) 27 La. Ann. 641, where the president of the corporation was suing for services rendered in superintending the construction of a railroad depot, it is held that, the evidence showing that the company expected to pay him no salary therefor at the time of authorizing him to undertake such work, he is not entitled to remuneration therefor.

⁶⁸ See *supra*, II. b. 1.

⁶⁹ In *GOODIN v. DIXIE PORTLAND CEMENT Co.* ante, 308, an action involving the right to compensation of an assistant secretary who was also a stockholder, it is said that the reason for the rule applying to directors who are officers with respect to compensation for official duties is not applicable to stockholders who are officers. "They stand in no fiduciary relation to the corporation," it is said, "and we hold, with the great weight of authority, that when the circumstances of the employment do not negative such implication, and a stockholder is called upon by corporate authority to perform some special service, whether of an official character or otherwise, a contract is raised by implication to pay him what his services are reasonably worth."

In *Allen v. Central Counties Land Co.* (1913) 21 Cal. App. 163, 131 Pac. 78, an action by the secretary of a corporation to recover upon implied contract for services rendered thereto as secretary, it is said that "the fact that the plaintiff was a nominal stockholder of the corporation does not affect the case."

Rosborough v. Shasta River Canal Co. L.R.A.1917F.

(1863) 22 Cal. 556, is an action by the president of the board of trustees of the corporation to recover for services rendered as such upon implied contract. The court does not refer to plaintiff's relationship as trustee to the corporation, although that point is urged on behalf of defendant, but discusses only the fact that plaintiff was a stockholder. From that viewpoint it is held that "the fact that the plaintiff was a stockholder of the company can make no difference as to his right to compensation. Stockholders, like all other persons laboring or rendering services for a corporation, are entitled to pay therefor; and, if there is no special contract, the law will presume an implied contract to pay what the labor or services are reasonably worth. It seems to have been the expectation of both parties in this case that the plaintiff was to be paid for his services, but the amount was not fixed. . . . This understanding and expectation, although not sufficient, perhaps, to amount to an agreement, still removes all presumption that the services were performed gratuitously, if such a presumption is proper in such cases."

Edwards v. Fargo & S. R. Co. (1887) 4 Dak. 549, 33 N. W. 100, was a case involving the right of the secretary of a corporation who had performed duties outside the ordinary functions of secretary to recover compensation upon implied contract. Although it appears that he was a stockholder in the company, that point is not taken into consideration in the discussion. The court confuses cases involving the right of directors to compensation with this case, where it is specifically pointed out that there is no proof that plaintiff was a director. Its conclusion is stated as follows: "We hold that where a corporation has construed the duties of its secretary to include a field of arduous work, not strictly within the ordinary interpretation of the functions of that office, the secretary, after such duties performed, can recover in an action against the corporation a reasonable compensation therefor, and will not be held to distinguish between ordinary and extraordinary services."

⁷⁰ After stating, in *Mather v. Eureka Mower Co.* (1890) 118 N. Y. 629, 23 N. E. 993, affirming (1887) 44 Hun, 333, that the rule against compensation for directors, in the absence of contract, is based upon the trusteeship of the directors, the court continues: "The same reason may not exist

to be the result of a failure to note the distinction between officers who are, and officers who are not, directors. Where, of course, there is an established custom, of which an officer is informed, not to pay compensation to the holder of his office, he is barred thereby from any right of recovery upon implied contract.⁷¹

2. For extraordinary services.

If it is true that a director, or an officer who is a director, may recover upon implied contract for services outside the scope of official duty,⁷² how

for the application of the rule to a stockholder not a director, who has become an officer of the corporation; but he has a pecuniary interest in its management and business; and when he assumes the duties of the office, and performs them without some agreement or provision for compensation, the presumption, in view of his relation and interest, may properly arise that he performs the official services gratuitously. This proposition cannot be made dependent upon the proportionate amount of the stock held by him. If the officer expects to have compensation, and the corporation intends to pay him for his official services, it may easily be provided for by resolution or agreement before he enters upon his services. This is, at all events, a salutary rule, as applied to an officer who is a stockholder of the corporation. . . . In such case there may be presumed to exist a reason in the fact of such relation and interest to induce him to assume and exercise the duties of the trust, not dependent upon compensation for services when nothing appears to the contrary. The plaintiff had the relation of stockholder, and, in addition to his interest as such in the corporation, he had a further interest as banker, in having the benefit, such as it might be, of doing the banking business which the company might furnish. In view of those considerations and the further fact that he accepted the office and performed its duties without any express understanding that he should have compensation, the referee was permitted to conclude, as he did, that the plaintiff accepted the office of treasurer without any view to compensation, and performed the services gratuitously."

In *Metropolitan Rubber Co. v. Place* (1906) 77 C. C. A. 262, 147 Fed. 90, an action by the president of a corporation who was also a stockholder therein, for salary, it is said: "It is well settled that the officer of a corporation, who is a stockholder, is not entitled to compensation for the services performed by him as such officer, in the absence of any agreement or expressed assent by the governing body of the corporation that he shall be paid."

And see *Crumlish v. Central Improv. Co.* (1893) 38 W. Va. 390, 23 L.R.A. 120, 45 L.R.A.1917F.

much more reason is there for holding that an officer who is not a director, but only a stockholder, may recover upon quantum meruit for extraordinary services. Under the better rule he is entitled to recovery upon quantum meruit for his official services,⁷³ and certainly in jurisdictions where that rule is followed recovery must also be permitted for extraordinary services. In all of the cases found such recovery has been held proper.⁷⁴

b. Where stockholder is employee.

One court has said that "it is well

Am. St. Rep. 872, 18 S. E. 456, *supra*, note 5. The Pennsylvania law was applied in that case. However, the court expressed itself as agreeing with the Pennsylvania rule on the point.

See also *Lowe v. Ring* (1904) 123 Wis. 370, 101 N. W. 698, 3 Ann. Cas. 731, *supra*, note 5.

⁷¹ In an action by a stockholder upon implied contract for services rendered as secretary of the corporation, it is held in *Fraylor v. Sonora Min. Co.* (1861) 17 Cal. 594, that evidence of a custom of the corporation not to pay compensation for such services is admissible; and the court says: "If the plaintiff was informed of the existence of the usage and custom referred to, the inference would naturally be that he accepted the office and performed its duties without any expectation of being compensated for his services. If any such usage in fact existed, his position as a member and officer of the corporation is sufficient *prima facie* to charge him with a knowledge of its existence."

⁷² *Supra*, II. c. 1.

⁷³ *Supra*, III. a, 1.

⁷⁴ In *Hjorth Oil Co. v. Curtis* (1917) — *Wyo.* —, 163 Pac. 362, plaintiff was a stockholder and assistant secretary of defendant corporation and he was claiming compensation for services for negotiating a sale of land. After quoting with approval from cases sustaining the rule that stockholders who are not directors may recover upon implied contract for services rendered as officers of the corporation, the court continues: "If a director or managing officer is permitted to recover upon an implied contract a reasonable compensation for services rendered outside of his official duties, it must certainly be true that one who does not hold such official position, but is merely a stockholder, or if he be also an assistant secretary, may likewise recover a reasonable compensation for his services when called upon by corporate authority to perform them, and especially when it has been agreed or understood that he was to be paid for such services. The plaintiff was not in fact assistant secretary at the time of the sale nor during the latter and greater part of the period of the negoti-

settled that when a stockholder, who is not an officer or director, renders a service to the corporation by proper request or authority, a contract is implied to pay the reasonable value of his services, unless the circumstances negative such implication, as by showing that the services were to be gratuitous."⁷⁵ The rule so set out seems to be a proper and accurate statement of the law. There is no reason why the holding of stock should prevent the recovery of compensation upon implied contract for services as a servant or employee; and no case has been found which does not hold such recovery to be proper.⁷⁶

ations, but there is nothing in the evidence to show that the duties of that position were other than merely ministerial; and clearly they did not include the carrying on of negotiations for and selling valuable property of the corporation."

So, in *Rosehill Cemetery Co. v. Dempster* (1906) 223 Ill. 567, 79 N. E. 276, affirming (1905) 121 Ill. App. 143, an action involving the right of a stockholder in a corporation who afterwards became an officer thereof to compensation for services rendered in straightening out the affairs of the corporation as between the stockholders and creditors, who had assumed control thereof, it is held that the rule prohibiting an officer of a corporation from receiving compensation for services except where the same is authorized by by-law or resolution does not apply to any other agent employed by the corporation in good faith for a proper purpose, nor to an officer with respect to services outside the ordinary duties of his office.

And see *Edwards v. Fargo & S. R. Co.* (1887) 4 Dak. 549, 33 N. W. 100, *supra*, note 69.

⁷⁵ *Hjorth Oil Co. v. Curtis* (1917) — *Wyo.* —, 163 Pac. 362, which is an action by a stockholder to recover compensation for negotiating a sale of land.

⁷⁶ Where, in *Polk v. Reynolds* (1876) 54 Ind. 449, one member of a ditching company brought action to recover the value of services performed for the company, it is said that "the liability to pay for the labor done arises from the employment of the laborer by the corporation; and . . . the liability is the same whether the laborer so employed be a member of the corporation or a third person."

And in *Huntington Fuel Co. v. McIlvaine* (1907) 41 Ind. App. 328, 82 N. E. 1001, it is held that one who, at the instance of a director and majority stockholder, performs manual labor for a corporation, is entitled to recover its value, although he is a stockholder and manager of the company.

Barker v. Cairo & F. R. Co. (1874) 3 Thomp. & C. (N. Y.) 328, was an action to recover as on quantum meruit for services rendered a corporation as attorney. It is L.R.A.1917F.

IV. Right of officer, not director or stockholder, to compensation.

a. For services as officer.

No relationship of trust can be said to exist between a corporate officer who is not a director or stockholder and the corporation. Accordingly, the rule which denies officers who are directors the right of recovery of compensation upon quantum meruit⁷⁷ has no application to such, and it would seem that nothing stands in the way of recovery by such officer of compensation for official services upon quantum meruit.⁷⁸ Only one case seems to oppose this

said: "Nor does the fact that the lawyer employed is a stockholder, or otherwise interested in a corporation, incapacitate him in the slightest degree from being retained in its business, or from recovering payment for services rendered on such retainer. The only legitimate effect such a fact can have is to render necessary clearer and stronger proof of such retainer."

⁷⁷ *Supra*, II. b, 1.

⁷⁸ In *Smith v. Long Island R. Co.* (1886) 102 N. Y. 190, reversing (1884) 32 Hun, 38, it is held that one, not a director or a stockholder, who performs services as secretary of the corporation, is entitled to compensation therefor, although there has been no express contract with respect thereto, where there is nothing to show that the corporation did not expect to pay and the secretary to receive compensation therefor. The court says: "The point is made on the part of the defendant that the office of secretary being a corporate office, no right to compensation exists in the absence of an express contract. The cases cited do not support this contention. The rule that directors or trustees cannot recover for services rendered for the corporation upon an implied promise is an application of the general rule applicable to trustees. But we perceive no reason of policy or justice which should prevent a person appointed as secretary, and who is neither a director nor stockholder, from receiving a reasonable compensation for his services, although no rate of compensation was agreed upon and there was no express agreement that compensation should be made. Such an officer in this respect stands in no different position from an employee of any other grade who has rendered services at the request of the corporation."

And see *Carver v. San Joaquin Cigar Co.* (1911) 16 Cal. App. 572, 118 Pac. 91, in which a secretary, not a stockholder or director of the corporation, was permitted to recover the reasonable value of his services, there being no contract with reference to the amount of his compensation.

See also *Newport & M. R. Co. v. Hay* (1886) 8 Ky. L. Rep. 115, *supra*, note 10a.

view,⁷⁹ and it is merely the decision of an intermediate court.

b. For extraordinary services.

In view of the fact that officers who are directors⁸⁰ or stockholders⁸¹ may recover upon implied contract for services without the scope of their official duties, and in view of the additional fact that, by the better rule, officers who are neither directors nor stockholders

may recover upon quantum meruit for official services, there would seem to be slight grounds for denying recovery upon quantum meruit for services outside the scope of official duties to officers who are neither stockholders nor directors in the corporation. No cases of this kind have been found, but rules applicable thereto are readily deducible from a consideration of the whole subject.

⁷⁹ Where, in *Bair & G. Mfg. Co. v. Vandersaal* (1908) 36 Pa. Super. Ct. 615, it was not made to appear that the person claiming compensation for his services as president was either a stockholder or a director in the corporation, the court expands the rule against the compensation of

officers, in the absence of express contract, to all officers, whether directors or stockholders or not, and refuses to permit appellant to recover.

⁸⁰ *Supra*, II, c. 1.

⁸¹ *Supra*, III, a, 2.

E. L. D.

FLORIDA SUPREME COURT.

OCKLAWAHA RIVER FARMS COMPANY,
Appt.,

v.

JEFFERSON D. YOUNG et al.

(— Fla. —, 74 So. 644.)

Husband and wife — mortgage to secure husband's debt.

1. Section 1, art. 11, of the Constitution of Florida of 1885, which provides that the property of a married woman, owned by her before marriage, or lawfully acquired afterward, shall be her separate property, and shall not be liable for the debts of her husband without her consent given by some instrument in writing, executed according to the law respecting conveyances by married women, does not preclude a married woman from subjecting her separate property to the payment of her husband's pre-existing debt by joining with him in the execution of a mortgage in the form of a deed absolute, provided the same is executed in accordance with the law respecting conveyances by married women.

For other cases, see *Husband and Wife*, II, f, 2, in *Dig. 1-52 N. S.*

Headnotes by ELLIS, J.

Note. — The married women's separate property acts frequently authorize a married woman to bind her separate property for a debt of her husband. The method in which this may be done is usually prescribed in the statute or constitutional provision relating to the subject. The Florida constitutional provision involved in *Ocklawaha River Farms Co. v. Young*, provided that the separate property of a married woman shall not be liable for the debts of her husband without her consent given by some instrument in writing executed according to the law respecting conveyances by married women. There was in that case an in-

Same — expression of consent.

2. When a married woman, under the provisions of § 1, art. 11, of the Constitution of Florida of 1885, consents that her separate property shall be liable for the debts of her husband, such consent may be in the form of a deed absolute to her separate property, which by evidence aliunde may be shown to be a mortgage, and need not expressly recite her consent to the subjection of her property to such purpose, nor need such consent be supported by any other consideration than the debt of her husband.

For other cases, see *Husband and Wife*, II, f, 2, in *Dig. 1-52 N. S.*

Judgment — effect upon married woman.

3. Where a married woman who joins with her husband in the execution of a mortgage upon her separate property to secure a debt of her husband, and such mortgage is in the form of a deed absolute which recites a specific amount as consideration, and she afterwards institutes a suit against her husband and the mortgagee for the purpose of having the instrument declared to be a mortgage, and for an accounting to ascertain the amount of indebtedness to secure which the mortgage was given, she will be bound by the decree in such suit adjudicating the character of the instru-

ment in writing executed with the prescribed formalities and relating to her property. Notwithstanding this it was urged that the separate property of the wife was not bound in that case because the writing did not expressly state that it was given for the purpose of making the wife's property liable for the debt of her husband. This contention of counsel was negated by the court. Upon this restricted phase of the subject, this case appears to be one of first impression, a search disclosing no other in point.

ment and the amount due, which it was given to secure.

For other cases, see Judgment, II. c, 5, in Dig. 1-52 N. S.

Mortgage — consideration — pre-existing debt.

4. A pre-existing debt of the husband is a sufficient consideration to support a mortgage to his creditor executed by the debtor and his wife upon the latter's separate property to secure the debt, and such consideration is a good consideration within the meaning of § 2514 of the General Statutes of Florida; and, in the absence of fraud and injury to a subsequent grantee, such mortgage is a valid obligation, and will not be declared void at the instance of a subsequent purchaser with constructive notice of its existence.

For other cases, see Mortgage, I. d, in Dig. 1-52 N. S.

(January 31, 1917.)

APPEAL by complainant from an order of the Circuit Court for Marion County sustaining a demurrer to a bill filed to have certain deeds declared void and for other relief. Affirmed.

The facts are stated in the opinion.

Messrs. Hocker & Martin, for appellant:

The deeds were made without any valuable consideration moving to Mrs. Connor at the time, and might therefore be unenforceable.

21 Cyc. 1486; Bridges v. Blake, 106 Ind. 332, 6 N. E. 833; Kansas Mfg. Co. v. Gandy, 11 Neb. 448, 38 Am. Rep. 370, 9 N. W. 569; Chaffee v. Brown, 109 Cal. 211, 41 Pac. 1028; First Nat. Bank v. Lamont, 5 N. D. 393, 67 N. W. 145; Jones, Mortg. § 615; Widger v. Baxter, 190 Mass. 130, 3 L.R.A. (N.S.) 436, 76 N. E. 509; Briggs v. First Nat. Bank, 41 Neb. 17, 59 N. W. 351; 25 Am. & Eng. Enc. Law, 2d ed. 416; Mattair v. Card, 18 Fla. 761; Lines v. Smith, 4 Fla. 47.

A married woman's property shall not be liable for the debts of her husband without her consent given by some instrument in writing.

First Nat. Bank v. Ashmead, 23 Fla. 379, 2 So. 657, 665, 33 Fla. 416, 14 So. 886; Equitable Bldg. & L. Asso. v. King, 48 Fla. 252, 37 So. 181; Staley v. Hamilton, 19 Fla. 275; Kimm v. Weippert, 46 Mo. 532, 2 Am. Rep. 541; Bailey v. Pearson, 29 N. H. 77; Owen v. Cawley, 36 Barb. 52; Farthing v. Shields, 106 N. C. 289, 10 S. E. 998; 25 Am. & Eng. Enc. Law, 2d ed. 418.

These deeds, if upheld as mortgages, cannot be held to secure a greater sum than is mentioned therein as the consideration.

First Nat. Bank v. Ashmead, 33 Fla. 416, L.R.A.1917F.

14 So. 886; Equitable Bldg. & L. Asso. v. King, 48 Fla. 261, 37 So. 181.

The two deeds intended as a mortgage are in the statutory form of a warranty deed, and therefore utterly lacking in any sort of classification, identification, or limitation as to the indebtedness secured, and therefore violative of the general law.

Bowen v. Ratcliff, 140 Ind. 303, 49 Am. St. Rep. 203, 39 N. E. 860; 1 Jones, Mortg. 4th ed. § 344; 20 Am. & Eng. Enc. Law, 2d ed. 929, note 1; 27 Cyc. 1094, note 58.

Notice of prior conveyance does not prevent suit by the subsequent purchaser, because if he knew of the conveyance such purchaser only knew of a void thing.

2 Minor, Inst. p. 694; Cathcart v. Robinson, 5 Pet. 264, 8 L. ed. 120; Freeman v. Eatman, 38 N. C. (3 Ired. Eq.) 81, 40 Am. Dec. 444; Wyman v. Brown, 50 Me. 148; Wadsworth v. Havens, 3 Wend. 411.

It was probably unnecessary for the complainant to charge any specific fraudulent conduct on the part of Elliott, in order to state a prima facie case entitling it to relief.

Neubert v. Massman, 37 Fla. 98, 19 So. 625; Wait, Fraud. Conv. 2d ed. § 238; Lukins v. Aird, 6 Wall. 78, 18 L. ed. 750; Campbell v. Davis, 85 Ala. 56, 4 So. 140; Beidler v. Crane, 135 Ill. 92, 25 Am. St. Rep. 349, 25 N. E. 655; Bernhardt v. Brown, 122 N. C. 587, 65 Am. St. Rep. 725, 29 S. E. 884; Roberts v. Barnes, 127 Mo. 405, 48 Am. St. Rep. 640, 30 S. W. 113.

False claim of absolute ownership when a lien is all that is intended stamps the transaction as fraudulent.

Neubert v. Massman, 37 Fla. 98, 19 So. 625; Campbell v. Davis, 85 Ala. 56, 4 So. 140; Geary v. Porter, 17 Or. 465, 21 Pac. 442; Brown v. Bradford, 103 Iowa, 378, 72 N. W. 648; Earnshaw v. Stewart, 64 Md. 513, 2 Atl. 734; Barker v. French, 18 Vt. 460; Beidler v. Crane, 135 Ill. 92, 25 Am. St. Rep. 354, 25 N. E. 655; Bernhardt v. Brown, 122 N. C. 587, 65 Am. St. Rep. 725, 29 S. E. 884; McCulloch v. Hutchinson, 7 Watts, 434, 32 Am. Dec. 776; 20 Cyc. 446; 14 Am. & Eng. Enc. Law, 2d ed. 466.

Messrs. Hampton & Hampton, for appellees:

Complainant should have alleged every essential fact to entitle it to recover, and if the bill is found to be defective and the averments of the bill insufficient to entitle the plaintiff to relief, then the complainant cannot recover.

Johnson v. McKinnon, 45 Fla. 388, 34 So. 272; Pinney v. Pinney, 46 Fla. 559, 35 So. 95; Jacksonville v. Massey Business College, 47 Fla. 339, 36 So. 432; Weeks v. Turner Lumber Co. 53 Fla. 793, 44 So. 173; Baker v. McKinney, 54 Fla. 495, 44 So. 944.

Not a single fact alleged by the complainant constitutes any fraud. The taking of a deed instead of a mortgage as security for money is regulated by statute, and this court has repeatedly enforced such instruments as mortgages.

Chaires v. Brady, 10 Fla. 133; *Shear v. Robinson*, 18 Fla. 379; *Franklin v. Ayer*, 22 Fla. 654; *Elliott v. Connor*, 63 Fla. 408, 58 So. 241; *First Nat. Bank v. Ashmead*, 33 Fla. 416, 14 So. 886; *Matthews v. Porter*, 16 Fla. 466; *Hull v. Burr*, 58 Fla. 432, 50 So. 754; 1 *Moore, Fraud. Conv.* § 35; *Gilliland v. Fenn*, 90 Ala. 230, 9 L.R.A. 413, 8 So. 15; *Garner v. Boothe*, 31 Ala. 186; *Corprew v. Arthur*, 15 Ala. 525; *Elliott v. Horn*, 10 Ala. 348, 44 Am. Dec. 488; *Hudnal v. Wilder*, 4 M'Cord, L. 294, 17 Am. Dec. 744; *Dulaney v. Hoffman*, 7 Gill & J. 170, 28 Am. Dec. 208; *Fleming v. Townsend*, 6 Ga. 103, 50 Am. Dec. 326.

The presumption of law is, that as the deed recites a consideration, there was a good and valuable consideration for the execution thereof.

Elliott v. Connor, 63 Fla. 410, 58 So. 241.

The amount or other particulars of a debt which on its face it purports to secure are sufficient to put creditors and subsequent purchasers upon notice that the grantee has rights in the property conveyed, and upon inquiry as to the extent of those rights.

Equitable Bldg. & L. Asso. v. King, 48 Fla. 252, 37 So. 181.

This was not a voluntary conveyance; there was a good consideration for it; the complainant was not a bona fide purchaser for value without notice, and the Statute of 27 Eliz. being § 2514 of the General Statutes of this state, has absolutely no application to the case.

1 *Moore, Fraud. Conv.* pp. 216, 217, § 25; *Cathcart v. Robinson*, 5 Pet. 264, 8 L. ed. 120; *Gibson v. Love*, 4 Fla. 233; *Hudnal v. Wilder*, 4 M'Cord, L. 295, 17 Am. Dec. 744; *Beasley v. Coggins*, 48 Fla. 222, 37 So. 213, 5 Ann. Cas. 801; *Mattingly v. Nye*, 8 Wall. 370, 19 L. ed. 380; *Porter v. Pittsburg Bessemer Steel Co.* 120 U. S. 649, 30 L. ed. 830, 7 Sup. Ct. Rep. 1206; *Anderson v. Roberts*, 18 Johns. 515, 9 Am. Dec. 235; *Kenney v. Dow*, 10 Mart. (La.) 577, 13 Am. Dec. 342; *Gamble v. Hamilton*, 31 Fla. 401, 12 So. 229; *Fleming v. Townsend*, 6 Ga. 103, 50 Am. Dec. 321; *Lancaster v. Dolan*, 1 Rawle, 231, 18 Am. Dec. 625; *Fowler v. Stoneum*, 11 Tex. 478, 62 Am. Dec. 499.

A greater fraud could not be perpetrated than that now sought to be perpetrated against the estate of J. M. Elliott, Jr., by the complainant in this suit, who is in no sense an innocent purchaser.

Hinde v. Longworth, 11 Wheat. 109, 6 L. ed. 454; *Clark v. Killian*, 103 U. S. 766, L.R.A.1917F.

28 L. ed. 607; *Wallace v. Penfield*, 106 U. S. 260, 27 L. ed. 147, 1 Sup. Ct. Rep. 216.

Complainant is not a bona fide purchaser for value and without notice.

Curry v. Lehman, 55 Fla. 847, 47 So. 18; *Ward v. German American Lumber Co.* 62 Fla. 582, 56 So. 565; *Gerow v. Castello*, 11 Colo. 560, 7 Am. St. Rep. 260, 19 Pac. 505; *Prickett v. Muck*, 74 Wis. 199, 42 N. W. 256; *Balfour v. Hopkins*, 35 C. C. A. 445, 93 Fed. 564; *Deroin v. Jennings*, 4 Neb. 97; *Spicer v. Waters*, 65 Barb. 227, 11 Am. Dec. 401.

Ellis, J., delivered the opinion of the court:

In January, 1915, the Ocklawaha River Farms Company, a corporation, exhibited its bill in chancery against Jefferson D. Young, Thomas Stonewall Kyle, Claude E. Connor, Ruby C. Connor, the Alabama City Land & Development Company, a corporation, and Nena Kyle Elliott as executrix of J. M. Elliott, Jr., deceased, and prayed that certain deeds made by Ruby C. Connor and her husband to J. M. Elliott, Jr., be declared void as against the complainant and Young and Kyle; that a deed by J. M. Elliott, Jr., and wife to the Alabama City Land & Development Company, dated July 25, 1910, and filed for record March 16, 1912, be declared void, and that Nena Kyle Elliott as executrix and the Alabama City Land & Development Company be divested of all interest or claim to such part of the lands as are owned by the complainant, and that if the deeds of March 23, and March 28, 1908, which were the deeds executed by Ruby C. Connor and her husband to J. M. Elliott, Jr., are decreed to have any binding force as a mortgage, that complainants may be permitted to redeem the lands upon the payment of whatever may be adjudged to be a valid charge against the same, and for general relief.

The bill as amended alleges, in substance, that the complainant is "seised and possessed of a fee-simple estate" in certain lands located in Marion county, and that it acquired the lands in 1913 under a deed of conveyance from Z. C. Chambliss, trustee, for the defendants Young and Kyle; that Chambliss as trustee acquired the lands under a warranty deed from Young and Kyle and their wives, and that Young and Kyle acquired the lands from Ruby C. Connor and her husband, Claude E. Connor, by warranty deed in 1909. That complainant has been in possession of the lands since the spring of 1913, and has expended a large sum of money on them in improvements. That on March 23, 1908, Ruby C. Connor, who was the owner of the lands described in the bill, "attempted to execute a deed to the said

lands" to J. M. Elliott, Jr. That the deed was in the statutory form of a warranty deed, and expressed a consideration of \$5,000, but the lands were misdescribed, and on the 28th of March, 1908, the error being discovered, Ruby Connor and her husband executed to Elliott a deed correctly describing the lands. The second deed was also in the statutory form, and expressed a consideration of \$1, and recited that the same was given to correct an error in the description of the first deed. Both deeds were recorded in the same book, the first on page 1, and the second on page 4. That in July, 1908, a building which was located on the lands was destroyed by fire, and Elliott collected the proceeds of the insurance policy, amounting to \$4,400. It is alleged that the two deeds were given by the Connors to Elliott for the purpose of securing the payment of money, and if they had any binding effect constituted a mortgage; but the deeds failed to specify any debt for which they were security, and did not refer to any written obligation as evidencing any debt from Ruby Connor or her husband to Elliott. That in 1909 and repeatedly thereafter Elliott claimed that he did not know the amount in which C. E. Connor was indebted to him or the companies controlled by Elliott, and asserted and claimed to Connor, and Young and Kyle that he (Elliott) was the owner of the property described in the two deeds; refused to state what sum of money the lands were intended to secure; refused to render an accounting to Ruby C. Connor or her husband for the proceeds of insurance; and in the spring of 1909 "there was tendered in behalf of the said Ruby C. Connor to the said J. M. Elliott, Jr., the sum of \$5,000." It is also alleged that in March, 1909, Ruby C. Connor by her next friend, J. D. Young, filed a bill in the circuit court for Marion county against J. M. Elliott, Jr., and C. E. Connor, to declare the deeds mentioned to be a mortgage, and for the purpose of taking an account and to redeem the lands. A *lis pendens* was filed and recorded. That Elliott contested the suit; denied that the deeds were intended as mortgages, but were intended to vest in him the absolute title to the lands. That the chancellor decreed the deeds to be mortgages, and that decree was affirmed by this court upon appeal by Elliott. 63 Fla. 408, 58 So. 241. That the said suit brought by Mrs. Connor is still pending in the circuit court, and that Elliott has brought forward and undertaken to charge a large amount of money claimed to be due to him and some of his companies by C. E. Connor as being secured by the mortgages, and some of such claims are barred by the Statute of Limitations and are "otherwise of a false and illegal character." L.R.A.1917F.

By amendment to the bill it was alleged that the lands were the separate statutory property of Ruby Connor at the time she and her husband made and executed the deeds. That she was paid a large consideration for the deed she and her husband executed to Young and Kyle, who conveyed to Chambliss as trustee for conveying the title to complainant, who paid Young and Kyle a large consideration therefor. That up to April, 1909, Elliott permitted Ruby Connor and her husband to remain in possession of a large part of the property, but none of that described in the bill. That the entire tract of land described in the deeds was unsuitable for occupation except the part occupied by Ruby Connor and her husband. That during the winter of 1908 and 1909 Elliott, being advised that Young and Kyle were willing to undertake the reclamation of the land and expend a large sum in such work, refused to render a true account of what was due him from Connor, but claimed that he (Elliott) was the owner of the land, which had greatly increased in value because of the fact becoming known that the lands could be reclaimed, and that responsible parties were willing to undertake the work.

The original bill alleges that in July, 1910, Elliott, in order to defeat the purpose of the suit brought by Ruby Connor by her next friend, J. D. Young, against Elliott and Connor, her husband, undertook to convey the lands to the Alabama City Land & Development Company for an expressed consideration of \$10,000. This deed, however, was not recorded until March 16, 1912. It was alleged that the Alabama City Land & Development Company was dominated and controlled by Elliott, and the deed to it was an attempt by Elliott to perpetrate a fraud on Ruby C. Connor; that the deed was not made until after the decree in the suit of Ruby Connor against Connor and Elliott was affirmed by this court, and after Elliott had lost an ejectment suit against Mrs. Connor and her husband involving the same lands, decided in December, 1909; that before Elliott took any steps to take or obtain possession of the lands Young and Kyle had expended a large sum of money on the lands in the work of reclamation; that the deed from Elliott to the Alabama City Land & Development Company was without consideration, and the deeds from the Connors to Elliott in 1908 were intended merely as security for any proper debt then owing from Connor to Elliott.

It is alleged that Elliott died November, 1914; that his will was duly probated and letters testamentary executed to the defendant Nena Kyle Elliott.

It is insisted, and the bill so charges, that

the deeds from the Connors to Elliott in 1908 which were decreed to be mortgages are void under § 2514, General Statutes of Florida, as to subsequent purchasers by reason of the conduct of Elliott as recited in the bill and as stated in substance herein, and that if the deeds are valid as mortgages, they are of no binding force or effect as security for any amount in excess of \$5,000, and that after applying the proceeds of the fire insurance policy collected by Elliott, there only remains due about \$600.

A demurrer was interposed to the bill upon the ground that the facts stated did not render the deeds from the Connors to Elliott void; that the complainant did not offer to do equity, and there was no equity in the bill. The demurrer was sustained, and this appeal was taken from the order sustaining the demurrer.

The controversy in this case arises upon two points:

First, whether the deeds from Ruby C. Connor and her husband to J. M. Elliott, Jr., executed in March, 1908, were void under article 11 of the Constitution of 1885, as being voluntary and without consideration, and because they do not contain an expressed consent of Ruby C. Connor that the lands therein described shall be liable for the debt which the instruments were given to secure. Incidental to this point arises the further question whether the amount secured by the deeds, if they are valid, is not limited by the consideration named therein, namely, \$5,000.

Second, does the conduct of J. M. Elliott, Jr., since the execution of the deeds to him by Ruby C. Connor and her husband in 1908 render them void as to the complainants under § 2514 of the General Statutes of Florida?

Appellants contend in their brief that article 11 of the Constitution requires that before the separate property of a married woman may become liable for the debts of her husband, her consent must be obtained in writing expressly giving such consent, and that a consideration must move to her or her husband for such consent at the time the written instrument is executed.

The bill alleges that the deeds from the Connors to Elliott, executed in 1908, were given for the purpose of securing the payment of money, and if they had any binding effect constituted a mortgage.

In the case of Connor v. Connor, 59 Fla. 467, 52 So. 727, Mrs. Connor, by her next friend, J. D. Young, in a suit against her husband and J. M. Elliott, Jr., sought to have the deeds of 1908 executed by her and husband to J. M. Elliott, Jr., declared to be a mortgage to secure the indebtedness of her husband to Elliott. In that bill she

alleged that she consented to secure the payment of the indebtedness of her husband to Elliott, and any future indebtedness of her husband to Elliott, and offered to pay any and all amounts due to him by her husband, the payment of which was secured by said conveyances. The prayer was for an accounting, and that she might redeem the land upon proper payments. A demurrer to the bill was sustained and an appeal taken from that order. This court held that the allegations of the bill indicated that the intention of the parties was to secure the payment of money due to the mortgagee by the husband of the mortgagor, and reversed the order sustaining the demurrer. The case came to this court again upon an appeal from a decree on the pleadings and evidence, in which decree the chancellor found the equities of the cause to be with the complainant, and referred the same to a master to state an account between C. E. Connor and J. M. Elliott, Jr. This court said that the question presented was "whether on the evidence under the statutes of this state the conveyance of the property is in fact and in law merely a mortgage to secure the payment of money." It appeared from the evidence in that case that C. E. Connor was employed by J. M. Elliott, Jr., as a bookkeeper and confidential assistant, and that he used funds of his employer without authority, to a large amount, the exact or even approximate sum not being known at the date of the execution of the deeds, and that, with a view to reimburse Elliott for the money that C. E. Connor had misappropriated, and to relieve her husband from the stress of inability to pay a large, but not definitely ascertained, sum of money that he had unlawfully taken from his employer, Mrs. Connor joined with her husband in the execution of the deeds to her separate property, the recited consideration being \$5,000. After reviewing the evidence in the case this court answered the question in the affirmative. See Elliott v. Connor, 63 Fla. 408, 58 So. 241. We think that the facts involved in the above litigation by which Mrs. Connor, as well as Elliott, was bound show a sufficient consideration moving to Mrs. Connor for the execution of the instruments, even if she were not estopped by the character of the instruments from denying a consideration. But is not the debt of the husband a sufficient consideration for the wife's consent? At the common law the estate which the husband acquired in the lands of the wife was such an estate as could be transferred or alienated by him, and was subject to sale on execution at the instance of his creditors. 13 R. C. L. 1048; 2 Bl. Com. 126-128; Rose v. Rose, 104 Ky. 48, 41 L.R.A. 353, 84 Am. St. Rep. 430, 46

S. W. 524; *McNeer v. McNeer*, 142 Ill. 388, 19 L.R.A. 256, 32 N. E. 681; 2 Kent, Com. 130; *Van Duzer v. Van Duzer*, 6 Paige, 366, 31 Am. Dec. 257.

The husband was said to have been seised of the freehold in his wife's lands *jure uxoris*. It was held to be a vested estate in him, and it was not competent for legislation, without his consent, to take it from him and give it back to the wife. See *Bishop, Married Women*, § 40. The Act of March 8, 1845, Fla. Laws, 1845, No. 9), changed the rule of the common law, and provided that when a woman shall marry, being seised or possessed of real property, her title to the same shall continue separate, independent, and beyond the control of her husband, and shall not be taken in execution for his debts, and further provided that a married woman may become seised of real property during coverture by bequest, demise, gift, purchase, or distribution. But this act also required that the property so acquired should be inventoried and recorded in the clerk's office of the county in which the property was situated at the peril of being liable for her husband's debts "as if this act had not been passed." See *Mercer v. Hooker*, 5 Fla. 277; *Price v. Sanchez*, 8 Fla. 136.

The Constitution of 1868, art. 4, § 25, secured to the married woman all property, real and personal, owned by her before marriage, or lawfully acquired afterward, as her separate property, and provided that it should not be liable for the debts of her husband. This provision repealed such portions of the statute as prior to the adoption of the Constitution made the wife's property conditionally liable for her husband's debts. The Constitution of 1868 created an unconditional exemption of the wife's separate property from such debts. See *Fairchild v. Knight*, 18 Fla. 770. In the case of *Staley v. Hamilton*, 19 Fla. 275, which arose upon a transaction in 1866, this court, speaking through Mr. Chief Justice Randall, said the statute provided that the wife may mortgage her separate real property for any consideration whatever, "and so she may secure the payment of any debt of her husband or herself." But as the mortgage which the wife signed in that case was not executed in conformity with the statutory requirements, it was ineffectual, of no validity, and void. As the note which Mrs. Staley signed with her husband was not the method provided by statute for making her separate property liable for her husband's debt, it was, of course, ineffectual for that purpose. The view of the court seems to have been that parol evidence was not admissible to convert a void instrument into a valid one, nor convert a promissory note into a specific

lien upon real property. There is nothing in that case inconsistent with the idea that if the mortgage had been properly executed it would have been enforced. Now while the Constitution of 1868 created an unconditional exemption of the wife's separate property from liability for the debts of the husband, the Constitution of 1885 modified such exemption. It was probably done with the view of removing all possible conflicts between a constitutional clause providing unconditionally for the exemption of the wife's separate property from the debts of her husband, and the statute which, as construed in the above case, provided that she might mortgage her property for the purpose of making it liable for her husband's debts. The statute which was in existence at the time the Constitution of 1868 was in force contemplated that the husband's debt was a sufficient consideration to support the wife's mortgage of her property, and the framers of the Constitution of 1885, probably desiring to harmonize the constitutional provisions on that subject with the laws as they had existed in this state since 1835, under which the rights of property for many years had been adjudicated, merely required, as the statutes did, the consent of the wife evidenced by a written instrument executed according to certain formalities. The contention of appellant is based upon the theory that when the wife consents to the subjection of her separate property to liability for her husband's debts, she is in the same position as one who becomes a surety for a stranger, and a consideration must therefore flow to her from the creditor, else the contract of suretyship is *nudum pactum*.

But is this a contract of suretyship? The wife does not assume any obligation to pay the debt of her husband. It is not perfectly clear that the Constitution even requires the instrument to be in the form of a contract or mortgage, nor is it clear that any of the essentials of a contract are necessary. It is not required that there should be any mutuality of obligation between the wife and creditor of the husband; their minds are not required to meet on any proposition; her consent may be given without the creditor's knowledge; and it is not unreasonable to say that she may even limit the amount of indebtedness for which her property is to be liable, as well as the portion of her separate property which she consents to subject to his debts. The "some instrument in writing" of the Constitution may be very informal as to language and recitations so that the formalities of execution are duly observed.

This court said in the case of *Fritz v. Fernandez*, 45 Fla. 318, 34 So. 315, speaking through Mr. Justice Hocker: "There is,

of course, a difference between the wife's power of disposition of a purely equitable estate and of her purely statutory property. In the former case courts of equity recognize her complete power of disposition, unless that power was limited in the instrument creating the estate. In the latter case the power of disposition is regulated by the statutes which create the separate statutory property."

The learned justice said in that case that no reason was conceivable why a wife could not make a gift of her statutory property to her husband. When she consents that her separate property shall be liable for her husband's debts, she merely makes a gift of it to her husband in effect.

The reciprocal obligations, duties, and responsibilities, both legal and moral, of husband and wife, growing out of the status of marriage, may take the case out of the general rule. The consideration which may induce the wife to consent to the subjugation of her separate property to the payment of the valid debts of her husband may exist solely between her and her husband, it may grow out of the tenderest and most beautiful of sentiments which make the marital status a blessing to the principals and a benefit to society. These communications between husband and wife are privileged. Public policy forbids the curious from prying into them, yet they may afford the most potent reason for the wife's consent. So even as he may mortgage his property to secure the payment of a pre-existing debt, we think his wife may give her consent in the manner provided by law that her property may be subjected to the same purpose, without requiring the acceptance of a dollar from a stranger to give validity to the consent. The effect of these changes made by the statutes and Constitution upon the common law is beneficial both to the married woman and the husband's creditors; on the one hand, she is protected from annoyance in the enjoyment of her property, while, upon the other hand, the creditor, by obtaining the wife's consent according to the formalities of the statute, may secure himself fully against loss on account of a debt due by the insolvent husband.

As to the contention of counsel that the written consent of the wife should expressly state that the instrument given is for the purpose of making her property liable for the debt of her husband, we think there is no reason for such a rule, and that the language of the constitutional provision does not necessarily carry such meaning. The language is as follows: "All property, real and personal, of a wife owned by her before marriage, or lawfully acquired afterwards by gift, devise, bequest, descent, or purchase, shall be her separate property, and L.R.A.1917F.

the same shall not be liable for the debts of her husband without her consent given by some instrument in writing, executed according to the law respecting conveyances by married women."

The giving of the instrument in writing, which is to be executed according to the requirements of the statute respecting conveyances by married women, is the only evidence of consent required. If it is in the form of a mortgage, the mere placing of the lien upon the property is sufficient evidence of the consent. The only attribute required of the written instrument is that its execution must be in accordance with the formalities of the statute, which does not require that the real consideration or purpose of the conveyance shall be stated.

It is insisted by appellant that the mortgage made by Ruby C. Connor and her husband to J. M. Elliott, Jr., in 1908, is void under § 2514 of the General Statutes of Florida as to complainant and those under whom it claims, by reason of Elliott's conduct since the mortgage was executed, and that as he paid no consideration for the mortgage, he was not a bona fide purchaser, and was in the same position as a voluntary grantee. We do not agree with this contention, as a pre-existing debt was a sufficient consideration to support the mortgage. The debt due by Connor to Elliott was a live, valid, enforceable obligation, and constituted a sufficient consideration for the execution of the mortgage by the husband and wife. At the time of this mortgage the complainants had acquired no interest or claim in or upon the property. Appellant did not become a purchaser until years afterwards. The records of the county were open to it, and it was charged with notice as to the existence of liens and encumbrances upon the land which the record might have disclosed. The deed to Elliott from the Connors had been recorded, and appellant therefore had constructive notice of its existence when it purchased. In the transaction between the Connors and Elliott in 1908 there was no injury at the time to the appellant; nor was there any element of fraud in it. Unless fraud and injury coexists in a transaction, the courts can render no relief. See *J. I. Kelly Co. v. Pollock*, 57 Fla. 450, 131 Am. St. Rep. 1101, 49 So. 934. The mortgage appears to have been made with an honest and lawful intent, and for a good consideration. This being true, it was valid, and no subsequent fraudulent or illegal act of the parties can invalidate it. See 12 R. C. L. 475; *Dodd v. McCraw*, 8 Ark. 83, 46 Am. Dec. 301; *Summers v. Roos*, 42 Miss. 749, 2 Am. Rep. 653; *Currier v. Sutherland*, 54 N. H. 475, 20 Am. Rep. 143; *Beck v. Parker*, 65 Pa. 262, 3 Am. Rep. 625.

Section 2514 of the General Statutes of

Florida contains a proviso to the same effect. The language of the proviso is as follows: "Provided, that nothing in this section contained shall extend or be construed to impeach, make void or frustrate any conveyance, assignment or lease, assurance, grant, charge, lease, estate, interest or limitation, or use or uses of, in, to or out of any lands, tenements or hereditaments which shall be made upon and for good consideration and bona fide, to any person or persons, bodies politic or corporate, anything in this section to the contrary notwithstanding."

According to the view which we have of the above statute, and our understanding of the argument of counsel for appellant, the proviso of the act is itself an answer to the argument if it be admitted that the deed of 1908 was not a voluntary conveyance; that is to say, that Elliott was not in the position of a voluntary grantee. The history of the law of fraudulent conveyances shows that from the earliest times transfers of personal property in fraud of creditors have been deemed void at common law. The principle underlying the law was that the creditor had a claim upon the property of his debtor constituting the fund from which the debt should be paid. If the debtor, therefore, in the exercise of his right in the matter of disposing of his property, ignores the equitable right of his creditors to be paid out of the property in his hands, and exceeds the legitimate authority over his property by disposing of it with intent to delay or defraud his creditor, such disposition was deemed inequitable and void. The common law, however, was deemed too rigid in requiring proof of fraud; so statutes were passed in England to protect society from the imposition of cheats and swindlers and other fraudulent persons, and to hold in check the fraudulent contrivances of such persons. See 12 R. C. L. 465; *People v. Garnett*, 35 Cal. 470, 95 Am. Dec. 125; *Sands v. Codwise*, 4 Johns. 536, 4 Am. Dec. 305. The first statutes were aimed at the fraudulent gifts of chattels, Stat. 13 Eliz. chap. 5, at conveyances of land as well as chattels to defeat creditors, and Stat. 27 Eliz. chap. 4, against fraudulent conveyances to defeat subsequent purchasers. See *Fleming v. Townsend*, 6 Ga. 103, 50 Am. Dec. 318; *Springer v. Drosch*, 32 Ind. 486, 2 Am. Rep. 356; *Filley v. Register*, 4 Minn. 391, Gil. 296, 77 Am. Dec. 522; *Livermore v. Boutelle*, 11 Gray, 217, 71 Am. Dec. 708; *Trotter v. Howard*, 8 N. C. (1 Hawks) 320, 9 Am. Dec. 640; *Heath v. Page*, 63 Pa. 108, 3 Am. Rep. 533; *Fowler v. Stoneum*, 11 Tex. 478, 62 Am. Dec. 490; *Elliott v. Horn*, 10 Ala. 348, 44 Am. Dec. 488. These statutes were said to be declaratory of the common law, and that without their aid the common-law prin-

ciples which are so strong against fraud would have, in the end, accomplished the result aimed at by the statutes. See *Howe v. Waysman*, 12 Mo. 169, 49 Am. Dec. 126; *Hall v. Alabama Terminal & Improv. Co.* 143 Ala. 464, 2 L.R.A.(N.S.) 130, 39 So. 285, 5 Ann. Cas. 363. These statutes were adopted by the territory of Florida in 1823, and have been continued upon the statute books of this state to the present time. There are some slight variations in the language of our statutes, §§ 2513-2515, General Statutes of Florida, 1906, from that of the English originals, due, perhaps, to a laudable ambition to improve upon the English model. It is conceded that the statutes are highly remedial, beneficial in their nature, entitled to a liberal interpretation, are in *pari materia*, and should be construed together. The words "utterly void" in each of these statutes, 13 and 27 Eliz. §§ 2513, 2514, General Statutes, have not been given by the courts the full significance which they seem to imply. The word is construed to read "voidable" and voidable only at the instance of those embraced within the meaning of the terms "creditors and others" or "purchasers." See 12 R. C. L. 474, and authorities cited; also *Kent v. Lyon*, 4 Fla. 474, 56 Am. Dec. 404; *McKee v. West*, 141 Ala. 531, 109 Am. St. Rep. 54, 37 So. 740; *Doster v. Manistee Nat. Bank*, 67 Ark. 325, 48 L.R.A. 334, 77 Am. St. Rep. 116, 55 S. W. 137; *First Nat. Bank v. Eastman*, 144 Cal. 487, 103 Am. St. Rep. 95, 77 Pac. 1043, 1 Ann. Cas. 626; *Beidler v. Crane*, 135 Ill. 92, 25 Am. St. Rep. 349, 25 N. E. 655; *Hendricks v. Mount*, 5 N. J. L. 738, 8 Am. Dec. 623; *Loos v. Wilkinson*, 110 N. Y. 195, 1 L.R.A. 250, 18 N. E. 99; *Bynum v. Miller*, 86 N. C. 559, 41 Am. Rep. 467.

A purchaser who acquires a deed from an owner who has already encumbered his land must occupy an analogous position to a creditor of such owner before he can complain of the prior encumbrance, and if the prior encumbrance was made in good faith for a good consideration, it is valid as to such subsequent purchaser, who has no right to have it declared void.

The appellant was bound by the prior deed, he was charged with notice of its existence, and by common prudence and ordinary diligence could have ascertained the extent of the encumbrance.

The order sustaining the demurrer to the bill is affirmed.

Brown, Ch. J., and **Taylor**, **Shackelford**, and **Whitfield**, JJ., concur.

Petition for rehearing denied March 31, 1917.

IOWA SUPREME COURT.

A. D. PUGH

v.

ED. CRAWFORD et al., Appts.

(— Iowa, —, 156 N. W. 892.)

Municipal corporation — power to forbid parking of automobiles on streets.

1. Statutory authority to control the streets, keep them free from nuisance, and regulate the driving of vehicles thereon, empowers a municipal corporation, where the statute declares the obstruction of streets to be a nuisance, to forbid the parking of automobiles on streets in congested districts.

For other cases, see Municipal Corporations, II. c, 4, b, (1), in Dig. 1-52 N. S.

Highway — right to park automobiles in.

2. An individual has no right to permit his automobile to stand in a public highway for an unreasonable time.

For other cases, see Highways, II. b, in Dig. 1-52 N. S.

Municipal corporation — power to supplement statutory regulations.

3. A municipal corporation is not deprived of authority to prohibit the parking of automobiles on its congested streets by the fact that the legislature has made it unlawful to permit them to stand near corners, hydrants, or the entrance to theaters, or with machinery running, and has forbidden municipalities to exclude them from the free use of highways.

For other cases, see Municipal Corporations, II. c, 4, b, (1), in Dig. 1-52 N. S.

(March 14, 1916.)

APPEAL by defendants from a decree of the District Court for Polk County in plaintiff's favor in an action brought to enjoin the enforcement of a traffic ordinance of the city of Des Moines. Reversed.

Statement by Gaynor, J.:

Action to restrain the city from the enforcement of an ordinance prohibiting the standing of automobiles upon certain of the public streets of Des Moines. Decree for the plaintiff in the court below. Defendants appeal.

Messrs. H. W. Byers, Esq. C. Carlson, and Earl M. Steer, for appellants:

Injunction will not lie to test the validity of a criminal ordinance without a showing of irreparable injury.

Ewing v. Webster City, 103 Iowa, 226,

Note. — For validity and effect of regulation as to parking or leaving automobiles standing in street, see annotation following this case, post, 352.
L.R.A.1917F.

72 N. W. 511; Crighton v. Dahmer, 21 L.R.A. 84, and note, 70 Miss. 602, 35 Am. St. Rep. 666, 13 So. 237; Paulk v. Sycamore, 104 Ga. 24, 41 L.R.A. 772, 69 Am. St. Rep. 128, 30 S. E. 417; Brown v. Birmingham, 140 Ala. 598, 37 So. 173; J. W. Kelly & Co. v. Conner, 122 Tenn. 368, 25 L.R.A.(N.S.) 209, 123 S. W. 622; Re Sawyer, 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. Rep. 482; Harkrader v. Wadley, 172 U. S. 148, 43 L. ed. 399, 19 Sup. Ct. Rep. 110; Fitts v. McGhee, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269; Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 47 L. ed. 778, 23 Sup. Ct. Rep. 498; 22 Cyc. 903.

To permit automobiles to stand along the curbs of the streets for such length of time and in such numbers as to obstruct traffic on the streets would amount to a nuisance as that term is used in Code, § 753.

Thomp. Neg. § 1296; State v. Sugarman, 126 Minn. 477, 52 L.R.A.(N.S.) 999, 148 N. W. 466.

The ordinance is presumed to be reasonable and valid, and all doubt should be resolved in favor of its validity.

State ex rel. Cedar Rapids v. Holcomb, 68 Iowa, 107, 56 Am. Rep. 863, 26 N. W. 33; Snouffer v. Cedar Rapids & M. C. R. Co. 118 Iowa, 287, 92 N. W. 79; McGuire v. Chicago, B. & Q. R. Co. 131 Iowa, 340, 33 L.R.A.(N.S.) 706, 108 N. W. 902; Hubbell v. Higgins, 148 Iowa, 36, 126 N. W. 914, Ann. Cas. 1912B, 822; 2 Dill. Mun. Corp. 5th ed. § 649; 2 McQuillin, Mun. Corp. § 974; 21 Am. & Eng. Law, 2d ed. 978; Van Hook v. Selma, 70 Ala. 361, 45 Am. Rep. 85; State ex rel. Mincees v. Schoenig, 72 Minn. 528, 75 N. W. 711.

Mr. A. D. Pugh, in propria persona:

A court of equity has jurisdiction to enjoin successive, harassing criminal prosecutions under a void city ordinance when any of the grounds of equity jurisdiction exists.

Bear v. Cedar Rapids, 147 Iowa, 341, 27 L.R.A.(N.S.) 1150, 126 N. W. 324; Ewing v. Webster City, 103 Iowa, 226, 72 N. W. 511; Crighton v. Dahmer, 21 L.R.A. 87, and note, 70 Miss. 602, 35 Am. St. Rep. 666, 13 So. 237; South Covington & C. Street R. Co. v. Berry, 93 Ky. 43, 15 L.R.A. 604, 40 Am. St. Rep. 161, 18 S. W. 1026; Wood v. Brooklyn, 14 Barb. 425; Baltimore v. Radecke, 49 Md. 218, 33 Am. Rep. 239; Littleton v. Burgess, 2 L.R.A.(N.S.) 633, note; Southern Exp. Co. v. Ensley, 116 Fed. 756; Hall v. Dunn, 25 L.R.A.(N.S.) 193, and note, 52 Or. 475, 97 Pac. 811; Ignaz v. Knoxville, 1 Tenn. Ch. App. 1; Coal & Coke R. Co. v. Conley, 67 W. Va. 129, 67 S. E. 613; Bluefield Waterworks & Improv. Co. v. Bluefield, 69 W. Va. 1, 33 L.R.A.(N.S.) 759, 70 S. E. 772; State ex rel. Terminal

R. Asso. v. Tracy, 37 L.R.A.(N.S.) 448, note; Reeves v. Decorah Farmers Co-op. Soc. 160 Iowa, 194, 44 L.R.A.(N.S.) 1104, 140 N. W. 844; New Orleans Baseball & Amusement Co. v. New Orleans, 118 Am. St. Rep. 372, note.

Any provision of an ordinance in conflict with the statutes is void.

Iowa City v. McInnery, 114 Iowa, 586, 87 N. W. 498; Chariton v. Barber, 54 Iowa, 360, 37 Am. Rep. 209, 6 N. W. 528; Mt. Pleasant v. Breeze, 11 Iowa, 399; Nevada v. Hutchins, 59 Iowa, 506; Knoxville v. Chicago, B. & Q. R. Co. 83 Iowa, 636, 32 Am. St. Rep. 321, 50 N. W. 61; Helena v. Dunlap, 102 Ark. 131, 143 S. W. 138; Seattle v. Macdonald, 17 L.R.A.(N.S.) 58, note; Re Hoffert, 34 S. D. 271, 52 L.R.A.(N.S.) 968, 148 N. W. 20.

It was the intention of the legislature to establish uniform regulations throughout the state for the use of streets and highways by motor vehicles, and to repeal all provisions inconsistent with the act.

State v. Reed, 162 Iowa, 572, 144 N. W. 310; Harlan v. Kraschel, 164 Iowa, 667, 146 N. W. 403.

Provisions of an ordinance in excess of the powers of the city are void.

Seattle v. Macdonald, 17 L.R.A.(N.S.) 59, note; Chariton v. Barber, 54 Iowa, 360, 37 Am. Rep. 209, 6 N. W. 528; Mt. Pleasant v. Breeze, 11 Iowa, 399; Nevada v. Hutchins, 59 Iowa, 506, 13 N. W. 634; Knoxville v. Chicago, B. & Q. R. Co. 83 Iowa, 636, 32 Am. St. Rep. 321, 50 N. W. 61.

The stopping and standing of automobiles in the street in accordance with the statute cannot possibly constitute a nuisance under Code, § 753.

Milburn v. Cedar Rapids, 12 Iowa, 246; Frith v. Dubuque, 45 Iowa, 406; Elam v. Mt. Sterling, 20 L.R.A.(N.S.) 600, note; Jones v. Waltham, 4 Cush. 209, 50 Am. Dec. 783; Redford v. Coggeshall, 19 R. I. 313, 36 Atl. 89.

An ordinance which prohibits stopping anywhere within twenty-one blocks in the business district of a city, except to load or unload, is unreasonable and void.

Walker v. Com. 40 Pa. Super. Ct. 638.

An ordinance which contravenes the general policy of the state law is void.

Hedrick v. Lanz, 170 Iowa, 437, 152 N. W. 610.

The right to run, stop, and stand an automobile on the streets, granted in the form of a license, for a consideration, under a statute, is in the nature of a franchise, and a valuable personal and property right.

Walker v. Com. supra; Coal & Coke R. Co. v. Conley, 67 W. Va. 129, 67 S. E. 613; Bluefield Waterworks & Improv. Co. v. L.R.A.1917F.

Bluefield, 69 W. Va. 1, 33 L.R.A.(N.S.) 759, 70 S. E. 772.

Gaynor, J., delivered the opinion of the court:

The plaintiff filed the following petition, in which he made the city of Des Moines, the chief of police, the superintendent of public safety, and the police judge of the city defendants. The petition is substantially as follows:

"Par. 1. The plaintiff is a resident of the city, and brings this suit for the benefit of himself and other private automobile owners in the city.

"Par. 2. The defendant is a city of the first class, organized under chapter 14C of title 5 of the Supplement of the 1913 Code.

"Par. 3. Section 30 of ordinance 1594 of said city, as amended, reads as follows:

"Sec. 30. No person shall between the hours of 7 o'clock A. M. and 6:30 o'clock P. M. leave standing upon any of the following streets any vehicle, whether in charge of a driver or not, to wit:

"'West Fifth street, from Court avenue to Locust street;

"'West Sixth street, from Mulberry street to Grand avenue;

"'West Walnut street, from Third street to Ninth street;

"'West Locust street, from Third street to Eighth street;

"'Mulberry street, from Fifth street to Seventh street;

"'West Seventh street, from Mulberry street to Grand avenue.

"'(This section shall not be construed to prohibit vehicles in charge of a driver or other person from standing on said streets for not more than twenty minutes while such vehicle is being loaded or unloaded.)'

"That section 31, of said ordinance, as amended, read as follows:

"'No person shall between the hour of 7 o'clock A. M. and 6:30 o'clock P. M. leave standing any vehicle for a longer period than one hour on any of the following streets:

"'West Walnut street, from the bridge to Third street;

"'West Locust street, from the bridge to Third street, and from Eighth street to Ninth street;

"'West Grand avenue, from Second street to Ninth street;

"'West Third street, from Court avenue to Grand avenue;

"'West Fourth street, from Court avenue to Grand avenue;

"'West Fifth street, from Vine street to Court avenue;

"'West Sixth avenue, from Cherry street to Mulberry street;

"East Walnut street, from First street to Sixth street;

"East Locust street, from Fifth street to Seventh street:

"Provided, that the council may by ordinance designate portions of the streets named in this section as stands for vehicles used for the transportation of persons or property for hire."

"That § 38 of said ordinance provides as follows: 'Any person violating any of the rules, regulations or provisions of this ordinance shall be punished by a fine of not less than \$1 nor more than \$50, and shall stand committed until such fine and costs are paid.'

"The ordinance was entitled as follows: 'An Ordinance Relating to Street Traffic and Regulating the Use of the Streets, Alleys, and Public Places of the City of Des Moines by Street Cars, Carts, Drays, Hacking Coaches, Omnibuses, Carriages, Wagons, Motor Vehicles, and Providing a Penalty for Violation Thereof.'

"That the above ordinance as amended, and as set forth herein, in so far as the same is valid, has been in force in the city at all times since November 19, 1913, up to the present time.

"Par. 4. Recites that the plaintiff was an attorney at law residing in the city; maintained an office on West Fifth street between Locust and Walnut streets; that he is the owner of a private passenger automobile carrying five persons; that the same is duly licensed and registered and numbered under the state law relating to motor vehicles for the year 1915; that he paid the requisite fee therefor; that he used the said automobile in going to and from his office and elsewhere about the city and country in the practice of his profession; that, when said automobile was not in use during business hours, it frequently stands on West Fifth street in the block where plaintiff's office is located; that said automobile was so licensed, was used, and so stood during all the times hereinafter referred to; that the use of said automobile is of value to the plaintiff.

"Par. 5. That the sections of the ordinance hereinbefore set out, in so far as they prohibit or restrict the standing in the streets of a private automobile not used for hire, duly licensed, registered, and numbered under the state law, are in excess of the lawful power of the city and void; that said sections are also void in that they are unreasonable; that they are in conflict with §§ 1571m20 and 1571m33, of the Supplement of Code 1913.

"Par. 6. That prior to the commencement of this action plaintiff had been charged with the violation of § 30 of said L.R.A.1917F.

ordinance by permitting the same to stand in the street more than twenty minutes; that he was tried upon said charge and acquitted.

"Par. 7. That, notwithstanding said adjudication resulting in his acquittal, he was again charged with violating this section, and was again tried and acquitted.

"Par. 8. That since June 26, 1915, the plaintiff has been five times charged with the violation of said ordinance, and in permitting his automobile to stand on Fifth street between Locust and Walnut; that these trials have involved him in loss of time and expense and great inconvenience, and he has suffered irreparable injury therefrom; that the legal remedy by appeal from repeated criminal charges and convictions is grossly inadequate, and the plaintiff has no plain, speedy, and adequate remedy at law except by injunction, and unless the defendant is restrained from enforcing such void provisions of the ordinance. Wherefore the plaintiff prays that a writ of injunction issue restraining defendants from enforcing the ordinance in the particulars set forth in the petition, and from in any manner enforcing said judgments therein for violating said ordinance under the further order of the court, and that said ordinance be declared void."

To this defendants filed a demurrer stating the following grounds:

(1) That plaintiff is not entitled to the relief prayed for, nor to any relief.

(2) That the petition on its face shows that the plaintiff is not entitled to the relief prayed for, or any relief.

(3) The petition on its face shows that the court was without jurisdiction to grant relief prayed for or any relief.

(4) The petition on its face shows that the plaintiff has a plain, speedy, and adequate remedy at law.

The court overruled this demurrer and granted a writ of temporary injunction restraining the defendants as prayed in the petition. From this order the defendants appeal, and present two propositions for our consideration:

(1) That the court of equity has no jurisdiction to grant the relief prayed for.

(2) That the power exercised in the passage and adoption of the ordinance was an exercise of the power conferred upon or delegated to the city by the state through its legislature, and, as exercised, does not contravene any of the provisions of §§ 1571m20 and 1571m33 of the Supplement of the Code of 1913.

We take up these propositions in their reverse order. Was there power in the city to pass and adopt the ordinance complained of? This presents two propositions: (1)

The right of the city to exercise control over the streets and alleys within its corporate limits and to regulate their use; (2) the right of the citizens to the free and unobstructed use of the streets for unobstructed travel.

Section 753 of the Code of 1897 provides: "They [meaning cities and towns] shall have the care, supervision and control of all public highways, streets, avenues, alleys, public squares and commons within the city, and shall cause the same to be kept open . . . and free from nuisances."

Section 755 of the same Code provides: "They shall have power to restrain and regulate the riding and driving of horses, live stock, vehicles and bicycles within the limits of the corporation, and prevent and punish fast or immoderate riding or driving within such limits."

Under these statutes the care and control of the highways, streets, and sidewalks within cities are committed to the proper governing body of the municipality, to the end that they may secure to the inhabitants and the general public the convenient and unobstructed use and enjoyment of those thoroughfares for their appropriate purposes. So the state, through its legislature, has conferred upon cities the right to adopt ordinances to promote the order, comfort, and convenience of the inhabitants that are reasonable and not in conflict with the laws and policies of the state or in violation of private rights.

Separating in our minds for a moment the individual from the public as an aggregation, and looking now to the traveling public,—those who use and have a right to use the streets and highways for the purposes for which they are set apart,—the mind reaches the conclusion without any confusion of thought that the public have an untrammelled right to free and unobstructed transit over streets, sidewalks, and alleys. This is the primary and appropriate use to which they are generally put. Therefore whatever interferes, unreasonably or unnecessarily, with this use, is a nuisance which the council may prohibit by ordinance, and so it is made its duty to keep streets and sidewalks open and in repair and free from nuisance, to the end that this right may be secured.

Section 5078 of the Code of 1897 provides: "The obstructing or encumbering by fences, buildings or otherwise the public roads, private ways, streets, alleys, commons, landing places or burying grounds, are nuisances."

In *White v. Kent*, 11 Ohio St. 550, that court said: "The public have a right of free and unobstructed transit over streets, sidewalks, and alleys, and this is the pri-

mary and appropriate use to which they are generally dedicated. Whatever interferes unreasonably and unnecessarily with this use is a nuisance which a city council may well prohibit by ordinance. Individuals have no right to appropriate the sidewalks to the use of their own trade or business, in such manner as to interfere with their public use."

In *Wilkes-Barre v. Garabed*, 11 Pa. Super. Ct. 355, that court said [*Marini v. Graham*, 87 Cal. 130, 7 Pac. 442]: "The sidewalks of a public street of a city are parts of the street. Any obstruction of the sidewalk is therefore an obstruction of the street and a nuisance. But it is a public nuisance because it interferes with the free use of the street by traveling public in general, and not merely some particular person."

See *Ex parte Taylor*, 87 Cal. 91, 25 Pac. 258; *Marini v. Graham*, supra.

The ordinance in the instant case does not declare the obstruction of the streets by the parking of automobiles upon the streets a nuisance, but proceeds upon the theory that the general law so declares and provides. It simply forbids the obstruction, and declares that such obstruction shall be unlawful. This it does under the exercise of its police power and the authority expressly granted by the statute. It does not contravene the state law prescribing penalties for obstruction of highways. The penalty is not of a different character or in excess of one prescribed by the statute, but is of the same character, only less in degree.

In *Com. v. Stodder*, 2 Cush. 562, 48 Am. Dec. 679, it is said: "We perceive nothing objectionable in an ordinance . . . providing for the safety and convenience of the public generally, by prescribing, by general by-law, or by ordinance, certain streets or portions of streets to be used for travel by vehicles. . . . Such regulations and restrictions might be warranted even to effect the minor object, that of preventing and greatly obstructing the free and convenient use of the streets for general purposes."

Vanderhurst v. Tholeke, 113 Cal. 147, 35 L.R.A. 267, 45 Pac. 266. This was an action to enjoin the city or its officers from cutting down certain trees standing or growing on a sidewalk in front of plaintiff's premises. The court below found that the trees did not constitute a nuisance and dismissed the case. On appeal it was said: "It is contended that the finding that the trees do not constitute an obstruction or a nuisance is without competent support, and this is the material question arising, since without the aid of that finding the judgment cannot stand. . . . Under the character of [the] . . . city, the common council is given the general care, custody, and con-

trol of the streets, with power to lay out, open, alter, vacate, improve, cleanse, and repair the same. . . . Under this grant of power there can be no question that the city authorities can, and it is their duty to, cause the removal of anything constituting an obstruction to the streets, . . . since anything which is an obstruction to the free use of a public street constitutes a public nuisance. . . . It was not essential to the power of the city to remove the trees that they should completely obstruct the walk, or take up the entire width thereof. The degree of obstruction justifying their removal is a question for the city. . . . The public is entitled to the free and unobstructed use of the entire street . . . for purposes of travel, subject only to the reasonable and proper control of the municipality."

See also *Chase v. Oshkosh*, 81 Wis. 313, 15 L.R.A. 553, 29 Am. St. Rep. 898, 51 N. W. 560; *State v. Sugarman*, 126 Minn. 477, 52 L.R.A.(N.S.) 999, 148 N. W. 466.

In the latter case the ordinance prohibited the obstruction of the street by persons gathering upon a footwalk or sidewalk so as to obstruct the free passage of foot passengers. The ordinance provided: "Three or more persons shall not stand together or near each other in any street or on any footwalk or sidewalk in said city, so as to obstruct the free passage for foot passengers, and any person or persons so standing shall move on immediately after a request to do so made by the mayor, chief of police, or any police officer or watchman."

The court further said: "The main attack is directed against the ordinance. It is contended that the city had no power to enact it. . . . The regulation of traffic upon the crowded thoroughfares of a large city is so imperative that a court should hesitate to deny that this is among one of the police powers granted to the same."

The court further said: "The purpose of the ordinance must be kept in view. It is to secure to the public the use of the streets for unobstructed travel. Streets and highways are dedicated, secured, and maintained primarily for public transit, and must be so preserved. All other uses thereof must be subordinated or yield to the right of free and unobstructed passage. This ordinance must be considered as an aid of this primary use of the streets, and not as a prohibition or regulation of assemblies therein, except as these interfere with public travel. . . . It might also be said that the power given to prevent public nuisances . . . is sufficient authority for the enactment of the ordinance. Obstructions of public streets, whether by inanimate objects or by persons, would seem to come

within the definition of a public nuisance. . . . The city is specifically charged with the care and maintenance of the streets for public travel, and, as a necessary incident, it would seem, proper regulations are indispensable so that travel may not be impeded or obstructed. The power to make rules and enforce them is required both for the convenience of travel and the protection of the streets."

McQuillin on Municipal Ordinances, § 458, says: "It is undoubtedly true that the police power extends to all reasonable regulations relating to keeping the sidewalks, streets, and public ways free from obstructions and nuisances, and to all proper restraining regulations relative to the use thereof."

In *Com. v. Fenton*, 139 Mass. 195, 29 N. E. 653, it is said: "A municipal regulation which prohibits any person from allowing his vehicle to stop in a street for a longer time than twenty minutes is a valid police regulation, . . . and on a complaint for violating the provisions of the regulation evidence that the defendant had a license as a hawker or peddler from the commonwealth . . . is immaterial."

In *Com. v. Brooks*, 99 Mass. 434, the same doctrine is recognized, although the defendant was acquitted on the ground that his violation was not intentional. See also *J. K. & W. H. Gilcrest Co. v. Des Moines*, 128 Iowa, 49, 102 N. W. 831; *Lacy v. Oska-loosa*, 143 Iowa, 704, 31 L.R.A.(N.S.) 853, 121 N. W. 542. This was an action to restrain the defendant city and its officers from removing certain hitching posts or racks which had been planted and maintained along the street and bordering on a public park. The defendant contended that it had a right to remove them under the statute and by virtue of the police power vested in the city. The petition was dismissed by the court, and the plaintiff appealed. In disposing of the case the court was called upon to deal somewhat with the questions presented in this case. The court said: "By statute the control and care of the streets are vested exclusively in the city, and it is made its duty to see that they are kept open and in repair and free from nuisances. . . . The powers thus conferred are legislative in character, and within the limits prescribed by statute are plenary. The only limit upon them which the courts have been inclined to recognize is that they shall not be exercised unreasonably. The wisdom of a legislative act is not a matter for judicial consideration or review, nor will the courts inquire into the necessity of a change or improvement in a public street ordered in due form by municipal authority. . . . The statute

provides that the obstructing or encumbering of public roads by buildings, fences, or otherwise is a nuisance (Code, § 5078), and, as we have already seen, cities are charged with the duty of keeping the streets free therefrom. The primary use or purpose for which streets are established is to afford the public a way of passage or travel. . . . A 'street' is a public way from side to side and from end to end, and any private use thereof which in any degree detracts from, hinders, or prevents its free use as a public way to its full extent is, within the meaning of the law, an . . . encumbrance. . . . The fact that, notwithstanding the obstruction, there is still ample room left for passage of teams and travelers, will not exempt it from liability to removal whenever ordered by the proper municipal authority."

See also, as bearing on this point, *Quinn v. Bagge*, 138 Iowa, 426, 114 N. W. 205; *Morrison v. Chicago & N. W. R. Co.* 117 Iowa, 587, 91 N. W. 793.

We have these propositions established so far as the city and the general public are concerned: That the public streets of a city are dedicated to public use, and are a public way from "side to side and end to end," and that any private use thereof which in any degree detracts from or hinders or prevents its free use as a public way to its full extent is, within the meaning of the law, an obstruction or encumbrance, and any obstruction or encumbrance for private purposes is in law a nuisance; that the city is given the exclusive care and control of the streets, and it is made its duty to keep them open and in repair and free from nuisance; that the primary use or purpose for which streets are established is to afford the general traveling public a way of passage or travel, and the general traveling public are invested with the right to have them in repair and free from nuisance, that this right may be enjoyed.

This brings us to a consideration of the right of the individual in and to the use of the streets, separate and distinct from his right as a member of the general traveling public. In 1812 Lord Ellenborough of England had occasion to speak on this question. He spoke in the case of *Rex v. Cross*, 3 Campb. 224. In this case the defendant was indicted for causing and permitting coaches to stand and remain for a long and unreasonable time in the public highway, to the great annoyance of his Majesty's subjects. Lord Ellenborough said: "And is there any doubt that, if coaches on the occasion of a route wait an unreasonable length of time in a public street, and obstruct the transit of his Majesty's subjects who wish to pass through it in carriages or on foot, L.R.A.1917F.

the persons who cause and permit such coaches so to wait are guilty of a nuisance? . . . The King's highway is not to be used as a stable yard. It is immaterial how long the practice may have prevailed; for no length of time will legitimate a nuisance. . . . A stagecoach may set down or take up passengers in the street, this being necessary for public convenience; but it must be done in a reasonable time, and private premises must be procured for the coach to stop during the interval between the end of one journey and the commencement of another. No one can make a stable yard of the King's highway."

He spoke again in *Rex v. Jones*, 3 Campb. 230. In this case the defendant occupied a small timber yard. From the narrowness of the street and the construction of the yard he had, in several instances, necessarily deposited long sticks of timber in the street, and had them sawed into shorter pieces before they were carried into his yard. Judge Ellenborough said: "A cart or wagon may be unloaded at a gateway, but this must be done with promptness. So as to the repairing of a house. The public must submit to the inconvenience occasioned necessarily in repairing the house, but, if this inconvenience is prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance. The rule of law upon this subject is much neglected, and great advantages would arise from a strict and steady application of it. I cannot bring myself to doubt of the guilt of the present defendant. He is not to eke out the inconvenience of his own premises by taking in the public highway into his timber yard, and, if the street be narrow, he must remove to a more commodious situation for carrying on his business."

In *Cohen v. New York*, 113 N. Y. 532, 4 L.R.A. 406, 10 Am. St. Rep. 506, 21 N. E. 700, the court said: "The storing of the wagon in a highway was a nuisance. The primary use of a highway is for the purpose of permitting the passing and repassing of the public, and it is entitled to the unobstructed and uninterrupted use of the entire width of the highway for that purpose."

The court further said: "It is no answer to the charge of nuisance that, even with the obstruction in the highway, there is still room for two or more wagons to pass, nor that the obstruction itself is not a fixture. . . . The highway may be a convenient place for the owner of carriages to keep them in, but the law, looking to the convenience of the greater number, prohibits any such use of the public streets."

The authorities seem uniform in holding that a person cannot carry on his business

in a public street in such a way as to obstruct the street, either by placing actual physical obstructions upon it, or even in such a way as to collect crowds upon the walk, or in front of his business, or so as to interfere with the public travel. If he does, he is chargeable as for nuisance. The fact that the business is lawful does not justify him in interfering with or annoying the public in the obstruction of the free use of the streets. The right given the citizen is to use the public highway for travel, but not so as to impede the free passage of other citizens upon it generally.

The plaintiff's claim is summoned up in the fifth paragraph of his petition, and this brings us to a consideration of the claim that the ordinance is in excess of the lawful power of the city and void. This contention rests upon the thought suggested that the state has taken from the city the powers to prohibit or restrict the standing of private automobiles in the streets. This contention rests upon the claim that in the enactment of chapter 2B, title 8, Code Supplement of 1913, the state has taken away from the city the power to regulate and control the use of automobiles upon all public highways, including the streets of the city, and that the city has no power to pass any ordinance, rule, or regulation such as is here complained of. It cannot be contended that by the enactment of this chapter the state, through its legislature, has taken away from the city all right to regulate the occupancy of the public streets under the power theretofore existing in the city; that it has taken away from it the power to keep it free from nuisance, and open and free to the general public as an avenue of travel.

It is true that in subdivisions 13, 14, 15, and 16 of this chapter the state has made some regulations touching the standing of automobiles upon public streets or highways. Subdivision 13 of § 1571m18 makes it unlawful for the operator of a motor vehicle to leave the vehicle standing upon any street in the business district within 20 feet of the corner or within 20 feet of a hydrant, unless such vehicle is in charge of some person capable of driving the same. Subdivision 14 provides that no motor vehicle shall be left standing in front or within 15 feet of either side of the entrance of a theater, etc., where large assemblies of people are being held, except in taking or discharging passengers or freight. Subdivision 15 provides for the control of these vehicles under the direction of the police. Section 16 makes it unlawful for the operator or person in charge to leave unattended upon any street or highway a motor vehicle while any part of the machinery is in motion. These are positive inhibitions and directions

from the state, and are effectual, and must be enforced as just and reasonable regulations on the part of the state of the use of public highways within its limits.

It is true that § 1571m20 provides that local authorities shall have no power to pass or enforce or maintain any ordinance, rule, or regulation requiring from any owner to whom this act is applicable any fee, license, or permit for the use of the public highways. It is true that it provides that municipalities may not exclude the owner of an automobile from the free use of the public highway.

In passing on the last proposition it is sufficient to say that this ordinance does not exact any fee, license, or permit from the owner of any automobile for the privilege of using the public streets. It does not exclude any automobile owner from the free use of the public streets. We interpret this to mean the free use for the purposes for which streets are primarily dedicated,—the free use of the streets for public travel. Clearly it cannot mean that the city is prohibited from preventing the obstruction of its streets by the leaving of automobiles standing therein, to the hindrance and inconvenience of the general public in the use of the streets for travel.

While the statute provides that no municipality can exclude an automobile owner from the free use of the public highway, it cannot with reason be said that by such enactment the legislature undertook to, and did, repeal § 753 of the Code of 1897, in so far as it gives power to a city to keep its streets open and in repair and free from nuisance. It cannot be interpreted to mean, when it said, "The city shall not have power to exclude such owner from the free use of the public highway," to say, and did say, that thereafter the city had no power to prevent a citizen "from making a stable yard of the King's highway." If the restrictions and regulations for the use of automobiles upon the public highways provided for in chapter 2B of title 8, Supplemental Code 1913, were the only regulations and restrictions that could, under any circumstances, be made binding upon a citizen or user of the public streets in the crowded thoroughfares of a large city, then the city would be powerless to prevent the absolute obstruction of its streets by the standing and crowding of automobiles thereon, even to the extent of an absolute hindrance of the use of the streets for their primary purpose. In fact, so far as automobiles are concerned, it would prevent the city from keeping them open and free from nuisance. Thus the general public welfare would be subordinated to a reckless disregard of the rights

of others in the use of the public thoroughfare within the city.

The plaintiff's contention, when reduced to its last analysis, is that, under this act of the legislature, all automobile owners and drivers are given full license to stop their cars upon the public streets when and where they please and for such a length of time as suits their pleasure and convenience, and to leave them standing there, though to the great prejudice and inconvenience of the general public desiring to use the streets for their primary purposes; and the city whose duty it is to keep the streets open and free from nuisance, is rendered as helpless as the shackled prisoner at the bar. The mere statement of the proposition is its own answer. Conceding for the purpose of the argument that the legislature has given to the automobile driver the free use of the public streets, and that the city has no power to exclude from the free use of the public streets, we must construe this language to mean that free use which is involved in the right to come and go and drive upon the streets without let or hindrance. The idea of the free use of a street does not involve the right to obstruct the free use of the street. If one man, in the exercise of his right to the free use of the

street, can stable his automobile upon the public street and leave it standing there, any number of persons can exercise the same right, until a point is reached where the travel upon the street is absolutely obstructed. Each, under plaintiff's contention, would be exercising his right to the free use of the street.

We do not find anything in this ordinance inconsistent with or contrary to the provisions of the chapter relied on, and we think the ordinance is reasonable in its provisions.

Without passing upon the question as to whether or not an action of this kind can be maintained in a court of equity, because such holding is not necessary to the determination of this case, we call attention to the opinion filed at this term of court in the case of *Huston v. Des Moines*, — Iowa, —, 156 N. W. 883, in which this question was discussed and determined.

Upon the whole record we think the court erred in overruling defendant's demurrer to plaintiff's petition and in granting the writ as prayed, and the case is therefore reversed.

Evans, Ch. J., and Ladd and Salinger, JJ., concur.

Petition for rehearing denied.

Annotation—Validity and effect of regulation as to parking or leaving automobiles standing in street.

As to right of municipal corporation to prohibit loitering on public streets, see annotation to *St. Louis v. Gloner*, 15 L.R.A. (N.S.) 973.

As to power of municipality to prevent gathering or assembling of persons in streets or on sidewalk, see annotation to *State v. Sugarman*, 52 L.R.A. (N.S.) 999.

As to power to prohibit use of automobile upon public thoroughfares, see annotation to *Christy v. Elliott*, 1 L.R.A. (N.S.) 221; *State v. Mayo*, 26 L.R.A. (N.S.) 503; and *Com. v. Kingsbury*, L.R.A.1915E, 264.

As to parking cars or making up trains within city limits, see annotation to *New Orleans v. Lenfant*, 29 L.R.A. (N.S.) 643.

This note does not cover the question of liability for injuries sustained by reason of automobiles standing in the street.

It was decided in *PUGH v. CRAWFORD*, ante, 345, that an owner of an automobile has no right to permit it to stand in the highway for an unreasonable time, and that statutory authority to control the streets, keep them free from nuisance, and regulate the driving of vehicles L.R.A.1917F.

thereon, empowered the municipality, where the statute declared the obstruction of streets to be a nuisance, to forbid the parking of automobiles in congested districts, and also that the municipality was not deprived of authority to forbid such parking by reason of the fact that the legislature had made it unlawful to permit automobiles to stand near corners, hydrants, or the entrance to theaters, or with machinery running, and had forbidden municipalities to exclude them from the free use of highways.

There are as yet few cases which have considered questions dealing with parking and leaving automobiles in the highway, and for this reason this case is of unusual value.

In *Duluth v. Esterly* (1911) 115 Minn. 64, 131 N. W. 791, evidence in substance that the defendant left his five-passenger automobile tagged "for hire" for an hour and a half in front of his place of business and near the entrance to a large hotel was held sufficient to sustain a conviction under an ordinance making it unlawful for any person to obstruct or encumber, or cause to be obstructed or encumbered, any city street with

vehicles of any description. The court said: "No hard and fast rule can be laid down as to what in every case will constitute an obstructing or encumbering of a street by an automobile or other vehicle, within the purview of the ordinance here in question. The time and place of an alleged obstruction and the kind of vehicle must be taken into consideration in each particular case. The stopping temporarily and for a reasonable time of an automobile in a public street, for the convenience of the owner, is not a violation of the ordinance; but he cannot lawfully use the street as a garage or for a taxicab stand, contrary to reasonable police regulations. The evidence in this case, in view of the time, place, and manner of the obstruction, is ample to sustain the conviction of the defendant."

In *Gassenheimer v. District of Columbia* (1905) 25 App. D. C. 179, the evidence was held insufficient to sustain a conviction for violating a police regulation providing that "no vehicle shall unnecessarily obstruct the free passageway of any street or avenue nor hinder nor delay the passage of any other vehicle," where there was testimony that the defendant kept an automobile licensed for hire in front of his hotel for two hours, and that the car was kept in front of the hotel for the guests, and there was no evidence that the defendant knowingly permitted automobiles standing in front of his hotel to be rented to persons other than his guests. The court said: "We are of the opinion that proof that an automobile stood in front of a hotel for two hours is not sufficient

to sustain a conviction that the free passageway of a street has been unnecessarily obstructed and traffic thereon hindered and delayed. There is absolutely no affirmative testimony whatever to show that traffic was delayed or hindered, to the slightest degree, by reason thereof. The information was not based upon the allegation that a public cab stand was maintained in an unauthorized place, and there is no proof that the plaintiff in error rents his automobiles, standing in front of his hotel for hire, to any and all persons who may desire to use them. The information cannot be sustained upon any inference. It requires sufficient legal proof in order that such a charge be sustained."

In *Rex v. Justices of Yorkshire* [1910] 1 K. B. (Eng.) 439, 79 L. J. K. B. N. S. 244, 102 L. T. N. S. 138, a breach of the motor cars use and construction order of 1904, forbidding a person in charge of a motor car to allow it to stand on the highway so as to cause unnecessary obstruction thereof, was held not an offense within the meaning of a section of the Motor Car Act providing that any court before whom a person is convicted "of any offense in connection with the driving of a motor" car shall cause the conviction to be indorsed on his license, it being held that the quoted words applied to the actual locomotion of the car, and did not include the mere leaving of the car at rest in the highway, so that one only guilty of allowing his car to obstruct the highway could not be convicted under the Motor Car Act for failing to produce his license for indorsement. J. T. W.

KENTUCKY COURT OF APPEALS.

PADUCAH TRACTION COMPANY, Appt.,
v.

MRS. MINNIE L. WEITLAUF.

(176 Ky. 82, 195 S. W. 99.)

Carrier — stalling car — injury to passenger — proximate cause.

A passenger who, to avoid delay, leaves a car which, through the carrier's negligence, has been stalled a short distance from his destination, and proceeds to walk along the track across a trestle, when he might have chosen another way which was safe, cannot hold the carrier liable for injury due to his

falling on the trestle, since his own negligence was the proximate cause of his injury. For other cases, see *Proximate Cause, III. in Dig. 1-52 N. S.*

(June 1, 1917.)

APPEAL by defendant from a judgment of the Circuit Court for McCracken County in plaintiff's favor, and from the overruling of a motion for new trial, in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Wheeler & Hughes, for appellant:

Since plaintiff's own negligence was the proximate cause of her injury, she cannot hold defendant liable.

Louisville v. Hart, 143 Ky. 171, 35 L.R.A.

Note. — As to liability of carrier for personal injuries to passenger who attempts to reach his destination by other means because of delay or stalling of car or train, see annotation following this case, post, 357. U.R.A.1917F.

(N.S.) 207, 136 S. W. 212; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Burnett v. Rome R. & Light Co.* 7 Ga. App. 323, 66 S. E. 803.

Messrs. John K. Hendrick and Clay & Reed for appellee.

Miller, J., delivered the opinion of the court:

This is an appeal by the Paducah Traction Company from a judgment of the McCracken circuit court, awarding Minnie L. Weitlauf a judgment against it for \$4,000 for personal injuries.

The facts are comparatively few, and are as follows:

On September 15, 1915, at about 6:30 o'clock P. M., Mrs. Weitlauf boarded one of appellant's Third street cars near the corner of Third and Norton streets, in the business district of Paducah, for the purpose of going to her home beyond the end of Jefferson street, about 2 miles distant. For some reason, the car did not make its schedule time; it not only traveled slowly, but the lights would go off and on, indicating an insufficient electrical power to adequately propel the car. At Broadway, Mrs. Weitlauf was transferred to a Broadway car, which she boarded about 7 o'clock, and went to a point on Jefferson street, if extended, known as Mallory's station near Twenty-ninth street, where it stalled at about 7:35 P. M.

Mrs. Weitlauf lives on a country road about a mile beyond the corporate limits of the city of Paducah. To reach her home she usually left the car at Thirty-First and Jefferson streets (Jones's Crossing) and walked north about a quarter or half a mile. Twenty-Fifth street constitutes the corporate boundary of the city of Paducah; but there are roadways, some improved and some unimproved, some open but others not formally dedicated, lying between Twenty-Fifth and Thirty-First streets. Jefferson street is open and improved to Twenty-Fifth street, but from Twenty-Fifth to Twenty-Eighth street it is open and formally dedicated 100 feet in width; but it is not improved by grading and graveling. From Twenty-Eighth to Thirty-First street, Jefferson street is neither open nor dedicated, and the right of way of the appellant company passes between the fences on either side, without a walkway or improvement. Broadway road is graveled and improved to and beyond Thirty-First street. Jefferson street is immediately north of and one block from Broadway, running parallel with it. At Twenty-Eighth street, Broadway and Jefferson streets are intersected by a gravel road. The car line is double-tracked from a point a few feet east of where the car

stopped in front of Mallory's, to Twenty-Eighth street, and from Mallory's to Twenty-Eighth street there is a good cinder path between the tracks, and on each side thereof.

The fair grounds extend along the north side of Jefferson street in this neighborhood, while the residences of Mr. Mallory, Mrs. Noble, and other citizens extend along the south side of Jefferson street, and back to Broadway.

Mr. Mallory lives at a point about where Twenty-Ninth street would cross Jefferson street extended, if Twenty-Ninth street were open; and there is a board walk extending through the Mallory property to Broadway. The car line extends to Thirty-First street; and, as Mrs. Weitlauf lives some distance beyond Thirty-First street, she would alight from the car at Thirty-First street and walk the remaining distance. At Mallory's the right of way is narrow and inclosed by fences on each side. There was a short trestle about the size of an ordinary cow gap in the track just beyond Mallory's station. It spanned a ditch about 4 or 5 feet deep, and was connected with a fence at either side.

After remaining in the car not exceeding five minutes, Mrs. Weitlauf left the car, for the purpose of walking home. As she left the car, according to her version, the conductor asked her if she was going to leave the car, to which she replied: "Yes, I have some medicine for my sick child, and I am going to get off. I have been here about two hours. They will be worried about me, and I will get off."

She further stated that she left the car and went home, and that, of course, she had not really remained at Mallory's two hours, as she stated to the motorman. According to the motorman's story, he said to her as she was leaving the car: "Lady, won't you remain on the car? Perhaps we will go on in a few minutes." Whereupon she said, "No, I will go ahead." The motorman saying: "Well, be careful; there is a trestle up there." A passenger on the car corroborated what the motorman said with reference to the trestle. This, however, is immaterial, since Mrs. Weitlauf admitted she knew of the existence of the trestle a short distance in front of the car; that she had lived at her present abode for about three years, and had crossed the trestle many times before; that she knew all about it, and knew that it was not provided for people to walk on.

After leaving the car, Mrs. Weitlauf walked up Jefferson street towards her home, and, as she was crossing the trestle, she missed her footing on the last step and fell, breaking her arm. Upon her direct examination, Mrs. Weitlauf said: "I got

off the car and went down the trestle, and got over all but the last step safely, and missed my footing, and fell with my arm under me."

Upon cross-examination, she further said:

Q. How long have you lived where you now live?

A. Three years.

Q. Had you ever walked down that track before this occurrence?

A. Yes, sir.

Q. You knew there was a trestle there?

A. Yes, sir.

Q. It was dark, you say?

A. Yes, sir.

Q. You knew that the trestle was up off the ground?

A. I knew it was off the ground; I thought I was safely over it.

Q. You knew it was provided for running cars over?

A. I knew that, but it was the only way to get home.

Q. You knew it was not provided for people to walk over?

A. I certainly did.

As above stated, Broadway is a constructed gravel road running parallel with Jefferson street, there is a board walkway extending through Mallory's yard to Broadway, and Twenty-Eighth is a gravel road crossing both Broadway and Jefferson streets. Although Jefferson street was not constructed beyond Twenty-Fifth street, there was a cinder path extending from Mallory station back to the gravel road at Twenty-Eighth street.

Mrs. Weitlauf was acquainted with Mrs. Mallory, and knew of the existence of the walkway through the Mallory yard. Mrs. Weitlauf had therefore two safe ways by which she could have gone home: First, she could have gone through the Mallory grounds to Broadway, and thence out Broadway to Thirty-Second street; or, secondly, she could have gone down the cinder path to the gravel road at Twenty-Eighth street, thence over to Broadway, and out Broadway to Thirty-Second street. She had, however, another and more dangerous way, of walking straight ahead down the railroad track and across the trestle, which was perhaps three squares shorter than the longest of the safe ways. She voluntarily took the dangerous path, and was injured. In her petition, she alleges that she was compelled to leave the car; and that it was necessary for her to cross, and she attempted to cross, the trestle over the drain or ditch on the right of way, and thereby was injured. The petition alleged the defective L.R.A.1917F.

construction of the trestle; but no proof was offered to sustain the allegation.

The answer traversed the charge of negligence upon the part of the defendant; and, in a second paragraph, it affirmatively alleged that Mrs. Weitlauf voluntarily left the car at a point not provided for receiving or discharging passengers, and of her own volition walked down the right of way, where she had no right to be, and was injured while crossing the trestle, thereby causing her injuries by her own negligence.

At the close of plaintiff's proof, as well as at the close of all the testimony, the defendant asked that the jury be peremptorily instructed to find for the defendant; but this motion was overruled, and the trial proceeded, with the result above indicated.

In addition to the above facts, there was evidence tending to show that the bad quality of the coal used in generating the electric power used by the street car company caused the car to stop; and it is contended by the appellee that the company was guilty of negligence in that further respect. However, under our view of the case, we do not think it necessary to discuss that feature, since the plaintiff can only recover in case her injury was the proximate result of the negligence of the defendant. Although the company may have been negligent in using bad and dirty coal in its furnace, it is not liable if Mrs. Weitlauf's injuries were caused by her own negligence; and, although the cause of the car stopping was probably the dirty and defective coal, the stopping of the car was not the proximate cause of appellee's injury.

Mrs. Weitlauf was in no way compelled to leave the car; no indignity was offered her; she received no physical injury at the hands of the company; she was not asked to leave the car; on the contrary, the motor-man requested her to remain on the car, suggesting that probably the car would go forward in a few minutes. We have therefore the case of a passenger voluntarily leaving the car before it reaches the passenger's destination, and, while passing along the track and over a trestle which she knows exists, she steps "short" and falls over the culvert, receiving her injuries. Under these facts, it is difficult to understand upon what theory Mrs. Weitlauf can recover damages from the company for her injuries.

A common carrier must use ordinary care to carry its passenger to his destination in a reasonable time; it is not responsible for delays which are caused by accidents that ordinary care may not guard against. *Southern R. Co. v. Miller*, 129 Ky. 102, 110 S. W. 351. And, while a common carrier is not an insurer as to the time when pas-

sengers will arrive at their destination, if a failure to reach the destination on schedule time is due to the negligence of the carrier, it is liable only for such damages as flow directly from the delay, and which the carrier might reasonably have anticipated at the time of making the contract. They are usually to be measured by the passenger's loss of time and money expended by reason of the delay. *Nashville & N. R. Co. v. Spurling*, 160 Ky. 819, 170 S. W. 192, Ann. Cas. 1916A, 487; *Central of Georgia R. Co. v. Wallace*, 49 L.R.A.(N.S.) 429, Ann. Cas. 1915A, 1076, with note (141 Ga. 51, 80 S. E. 282); *Morrison v. Illinois C. R. Co.* 165 Ill. App. 415; *Hayes v. Wabash R. Co.* 163 Mich. 174, 31 L.R.A.(N.S.) 229, 128 N. W. 217; *Morris v. Colorado Midland R. Co.* 48 Colo. 147, 31 L.R.A.(N.S.) 1106, 139 Am. St. Rep. 268, 109 Pac. 430, 20 Ann. Cas. 1006; *Leclair v. Tacoma R. & Power Co.* 62 Wash. 157, 113 Pac. 268.

Admitting, for the argument, that negligence upon the part of the company was shown, there remains the all-important question: What was the proximate cause of Mrs. Weitlauf's injuries?

The rule is stated as follows, in 10 C. J. 978: "As in other cases of actionable negligence, in order to hold the carrier liable, its wrongful act or omission constituting negligence must have been the direct and proximate cause of the injury complained of, and, if there were other possible causes, the question is whether the negligent construction, maintenance, or operation of the premises, roadbed, machinery, or appliances was the efficient and dominant cause producing the injury. The particular act of negligence relied on as constituting the grounds of recovery must have been the proximate cause of the injury. If the carrier or its employees were negligent, and the injury resulted mediately or immediately from such negligence, then the carrier is liable, although there may have been an intervening cause not chargeable to the carrier's fault, except in cases where, although the carrier is negligent, there is an intervening independent cause for the injury, not the result of the carrier's negligence or other wrong; in such case, the carrier is not liable. Thus, where the passenger is not given a reasonable opportunity to alight, but is carried past his destination or the proper place for alighting, the carrier will not be liable for injury suffered by the passenger after alighting without injury, if the subsequent injury is not such as could have been anticipated as the result of being carried beyond the place for alighting, and is not in itself due to any fault of the carrier, although, if the place or circumstances are not proper for the alighting of the pas-

senger, the carrier will be liable for injuries naturally resulting from his getting off there."

"Proximate cause" may be defined as that which, in a natural and continuous sequence, unbroken by any new cause, produces an event, and without which the event would not have occurred. The "proximate cause" is that which is nearest in the order of responsible causation. *Butcher v. West Virginia & P. R. Co.* 37 W. Va. 180, 18 L.R.A. 519, 16 S. E. 457; *Lutz v. Atlantic & P. R. Co.* 6 N. M. 496, 16 L.R.A. 819, 30 Pac. 912. It is that which stands next in causation to the effect, not necessarily in time or space, but in causal relation. *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 18 L.R.A. 215, 32 N. E. 285, 14 Am. Neg. Cas. 201; *Claffin v. Houseman*, 93 U. S. 130, 23 L. ed. 833.

In *East Tennessee, V. & G. R. Co. v. Lockhart*, 79 Ala. 315, the rule is well stated, as follows: "Negligence and wrongful conduct having been established, the general rule is that the defendant is liable for the natural and proximate damages resulting therefrom,—such consequences as might probably ensue in the natural and ordinary course of events. Though the defendant is not responsible for any events produced by independent intervening circumstances, which have no connection with the primary act, if the intervening agencies are put in operation by the wrongful act of the defendant, the injuries directly produced by such agencies are proximate consequences of the primary cause, though they may not have been contemplated or foreseen. The relation of cause and effect between the tortious act and the intervening agencies being shown, the same relation between the primary wrong and the subsequent injuries is also established; the first wrongful act operating through a succession of circumstances, each connected with, and originated by, the next preceding."

In *Louisville v. Hart*, 143 Ky. 171, 35 L.R.A.(N.S.) 207, 136 S. W. 212, this court approved the definition of Judge Cooley that "proximate cause" must be the legitimate sequence of the thing amiss. In other words, the law always refers the injury to the proximate, not the remote, cause. A more extended definition or explanation of "proximate cause" is found in *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256, as follows: "The question always is: Was there an unbroken connection between the wrongful act and the injury,—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the

wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

In support of the ruling of the lower court, appellee relies upon *Louisville & N. R. Co. v. Keller*, 104 Ky. 769, 47 S. W. 1072, 5 Am. Neg. Rep. 398; *Kentucky & I. Bridge & R. Co. v. Buckler*, 125 Ky. 24, 8 L.R.A. (N.S.) 555, 128 Am. St. Rep. 234, 100 S. W. 328; *Southern R. Co. v. Miller*, 129 Ky. 98, 110 S. W. 351; *Louisville & N. R. & Lighting Co. v. Comley*, 169 Ky. 11, 183 S. W. 207; and other cases of that character. None of those cases, however, are applicable under the facts of this case. In the *Keller Case* the plaintiff was, at the end of her journey, put off a train in a storm, with the way to the depot obstructed so as to prevent her reaching shelter from the rain and hail, thus showing negligence upon the part of the company, and injury as its natural and proximate result. In the *Miller Case*, he was required to spend the night in the caboose of a freight car, which was so negligently heated as to expose Miller to the inclement weather, thereby causing his illness. In allowing him to recover, the court said the immediate cause of Miller's illness was his exposure during the night in the caboose, and unquestionably his exposure and consequent illness was the natural and reasonable consequence of the railway company's failure to transport him to his destination within a reasonable time. In the *Buckler Case*, the plaintiff was carried beyond his station, and was directed by the conductor to alight and walk back along the track to a certain light and then leave the track. In following these instructions,

Buckler was injured. He was allowed to recover because his injuries were directly caused by the negligence of the company in carrying him beyond his station, and in directing him to retrace his steps over an unknown and dangerous path. In the *Cromley Case*, the plaintiff was required to leave the car at night and before the completion of her journey; these were the elements upon which her recovery was based.

But, in the case before us, Mrs. Weitlauf was not carried beyond her station, she was not directed or asked to leave the car, and no directions were given her in any way. Upon the contrary, the motorman requested her to remain upon the car. Furthermore, when she left the car, instead of taking a safe route, which was open and known to her, she took an unsafe route, with which she was well acquainted, and thereby invited the accident which befell her. The only respect in which the company failed to carry out its contract was to carry her to her destination, but that did not constitute a tort. Mrs. Weitlauf, having suffered no personal injury, insult, or indignity at the hands of the company or its agents, her action was founded in contract, not in tort. *Spurling Case*, 160 Ky. 819, 170 S. W. 192, Ann. Cas. 1916A, 487; 4 R. C. L. 1090.

In order for the company to be liable, Mrs. Weitlauf's injuries must have been the direct and proximate result of negligence upon the part of the company; but, instead of that being true, it cannot be doubted that her injuries were the direct result of her own negligence. Under the well-established rule that a peremptory instruction is proper when, after admitting every fact shown by the plaintiff's evidence to be true, as well as all reasonable inferences that can be drawn therefrom, the plaintiff has failed to establish her case, the defendant's motion for a directed verdict should have been sustained. *Southern R. Co. v. Goddard*, 121 Ky. 567, 89 S. W. 675, 12 Ann. Cas. 116.

Judgment reversed.

Annotation—Liability of carrier for personal injuries to passenger who attempts to reach his destination by other means because of delay or stalling of car or train.

There are but few cases strictly in point upon the question outlined in the title, but a number of analogous situations have been dealt with in previous annotations.

Thus, for liability to passenger for default or delay in running railroad train, see the notes to *Hansley v. Jamesville & W. R. Co.* 32 L.R.A. 543, and to *Central L.R.A.* 1917F.

of *Georgia R. Co. v. Wallace*, 49 L.R.A. (N.S.) 429.

For measure of damages for carrying passenger beyond destination, see the notes to *Dalton v. Kansas City, Ft. S. & M. R. Co.* 17 L.R.A. (N.S.) 1226, and to *Ft. Smith & W. R. Co. v. Ford*, 41 L.R.A. (N.S.) 745.

For the question as to what injuries

may be deemed the proximate result of discharging passenger at improper place, or one not his destination, see the note to *Georgia R. & Electric Co. v. McAllister*, 7 L.R.A.(N.S.) 1177.

As to damage incident to attempt to reach destination by other means as an element of recovery for failure to stop train for intending passenger, see the note to *International & G. N. R. Co. v. Addison*, 8 L.R.A.(N.S.) 880.

The decision in *PADUCAH TRACTION Co. v. WEITLAUF*, ante, 353, is clearly correct by reason of the contributory negligence of the plaintiff. The situation was somewhat analogous to that of a person who, having choice of ways, chooses the one which he knows to be dangerous, and then attempts to hold the municipality for his injuries. See the note to *Lerner v. Philadelphia*, 21 L.R.A.(N.S.) 659.

In *Southern R. Co. v. Miller* (1908) 129 Ky. 98, 110 S. W. 351, the plaintiff's train, after a long delay, stopped in the train yard, but at some distance from the station, and the plaintiff got off and walked home, getting his feet wet and becoming ill; and he alleged that there were bad conditions of alternating cold and heat in the car. In reversing a judgment for the plaintiff the court, *inter alia*, stated that on another trial the court should instruct the jury that if, when there was no negligence delaying the train, the plaintiff voluntarily left the train and walked to the station, the defendant was not responsible for any sickness brought upon him by the walk. The court said: "If, rather than wait for the train to get down to the station, the plaintiff walked to it, when there was no negligence on the part of the railroad company causing the delay, the defendant would not be responsible for any sickness brought upon him by reason of the walk." (On a second trial there was a judgment for the plaintiff, which was affirmed in (1909) — Ky. —, 120 S. W. 278.)

The following cases, while not strictly within the scope of this note, are of interest in this connection:

In *Pickens v. South Carolina & G. R. Co.* (1898) 54 S. C. 498, 32 S. E. 567, it appeared that, owing to the defendant's failure to provide transportation, the plaintiff was compelled to get off at an intermediate station, and, in consequence of its lack of heat and of boisterous negroes, she left the station to seek accommodations, and while on the way to do so was caught by a sudden storm and made ill. In reversing a judgment for L.R.A.1917F.

the plaintiff on other grounds, it was held that the damages from the storm were not too remote. The court said: "Leaving the depot was the natural consequence of the defendant's failure to provide transportation for the plaintiff from Aiken to Edgefield; and in view of the frequency and suddenness with which storms arise in this country, it cannot be said that the injury from the storm was 'the intervention of any such extraordinary result as that the usual course of nature should seem to have been departed from;' at least, this was a question to be determined by the jury."

Where a traction company sells tickets to the center of the city of destination without informing its passengers that its train will go no farther than the outskirts, and compels a passenger to get off in a storm in the middle of the night, 3 miles from the station, and she has to walk a considerable distance before finding a conveyance to take her to shelter, and is made ill by the experience, the company will be liable in tort. *Louisville & N. R. & Lighting Co. v. Comley* (1916) 169 Ky. 11, 183 S. W. 207, where the court said: "When the contract of carriage is broken in such manner as to be tortious, as when no effort is made by the carrier to look after the safety or comfort of the passenger, and the situation is such that the passenger cannot find safe and comfortable accommodations by the exercise of reasonable care, and suffers injury in consequence thereof, the damage should be assessed under the tort rule, and the carrier must compensate him not only for lost time and expense incurred, but for such inconvenience, discomfort, injury, or illness as follows directly from its acts."

The act of a carrier, who had contracted to take the plaintiff to her residence, in setting her down from his omnibus on a main street of the city, during the daytime, and at a point about a mile from her home, is not the proximate cause of an injury to her health resulting from a cold contracted by her in walking home, where the point at which she was left was on the line of a street railway which passed close to her residence, and she was young, in good health, warmly clad, and accompanied by an intimate friend. *Francis v. St. Louis Transfer Co.* (1877) 5 Mo. App. 7.

In *Leclair v. Tacoma R. & Power Co.* (1911) 62 Wash. 157, 113 Pac. 268, where a traction company, on account of its inability to collect fare from other passengers, left the car in which the plain-

tiff was riding on a siding, and in the middle of the night she obtained a team and wagon which took her home, and she contracted a slight cold, the appellate court reduced the damages in her favor from \$750 to \$100.

While beyond the scope of this note, reference may also be made to *Hobbs v. London & S. W. R. Co.* (1875) L. R. 10 Q. B. 111, 44 L. J. Q. B. N. S. 49, 32 L. T. N. S. 352, 23 Week. Rep. 520, 5 Eng. Rul. Cas. 381, where the plaintiffs took the defendant's midnight train, represented to be for Hampton Court, but which went in another direction, and the plaintiffs were taken to a station several miles distant, and, being unable to get a conveyance or accommodation, they walked home several miles in the rain, and one of them took cold. It was held that the verdict for the plaintiffs

for £8 damages for inconvenience must stand, but that another part of the verdict for £20, damages from taking cold, must be set aside. *Hobbs v. London & S. W. R. Co.* (Eng.) supra. Cockburn, Ch. J., said: "Again, the party is entitled to take a carriage to his home. Suppose the carriage overturns or breaks down, and the party sustains bodily injury from either of those causes, it might be said: 'If you had put me down at my proper place of destination, where by your contract you engaged to put me down, I should not have had to walk or to go from Esher to Hampton in a carriage, and I should not have met with the accident in the walk or in the carriage,' stating that such an accident would be too remote for damages. B. B. B.

MICHIGAN SUPREME COURT.

ESTELLA CULLEY, Appt.,

v.

FORREST C. BADGLEY.

(— Mich. —, 163 N. W. 33.)

Attorney and client — allowance of fees — effect on contract obligation.

An allowance of attorney's fees out of the husband's estate under the statute in a divorce proceeding upon application of the wife does not relieve her of her contract obligation to compensate her attorney for his services in such proceeding.

For other cases, see Attorneys, II. c, 1, in Dig. 1-52 N. S.

(May 31, 1917.)

APPEAL by plaintiff, upon case made, from a judgment of the Circuit Court for Jackson County in her favor for a less amount than claimed in an action brought to recover certain moneys in defendant's possession alleged to belong to plaintiff. Affirmed.

The facts are stated in the opinion.

Mr. Grove H. Wolcott, for appellant:

A solicitor employed by a married woman in a divorce case, after having had an allowance for his fees made by the court out of the husband's estate, cannot make any further claim for compensation by the wife.

Wolcott v. Patterson, 100 Mich. 227, 24 L.R.A. 629, 43 Am. St. Rep. 456, 58 N. W. 1006; *Jordan v. Westerman*, 62 Mich. 170, 4 Am. St. Rep. 836, 28 N. W. 826; *Bloss*

v. Bloss, 187 Mich. 425, 153 N. W. 666; *Allen v. Allen*, 188 Mich. 532, 155 N. W. 488.

Mr. Forrest C. Badgley, in propria persona, and Messrs. Wilson & Cobb, for appellee:

Plaintiff made an express contract with the defendant, which is conclusively established. She had the power to make such contract, and she thereby obligated herself.

Wolcott v. Patterson, 100 Mich. 227, 24 L.R.A. 629, 43 Am. St. Rep. 456, 58 N. W. 1006; *Dietrich v. Hoefelmeir*, 128 Mich. 145, 87 N. W. 111; *Cadman v. Markle*, 76 Mich. 448, 5 L.R.A. 707, 43 N. W. 315; *Bolthouse v. De Spelder*, 181 Mich. 153, 147 N. W. 589; *State ex rel. Arthur v. Superior Ct.* 58 Wash. 97, 107 Pac. 876.

Stone, J., delivered the opinion of the court:

This action was brought to recover certain moneys in the defendant's possession alleged to belong to the plaintiff. The plea was the general issue, with notice of claim of lien for attorneys' fees and tender.

The case is brought here by the plaintiff upon case made, and from the statement of facts we glean the following: The plaintiff, having trouble with her husband in the summer of 1911, employed the defendant, a practising attorney, to institute proceedings against her husband to dissolve the marriage, and obtain permanent alimony. At the time of defendant's employment, according to his testimony, plaintiff asked him what he would charge her for his services. He told her that, inasmuch as the services he might be called upon to perform were a matter of great uncertainty, he could not

Note. — As to liability of married woman for legal services in divorce suit, see annotation following this case, post, 362. L.R.A.1917F.

in advance advise her as to the amount he would charge. He further stated to her that he might be able to effect a settlement with her husband; and, if so, the charge would be small. On the other hand, if litigation ensued, he could give her no assurance on the subject, beyond saying that he would expect such compensation as his services were reasonably worth; that, with this understanding on his part, defendant undertook to negotiate a settlement with the husband, but, this proving unavailing, in September, 1911, the defendant, acting as plaintiff's solicitor, prepared and filed a bill of complaint to dissolve the marriage relation and obtain permanent alimony.

The plaintiff made the claim in her testimony that the defendant from the outset, with reference to his employment, assured her that her husband would have to pay all of the expenses of the divorce suit, including his fees. On July 17, 1911, according to defendant's testimony, plaintiff wrote him a letter, in which she said that she was going to get another attorney, and that her attorneys would have to get their pay out of her husband, as she had no means. Defendant testified that the first time plaintiff came into his office after the letter was received he asked her what she meant by it, to which she replied: "What I meant by that was all I had was this 40 acres of land out there, and if we get into a lawsuit with Mr. Culley, and if we don't win the case, I don't know how I could pay my lawyers; I wouldn't have anything to pay with."

To which defendant replies: "Of course, if we don't win this lawsuit, my charge to you will be very reasonable and very small. If we do succeed in this case, I shall expect you to pay what the service is worth."

A hearing of the divorce case was had, which resulted in a decree in favor of the plaintiff. The trial, with the hearings later held for the purpose of determining the value of the property of the defendant in the divorce case, covered a period of fourteen days. The decree in the divorce case required the defendant therein to pay the plaintiff herein \$2,600 in cash, and also to convey to her 80 acres of land, or at his option pay complainant \$4,400, and also a solicitor's fee of \$300 and the taxed costs.

The husband appealed to this court. The stenographer's transcript of testimony covered 1,136 pages, making a printed record of 531 pages.

After the case had been appealed to this court, the plaintiff filed her petition, in which she stated that she was informed by her solicitors that they should be paid at that time at least \$750 to apply on their services already rendered, and to be rendered in the preparation of the case for hearing. L.R.A.1917F.

ing in this court, and the final argument thereof, and in addition thereto an allowance of \$50 to cover the expense of printing briefs. In both petitions filed in the circuit court for temporary alimony and in the petition filed in this court the plaintiff stated that the only property she had was 40 acres of land, subject to a life estate of her mother, and also subject to a lien of a mortgage upon which there was due \$1,600; that she had no income, and would be unable to prosecute the case and defray the costs and expenses attending the same without assistance from the defendant therein.

Upon a hearing of the petition filed in this court an order was made requiring the said Culley to pay a solicitor's fee of \$100 and \$50 to cover the cost of printing briefs. This money was paid to the defendant herein, who immediately paid one half of the solicitor's fee to Mr. Noon, an attorney who was employed by the plaintiff after the divorce suit was pending, to assist in the litigation.

The decree of the circuit court was affirmed by this court with costs. *Culley v. Culley*, 189 Mich. 496, 155 N. W. 401.

After the decree of this court some controversy arose, the plaintiff herein claiming that Mr. Culley had forfeited his option to pay the sum of \$4,400 in lieu of conveying to her the land. In the meantime there had been turned over to the defendant herein \$7,460, in which amount was included the attorney's fee allowed by the circuit court and this court.

Afterwards the present counsel for the plaintiff, having satisfied himself that the plaintiff was not entitled to the land in question, requested the defendant herein to turn over to him the \$4,400 paid by Culley in lieu of such land, which was done, and the plaintiff thereupon conveyed the land to Culley. This suit was brought to recover the money in defendant's possession, \$2,610, less \$400 awarded by the courts as solicitors' fees, being \$2,210.

While the controversy about the land was on the plaintiff made inquiry as to the charge which her attorneys, the defendant and Mr. Noon, would make against her for services. She was then informed by the defendant that he had received some money for expenses, and \$75 of the attorney's fee, being \$25 allowed by the circuit court, and one half of the amount allowed by the supreme court, and \$300 allowed by the circuit court, and that his charge would be \$1,000, giving her credit for \$400 solicitors' fees allowed by the court. Mr. Noon informed her that his charge would be \$500, less a credit of \$50 which he had received from the defendant, being one half of the solicitor's fee allowed by the supreme court.

Upon receipt of this information plaintiff replied: "I understood you would get your pay out of Mr. Culley."

Before the date on which settlement was to be made plaintiff consulted Mr. Wolcott, her attorney in this suit, and, through him, made written demand upon defendant for the money in his possession, less \$400 solicitors' fees allowed by the court, and gave notice to him that he was discharged as her attorney. A few days later defendant paid to Mr. Noon \$450 from the funds in his hands, but without any authority from the plaintiff, and deducted from the balance the amount of his charge of \$1,000 less \$400, and tendered to Mr. Wolcott, who was authorized to receive the money, the balance of the money in his hands, in gold, the amount of the tender being \$1,610, which was refused, and suit was brought.

Upon the trial the plaintiff claimed and testified that she had a bargain with defendant which in effect was that he should represent her in said litigation, and take as payment for his services such sums as were allowed by the court for attorneys' fees. The defendant denied that such agreement was ever made, and testified that an agreement was made with the plaintiff that he would charge her what his services were worth. The trial court submitted the controversy to a jury to find what the bargain was. The instructions were plain and specific that, if the bargain was as claimed by the plaintiff, the tender was not sufficient, and the plaintiff would be entitled to a verdict for \$2,210; that, if the contract was as claimed by the defendant, the tender was sufficient, and the plaintiff would be entitled to a verdict for \$1,610. The jury found the contract to be as claimed by the defendant, and returned a verdict for the plaintiff in the latter sum.

That defendant's charge for services was reasonable was not disputed at the trial; the plaintiff contending that, the courts having awarded certain sums of money in the way of solicitors' fees, the defendant was obliged to accept such awards in full payment and satisfaction of his services, regardless of the value of such services or any contract between the parties.

At the close of the evidence plaintiff moved for a directed verdict in favor of the plaintiff for the sum of \$2,210, on the ground that, the defendant having had an allowance for solicitors' fees, conceded to be \$400, out of the property of the defendant in the divorce case, and the defendant having received the same, he could not claim anything further of the plaintiff. The court, under the statute, reserved decision thereon, and the jury rendered the verdict above stated. Plaintiff's attorney also requested L.R.A.1917F.

the court to charge the jury that the defendant, having had solicitors' fees allowed by the court, conceded to be \$400, could not claim anything further from the plaintiff. This request was refused. Later plaintiff brought up for hearing said motion for judgment thereon in favor of the plaintiff for \$2,210 notwithstanding said verdict, which motion was denied, and judgment was rendered for the amount of the verdict, with costs to the defendant.

Under appropriate assignments of error counsel for appellant says: "The sole question for consideration by this court, upon the agreed facts, seems to be whether or not a solicitor employed by a married woman in a divorce case, after having had an allowance for his fees made by the court out of the husband's estate, can make any further claim for compensation by the wife. The question has never been directly raised in this court before, to the knowledge of plaintiff's counsel."

Our attention is called to § 8628, Comp. Laws, and its construction in *Wolcott v. Patterson*, 100 Mich. 227, 24 L.R.A. 629, 43 Am. St. Rep. 456, 58 N. W. 1006, and *Jordan v. Westerman*, 62 Mich. 170, 4 Am. St. Rep. 836, 28 N. W. 826. It is urged that, when an attorney receives the allowance made by the court out of the husband's estate, his entire compensation is provided for, and he has no right to insist that the wife shall turn over to him a part of her alimony to make good what he considers inadequate pay for his services. We understand counsel for appellant to claim that, no matter what the contract was, when the application was made to the court for this compensation, and it was allowed and paid defendant, he thereby waived any other or further claim against the plaintiff. The facts are that the plaintiff applied to the courts for relief under the statute cited, and not the defendant. We do not think that by such application the plaintiff could be relieved of her contract with the defendant, as found by the jury. We have read the cases cited by appellant with care, and do not think that they support the position claimed. In the *Wolcott Case* this court said: "The statute clearly indicates that such proceedings are to be maintained at the cost of the wife, unless the court shall relieve her of such cost by an order for expense money to be paid by her husband."

In this court the order was made on "account of" attorneys' fees, and we do not think that this record shows that the sums ordered paid were to "relieve" her from such cost, or from her contract with defendant. In the *Wolcott Case* we also said: "It would seem to follow logically that, having the power to bring suit, and being in such

suit responsible for costs, she must be held competent to contract for the services of an attorney to represent her rights. We think the right to contract for such services is necessarily incident to and included in her right to bring suit."

We think it was the defendant's duty, in representing his client, to obtain, in the way of costs and expenses, what he in fairness could obtain at the hands of the court, to the end that his client might to that extent be relieved. Did he, by performing this duty, vitiate his contract with the plaintiff, which entitled him to a fair compensation for the services rendered? We think not. It would be unfortunate for the client if this were so; for no married woman would be able to have a contract with her counsel, and be at liberty to apply to the court for aid under the statute, without thus abrogating the contract.

In *McCurdy v. Dillon*, 135 Mich. 678, 98 N. W. 746, it was held that a contract between an attorney and a married woman by which the attorney should receive as compensation for his services a certain per cent of the alimony to be allowed in the case is void, as contrary to public policy, following *Jordan v. Westerman*, supra. This holding rendered it necessary for this court to pass upon the rights of the parties, as the service had been performed. Chief Justice Moore, speaking for the court, said: "It is the law of this state that a married woman may make herself chargeable for the services of an attorney employed by her in

a divorce suit. *Wolcott v. Patterson*, 100 Mich. 227, 24 L.R.A. 629, 43 Am. St. Rep. 456, 58 N. W. 1006. If a valid contract for retainer fees was in fact made, it would not be abrogated because an attempt was made to merge it in a void contract. . . . On the other hand, if no contract was made as to how Mr. McCurdy should be paid, except the void contract, then he would be entitled to recover what his services were reasonably worth. *Cadman v. Markle*, 76 Mich. 448, 5 L.R.A. 707, 43 N. W. 315."

See also *Re De Spelder*, 181 Mich. 153-160, 148 N. W. 179.

In *State ex rel. Arthur v. Superior Ct.* 58 Wash. 97, 107 Pac. 876, the supreme court of Washington considered statutes similar to ours in a divorce suit by the wife. We quote from the headnote: "Section 988, authorizing the court in an action for divorce to make, as between the parties, such orders as it deems proper for the disposition of the property and the children of the parties, and relative to the expenses of the action, does not give the court jurisdiction to determine questions arising solely between the litigants and their counsel; but § 474, providing that the measure of compensation of attorneys shall be left to the agreement of the parties, applies to an action for divorce."

The Code provisions there referred to are quite similar to our §§ 8628 and 11254, Compiled Laws.

We find no error in the record, and the judgment of the Circuit Court is affirmed.

Annotation—Liability of married woman for legal services in divorce suit.

The authorities are not unanimous upon the liability of a wife for legal service in a divorce suit. The earlier cases on this question are discussed in the notes to *Wolcott v. Patterson*, 24 L.R.A. 634, and *Tyler v. Winder*, 34 L.R.A. (N.S.) 1080. The court in *CULLEY v. BADGLEY*, ante, 359, necessarily assumed that the wife may be liable for such services, the question there being whether the wife is relieved of her contract to pay attorney fees by an allowance of attorney fees against the husband in the divorce action. The court came to the conclusion that she is not so relieved. See *State ex rel. Arthur v. Superior Ct.* 58 Wash. 97, 107 Pac. 876, discussed in the earlier note for a similar decision.

No cases passing directly upon the liability of a married woman for such services seem to have been decided since the date of the last of the foregoing notes. In *Marvel v. Marvel* (1915) 163 Ky. 601, 174 S. W. 27, a husband and

wife had entered into a separation agreement in which it was provided that in the event that "either party brings suit for a divorce, the complainant is to pay all costs of same including attorneys' fees and cost of court." Upon the subsequent refusal of the husband to abide by the agreement, the wife brought an action for divorce, in which she relied upon certain provisions of the contract, whereupon the husband claimed that the wife thereby made herself liable for his attorneys' fees. The court, however, held the wife not liable for the attorneys' fees of the husband, stating that the contract must be construed in the light of the statute which made the husband liable for the costs of a divorce suit, and states that the evident intention of the parties was to relieve the husband of the burden which the law would have imposed on him had it not been for the provision of the contract, and that, "fairly construed, the contract

merely provides that the party bringing the suit shall be liable for attorneys' fees and the cost incurred in obtaining

the divorce, and not for attorneys' fees and the cost incurred in resisting the divorce." W. A. E.

NEW YORK COURT OF APPEALS.

PHOEBE A. VAN BLARICOM, Admr., etc.,
of Allan B. Van Blaricom, Deceased,
Appt.,

v.

FRANK L. DODGSON, Impleaded, etc.,
Resp't.

(220 N. Y. 111, 115 N. E. 443.)

Master and servant — son using automobile as servant.

One owning an automobile for the pleasure of his family is not liable for injury negligently caused by his adult son, who is a capable driver, when, with the owner's permission, he is using the car for his own purposes, on the theory that in so doing he is really carrying out the business of the owner of furnishing such pleasure.

For other cases, see *Master and Servant, I. b*, in *Dig. 1-52 N. S.*

(February 27, 1917.)

APPPEAL by plaintiff from a judgment entered upon an order of the Appellate Division of the Supreme Court, Fourth Department, reversing as to defendant Frank L. Dodgson a judgment of a trial term for Monroe County in plaintiff's favor, and dismissing the complaint as to said defendant, in an action brought to recover damages for the death of plaintiff's intestate, alleged to have been caused by the negligent driving of defendant's automobile. Affirmed.

The facts are stated in the opinion.

* Messrs. Wile & Oviatt, for appellant:

A son, a member of the father's immediate family, operating with his father's consent an automobile owned by the father, and purchased and maintained for the pleasure and benefit of his family, is a servant of the father, acting within the scope of his authority, where the machine is being operated for the benefit of a member of his family, though it be for the benefit of the operator himself.

Birch v. Abercrombie, 74 Wash. 486, 50 L.R.A.(N.S.) 59, 133 Pac. 1020; *Kayser v. Van Nest*, 125 Minn. 277, 51 L.R.A.(N.S.) 970, 146 N. W. 1091; *Daily v. Maxwell*, 152 Mo. App. 415, 133 S. W. 351; *Guignon v. Campbell*, 80 Wash. 543, 141 Pac. 1031; *Marshall v. Taylor*, 168 Mo. App. 240, 153

S. W. 527, 6 N. C. C. A. 313; *Hays v. Hogan*, 180 Mo. App. 237, 165 S. W. 1125; *Davie v. Littlefield*, 97 S. C. 171, 81 S. E. 487; *Hiroux v. Baum*, 137 Wis. 197, 19 L.R.A.(N.S.) 332, 118 N. W. 533; *McNeal v. McKain*, 33 Okla. 449, 41 L.R.A.(N.S.) 775, 126 Pac. 742; *Stowe v. Morris*, 147 Ky. 386, 39 L.R.A.(N.S.) 224, 144 S. W. 52; *Winn v. Haliday*, 109 Miss. 691, 69 So. 685; *Allen v. Bland*, — Tex. Civ. App. —, 168 S. W. 35; *Smith v. Jordan*, 211 Mass. 269, 97 N. E. 761; *Erllich v. Heis*, 193 Ala. 669, 69 So. 530; *Missell v. Hayes*, 86 N. J. L. 348, 91 Atl. 322.

The questions whether the relation of master and servant existed between the defendant Frank L. Dodgson and his son, LaMont E. Dodgson, and whether the latter was acting within the scope of his authority, were questions of fact for the jury.

Rounds v. Delaware, L. & W. R. Co. 64 N. Y. 129, 21 Am. Rep. 597, 8 Am. Neg. Cas. 536; *Stone v. West Transp. Co.* 38 N. Y. 240; *Cohen v. Berlin & J. Envelope Co.* 166 N. Y. 292, 59 N. E. 906; *Mott v. Consumers' Ice Co.* 73 N. Y. 543; *Ferris v. Sterling*, 214 N. Y. 249, 108 N. E. 406, Ann. Cas. 1916D, 1161; *McCann v. Davison*, 145 App. Div. 522, 130 N. Y. Supp. 473; *Parker v. Wilson*, 179 Ala. 361, 43 L.R.A.(N.S.) 87, 60 So. 150; *Erllich v. Heis*, 193 Ala. 669, 69 So. 530; *Missell v. Hayes*, 86 N. J. L. 348, 91 Atl. 322.

Messrs. Bentley & MacFarlane, for respondent:

Defendant Frank L. Dodgson is not liable for the manner in which his adult son used his automobile when engaged in driving himself alone on his own private purposes of pleasure and recreation, even though the automobile was bought by defendant as head of the household, to be used by the members of his household in general, in such manner as they chose.

Heissenbittel v. Meagher, 162 App. Div. 752, 147 N. Y. Supp. 1087; *Tanzer v. Read*, 160 App. Div. 584, 145 N. Y. Supp. 708; *Maher v. Benedict*, 123 App. Div. 579, 108 N. Y. Supp. 228; *Towers v. Errington*, 78 Misc. 207, 138 N. Y. Supp. 119; *Roberts v. Schanz*, 83 Misc. 139, 144 N. Y. Supp. 824; *Stewart v. Baruch*, 103 App. Div. 577, 93 N. Y. Supp. 161; *Clark v. Buckmobile Co.* 107 App. Div. 120, 94 N. Y. Supp. 771.

Upon principle, the mere fact that a father buys and maintains an automobile for the use of his own household when and as the members of the household please does not,

Note. — As to liability where automobile is being used by a member of owner's family, see annotation following this case, post, 365.

L.R.A.1917F.

without more, render the father liable for the manner of its use by an adult son while the latter is engaged on his own private purposes of pleasure and recreation.

Doran v. Thomsen, 76 N. J. L. 754, 19 L.R.A.(N.S.) 335, 131 Am. St. Rep. 677, 71 Atl. 296; *Ferris v. Sterling*, 214 N. Y. 249, 108 N. E. 406, Ann. Cas. 1916D, 1161; *Reilly v. Connable*, 214 N. Y. 586, L.R.A. 1916A, 954, 108 N. E. 853, Ann. Cas. 1916A, 656.

Hiscock, Ch. J., delivered the opinion of the court:

The respondent had a family consisting of his wife, a married daughter and son-in-law, and an adult son, all of whom resided with him. He was also the owner of an automobile which he "had purchased for the pleasure of the members" of his family and himself, and which car his wife drove from time to time "for her pleasure," as his son "also did." Said son also drove the car in taking out the daughter and her husband, and "the car was used for the entertainment of the members of the family and defendant's (your) guests." Interpreted in the light of ordinary experience, this evidence means that respondent kept the car for family use, whether of pleasure or convenience, and that he permitted his son from time to time to use the same for his individual accommodation.

On a given occasion the son, unaccompanied by any other members of the family, and pursuing solely and exclusively his own pleasure, and not any object of family entertainment or convenience, took the car, and so negligently operated it as to kill plaintiff's intestate. There is no claim that he was ignorant of or generally unskilled in the management of an automobile, and the question is whether, under such circumstances, the respondent was so the principal of the son as to be responsible for his negligent conduct under the ordinary rules of agency. We may assume for the purposes of this discussion that if the son had been driving the car while containing other members of the family, for their convenience, he might be regarded as so carrying out the purposes of his father, and for which the car was maintained, as to be the agent of the latter and to make him liable for negligence. If the owner of a car directly or indirectly causes someone, whether his son or hired chauffeur, to drive the same for the benefit of members of his family, it is familiar law that such driver may become the agent of the owner, and several of the decisions cited by appellant, such as *Smith v. Jordon*, 211 Mass. 269, 97 N. E. 761; *Missell v. Hayes*, 86 N. J. L. 348, 91 Atl. 322, might be accepted on such a theory. L.R.A.1917F.

The proposition of liability urged in this case, however, goes further. It asserts that the father is liable for negligence in the management of his automobile by an adult son when the latter is pursuing his own exclusive ends, absolutely detached from accommodation of the family or any other member thereof. On its face a proposition seems to be self-contradictory which asserts that a person who is wholly and exclusively engaged in the prosecution of his own concerns is nevertheless engaged as agent in doing something for someone else. It has always been supposed that a person who was permitted to use a car for his own accommodation was not acting as agent for the accommodation of the owner of the car. *Reilly v. Connable*, 214 N. Y. 586, L.R.A. 1916A, 954, 108 N. E. 853, Ann. Cas. 1916A, 656. The attempt is made, however, to reconcile these apparently contradictory features of this proposition by the assertion that the father had made it his business to furnish entertainment for the members of his family, and that therefore, when he permitted one of them to use the car, even for the latter's personal and sole pleasure, such one was really carrying out the business of the parent, and the latter thus became a principal and liable for misconduct. This is an advanced proposition in the law of principal and agent, and the question which it presents really resolves itself into the one whether, as a matter of common sense and practical experience, we ought to say that a parent who maintains some article for family use, and occasionally permits a capable son to use it for his individual convenience, ought to be regarded as having undertaken the occupation of entertaining the latter, and to have made him his agent in this business, although the act being done is solely for the benefit of the son. That really is about all there is to the question. Not much can be profitably said by way of amplification or in debate of the query whether such a liability would rest upon reasonable principles, or whether it would present a case of such theoretical and attenuated agency, if any, as would be beyond the recognition of sound principles of law as they are ordinarily applied to that relationship. The question largely carries on its face the answer, whichever way to be made. Unquestionably, an affirmative answer has been given by the courts of some states. *Birch v. Abercrombie*, 74 Wash. 486, 50 L.R.A.(N.S.) 159, 133 Pac. 1020; *Marshall v. Taylor*, 168 Mo. App. 240, 153 S. W. 527, 6 N. C. C. A. 313; *Hays v. Hogan*, 180 Mo. App. 237, 165 S. W. 1125; *Davis v. Littlefield*, 97 S. C. 171, 81 S. E. 487; *Griffin v. Russell*, 144 Ga. 275, L.R.A.1916F, 216, 87 S. E. 10. But it seems to us that such a

theory is more illusory than substantial, and that it would be far-fetched to hold that a father should become liable as principal every time he permitted a capable child to use for his personal convenience some article primarily kept for family use. That certainly would introduce into the family relationship a new rule of conduct which, so far as we are aware, has never been applied to other articles than an automobile. We have never heard it argued that a man who kept for family use a horse or wagon or boat or set of golf sticks had so embarked upon the occupation and business of furnishing pleasure to the members of his family that if sometime he permitted one of them to use one of those articles for his personal enjoyment, the latter was engaged in carrying out, not his own purposes, but, as agent, the business of his father.

It seems to us that the present theory is largely due to the thought that because an automobile may be more dangerous when carelessly used than any of the other articles mentioned, there ought to be a larger liability upon the part of the owner, and to this end an extension of the doctrine of principal and agent in order properly to safeguard its use. Thus, in *Hays v. Hogan*, 180 Mo. App. 237, 165 S. W. 1125, it is said: "We think that when an automobile . . . is being used by another member of the family than the owner, but with the owner's consent, that he should not be heard to say that such other is not his agent or servant. No dangerous rule is thus established, but one in harmony with and conducive to the proper recognition of the legislative enactment."

And in *Birch v. Abercrombie*, 74 Wash. 486, 50 L.R.A.(N.S.) 59, 133 Pac. 1020, it is said: "We think that, both on reason and authority, the daughter in the present instance should be held the agent of her parents. . . . Any other view would set a premium upon the failure of the owner to employ a competent chauffeur to drive an automobile kept for the use of the members of his family. . . . The adoption of a doctrine so callously technical would be a little short of calamitous."

And in the present case it is in effect argued that because the use of an automobile upon a highway may be dangerous, and

therefore is a privilege subject to license by the state, the courts can apply a different rule of agency to its use than would or could be applied to the case of the other articles which have been mentioned. This kind of argument, as it appears to us, discloses the novelty and weakness of the proposition which is being urged upon us. It seems to disclose the idea, as an essential part of the argument, that because an automobile is different than a horse or boat, some advanced rules ought to be applied to its use. But the rules of principal and agent are not thus to be formulated. They are believed to be constant, and not variable in response to the supposed exigencies of some particular situation. The question whether one person is the agent of another in respect to some transaction is to be determined by the fact that he represents and is acting for him, rather than by the consideration that it will be inconvenient or unjust if he is not held to be his agent. If, contrary to ordinary rules, the owner of a car ought to be responsible for the carelessness of everyone whom he permits to use it in the latter's own business, that liability ought to be sought by legislation as a condition of issuing a license rather than by some new and anomalous slant applied by the courts to the principles of agency.

These views, which seem to us to be supported by principle and reason, also find authority directly and indirectly in the following decisions: *Heissenbittel v. Meagher*, 162 App. Div. 762, 147 N. Y. Supp. 1087; *Farthing v. Strouse*, 172 App. Div. 523, 158 N. Y. Supp. 840; *Tanzer v. Read*, 160 App. Div. 584, 145 N. Y. Supp. 708; *Maher v. Benedict*, 123 App. Div. 579, 108 N. Y. Supp. 228; *Doran v. Thomsen*, 76 N. J. L. 754, 19 L.R.A.(N.S.) 335, 131 Am. St. Rep. 677, 71 Atl. 296; *Cohen v. Meador*, 119 Va. 429, 89 S. E. 876; *Parker v. Wilson*, 179 Ala. 361, 43 L.R.A.(N.S.) 87, 60 So. 150; *McFarlane v. Winters*, 47 Utah, 598, L.R.A.1916D, 618, 155 Pac. 437; *Johnston v. Cornelius*, — Mich. —, 159 N. W. 318; *Smith v. Jordan*, 211 Mass. 269, 97 N. E. 761; *Campbell v. Arnold*, 219 Mass. 160, 106 N. E. 599.

We think the judgment appealed from should be affirmed, with costs.

Chase, Collin, Cuddeback, Hogan, Cardozo, and Pound, JJ., concur.

Annotation—Liability where automobile is being used by a member of owner's family.

This annotation supplements that to *McNeal v. McKain*, 41 L.R.A.(N.S.) 775; *Birch v. Abercrombie*, 50 L.R.A.(N.S.) 59; and *Griffin v. Russell*, L.R.A.1917F.

1916F, 223. These notes are confined to cases in which the parent's liability is discussed or decided with reference to the principle of agency or respondent

superior. As to liability of owner upon the ground of dangerous agency or of negligence in intrusting car to incompetent or negligent persons, for injury inflicted while latter is operating car for his own purposes, see annotation to *Neubrand v. Kraft*, L.R.A.1915D, 691; *Walker v. Klopp*, L.R.A.1916E, 1295; and *Gardiner v. Solomon*, post, 384.

As to liability of owner for injuries by automobile while being used by a servant or third person for his own business or pleasure, see annotation to *Reilly v. Connable*, L.R.A.1916A, 957.

Where parent's automobile is being driven by child—generally.

(Supplementing notes in 41 L.R.A. (N.S.) p. 775; 50 L.R.A. (N.S.) p. 59; and L.R.A.1916F, p. 223.)

A father is not liable for an injury inflicted by an automobile not purchased or maintained primarily for the pleasure of the family, which was taken by his adult daughter without his consent, for a pleasure trip of her own. *Woods v. Clements* (1917) 113 Miss. 720, L.R.A. 1917E, 357, 74 So. 422, affirmed on rehearing in (1917) — Miss. —, L.R.A. 1917E, 358, 75 So. 119.

And where the son of the owner of an automobile, a grown man, engaged in business for himself, was, at the time the injury was inflicted by the machine, using it for his own personal pleasure and benefit and in no respect in the interest of or on behalf of the owner, and there was no express authority for the use of the car on the particular occasion, but, at most, a mere implied consent, growing out of the relationship of the parties and a previous use by the son, the owner is not liable for an injury inflicted while the son was using the car. *Gardiner v. Solomon* (1917) — Ala. —, post, 380, 75 So. 621.

Relationship alone does not make a father answerable for injuries inflicted by his automobile while being used by his son, even though the latter is a minor. *Cohen v. Meador* (1916) 119 Va. 429, 89 S. E. 876. The son in this case, who was an adult, was held not to have been representing his father at the time an injury was inflicted by the latter's car, it appearing that, after returning from a drive, the son left his mother and father at the latter's store, and, with two of his brothers, started to put the car up, when he met two friends, whom he invited to go for a ride, during the course of which the injury occurred.

Although at the time an injury is inflicted by an automobile it is being driven by the owner's son without the L.R.A.1917F.

owner's knowledge, and contrary to his express order, yet the owner is liable where the trip was being made for a purpose within the general scope of the authority of the son as chauffeur for his father, for the purpose of finding the latter and bringing him home, as was customary. *House v. Fry* (1916) 30 Cal. App. 157, 157 Pac. 500.

The evidence in *Raub v. Donn* (1916) 254 Pa. 203, 98 Atl. 861, which was an action against a father to recover for an injury resulting from the negligent operation of his automobile while in charge of his adult son, was held sufficient to warrant the submission to the jury of the question whether the son was acting for the father at the time of the accident, and also sufficient to sustain an affirmative finding, there being testimony that the son was in his father's employ; that, on the day of the accident, the father had gone away and instructed a mechanic to repair the automobile; that, after the mechanic had worked upon it at the garage, he and the son took it out on the road to test it; and that, after the mechanic was satisfied with its operation, he turned it over to the son to drive back to the garage, the accident having occurred on the way back.

The owner of an automobile cannot escape responsibility for an injury inflicted by the car while he was riding therein, and while it was being driven by his seventeen-year-old son, on the ground that he was wholly passive and took no part in the driving or management of the car; if it was driven without proper lights, or was operated at a reckless speed, he was tacitly, at least, consenting thereto, and the driver's negligence was his negligence. *Daggy v. Miller* (1917) — Iowa, —, 162 N. W. 854.

—where a car is purchased or kept for use of family.

(Supplementing notes in 50 L.R.A. (N.S.) p. 60, and L.R.A.1916F, p. 225.)

It will be noted that the court in *VAN BLARICOM v. DODGSON*, ante, 363, decided that a father who kept a car for family use and permitted his adult son from time to time to use it for his individual accommodation was not liable for an injury resulting from its negligent operation by the son on an occasion when he was unaccompanied by any other members of the family, and was pursuing solely and exclusively his own pleasure, there being no claim that he

was ignorant of or generally unskilled in the management of an automobile.

In *Lemke v. Ady* (1916) — Iowa, —, 159 N. W. 1011, it was held that one who keeps an automobile for use as a pleasure vehicle for his family, and permits his son to drive it, is liable for an injury inflicted through the negligent operation of the car by the son while he is taking his mother for a drive, since the son, under such circumstances, is the agent of the father, and the car is in the father's service, the furnishing of comforts and enjoyments within his means to his wife and family being part of a father's business or service. The court in this case stated that a father is not responsible for torts of his minor child simply because of his relationship, but that it must appear that the minor was engaged in some acts for the benefit of the father or for some of the members of the family, with his knowledge and consent, in order to render him liable.

In *Jensen v. Fischer* (1916) 134 Minn. 366, 159 N. W. 827, the court stated that although the head of a family may buy an automobile for the general use of the members of his family, he nevertheless retains the right to deny its use to any member whenever he sees fit, and that when he does so he cannot be held liable if such member surreptitiously takes the car and negligently operates it to the injury of another. In this case, although the evidence of the father and son, who was twenty years old, that the father, on the day of the accident, had forbidden the son to take the car, was uncontradicted, it was held that the evidence was sufficient to take the question whether the son, at the time of the accident, was in the service of his father, to the jury, it being held that certain features of the testimony might tend to disprove the testimony of the father and son, among which were mentioned the son's act in going to the garage in broad daylight, taking the car, and loading it with children, and passing in front of the house just after the father had forbidden him to use the car, and also the unlikelihood that the son in question and another son, both of whom took care of the car, were obliged, each time they had occasion to go to the garage, to ask their father or mother for the key, as testified by the defendant and his son.

In *Johnston v. Cornelius* (1916) — Mich. —, 159 N. W. 318, which was an action against the owner of an automobile to recover for an injury sustained while it was being driven by his

son without the father's consent, the ownership of the car was held to furnish no presumption of liability by the father. It appeared in this case that the son had no right or authority to take the car on the night of the accident; that, although he frequently drove the car, it was always with the consent of his parents, except upon one occasion, about a year previous, when he had taken the car without permission and had been punished for so doing, and it was held that the father was not liable for the injury in question on the ground that he had been negligent in his conduct, or on the ground that he owned the car, which was kept for family use. *Ibid.*

Where automobile is being driven by chauffeur under orders of member of family.

Supplementing notes in 41 L.R.A. (N.S.) p. 778; 50 L.R.A. (N.S.) p. 63; and L.R.A. 1916F, p. 228.

In *Freeman v. Green* (1916) — Mo. App. —, 186 S. W. 1166, the owner of an automobile was held liable for an injury which occurred while being driven by a chauffeur for the convenience of the owner's son-in-law, who was a member of the owner's household and had been accorded the privilege of using the automobile for his own business or pleasure when it was not being used by the owner, and who, at the time of the injury, was using the machine under this general consent. J. T. W.

UNITED STATES SUPREME COURT.

CHESAPEAKE & OHIO RAILWAY COMPANY, Plff. in Err.,
v.

ADDIE KELLY, Admr., etc., of Matt Kelly, Deceased.

(241 U. S. 485, 60 L. ed. 1117, 36 Sup. Ct. Rep. 630.)

Jury — infringement of right — non-unanimous verdict — action under Federal statute.

1. The requirement of U. S. Const., 7th Amend., that trials by jury be according to the course of the common law, i. e., by a unanimous verdict, does not control the state courts, even when enforcing rights under a Federal statute like the Employers' Liability Act of April 22, 1908, and such courts may, therefore, give effect, in actions

Note. — As to reduction to present value of pecuniary loss to the statutory beneficiaries from death, see annotation following this case, post, 373.

under that statute, to a local practice permitting a less than unanimous verdict.

For other cases, see Jury, I. d. 1, in Dig. 1-52 N. S.

Damages — for death — future benefits — present cash value.

2. The present cash value of the future benefits of which the beneficiaries were deprived by the death, making adequate allowance, according to the circumstances, for the earning power of money, is the proper measure of recovery in an action against an interstate railway carrier under the Employers' Liability Act of April 22, 1908, as amended by the Act of April 5, 1910, for the benefit of the widow and dependent children of an employee killed while engaged in interstate commerce.

For other cases, see Damages, III. i, 3, in Dig. 1-52 N. S.

(June 5, 1916.)

ERROR to the Court of Appeals of the State of Kentucky to review a judgment affirming a judgment of the Circuit Court for Montgomery County in favor of plaintiff in an action brought under the Federal Employers' Liability Act, to recover damages for the death of plaintiff's intestate while in defendant's employ. Reversed.

The facts are stated in the opinion.

Messrs. John T. Shelby, Robert L. Northcutt, John Craig Shelby, H. T. Wickham, Henry Taylor, Jr., and Lewis Apperson, for plaintiff in error:

The jury should have been told to award that sum which represented the present cash value of reasonable expectation of pecuniary advantage to the dependent widow and infant children.

Hackney v. Delaware & A. Teleg. & Teleph. Co. 69 N. J. L. 335, 55 Atl. 252; McCabe v. Narragansett Electric Lighting Co. 26 R. I. 427, 59 Atl. 112; Louisville & N. R. Co. v. Trammell, 93 Ala. 354, 9 So. 870; Benton v. North Carolina R. Co. 122 N. C. 1007, 30 S. E. 333; Watson v. Seaboard Air Line R. Co. 133 N. C. 188, 45 S. E. 555; Rudiger v. Chicago, St. P. M. & O. R. Co. 101 Wis. 292, 77 N. W. 169; Southern R. Co. v. Hill, 139 Ga. 549, 77 S. E. 803.

It was error for the jury to consider the high wages in the hazardous employment without also considering that the expectancy of life in that employment was less than normal.

Stewart v. Louisville & N. R. Co. 136 Ky. 724, 125 S. W. 154.

Messrs. John T. Shelby, E. L. Worthington, W. D. Cochran, Le Wright Browning, David H. Leake, Walter Leake, W. F. Evans, William H. Bremner, Frederick M. Miner, and Benjamin D. Warfield also for plaintiff in error:

The words "right of trial by jury," as L.R.A.1917F.

found in the 7th Amendment to the Constitution of the United States, which is to be preserved in all suits at law when the amount in controversy exceeds \$20, imply a common-law jury of twelve men, whose verdict must be unanimous.

Capital Traction Co. v. Hof, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580; American Pub. Co. v. Fisher, 166 U. S. 464, 41 L. ed. 1079, 17 Sup. Ct. Rep. 618; Springville v. Thomas, 166 U. S. 707, 41 L. ed. 1172, 17 Sup. Ct. Rep. 717.

And the phrase "suits at common law" means not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights are to be ascertained and determined in contradistinction to rights in equity and admiralty.

Parsons v. Bedford, 3 Pet. 433, 7 L. ed. 732.

The right of trial by jury is not a mere matter of procedure, but a substantive right.

Walker v. New Mexico & S. P. R. Co. 165 U. S. 593, 41 L. ed. 837, 17 Sup. Ct. Rep. 421, 1 Am. Neg. Rep. 768; American Pub. Co. v. Fisher, and Springville v. Thomas, supra; Slocum v. New York L. Ins. Co. 228 U. S. 364, 57 L. ed. 879, 33 Sup. Ct. Rep. 523, Ann. Cas. 1914D, 1029; Atlantic Coast Line R. Co. v. Burnette, 239 U. S. 199, 60 L. ed. 226, 36 Sup. Ct. Rep. 75; Norfolk Southern R. Co. v. Ferebee, 238 U. S. 269, 59 L. ed. 1303, 35 Sup. Ct. Rep. 781.

The right of trial by jury, as provided by the 7th Amendment, is a fundamental right which inheres in every cause of action of common-law nature created by the Federal government, and applies wherever the law is sought to be enforced within the limits of the Federal Union; and Congress and the states (in such cases) are powerless to take it away.

Walker v. New Mexico & S. P. R. Co. 165 U. S. 593, 595, 41 L. ed. 837, 840, 17 Sup. Ct. Rep. 421, 1 Am. Neg. Rep. 768; American Pub. Co. v. Fisher, 166 U. S. 464, 41 L. ed. 1079, 17 Sup. Ct. Rep. 618; Springville v. Thomas, 166 U. S. 707, 41 L. ed. 1172, 17 Sup. Ct. Rep. 717; Bauman v. Ross, 167 U. S. 548-592, 42 L. ed. 270-289, 17 Sup. Ct. Rep. 966; Thompson v. Utah, 170 U. S. 343-350, 42 L. ed. 1061-1066, 18 Sup. Ct. Rep. 620; Guthrie Nat. Bank v. Guthrie, 173 U. S. 528-537, 43 L. ed. 796-800, 19 Sup. Ct. Rep. 513; Capital Traction Co. v. Hof, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580; Maxwell v. Dow, 176 U. S. 581, 596, 44 L. ed. 597, 603, 20 Sup. Ct. Rep. 448, 494; Black v. Jackson, 177 U. S. 349, 44 L. ed. 801, 20 Sup. Ct. Rep. 648; Downes v. Bidwell, 182 U. S. 244, 270, 45 L. ed. 1068, 1100, 21 Sup. Ct. Rep. 770; Raasmussen v. United States, 197 U. S. 516-

526, 49 L. ed. 862-865, 25 Sup. Ct. Rep. 514; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 55-59, 56 L. ed. 327, 348-350, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Slocum v. New York L. Ins. Co. 228 U. S. 364, 377, 57 L. ed. 879, 885, 33 Sup. Ct. Rep. 523, Ann. Cas. 1914D, 1029; Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265; Atlantic Coast Line R. Co. v. Burnette, 239 U. S. 199, 60 L. ed. 226, 36 Sup. Ct. Rep. 75; Whallon v. Bancroft, 4 Minn. 109, Gil. 70; Norval v. Rice, 2 Wis. 22; Gaston v. Babcock, 6 Wis. 503; Ross v. Irving, 14 Ill. 171; Baltimore & O. & C. R. Co. v. Ketrang, 122 Ind. 5, 23 N. E. 527; Swarz v. Ramala, 63 Kan. 633, 66 Pac. 649; State v. Doty, 32 N. J. L. 403, 90 Am. Dec. 671; Byers v. Com. 42 Pa. 89.

Congress has not granted jurisdiction of cases under the Federal Employers' Liability Act to state courts which do not answer the requirements of the 7th Amendment.

Clafin v. Houseman, 93 U. S. 130, 23 L. ed. 833; 3 Story, Const. § 1748; The Moses Taylor, 4 Wall. 411, 18 L. ed. 397; American Pub. Co. v. Fisher, 166 U. S. 464, 41 L. ed. 1079, 17 Sup. Ct. Rep. 618; Walker v. New Mexico & S. P. R. Co. 165 U. S. 595, 41 L. ed. 840, 17 Sup. Ct. Rep. 421, 1 Am. Neg. Rep. 768; State v. Sinnott, 89 Me. 41, 35 Atl. 1007; Rogers v. Bonnett, 2 Okla. 553, 37 Pac. 1078; Clark v. Com. 29 Pa. 129; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 12, 56 L. ed. 327, 332, 32 Sup. Ct. Rep. 169, 38 L.R.A.(N.S.) 44, 1 N. C. C. A. 875; United States v. Curtis, 107 U. S. 671, 27 L. ed. 534, 2 Sup. Ct. Rep. 601; United States v. Hall, 131 U. S. 50, 33 L. ed. 97, 9 Sup. Ct. Rep. 663; Cohen v. Virginia, 6 Wheat. 414, 5 L. ed. 293; Kansas City Southern R. Co. v. Leslie, 238 U. S. 599, 59 L. ed. 1478, 35 Sup. Ct. Rep. 844; Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265.

Messrs. Edward C. O'Rear, B. G. Williams, and F. W. Clements, for defendant in error:

The jury was correctly instructed as to the method of ascertaining the damages.

Chesapeake & O. R. Co. v. Dixon, 104 Ky. 613, 47 S. W. 615; Louisville & N. R. Co. v. Morris, 14 Ky. L. Rep. 466, 20 S. W. 539; Chesapeake & O. R. Co. v. Lang, 100 Ky. 221, 38 S. W. 503, 40 S. W. 451, 41 S. W. 271; Louisville & N. R. Co. v. Simrall, 127 Ky. 55, 104 S. W. 1011.

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Messrs. C. B. Stuart, A. C. Cruce, M. K. Cruce, R. S. Dinkle, George B. Martin, George B. Leonard, B. F. Procter, George H. Lamar, C. U. McElroy, D. W. Wright, C. W. Allen, and H. W. Walsh, also for defendants in error:

That the provisions of the 7th Amendment are applicable to the judiciary of the territories and the District of Columbia does not show that those provisions must be followed in state courts, in trying cases involving Federal laws. The United States has created those courts by virtue of its authority as sovereign of the territories and of the District; but the United States has not created state courts. The reason the 7th Amendment applies to the territories and the District is that the United States is sovereign, and the 7th Amendment is binding upon the United States in creating its judiciary. The reason does not lie in the fact that the courts of the territories are enforcing Federal law.

Capital Traction Co. v. Hof, 174 U. S. 1, 5, 43 L. ed. 873, 874, 19 Sup. Ct. Rep. 530; Thompson v. Utah, 170 U. S. 343, 348, 42 L. ed. 1061, 1066, 18 Sup. Ct. Rep. 620; American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 511, 546, 7 L. ed. 242, 256.

The 7th Amendment applies to the Federal judiciary, not to Federal rights.

Barron v. Baltimore, 7 Pet. 243, 246, 249, 8 L. ed. 672, 674, 675; Walker v. Sauvinet, 92 U. S. 90, 92, 23 L. ed. 678, 679; Brown v. New Jersey, 175 U. S. 172, 174, 44 L. ed. 119, 120, 20 Sup. Ct. Rep. 77; Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494; Pearson v. Yewdall, 95 U. S. 294, 24 L. ed. 496; Ohio ex rel. Lloyd v. Dollison, 194 U. S. 447, 48 L. ed. 1065, 24 Sup. Ct. Rep. 703; Bollin v. Nebraska, 176 U. S. 87, 44 L. ed. 383, 20 Sup. Ct. Rep. 287, affirming 51 Neb. 581, 71 N. W. 444; Brown v. Walker, 161 U. S. 606, 40 L. ed. 824, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644; Monongahela Nav. Co. v. United States, 148 U. S. 324, 37 L. ed. 467, 13 Sup. Ct. Rep. 622; McElvaine v. Brush, 142 U. S. 158, 35 L. ed. 973, 12 Sup. Ct. Rep. 156; Eilenbecker v. District Ct. 134 U. S. 34, 33 L. ed. 803, 10 Sup. Ct. Rep. 424; Spies v. Illinois, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21; Edwards v. Elliott, 21 Wall. 552, 22 L. ed. 490; Supreme Justices v. Murray, 9 Wall. 277, 19 L. ed. 660; Fox v. Ohio, 5 How. 410, 12 L. ed. 213; Livingston v. Moore, 7 Pet. 551, 8 L. ed. 781.

State courts, whether providing a common-law jury or not, may take jurisdiction of cases involving Federal rights, and determine the case in accordance with their usual and customary methods of trial.

Winters v. Minneapolis & St. L. R. Co.

126 Minn. 260, 148 N. W. 106; *Chesapeake & O. R. Co. v. Kelly*, 161 Ky. 655, 171 S. W. 185; *Louisville & N. R. Co. v. Winkler*, 162 Ky. 843, 173 S. W. 151, 9 N. C. C. A. 146; *Bombolis v. Minneapolis & St. L. R. Co.* 128 Minn. 112, 150 N. W. 385; *St. Louis & S. F. R. Co. v. Brown*, 45 Okla. 143, 144 Pac. 1075; *Chesapeake & O. R. Co. v. Carnahan*, 118 Va. 46, 86 S. E. 865; *Gibson v. Bellingham & N. R. Co.* 213 Fed. 488; 15 Columbia L. Rev. 616; 3 Va. L. Rev. 312; 1 Va. L. Reg. 721.

Mr. Justice Pitney delivered the opinion of the court:

In this action, which was founded upon the Employers' Liability Act of Congress of April 22, 1908 (chap. 149, 35 Stat. at L. 65), as amended by Act of April 5, 1910 (chap. 143, 36 Stat. at L. 291, Comp. Stat. 1913, § 8662), defendant in error, as administratrix of Matt Kelly, deceased, recovered a judgment in the Montgomery circuit court for damages because of the death of the intestate while employed by plaintiff in error in interstate commerce. The verdict was for \$19,011, which was apportioned among the widow and infant children of the deceased, excluding a son who had attained his majority. The court of appeals of Kentucky affirmed the judgment, and denied a rehearing. 160 Ky. 296, 169 S. W. 736; 161 Ky. 655, 171 S. W. 185.

Upon the present writ of error the first contention is that the limitation of the 7th Amendment to the Federal Constitution preserving the common-law right of trial by jury inheres in every right of action created under the authority of that Constitution, and that because, as is said, the courts of Kentucky are unable to secure that right to litigants by reason of a law of the state, passed pursuant to a provision of its Constitution, by the terms of which in all trials of civil actions in the circuit courts three fourths or more of the jurors concurring may return a verdict, those courts are without jurisdiction of actions arising under the Federal Employers' Liability Act. This contention has been set at rest by our recent decision in *Minneapolis & St. L. R. Co. v. Bombolis*, 241 U. S. 211, 60 L. ed. 961, 36 Sup. Ct. Rep. 595.

The only other matter requiring consideration is the instruction of the trial court, affirmed by the court of appeals, respecting the method of ascertaining the damages. We may say in passing that while the act of Congress does not require that in such cases damages be apportioned among the beneficiaries (*Central Vermont R. Co. v. White*, 238 U. S. 507, 515, 59 L. ed. 1433, 1438, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265), it is not in the present case insisted L.R.A.1917F.

that the act prohibits such an apportionment, and if there be any question about this it is not now before us.

Respecting the matter with which we have to deal, the trial court, after stating that if the jury should find for the plaintiff they should fix the damages at such sum as would reasonably compensate the dependent members of Kelly's family for the pecuniary loss, if any, shown by the evidence to have been sustained by them because of Kelly's injury and death; and that, in fixing the amount, they were authorized to take into consideration the evidence showing the decedent's age, habits, business ability, earning capacity, and probable duration of life, and also the pecuniary loss, if any, which the jury might find from the evidence that the dependent members of his family had sustained because of being deprived of such maintenance or support or other pecuniary advantage, if any, which the jury might believe from the evidence they would have derived from his life thereafter,—proceeded as follows: "If the jury find for the plaintiff they will find a gross sum for the plaintiff against the defendant which must not exceed the probable earnings of Matt Kelly had he lived. The gross sum to be found for plaintiff, if the jury find for the plaintiff, must be the aggregate of the sums which the jury may find from the evidence and fix as the pecuniary loss above described, which each dependent member of Matt Kelly's family may have sustained by his death;" following this with an instruction respecting the apportionment, with which, as we have said, we are not now concerned. Defendant requested an instruction that the jury should "fix the damages at that sum which represents the present cash value of the reasonable expectation of pecuniary advantage . . . to said Addie Kelly during her widowhood and while dependent, and pecuniary advantage to said infant children while dependent and until they become twenty-one years of age." This was refused.

Laying aside questions of form, the court of appeals treated the instruction given and the refusal of the requested instruction as raising the question "that what the beneficiary is entitled to is not a lump sum equal to what he would receive during the estimated term of dependency, but the present cash value of such aggregate amount." Defendant's contention was overruled upon the ground that the whole loss of the beneficiaries is sustained at the time of the death of the party in question, the court saying: "While that loss is, in a measure, future support, the father's death precipitated it, so that it is all due, and we are not impressed with the argument that the

sum due should be reduced by rebate or discount. The value of a father's support is not so difficult to estimate, and the average jurymen is competent to compute it, but to figure interest on deferred payments, with annual rests, and reach a present cash value of such loss to each dependent is more than ought to be asked of anyone less qualified than an actuary." [160 Ky. 303.]

We are constrained to say that, in our opinion, the court of appeals erred in its conclusion upon this point. The damages should be equivalent to compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased. *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 70, 71, 57 L. ed. 417, 421, 422, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; *American R. Co. v. Didricksen*, 227 U. S. 145, 149, 57 L. ed. 456, 457, 33 Sup. Ct. Rep. 224; *Gulf, C. & S. F. R. Co. v. McGinnis*, 228 U. S. 173, 175, 57 L. ed. 785, 786, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806. So far as a verdict is based upon the deprivation of future benefits, it will afford more than compensation if it be made up by aggregating the benefits without taking account of the earning power of the money that is presently to be awarded. It is self-evident that a given sum of money in hand is worth more than the like sum of money payable in the future. Ordinarily a person seeking to recover damages for the wrongful act of another must do that which a reasonable man would do under the circumstances to limit the amount of the damages. *Wicker v. Hoppock*, 6 Wall. 94, 99, 18 L. ed. 752, 753; *The Baltimore*, 8 Wall. 377, 387, 19 L. ed. 463, 465; *United States v. Smith*, 94 U. S. 214, 218, 24 L. ed. 115; *Warren v. Stoddart*, 105 U. S. 224, 229, 26 L. ed. 1117, 1120; *United States v. United States Fidelity & G. Co.* 236 U. S. 512, 526, 59 L. ed. 696, 703, 35 Sup. Ct. Rep. 298, and the putting out of money at interest is at this day so common a matter that ordinarily it cannot be excluded from consideration in determining the present equivalent of future payments, since a reasonable man, even from selfish motives, would probably gain some money by way of interest upon the money recovered. Savings banks and other established financial institutions are in many cases accessible for the deposit of moderate sums at interest, without substantial danger of loss; the sale of annuities is not unknown; and, for larger sums, state and municipal bonds and other securities of almost equal standing are commonly available.

Local conditions are not to be disregarded, and besides, there may be cases where the anticipated pecuniary advantage of

which the beneficiary has been deprived covers an expectancy so short and is in the aggregate so small that a reasonable man could not be expected to make an investment or purchase an annuity with the proceeds of the judgment. But, as a rule, and in all cases where it is reasonable to suppose that interest may safely be earned upon the amount that is awarded, the ascertained future benefits ought to be discounted in the making up of the award.

We do not mean to say that the discount should be at what is commonly called the "legal rate" of interest; that is, the rate limited by law, beyond which interest is prohibited. It may be that such rates are not obtainable upon investments on safe securities, at least, without the exercise of financial experience and skill in the administration of the fund; and it is evident that the compensation should be awarded upon a basis that does not call upon the beneficiaries to exercise such skill, for where this is necessarily employed, the interest return is in part earned by the investor rather than by the investment. This, however, is a matter that ordinarily may be adjusted by scaling the rate of interest to be adopted in computing the present value of the future benefits; it being a matter of common knowledge that, as a rule, the best and safest investments, and those which require the least care, yield only a moderate return.

We are not in this case called upon to lay down a precise rule or formula, and it is not our purpose to do this, but merely to indicate some of the considerations that support the view we have expressed that, in computing the damages recoverable for the deprivation of future benefits, the principle of limiting the recovery to compensation requires that adequate allowance be made, according to circumstances, for the earning power of money; in short, that when future payments or other pecuniary benefits are to be anticipated, the verdict should be made up on the basis of their present value only.

We are aware that it may be a difficult mathematical computation for the ordinary jurymen to calculate interest on deferred payments, with annual rests, and reach a present cash value. Whether the difficulty should be met by admitting the testimony of expert witnesses, or by receiving in evidence the standard interest and annuity tables in which present values are worked out at various rates of interest and for various periods covering the ordinary expectancies of life, it is not for us in this case to say. Like other questions of procedure and evidence, it is to be determined according to the law of the forum.

But the question of the proper measure of damages is inseparably connected with the

right of action, and in cases arising under the Federal Employers' Liability Act it must be settled according to general principles of law as administered in the Federal courts.

We are not reminded that in any previous case in this court the precise question now presented has been necessarily involved. But in two cases the applicability of present values has been recognized.

Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 30 L. ed. 257, 7 Sup. Ct. Rep. 1, 10 Am. Neg. Cas. 574, was a review of a judgment recovered in a circuit court of the United States in an action for personal injuries where the damages claimed included compensation for the impairment of plaintiff's earning capacity. Assuming, for purposes of illustration, that plaintiff's expectancy of life was thirty years, the trial judge instructed the jury (p. 551) that it would not be proper to allow him in gross the sum of the annual losses during his expectancy, "for the annuity will be payable one part this year and another part next year, and each of the thirty parts payable each of the thirty years. You must have a sum such that, when he dies, it will all be used up at the end of thirty years." Having called attention to certain tables that were in evidence, he proceeded to say: "Add that to the present worth of annuity if you find he was damaged." The judgment was reversed, not because of the recognition of the rule of present values, but because of the conclusive force that was given by the trial judge to the life and annuity tables. In the course of the opinion the court, by Mr. Justice Gray, said (p. 554) that the compensation should include "a fair recompense for the loss of what he would otherwise have earned in his trade or profession, and has been deprived of the capacity of earning by the wrongful act of the defendant. . . . In order to assist the jury in making such an estimate, standard life and annuity tables, showing at any age the probable duration of life, and the present value of a life annuity, are competent evidence. . . . But it has never been held that the rules to be derived from such tables or computations must be the absolute guides of the judgment and the conscience of the jury."

In *Pierce v. Tennessee Coal, Iron & R. Co.* 173 U. S. 1, 43 L. ed. 591, 19 Sup. Ct. Rep. 236, 5 Am. Neg. Rep. 747, which was an action founded upon defendant's breach and abandonment of a contract of employment construed by this court to be limited only by plaintiff's life, the trial court ruled (p. 6) that no recovery could be allowed beyond the instalments of wages due up to the date of the trial, refusing to charge,

as requested by plaintiff, that he was "entitled to the full benefit of his contract, which is the present value of the money agreed to be paid and the articles to be furnished under the contract for the period of his life, if his disability is permanent," etc. This court held (p. 10) that the circuit court had erred in restricting the damages as mentioned, and in declining to instruct the jury in accordance with plaintiff's request; citing *Vicksburg & M. R. Co. v. Putnam*, *ubi supra*, and quoting the reference to the "present value of a life annuity;" and also citing (p. 13) *Schell v. Plumb*, 55 N. Y. 592, and making the following quotation from the opinion of the court of appeals of New York in that case: "Here the contract of the testator was to support the plaintiff during her life. That was a continuing contract during that period; but the contract was entire, and a total breach put an end to it, and gave the plaintiff a right to recover an equivalent in damages, which equivalent was the present value of her contract."

That where future payments are to be anticipated and capitalized in a verdict the plaintiff is entitled to no more than their present worth is commonly recognized in the state courts. We cite some of the cases, but without intending to approve any of the particular formulæ that have been followed in applying the principle; since in this respect the decisions are not harmonious, and some of them may be subject to question. *Louisville & N. R. Co. v. Trammell*, 93 Ala. 350, 355, 9 So. 870; *McAdory v. Louisville & N. R. Co.* 94 Ala. 272, 276, 10 So. 507; *Central R. Co. v. Rouse*, 77 Ga. 393, 408, 3 S. E. 307; *Atlanta & W. P. R. Co. v. Newton*, 85 Ga. 517, 528, 11 S. E. 776; *Kinney v. Folkerts*, 78 Mich. 687, 701, 44 N. W. 152, 84 Mich. 616, 624, 48 N. W. 283; *Hackney v. Delaware & A. Teleg. & Teleph. Co.* 69 N. J. L. 335, 337, 55 Atl. 252; *Gregory v. New York, L. E. & W. R. Co.* 55 Hun. 303, 308, 8 N. Y. Supp. 525; *Benton v. North Carolina R. Co.* 122 N. C. 1007, 1009, 30 S. E. 333; *Poe v. Raleigh & A. Air Line R. Co.* 141 N. C. 525, 528, 54 S. E. 406; *Johnson v. Seaboard Air Line R. Co.* 163 N. C. 431, 452, 79 S. E. 690, Ann. Cas. 1915B, 598, 4 N. C. C. A. 627; *Goodhart v. Pennsylvania R. Co.* 177 Pa. 1, 17, 55 Am. St. Rep. 705, 35 Atl. 191; *Irwin v. Pennsylvania R. Co.* 226 Pa. 156, 75 Atl. 19; *Reitler v. Pennsylvania R. Co.* 238 Pa. 1, 7, 85 Atl. 1009; *McCabe v. Narragansett Electric Lighting Co.* 26 R. I. 427, 435, 59 Atl. 112; *Houston & T. C. R. Co. v. Willie*, 53 Tex. 318, 328, 37 Am. Rep. 756; *Rudiger v. Chicago, St. P. M. & O. R. Co.* 101 Wis. 292, 303, 77 N. W. 169; *Secord*

v. John Schroeder Lumber Co. 160 Wis. 1, 7, 150 N. W. 971. See also St. Louis, I. M. & S. R. Co. v. Needham (C. C. A. 8th) 3 C. C. A. 129, 10 U. S. App. 339, 52 Fed. 371, 377; Baltimore & O. R. Co. v. Henthorne

(C. C. A. 6th) 19 C. C. A. 623, 43 U. S. App. 113, 73 Fed. 634, 641.

Judgment reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Annotation—Reduction to present value of pecuniary loss to the statutory beneficiaries from death.

As the title indicates, this note is confined to the question whether the gross loss suffered by the beneficiaries covering the period of expected benefits which the jury determine is to be reduced to its present cash value in making the award of damages in an action for wrongful death.

As to the admissibility and use of mortality or annuity tables in death actions, see note to Ruehl v. Lidgerwood Rural Teleph. Co. L.R.A. —, —.

Many other questions in relation to the measure, elements, and amount of damages in actions for death are treated in notes cited in the L.R.A. Indexes under the title, "Damages," subtitle, "Death." Many other questions in relation to actions for death are discussed in notes cited in the L.R.A. Indexes under the title, "Death."

It is not the purpose of this note to cover the question of the damages recoverable for negligently killing a person, but the discussion is limited to the question as to whether or not the award of damages should be based upon the gross loss or the present value thereof.

Damages recoverable for negligently killing a person include not only compensation for present loss, but also for any prospective loss. As to the amount to be awarded for prospective loss, the question arises as to whether this amount should be in gross, or whether this gross amount should be reduced to its present value. By the great weight of authority, where the damages to be awarded for negligently causing the death of a person are compensation to designated relatives for their pecuniary loss, both immediate and prospective, so far as the loss is prospective the gross amount thereof should be determined, and this amount should be reduced to its present worth. CHESAPEAKE & O. R. Co. v. KELLY, ante, 367; St. Louis, I. M. & S. R. Co. v. Needham (1892) 3 C. C. A. 129, 10 U. S. App. 339, 52 Fed. 371; Louisville & N. R. Co. v. Morris (1912) 179 Ala. 239, 60 So. 933; Alabama Mineral R. Co. v. Jones (1896) 114 Ala. 519, 62 Am. St. Rep. 121, 21 So. 507, 1 Am. Neg. Rep. 55; Louisville & N. R. L.R.A.1917F.

Co. v. Jones, 130 Ala. 456, 30 So. 586; McAdory v. Louisville & N. R. Co. (1891) 94 Ala. 272, 10 So. 507; Louisville & N. R. Co. v. Trammell (1890) 93 Ala. 354, 9 So. 870; Kansas City Southern R. Co. v. Leslie (1916) 125 Ark. 516, 189 S. W. 171; St. Louis, I. M. & S. R. Co. v. Hitt (1905) 76 Ark. 227, 88 S. W. 908, 990; St. Louis, I. M. & S. R. Co. v. Sweet (1895) 60 Ark. 550, 31 S. W. 571; Atlanta & W. P. R. Co. v. Newton (1890) 85 Ga. 517, 11 S. E. 776; Central R. Co. v. Rouse (1886) 77 Ga. 393, 3 S. E. 307; David v. Southwestern R. Co. (1870) 41 Ga. 223; Macon & W. R. Co. v. Johnson (1868) 38 Ga. 409, 11 Am. Neg. Cas. 292; Georgia F. & A. R. Co. v. Sasser (1908) 4 Ga. App. 276, 61 S. E. 505; Benton v. Chicago, R. I. & P. R. Co. (1881) 55 Iowa, 496, 8 N. W. 330, 3 Am. Neg. Cas. 349; Kirby v. Chicago, R. I. & P. R. Co. (1915) 173 Iowa, 144, 155 N. W. 343; Rouse v. Detroit Electric R. Co. (1901) 128 Mich. 149, 87 N. W. 68; Baleh v. Grand Rapids & I. R. Co. (1887) 67 Mich. 394, 34 N. W. 884; Nash v. Minneapolis & St. L. R. Co. (1915) 131 Minn. 166, L.R.A. —, —, 154 N. W. 957; Smith v. Pryor (1916) 195 Mo. App. 259, 190 S. W. 69; Danskin v. Pennsylvania R. Co. (1912) 83 N. J. L. 522, 83 Atl. 1006; Hackney v. Delaware & A. Teleg. & Teleph. Co. (1903) 69 N. J. L. 335, 55 Atl. 252; Watson v. Seaboard Air Line R. Co. (1903) 133 N. C. 188, 45 S. E. 555; Benton v. North Carolina R. Co. (1898) 122 N. C. 1007, 30 S. E. 333; Coley v. Statesville (1897) 121 N. C. 301, 28 S. E. 482; Pickett v. Wilmington & W. R. Co. (1895) 117 N. C. 616, 30 L.R.A. 257, 53 Am. St. Rep. 611, 23 S. E. 264; Burns v. Pennsylvania R. Co. (1908) 219 Pa. 225, 68 Atl. 704; Hockenberry v. New Castle Electric Co. (1916) 251 Pa. 398, 96 Atl. 1046; Irwin v. Pennsylvania R. Co. (1910) 226 Pa. 156, 75 Atl. 19; McCabe v. Narragansett Electric Lighting Co. (1904) 26 B. I. 427, 59 Atl. 112; Missouri, K. & T. R. Co. v. Henderson (1912) — Tex. Civ. App. —, 148 S. W. 822; Gray v. Phillips (1909) — Tex. Civ. App. —, 117 S. W. 870; Ft. Worth & D. C. R. Co. v. Linthicum (1903) 33

Tex. Civ. App. 375, 77 S. W. 40; **Houston & T. C. R. Co. v. Turner** (1904) 34 **Tex. Civ. App.** 397, 78 S. W. 712, reversed on other grounds in (1906) 99 **Tex.** 547, 91 S. W. 562; **Missouri, K. & T. R. Co. v. Ransom** (1867) 15 **Tex. Civ. App.** 689, 41 S. W. 826; **Rudiger v. Chicago, St. P. M. & O. R. Co.** (1898) 101 **Wis.** 292, 77 N. W. 169.

In **CHESAPEAKE & O. R. Co. v. KELLY**, ante, 367, reversing (1914) 160 **Ky.** 296, 169 S. W. 736, rehearing denied in (1914) 161 **Ky.** 655, 171 S. W. 185, in the state court the ruling of the trial court in refusing a specific instruction to the effect that the gross amount of the actual pecuniary loss of the statutory beneficiaries should be reduced to its present value was sustained. In passing upon an objection that the verdict was excessive, however, the court remarked that in view of earning capacity of the deceased and the other circumstances of the case, it could not be said that the jury did not assess the damages according to the present value.

The reason for requiring that the damages to cover the prospective loss be reduced to the present worth is pointed out in **CHESAPEAKE & O. R. Co. v. KELLY** to be that so far as the verdict is based upon the deprivation of future benefits, it will more than compensate if it is made up by aggregating the benefits without taking account of the earning power of the money that is presently to be awarded, for a given sum of money in hand is worth more than a like sum of money payable in the future, and it is proper to assume that the amount recoverable will be placed at interest, where it will earn a return. While it is a general rule that the present worth of the prospective loss is to be the basis of the verdict, it has been pointed out that local conditions are not to be disregarded, and where the anticipated pecuniary advantage of which the beneficiary has been deprived covers an expectancy so short and is in aggregate so small that a reasonable man could not be expected to make an investment or purchase an annuity with the proceeds of the judgment, it is not necessary to determine the present worth of such loss.

And it has been pointed out that in estimating the damages based upon the amount the decedent would probably earn in his lifetime, these earnings would not be in a lump sum, but would be from year to year, and hence the verdict should not be for the amount of the earnings less the probable amount of the L.R.A.1917F.

cost of maintenance as though the earnings would have been earned all at one time and immediately. **Benton v. Chicago, R. I. & P. R. Co.** (1881) 55 **Iowa**, 496, 8 N. W. 330, 3 **Am. Neg. Cas.** 349.

And it has been reasoned that the law does not contemplate the recovery of a sum, the interest upon which will afford the family of the deceased an income equivalent to the pecuniary benefits which they might expect from the decedent if he had continued to live, but it limits the recovery to a sum which will procure an annuity equivalent to such pecuniary benefit for the period covered by the life expectancy of the deceased. **Nash v. Minneapolis & St. L. R. Co.** (1915) 131 **Minn.** 166, L.R.A.—, —, 154 N. W. 957.

Different rules have been stated as to the method to be employed in computing the present worth of the gross amount necessary to compensate for the pecuniary loss of the statutory beneficiaries.

In determining the present worth, the discount should not necessarily be based upon the legal rate of interest, since such returns are not always obtainable upon investments on safe securities, at least without the exercise of financial experience and skill in the administration of the fund, hence compensation should be awarded upon a basis that does not call upon the beneficiaries to exercise such skill. **CHESAPEAKE & O. R. Co. v. KELLY**.

Compare with **Louisville & N. R. Co. v. Morris** (1912) 179 **Ala.** 239, 60 **So.** 933, holding that the measure of damages is a sum not in excess of that which at interest at 8 per cent for a time not exceeding decedent's expectancy would yield such an amount as his dependent family would probably have received each year from his earnings.

And see **Watson v. Seaboard Air Line R. Co.** (1903) 133 **N. C.** 188, 45 **S. E.** 555, holding that, in ascertaining the present value of the net income of the decedent in his lifetime, the jury may first ascertain what \$1 with 6 per cent interest would amount to for the time found the decedent would have lived, and divide the net income by the amount found that \$1 and interest would amount to.

It has been held that the amount recoverable is such a sum as, with the legal interest during the period of expectancy of the life of the deceased, will produce at the expiration of such period, a sum equal to the accumulation of his earnings in the same period. **McAdory**

v. Louisville & N. R. Co. (1891) 94 Ala. 272, 10 So. 507.

The verdict should be such sum as, being put to interest, will each year, by taking a part of the principal and adding it to the interest, yield an amount sufficient to cover the beneficiaries' loss for the entire period upon which the loss is based. *Louisville & N. R. Co. v. Trammell* (1890) 93 Ala. 354, 9 So. 870; *Louisville & N. R. Co. v. Jones* (1900) 130 Ala. 456, 30 So. 586.

Or stated in another way, the verdict should be such sum as would be exhausted at the end of the period for which compensation was to be made, by expending each year an amount equal to the beneficiaries' loss for that year. *Atlanta & W. P. R. Co. v. Newton* (1890) 85 Ga. 517, 11 S. E. 776.

And see *Danskin v. Pennsylvania R. Co.* (1912) 83 N. J. L. 522, 83 Atl. 1006, holding the amount of recovery is the present worth of a sum which, paid in annual instalments for the term of decedent's life expectancy, would give the beneficiaries the annual amount of decedent's contributions for their maintenance, and also the several amounts of such contributions with interest for the time between the death and the date of trial.

And also *Rudiger v. Chicago, St. P. M. & O. R. Co.* (1898) 101 Wis. 292, 77 N. W. 169, holding that, in arriving at the pecuniary loss of the statutory beneficiaries from the death complained of, the recovery should be limited to such sum as, being put at interest, will each year, by taking a part of the principal and adding it to the interest, realize an amount sufficient for the beneficiaries support for the time the decedent would have lived to support them, together with such further sum, if any, as the beneficiaries might reasonably have expected to have received from the earnings of the deceased.

The language of the court in *Texas Mexican R. Co. v. Higgins* (1906) 44 Tex. Civ. App. 523, 99 S. W. 200, indicates the entertainment by it of an erroneous view as to the manner of determining an annuity which would equal the amount of contributions the statutory beneficiaries had a reasonable expectation of receiving from the deceased had he continued in life. It is pointed out that the deceased had a life expectancy of twenty-five years, and that if the widow multiplied the amount she received from him annually by twenty-five, it would take a larger sum than the amount of damages assessed to yield an annuity equal to what she received. In this case the income of the deceased was equal to about \$75 per month, substantially all of which he contributed to his wife, and the amount of damages assessed was \$15,000.

In *Missouri, K. & T. R. Co. v. Ransom* (1867) 15 Tex. Civ. App. 689, 41 S. W. 826, it is held that it is not error to refuse to charge the jury that the measure of recovery for the wrongful death is such sum of money as will purchase an annuity equal to the value of the pecuniary aid which the plaintiff would have derived from the deceased if he had lived, calculated from the facts and circumstances in evidence, since the jury are thereby too closely limited in their estimate.

And in this state it has been held that an instruction that the damages assessed shall be for such sum as is of the value at the present time sufficient to reasonably and fairly compensate the beneficiaries for their pecuniary loss sufficiently limits the recovery to the present worth of the anticipated pecuniary benefits. *Ft. Worth & D. C. R. Co. v. Linthicum* (1903) 33 Tex. Civ. App. 375, 77 S. W. 40. A. G. S.

RHODE ISLAND SUPREME COURT.

HOME INSURANCE COMPANY

v.

UNION TRUST COMPANY.

(— R. I. —, 100 Atl. 1010.)

Insurance — mortgagee clause — duty of mortgagee to pay premium.

A mortgagee who, by the terms of his

contract, is under no obligation to pay the premiums for insurance on the property, does not assume such obligation in favor of the insurer by a rider attached to the policy making the loss payable to him as his interest shall appear, provided that, if the mortgagor fails to pay any premium due under the policy, the mortgagee shall on demand pay the same; at least where, after another proviso, the rider recites, "otherwise this policy shall be null and void."

For other cases, see *Insurance, III. h, in Dig.* 1-52 N. S.

Note. — As to liability of mortgagee under mortgage clause for insurance premium, see annotation following this case, post, 379. L.R.A.1917F.

(June 13, 1917.)

CERTIFICATION by the Superior Court for Providence and Bristol Counties, upon an agreed statement of facts, for the determination by the Supreme Court of questions arising in an action brought to recover certain premiums upon two policies of fire insurance. Judgment for defendant.

The facts are stated in the opinion.

Messrs. Mumford, Huddy, & Emerson, for plaintiff:

The defendant is under obligation to pay to the plaintiff the unpaid portion of the premiums for the insurance issued to the Mathewson Company.

Smith v. Union Ins. Co. 25 R. I. 260, 105 Am. St. Rep. 882, 55 Atl. 715; Boston Safe Deposit & T. Co. v. Thomas, 59 Kan. 470, 53 Pac. 472; St. Paul F. & M. Ins. Co. v. Upton, 2 N. D. 229, 50 N. W. 702; Colby v. Thompson, 16 Colo. App. 271, 64 Pac. 1053.

Messrs. Gardner, Pirce, & Thornley and Erving T. Arnold, for defendant:

The defendant did not, by the mortgagee clause, promise to pay the premium on each policy on demand if the mortgagor should fail to pay it.

Smith v. Union Ins. Co. 25 R. I. 260, 105 Am. St. Rep. 882, 55 Atl. 715; Rich v. Atwater, 16 Conn. 409; Robertson v. Caw, 3 Barb. 410, 5 N. Y. 125; Hastings v. Westchester F. Ins. Co. 73 N. Y. 141; Ormsby v. Phenix Ins. Co. 5 S. D. 72, 58 N. W. 301; Coykendall v. Blackmer, 161 App. Div. 11, 146 N. Y. Supp. 631.

If the proviso clause in each policy imported a promise by the defendant to pay the premium, the plaintiff's delay in making demand for payment released the defendant from liability.

Coykendall v. Blackmer, supra.

Stearns, J., delivered the opinion of the court:

This is an action to recover certain premiums upon two policies of fire insurance issued by the plaintiff on hotel and other property of the Mathewson Company in Narragansett, Rhode Island. The case was certified to this court on an agreed statement of facts, pursuant to the provisions of § 4, chap. 298, R. I. Gen. Laws 1909.

The material facts are as follows:

May 1, 1905, the Mathewson Company made a deed of trust conveying certain real and personal property to the Manufacturers' Trust Company to secure \$120,000 of bonds. Later the defendant, Union Trust Company, became trustee under said trust deed in place of the Manufacturers' Trust Company. The trust deed contains the following covenants of the Mathewson Company: "And the company covenants and agrees with the trustee that insurance against loss by fire shall be kept and main-

tained on the buildings and personal property liable to destruction or damage by fire covered by this indenture, in such insurance companies as the trustee shall approve, in a sum not less than one hundred and twenty thousand dollars (\$120,000), and that the policies of such insurance shall be assigned and transferred or made payable in case of loss to the trustee as collateral security hereto."

The trustee deed contains certain conditions upon which the trustee accepts the trusts, among others the following.

"Second. It shall be no part of the duty of the trustee to record this indenture as a mortgage of real or personal property, nor shall it be any part of the duty of the trustee to effect insurance against fire or other damages to any portion of the property hereby mortgaged, or to renew any policies of fire or other insurance, or to keep informed or advised as to the payment of taxes or assessments of or upon the mortgaged premises and property, or to require the payment of such taxes or assessments, but the company shall and will perform all the acts above mentioned necessary to fully protect the bonds described herein. The trustee may, however, in its discretion, at the expense of the company, do any or all of the matters or things in this paragraph set forth, or procure the same to be done."

"Fourth. The trustee shall be under no obligation or duty to perform any act hereunder, or to defend any suit in respect hereof unless first indemnified to its satisfaction."

On or about July 29, 1914, the plaintiff issued a policy of fire insurance for \$11,000 to the Mathewson Company for the term of one year from August 1, 1914, making the same payable in case of loss to the Union Trust Company, trustee, as its interest might appear, and annexed to said policy a certain contract or rider which contained the standard mortgage clause, as follows: "Loss or damage, if any, under this policy, shall be payable to Union Trust Company, of Providence, Rhode Island, trustee mortgagee (or trustee), as interest may appear, and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within-described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy: Provided that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same.

Provided also that the mortgagee (or trustee) shall notify this company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee), and, unless permitted by this policy, it shall be noted thereon and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void."

The premium on this policy was \$492.80, and the Mathewson Company on various dates between July 7, 1915, and August 28, 1915, paid on account thereof \$146.66, and there was further credited upon and deducted from said premium by the plaintiff company \$34.10, because of certain improvements made in the premises, by reason of which the rate was reduced. The balance due and sued for on this premium is \$312.04. About the 29th day of July, 1915, the plaintiff issued another policy to said Mathewson Company for the term of one year from August 1, 1915, for the same sum, made payable in the same way with a similar rider, the premium for which was \$458.70. The Mathewson Company did not pay any part of this premium, and in October or November, 1915, the plaintiff asked the Union Trust Company to pay this premium and threatened to cancel the policy if said premium was not paid. The premium was not paid, and on or about November 30, 1915, in accordance with the provisions of the policy, the plaintiff gave five days' notice of cancellation of said policy to the insured and ten days' notice to the defendant, the mortgagee. At the expiration of said notices the policy was canceled according to its terms, and the plaintiff credited upon the amount of said premium remaining unpaid the sum of \$294.53, and the balance of said premium (\$164.17), which is the pro rata premium for the period during which said policy was in force, remains unpaid. Formal demand was made on or about December 24, 1915, upon the Union Trust Company for the payment of these balances, and that company refused to pay said balances, and the parties now ask this court to determine whether the defendant is liable to the plaintiff for either of the sums above mentioned.

The questions at issue are as follows:

I. Did the defendant, under the mortgagee clause attached to each policy as a rider, promise to pay the premium on demand in case the mortgagor should neglect to pay it?

II. If the defendant did so promise, did the delay on the part of the insurance company in making demand for payment of the L.R.A.1917F.

premiums release the defendant from liability under its promise?

When the plaintiff issued these policies, by reason of the attachment of the riders thereto, it entered into two separate and independent contracts of indemnity, relating to the same subject, but applying to different interests therein: (1) A contract with the owner subject to certain conditions appropriate to the relation of owner to insurer; (2) A contract between the insurer and the mortgagee only, becoming effectual when the owner failed to pay premiums or violated the conditions of the policy, and concerning which the relation of the original insured to the property, or his acts or neglect, is of no account. When the first contract failed, or if it never attached, this second contract began and proceeded subject to its own conditions and limitations. See *Smith v. Union Ins. Co.* 25 R. I. 260, 105 Am. St. Rep. 882, 55 Atl. 715.

The plaintiff claims that the words in the mortgage clause, "Provided that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same," import a contract by the mortgagee to pay the premium if the mortgagor does not pay it. The defendant claims that this clause should be construed as a condition, and not as an agreement. To decide this question we must determine the true meaning of the clause in question. The word "provided" in instruments of this character in general has a well-settled legal meaning, and, construed in its natural and primary sense, imports a condition, and not an agreement.

In *Bouvier's Law Dictionary* the following definition is given: "A proviso always implies a condition unless subsequent words change it to a covenant."

In *Rich v. Atwater*, 16 Conn. 409, at page 419, the court says: "The proviso, it is said, requires such a construction. There has been much nice discussion upon the word 'provided.' *Cromwell's Case*, 2 Coke, 72, 76 Eng. Reprint, 579; *Kindler v. Leverages*, Cro. Eliz. pt. 1, p. 242, 78 Eng. Reprint, 497; *Pembroke v. Berkley*, Cro. Eliz. pt. 1, p. 385, pt. 2, p. 560, 78 Eng. Reprint, 631, 805; *Harrington v. Wise*, Cro. Eliz. pt. 2, p. 486, 78 Eng. Reprint, 737; *Geery v. Reason*, Cro. Car. 128, 79 Eng. Reprint, 713. It is certain, as is said by Judge Swift, that there is no word more proper to express a condition than this word 'provided;' and it shall always be so taken, unless it appears from the context to be the intent of the parties that it shall constitute a covenant."

There is nothing in the context of this instrument which requires a construction of this clause as a covenant. The parties have

used the technical word "provided," to which the courts in numerous cases have applied a certain well-known construction. The mortgagee clause in question is in the standard form, and presumably was carefully worded by experienced lawyers who were familiar with the customary legal construction of the word. Had the intention been that the word "provided," as used in this clause, should not be given its primary legal meaning and effect, but that the clause should be construed as a covenant rather than a condition, any possible ambiguity could easily have been removed by the addition of a few words such as "and it is agreed" or any similar phrase. In *Hastings v. Westchester F. Ins. Co.* 73 N. Y. 141, decided in 1878, the mortgagee clause in the policy of fire insurance on which suit was brought contained the following words: "It is also provided and agreed." The omission of such specific words of agreement in later forms, such as the one now in question, is of some significance.

It is admitted by the plaintiff in its reply brief that the second clause in the rider, to wit, "Provided also that the mortgagee (or trustee) shall notify this company of any change of ownership or occupancy," etc., is a strict technical condition subsequent. It is argued that the fact that the phrase, "otherwise this policy shall be null and void," is found only at the end of this proviso, and that it is separated from the rest of the clause only by a semicolon, and that the preceding proviso ends with a period, indicates that the words quoted above are intended to qualify the second proviso only, and not the first, and that the second proviso is independent of the first and is of a different nature. The effect of this argument is much weakened by the fact that the second proviso, which is of the same general character as the first, follows it immediately, and is connected with it by the words "provided also." We think both clauses are subsidiary to the main part of the mortgagee clause, and that the words, "otherwise the policy shall be null and void," are applicable to, and should be read with, both provisos. So read, its effect clearly makes both clauses conditions subsequent.

Under this construction of the two provisos, the effect of the mortgagee clause as a whole would be as follows: It would, as stated in the case of *Smith v. Union Ins. Co.* supra, constitute a separate contract between the insurance company and the mortgagee, entered into at the same time as the contract between the insurance company and the mortgagor, and based upon the same consideration. While it would come into existence as soon as the policy was delivered, it would not become active until some de-

fault, by nonpayment of the premium or otherwise, had been made by the mortgagor. Then it would come into full force and effect, and would give the mortgagee an independent right against the insurance company, which would, however, be subject to certain conditions subsequent. One of these would be that, if any part of the premium remained unpaid, the mortgagee would have to pay it upon demand or it would lose its rights under its independent contract, without being under any obligation to pay the unpaid premium if it preferred to let the policy lapse.

This construction protects fairly the interests of the insurance company and the mortgagee. The insurance company is entitled to the payment of the premium on the delivery of the policy, and consequently has the power to protect itself fully, without recourse to the mortgagee. It is in a position at all times, with full knowledge of the facts in regard to the payment of premiums, to call for payment from the mortgagor, and, if dissatisfied, can cancel the policy by giving the prescribed notice. On the other hand the mortgagee in many cases has no means of knowing whether the premium has been paid, and, as the insurance company must first make demand on the mortgagee for payment before rights of the mortgagee can be effected by the failure of the mortgagor to pay, it would impose an unreasonable burden on the mortgagee to require it to keep constant watch on the condition of the account between the insurance company and the mortgagor in order to protect itself from liability for unpaid premiums.

In this particular case it seems to be clear that the mortgagee did not intend or understand that it was bound unconditionally on demand to pay to the plaintiff the premiums on failure on part of the mortgagor to pay. By the second clause of the trust deed quoted above, it is specifically provided that it shall be no part of the duty of the trustee to insure the property or to keep informed as to the payment of assessments, etc., against the same. From the conduct of the insurance company it also seems clear that the company did not consider that the mortgagee was liable. The only payments on the policy issued August 1, 1914, were made between July 7, 1915, and August 28, 1915. No request for payment during the life of this policy was made on the mortgagee. So far as appears, the first intimation that the trustee had that the mortgagor was in arrears was in October or November, 1915, when the plaintiff asked the trustee to pay the premium on the policy which had been issued August 1, 1915, and threat was made to cancel said policy unless the premium was

paid. Not until on or about December 24, 1915, and after it had canceled the policy, did the insurance company make demand upon the mortgagee for payment.

The following cases support the contention of the plaintiff that the clause in question imports an agreement: *Boston Safe Deposit & T. Co. v. Thomas*, 59 Kan. 470, 53 Pac. 472; *St. Paul F. & M. Ins. Co. v. Upton*, 2 N. D. 229, 50 N. W. 702. Opposed to these cases are the cases of *Ormsby v. Phenix Ins. Co.* 5 S. D. 72, 58 N. W. 301, and *Coykendall v. Blackmer*, 161 App. Div. 11, 146 N. Y. Supp. 631, which hold that the clause in question is a condition, and not a covenant. The case of *Coykendall v. Blackmer* is a recent case, decided in 1914, in which the court carefully considered the

cases *St. Paul F. & M. Ins. Co. v. Upton* and *Boston Safe Deposit & T. Co. v. Thomas*, supra, and declined to follow them. We agree with the decision in the *Coykendall* Case, supra, that the provision in question should be construed as a condition rather than a covenant.

Inasmuch as this construction is decisive of the case, it is unnecessary to consider the second question in regard to the effect of the delay in making demand on the mortgagee for payment.

Decision for defendant for costs.

The papers in said cause, with our decision certified thereon, are ordered to be sent back to the Superior Court for the entry of final judgment upon the decision.

Annotation—Insurance: liability of mortgagee under mortgage clause for insurance premium.

The few cases which have considered the question under annotation are in conflict as to whether a proviso in the mortgage clause, to the effect that upon default by the mortgagor in the payment of premiums the mortgagee shall pay them, amount merely to a condition of the mortgagee's right to recover upon the policy, or to a covenant imposing a personal obligation. The conclusion reached in *HOME INS. CO. v. UNION TRUST CO.* ante, 375, that the provision was merely a condition, is supported by a recent New York case.

In the case referred to, *Coykendall v. Blackmer* (1914) 161 App. Div. 11, 146 N. Y. Supp. 631, where the mortgage clauses in policies issued at the request of the mortgagor provided that payment be made to the mortgagee as his interest should appear, and that as to his interest the insurance should not be invalidated by any act of the mortgagor nor by any change in the title or ownership: "Provided that, in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee shall on demand pay the same," it was decided that the word "provided" was used in the sense of "if" or "on condition," and that the clause should therefore be construed as a condition, and not a covenant by the mortgagee to pay the premium, and that he could not be held liable therefor. The court here pointed out that in *Boston Safe Deposit & T. Co. v. Thomas* (Kan.) *infra*, the mortgage contained a covenant that if the mortgagor did not pay the premiums the mortgagee might, and that the sum so paid should be a lien on the premises, L.R.A.1917F.

while the mortgage in the case before it contained no such provision, but provided merely that the mortgagor should keep the premises insured.

In *St. Paul F. & M. Ins. Co. v. Upton* (1891) 2 N. D. 229, 50 N. W. 702, however, where a policy issued to the mortgagor made the loss payable to the mortgagee as his interest should appear, and provided that the policy should not be avoided as to the mortgagee by any act or neglect of the mortgagor, nor by vacancy of the premises, nor by their occupation for purposes more hazardous than permitted by the policy: "Provided that in case the mortgagor or owner neglects or refuses to pay any premium due under this policy, then on demand the mortgagee shall pay the same," it was held that the clause did not merely prescribe a condition on performance of which the mortgagee might entitle himself to the benefits of the clause, but that the clause contained an express promise by the mortgagee to pay the premium in case of default by the mortgagor. The court said: "But why should this agreement be so construed as to give the mortgagee the option to avail himself of its provisions, while the insurance company are to have no choice? If this was the intention of the parties, why did not the provision read as follows: 'Provided that the mortgagee, in case of the default of the mortgagor, shall have paid the premium at the time he claims the benefit of this clause?' This would have left in him an option. But the clause, as it does read, is an absolute engagement to pay the money on the default of the mort-

gagor,—"then, on demand, the mortgagee shall pay the same." The clause provides that no neglect or act of the mortgagor, nor shall the vacancy of the premises, invalidate the policy. If defendant's contention is sound, this provision would be nugatory, if the mortgagor should pay the premium on time, for it is only in case of the mortgagor's default that the mortgagee can perform this condition of payment, and defendant insists that it is only on performance of such condition by him that he can have any rights under the mortgage clause. This construction would destroy its effect in many cases. It would often deprive the mortgagee of any benefit from the provision that he should not be prejudiced by any act or neglect of the mortgagor, nor by reason of the vacancy, etc., of the premises. The maxim, *Ut res magis valeat quam pereat*, is a safe guide. The mortgage clause gave the mortgagee immunity from certain forfeitures resulting under the policy from the mortgagor's acts or omissions, and the mortgagee in terms agreed to pay for this immunity the premium in case of the mortgagor's default. This is the clear import of the agreement."

This case was followed and a like conclusion reached in *Boston Safe Deposit & T. Co. v. Thomas* (1898) 59 Kan. 470, 53 Pac. 472, where the mortgage clause was the same, and the mortgage gave the mortgagee the right, upon the mortgagor's default in insuring the property and paying the premiums, of paying them himself and adding them to the mortgage indebtedness. The court in this case said: "While the word 'provided' ordinarily indicates that a condition follows, there is no magic in the term, but the clause is to be construed from the words employed and from the purpose of the parties gathered from the whole instrument. These mortgage clauses were furnished to Thomas by Ball to be attached to the policies. The first clause provides for the payment to Ball as trustee. The second clause provides that the policies shall not be invalidated by any act or neglect of the grantor or owner of the property insured. This included neglect to pay premiums on insurance policies as well as other neglects which, without such a clause in the policy, would have avoided it. By the terms of the deed of trust Throop covenanted to keep the property insured and to pay the premiums; but provision was also made that in case of his failure to do so the trustee or beneficiaries might pay the premiums and tack the L.R.A.1917F.

amount so paid to the trust deed. In consideration of the provisions against forfeiture through the neglect of the mortgagor, the creditor agreed that, if the mortgagor or owner failed to pay the premiums, he would pay them on demand. The value of the property mortgaged was mostly in the hotel building covered by the insurance. In case of its destruction by fire the bulk of the security would be gone, unless covered by valid insurance. For the safety of the holders of the notes it was of the utmost importance that the insurance should be kept in force. The provisions quoted in the deed of trust and the insurance policies were to that end, and rendered the beneficiaries liable for the unpaid premiums."

In *Colby v. Thompson* (1901) 16 Colo. App. 271, 64 Pac. 1053, the mortgagee was held liable for the premiums on policies containing a provision that as to the mortgagee they should not be invalid by any act of the mortgagor, and that, in case the mortgagor neglected or refused to pay the premiums, on demand the mortgagee should pay them, on the ground that he had made an original promise to pay by directing the insurance agent not to cancel the policies and stating that he would pay the premiums if the mortgagor did not. It appears that the agent called the mortgagee's attention to the mortgage clause and stated that the mortgagee would be liable for the premiums if the mortgagor did not pay them, but it was not decided what the mortgagee's liability for premiums would have been under the clause.

J. T. W.

ALABAMA SUPREME COURT.

MRS. CORA GARDINER, Appt.,

v.

MRS. D. A. SOLOMON.

(— Ala. —, 75. So. 621.)

Master and servant — liability for injury by automobile — adult son.

1. The owner of an automobile is not liable, under the doctrine of respondeat superior, for injury inflicted on a pedestrian by his adult son, who is in business for him-

Note. — As to liability of owner of automobile upon the ground of dangerous agency, or of negligence in intrusting car to incompetent or negligent person, for injuries inflicted while the latter is operating the car for his own purpose, see annotation following this case, post, 384.

self, in operating the car for his own purpose with the owner's consent implied from the relationship of the parties and previous permitted use.

For other cases, see Master and Servant, II. b, in Dig. 1-52 N. S.

Automobile — dangerous agency — intrusting to incompetent driver.

2. The owner of an automobile is liable for injury inflicted on a pedestrian by his adult son in the use of the machine under circumstances where the doctrine of respondeat superior would not apply, if the son was, to the knowledge of the owner, incompetent to handle the machine with safety.

For other cases, see Automobiles, II. a, in Dig. 1-52 N. S.

Same — incompetent driver.

3. One who is careless, heedless, indifferent, and reckless in driving an automobile is incompetent to handle such machine.

For other cases, see Automobiles, II. a, in Dig. 1-52 N. S.

Appeal — nonprejudicial error.

4. Sustaining demurrers to pleas before amendment is not reversible error if they are overruled after amendment, and the amendment imposes no additional burden on the pleader.

For other cases, see Appeal and Error, VII. m, 2, in Dig. 1-52 N. S.

Pleadings — replication — unnecessary — effect.

5. A defendant cannot complain of a replication informing him of specific facts upon which plaintiff intended to rely to show negligence, although they might have been proved under the general admission allegations of the complaint.

For other cases, see Pleading, V. in Dig. 1-52 N. S.

(April 10, 1917.)

APPEAL by defendant from a judgment of the Law and Equity Court for Morgan County in plaintiff's favor in an action brought to recover damages for the death of her intestate, alleged to have been caused by the negligent driving of defendant's automobile. Reversed.

The facts are stated in the opinion.

Count 3 was as follows:

Plaintiff claims of defendant the sum of \$15,000, for that heretofore, to wit, on or about August 21 or 22, 1915, the defendant was the owner of a motor car of tremendous weight and great power, which she allowed her son, Thomas, to operate. The said Thomas, on the day and date aforesaid, was, and long had been, a careless, indifferent, heedless, and reckless driver of such car, so that said car in his hands was a dangerous and deadly agency, of which facts defendant had been duly informed; yet, with information of such facts, she allowed her said son to propel said car along the public streets L.R.A.1917F.

of New Decatur, Alabama, at will, and intrusted its management and operation to him; and while, on the day and date aforesaid, he was engaged in running said car along a highway, to wit, Second avenue, in New Decatur, Alabama, in the very heart of the business section of said city of over 6,000 people, and in broad daylight, the said Thomas so negligently, heedlessly, recklessly, wrongfully, and indifferently conducted himself with respect to said car that he ran same against plaintiff's minor son, Charlie Solomon; and he, said defendant's said son, by means of such death-dealing instrumentality, so crushed and pushed, rolled, and dragged plaintiff's said minor son that he very soon died, and, his father being dead, plaintiff therefore sues. And plaintiff avers that at the time of said injury defendant's said son was using said car by defendant's consent and acquiescence; she having been informed of his dangerous proclivities in connection with the same as aforesaid.

Count 4:

Plaintiff claims of defendant the sum of \$15,000, for that heretofore, to wit, on or about August 21 or 22, 1915, defendant was the owner of a motor car of tremendous weight and great power, which she allowed her son, Thomas, to operate. Said Thomas, on the day and date aforesaid, was, and long had been, a careless, indifferent, heedless, and reckless driver of such car, so that said car in his hands was a dangerous and deadly agency, of which facts defendant had been duly informed; yet, with information of such facts, she allowed her said son to propel said car along the public streets of New Decatur, Alabama, at will, and procured indemnity insurance as a mode of protecting or reimbursing her against damages that might be recovered or recoverable by reason of her son's disastrous operation of said car, he being, with her consent, named on her application for such insurance or in the policy, or in both, as the operator or one of the operators of said car, the name of the insurance company being to plaintiff unknown; and while, on the day and date aforesaid, defendant's said son was engaged in running said car along a highway, to wit, Second avenue, in New Decatur, Alabama, in the very heart of the business section of said city of over 6,000 people, and in broad daylight, said Thomas so negligently, heedlessly, recklessly, wrongfully, and indifferently conducted himself with respect to said car that he ran same against plaintiff's minor son, Charlie Solomon, and he, defendant's said son, by means of such death-dealing instrumentality so crushed and pushed, rolled, and dragged plaintiff's minor son that he very soon died, and, his father being dead, plaintiff therefore sues. And plain-

tiff avers that at the time of said injury defendant's said son was using said car by defendant's consent and acquiescence, she having been informed of his dangerous proclivities in connection with the same as aforesaid.

Messrs. Eyster & Eyster for appellant.
Mr. E. W. Godbey, for appellee:

Evidence of previous reckless character is admissible to show incompetency.

Pittsburgh R. Co. v. Thomas, 98 C. C. A. 437, 174 Fed. 595.

Evidence of previous acts of recklessness is admissible to show notice of recklessness to the party sought to be charged.

First Nat. Bank v. Chandler, 144 Ala. 286, 113 Am. St. Rep. 39, 39 So. 828; Fletcher v. Baltimore & P. R. Co. 168 U. S. 140, 42 L. ed. 413, 18 Sup. Ct. Rep. 35; Pittsburgh R. Co. v. Thomas, supra.

An operator who does not properly conduct himself, and who does not have a general disposition to exercise the knowledge and skill which he may possess in a high degree, is an incompetent operator.

Pittsburgh R. Co. v. Thomas, supra; Maitland v. Gilbert Paper Co. 97 Wis. 476, 65 Am. St. Rep. 143, 72 N. W. 1124; Hamann v. Milwaukee Bridge Co. 127 Wis. 550, 106 N. W. 1081, 7 Ann. Cas. 461.

The owner of an instrument that is capable of being dangerously perverted is liable for the consequences of its perversion, or of allowing it to be used by one of whose disposition to abuse it to the probable injury of others he has notice.

Parker v. Wilson, 179 Ala. 361, 43 L.R.A. (N.S.) 87, 60 So. 153; Neubrand v. Kraft, 169 Iowa, 444, L.R.A.1915D, 691, 151 N. W. 455; Schultz v. Morrison, 91 Misc. 248, 154 N. Y. Supp. 257; Walker v. Klopp, L.R.A. 1916E, 1296, note; Daily v. Maxwell, 152 Mo. App. 415, 133 S. W. 351; Allen v. Bland, — Tex. Civ. App. —, 168 S. W. 35; Fletcher v. Baltimore & P. R. Co. 168 U. S. 140, 42 L. ed. 413, 18 Sup. Ct. Rep. 35.

The fact that a machine is purchased and maintained by one person for the use of another, whether for the exclusive use of the other or not, renders the provider and promoter thereof liable for the result of wrongful acts committed by the party for whose use it was provided and maintained.

Davis v. Littlefield, 97 S. C. 171, 81 S. E. 487; Stowe v. Morris, 147 Ky. 386, 39 L.R.A. (N.S.) 224, 144 S. W. 52; Guignon v. Campbell, 80 Wash. 543, 141 Pac. 1031; Allen v. Bland, — Tex. Civ. App. —, 168 S. W. 35; Switzer v. Sherwood, 80 Wash. 19, 141 Pac. 181, Ann. Cas. 1917A, 216.

The liability of the owner of the machine, is not obviated by the imposition of the owner's veto upon its use by the party for whose use it was purchased and maintained. L.R.A.1917F.

Lynde v. Browning, 2 Tenn. C. C. A. 262; House v. Fry, 30 Cal. App. 157, 157 Pac. 500.

The owner of an instrumentality susceptible of a dangerous use is liable for the injurious acts of another whom he expressly or impliedly licensed to use it.

Neubrand v. Kraft, L.R.A.1915D, 693, note.

Where there are a duty to maintain a constant lookout and a place of probably manifest danger, any failure to maintain such lookout after a party in peril gets where he cannot rescue himself imposes a liability on the operator forestalling any contributory negligence.

Manley v. Birmingham R. Light & P. Co. 191 Ala. 531, 68 So. 62; Birmingham R. Light & P. Co. v. Norton, 7 Ala. App. 571, 61 So. 462; Birmingham R. Light & P. Co. v. Aetna Acci. & Liability Co. 184 Ala. 601, 64 So. 46; Birmingham R. Light & P. Co. v. Drennen, 190 Ala. 176, 67 So. 388; Mobile Light & R. Co. v. Dooks, 11 Ala. App. 595, 66 So. 826; Mosso v. E. H. Stanton Co. 75 Wash. 220, L.R.A.1916A, 949, 134 Pac. 941; Bourrett v. Chicago & N. W. R. Co. 36 L.R.A. (N.S.) 957 note; Nehring v. Connecticut Co. 45 L.R.A. (N.S.) 896, note.

The averments of the complaint were sufficient for a recovery by reason of Gardiner's continuing negligence.

Louisville & N. R. Co. v. Loyd, 186 Ala. 119, 65 So. 166; Walker v. Alabama, T. & N. R. Co. 194 Ala. 360, 70 So. 126.

Anderson, Ch. J., delivered the opinion of the court:

Counts 1 and 2 proceed upon the theory of respondeat superior; that is, that the driver of the automobile in question was the agent of the defendant, and was acting within the line and scope of his authority when he ran over the plaintiff's intestate. We think that the proof utterly fails to establish these material facts. As the defendant was absent from the Decatur at the time, there was no express authority for the son to use the vehicle at this particular time, and at most there was a mere implied consent growing out of the relationship of the parties and a previous use of same by the son. It also appears that the son, who was a grown man engaged in business for himself, was at the time using the car for his own personal pleasure and benefit, and in no respect in the interest of or in behalf of the defendant. Upon the undisputed facts in the case, the defendant was entitled to the general affirmative charge, upon the authority of Parker v. Wilson, 179 Ala. 361, 43 L.R.A. (N.S.) 87, 60 So. 150, which was followed and approved in the case of Armstrong v. Sellers, 182 Ala. 582, 62 So. 28.

The case of *Heissenbuttel v. Meagher*, 162 App. Div. 752, 147 N. Y. Supp. 1087, is strikingly similar to the case at bar: "The plaintiff, while standing in a public street, waiting for a surface car, was struck and injured by an automobile belonging to defendant and driven by his son, a young man twenty-four years of age. This son was pursuing his studies as a law student, and lived with his father as a member of his family. The automobile was a pleasure vehicle, kept by defendant for the use of himself and his family. His son was privileged to use it for his individual purposes whenever he so desired. It was customary, also, for the son to act as chauffeur of the car when it was used by defendant or other members of the family. On the occasion of the accident the son had taken the car out for a pleasure drive, accompanied by several of his friends. Neither defendant nor any other member of his family, except his son, was in the party. It is evident from these facts that when the accident happened the car was neither expressly nor constructively in the use or service of the defendant, and that in driving the car the son was in no way acting as the defendant's agent. Under these circumstances, we hold that defendant is not liable for his son's negligent operation of the car."

The trial court erred in refusing the general charge for the defendant as to counts 1 and 2. This case is unlike the case of *Erlack v. Heis*, 193 Ala. 669, 69 So. 530, which was differentiated from the *Parker* and *Sellers* Cases, *supra*. There the son was not operating the car for his sole benefit and pleasure, but was taking the defendant's wife and her guests to Birmingham.

While automobiles are not inherently regarded as dangerous instrumentalities, and the owner thereof is not responsible for the negligent use of same, except upon the theory of the doctrine of respondeat superior, yet there is an exception if he intrusts it to one, though not an agent or servant, who is so incompetent as to the handling of same as to convert it into a dangerous instrumentality, and the incompetency is known to the owner when permitting the use of the vehicle. *Parker v. Wilson*, 179 Ala. 361, 43 L.R.A.(N.S.) 87, 60 So. 150; *Daily v. Maxwell*, 152 Mo. App. 415, 133 S. W. 351; *Lynde v. Browning*, 2 Tenn. C. C. A. 262; *Allen v. Bland*, — Tex. Civ. App. —, 168 S. W. 35. See also note as to third class, in L.R.A.1915D, p. 691. We think the averment in counts 3 and 4 of the complaint, that Thomas "was, and had long been, a careless, indifferent, heedless, and reckless driver of such car," was the equivalent of charging that he was incompetent. *First Nat. Bank v. Chandler*, 144 Ala. 286, 113 L.R.A.1917F.

Am. St. Rep. 39, 39 So. 822. As was said in the *Parker* Case, *supra*: "In the case of a mere permissive use, the liability of the owner would rest . . . upon the combined negligence of the owner and the driver, negligence of the one in intrusting the machine to an incompetent driver, of the other in its operation."

We do not think the counts 3 and 4 were subject to the defendant's demurrer.

We also think that there was evidence from which the jury could infer that Thomas was such a fast and reckless driver as to render the machine in his hands dangerous, that his use of the machine was permissive, and that the defendant, while permitting him to use the machine, was informed of his incompetency, and that the jury could infer that the death of the plaintiff's intestate resulted from the recklessness and negligence of the said Thomas in driving the automobile. The evidence was not, of course, one-sided, as there was evidence tending to show that he was a skilful driver, that the intestate was guilty of contributory negligence, and that Thomas was not guilty of subsequent negligence. Nor was there proof of an express consent from the defendant to her son to use the vehicle upon this occasion, or that she had actual notice of his incompetency as a driver, though there were circumstances from which all these facts could have been inferred by the jury. Therefore the trial court did not err in submitting counts 3 and 4 to the jury, and in refusing defendant's general charge as to the said counts.

We do not think that the appellant can predicate reversible error upon the part of the trial court in sustaining the demurrers to her special pleas before amendment. The trial court overruled the demurrer to said pleas after amendment, and the amendment did not put any additional burden upon the appellant, certainly not as to those which were shortened by the amendment; and, as to those to which additions were made, the addition merely set out facts essential to establish negligence on the part of the intestate, which was averred generally in the pleas before amendment, and which the defendant had to prove in order to establish said pleas before amendment.

Replication 2, to the defendant's special pleas, set up subsequent negligence on the part of the driver, Thomas Gardiner, and under our system of pleading was provable under the initial counts, and which fact would have rendered the action of the trial court in sustaining a demurrer to same harmless. But there was no impropriety in setting up subsequent negligence by way of a replication, and which was sufficiently done in replication 2, and the defendant can-

not complain that she was specifically informed of facts which could have been proved under the counts without a replication. It is true the replication describes Thomas Gardiner as the defendant, but this was an inadvertence, which was self-correcting, and which would no doubt have been stricken from the replication, had it been brought to the attention of counsel for the plaintiff and the trial court.

We have considered and discussed all the

points made in the brief of the appellant upon the submission of the case. For the errors above suggested, the judgment of the Law and Equity Court is reversed, and the cause is remanded.

McClellan, Sayre, and Gardner, JJ., concur.

Petition for rehearing denied May 24, 1917.

Annotation—Automobiles: liability of owner upon the ground of dangerous agency, or of negligence in intrusting car to incompetent or negligent person, for injuries inflicted while the latter is operating the car for his own purpose.

This annotation is supplementary to that accompanying *Neubrand v. Kraft*, L.R.A.1915D, 691, and *Walker v. Klopp*, L.R.A.1916E, 1295.

Generally, as to liability of owner for injuries by automobile while being used by a servant or a third person for his own business or pleasure, see annotation to *Reilly v. Connable*, L.R.A.1916A, 957, and earlier annotations there referred to.

As to liability where automobile is being used by a member of owner's family, see annotation to *Griffin v. Russell*, L.R.A.1916F, 223, and earlier annotations there referred to.

For liability of co-owners of automobiles, see annotation to *Hamilton v. Vioue*, L.R.A.1916E, 1301.

As appears from the prior annotation, the decision in *GARDINER v. SOLOMON*, ante, 380, that, although an automobile is not an inherently dangerous instrumentality, the owner may nevertheless be held liable apart from the doctrine of respondeat superior, for an injury sustained while it is being used by another to whom he has intrusted it, where such person is so incompetent as to convert it into a dangerous instrumentality and the owner knew of the incompetency, is not without support. In view of the danger to travelers on the highway from the operation of automobiles by incompetent persons, it seems no more than just to require owners of these machines to see to it that those to whom they intrust them are familiar with their mechanism and competent to control their movements.

A different question is presented when the owner is sought to be held liable upon the theory of dangerous agency, without reference to the general competency or incompetency of the person to whom

he intrusted the car and whose negligence in the particular instance caused the injury. As shown in the previous annotation, liability on this theory is generally denied in the absence of statute, although, as suggested at page 692 of the note in L.R.A.1915D, there are strong practical considerations for the adoption of such a ground of liability by statute or otherwise. In this connection, see note to *Daugherty v. Thomas*, 45 L.R.A.(N.S.) 699, as to validity of statute making the owner liable for injuries by automobile being used by another.

Some apparent support is lent to this view by expressions in the opinion in *Anderson v. Southern Cotton Oil Co.* (1917) — Fla. —, L.R.A.—, —, 74 So. 975, involving the liability of the owner of an automobile for injuries inflicted while the car was being used by an employee, as was claimed, for his own purposes. The majority opinion says: "The principles of the common law do not permit the owner of an instrumentality that is not dangerous per se, but is peculiarly dangerous in its operation, to authorize another to use such instrumentality on the public highways without imposing upon such owner liability for negligent use." The court, however, in holding that the question of the owner's liability should have been submitted to the jury, apparently proceeded upon the doctrine of respondeat superior, and the language above quoted is probably to be regarded as dicta, although the dissenting judge took the pains to state that he was unable to assent to the proposition that the owner of an automobile who permits another to use it for the latter's sole convenience or pleasure becomes liable in damages to a stranger who may sustain an injury because of

the negligent operation of the machine while so employed.

It was stated by the court in *Woods v. Clements* (1917) 113 Miss. 720, L.R.A. 1917E, 357, 74 So. 422, that, if a father should turn his car over to a child inexperienced in driving or incompetent to handle so powerful a machine, he might be held liable on a theory other than that of agency. The decision in this case, however, was rested upon the latter doctrine.

The decision in *Bogora v. Dix* (1916) 159 N. Y. Supp. 46, that the owner of an automobile was liable for an injury which occurred while his chauffeur was driving, on the theory that the owner of a dangerous machine placed by him in the control of one of his employees should be held liable for all damage resulting to others through its use by such employee when permitted by the employer, whether the immediate object of the use was for the benefit of the employer or employee, was reversed in (1917) 176 App. Div. 774, 162 N. Y. Supp. 992, where it was held that there could be no recovery against the owner if the chauffeur was, at the time the injury occurred, using the machine for his personal business, and not that of his employer. The court stated that the law contains no prohibition against the owner of an automobile lending it to his chauffeur, or to anyone else, for any lawful purpose, and that he is not liable for damages caused thereby, when it is in use by his consent on the business or pleasure of others.

And in *Potts v. Pardee* (1917) 220 N. Y. 431, 116 N. E. 78, the court refused to hold the owner of an automobile liable for an injury inflicted by it while it was being driven by her husband's chauffeur, on the ground that she was the owner and was in the car at the time, stating that this could not be done unless the rule which makes one responsible for the torts of another is entirely disregarded, and that if a change in this

respect is to be made it should be made by legislative enactment, and not by judicial decree.

And in *Brinkman v. Zuckerman* (1916) 192 Mich. 624, 159 N. W. 316, where recovery was sought against the owner of an automobile for damages done by it while it was being operated by his chauffeur, it was held that an automobile is not a "dangerous instrumentality" in the sense in which that term is used in the law, and that the owner could be held liable only under the law of master and servant, and that the relation between the owner and his chauffeur is to be determined, in the absence of statute, by the general rules of law relative to master and servant. And a like conclusion was reached in *Cohen v. Meador* (1916) 119 Va. 429, 89 S. E. 876.

Violation of statute in permitting use of car.

See also earlier notes referred to at the beginning of this note.

In *Taylor v. Stewart* (1916) 172 N. O. 203, 90 S. E. 134, the habit of the owner of an automobile, of allowing his thirteen-year-old son to run his machine in violation of a statute making it a misdemeanor for one under sixteen to drive an automobile, was held negligence, and it was said that from the facts the jury might well infer that when the plaintiff's intestate was killed by the defendant's automobile his son was driving with his consent. The court said: "It is generally held where a master unknowingly retains incompetent servants in his employ and to do his bidding, he becomes liable for their negligence. . . . Upon the same principle, where a father permits his minor child to operate his automobile upon the highways and public streets in violation of the statute, it is negligence upon the part of the father, and he becomes responsible for those injuries which are the result of such violation of law." J. T. W.

CALIFORNIA SUPREME COURT.
(Department No. 1.)

COUNTY OF SANTA BARBARA
v.

JOHN F. MORE et al.

(— Cal. —, 164 Pac. 895.)

Highway — trees — right to destroy.

1. The owner of the fee of a street is deprived of the right to remove trees which L.R.A.1917F.

he has planted therein, by statutes placing them under the charge of a board of forestry, and imposing a penalty upon whoever destroys any shade or ornamental tree. For other cases, see *Highways*, II. c, 1, in Dig. 1-52 N. S.

Constitutional law — prevention of removal of trees from highway.

2. The owner of the fee of a street is de-

Note. — As to right of abutting owner to remove or trim trees in highway, see annotation following this case, post, 389.

prived of no constitutional right by forbidding him to remove trees which he planted therein, although they interfere with crops on his abutting property, if they afford comfort to travelers and aid in the upkeep of the highway.

For other cases, see Highways, II. c, 1, in Dig. 1-52 N. S.

Pleading — damages — penalty.

3. An allegation of damages in a suit to enjoin destruction of trees will not support a recovery of a statutory penalty for such destruction.

For other cases, see Pleading, II. f, in Dig. 1-52 N. S.

(April 23, 1917.)

CROSS APPEALS from a judgment of the Superior Court for Santa Barbara County in an action brought to enjoin defendants from cutting down, destroying, or injuring certain trees along the highway, and to recover damages for the destruction of trees already cut; plaintiff appealing from so much of the judgment as refused it damages; defendants appealing from so much as granted the injunction. Affirmed.

The facts are stated in the opinion.

Messrs. E. W. Squier and Fred H. Schauer for plaintiff.

Mr. William G. Griffith, for defendants:

The trees in question are the property of the defendant John F. More, and he is entitled to exercise over them the rights of ownership.

Wright v. Austin, 143 Cal. 236, 65 L.R.A. 949, 101 Am. St. Rep. 97, 76 Pac. 1023; 2 Dill. Mun. Corp. 4th ed. § 663; Elliott, Roads & Streets, 3d ed. §§ 125, 499; Colegrove Water Co. v. Hollywood, 151 Cal. 429, 13 L.R.A. (N.S.) 904, 90 Pac. 1053; Bayonne v. North Arlington, 77 N. J. Eq. 166, 140 Am. St. Rep. 547, 75 Atl. 558; Overman v. May, 35 Iowa, 89; Higgins v. Reynolds, 31 N. Y. 156; Robert v. Sadler, 104 N. Y. 229, 58 Am. Rep. 498, 10 N. E. 428; Stackpole v. Healy, 16 Mass. 33, 8 Am. Dec. 121; People v. Foss, 80 Mich. 559, 8 L.R.A. 472, 20 Am. St. Rep. 532, 45 N. W. 480; Barclay v. Howell, 6 Pet. 500, 8 L. ed. 478; State, Avis Prosecutor, v. Vineland, 56 N. J. L. 474, 23 L.R.A. 685, 28 Atl. 1039; Phifer v. Cox, 21 Ohio St. 248, 8 Am. Rep. 58; Bliss v. Ball, 99 Mass. 507; Stretch v. Cassapolis, 125 Mich. 167, 51 L.R.A. 345, 84 Am. St. Rep. 567, 84 N. W. 51; Clark v. Basso, 34 Mich. 86; Winter v. Peterson, 24 N. J. L. 524, 61 Am. Dec. 678; 15 Am. & Eng. Enc. Law, 416; Lewis Em. Dom. 3d ed. § 863.

The abutting landowner, being the owner of the trees, may protect them from injury or destruction, except, of course, where they are an obstruction to travel, thus interfering with the public easement, in which case the L.R.A.1917F.

public authorities may cause them to be removed.

Daily v. State, 51 Ohio St. 348, 24 L.R.A. 724, 46 Am. St. Rep. 578, 37 N. E. 710; Lovejoy v. Campbell, 16 S. D. 231, 92 N. W. 24; Adams v. Syracuse Lighting Co. 137 App. Div. 449, 121 N. Y. Supp. 762; Brahan v. Meridian Home Teleph. Co. 97 Miss. 326, 52 So. 485; Chase v. Oshkosh, 81 Wis. 313, 15 L.R.A. 553, 29 Am. St. Rep. 898, 51 N. W. 560; Cartwright v. Liberty Teleph. Co. 205 Mo. 126, 12 L.R.A. (N.S.) 1125, 103 S. W. 982, 12 Ann. Cas. 249; Donahue v. Keystone Gas Co. 181 N. Y. 313, 70 L.R.A. 761, 106 Am. St. Rep. 549, 73 N. E. 1108, 18 Am. Neg. Rep. 203; McEachin v. Tuscaloosa, 164 Ala. 269, 51 So. 153; Brown v. Asheville Electric Co. 138 N. C. 533, 69 L.R.A. 631, 107 Am. St. Rep. 554, 51 S. E. 62; Winter v. Peterson, 24 N. J. L. 524, 61 Am. Dec. 678; Paola v. Wentz, 79 Kan. 148, 131 Am. St. Rep. 290, 98 Pac. 775; Frostburg v. Wineland, 98 Md. 239, 64 L.R.A. 627, 103 Am. St. Rep. 399, 56 Atl. 811, 1 Ann. Cas. 783; Atlanta v. Holliday, 96 Ga. 546, 23 S. E. 569; Kemp v. Des Moines, 125 Iowa, 640, 101 N. W. 474; Crismon v. Deck, 84 Iowa, 344, 51 N. W. 55; Billa v. Belknap, 36 Iowa, 583; Vanderhurst v. Tholcke, 113 Cal. 147, 35 L.R.A. 267, 45 Pac. 266.

Closely following upon the right of the landowner to protect his trees as against the public authorities, where the trees are not an obstruction to travel, is his right to remove them without interference from the public authorities, so long as he does not obstruct the free use of the public easement.

Lancaster v. Richardson, 4 Lans. 136; Bigelow v. Whitcomb, 72 N. H. 473, 65 L.R.A. 676, 57 Atl. 680.

In taking out his shade trees the defendant John F. More was in the exercise of his lawful right.

Colegrove Water Co. v. Hollywood, 151 Cal. 425, 13 L.R.A. (N.S.) 904, 90 Pac. 1053; Bigelow v. Whitcomb, 72 N. H. 473, 65 L.R.A. 676, 57 Atl. 680; Gurnsey v. Northern California Power Co. 160 Cal. 699, 36 L.R.A. (N.S.) 185, 117 Pac. 906; People v. Goodin, 136 Cal. 455, 69 Pac. 85; Lancaster v. Richardson, 4 Lans. 136; Frostburg v. Wineland, 98 Md. 239, 64 L.R.A. 627, 103 Am. St. Rep. 399, 56 Atl. 811; Brown v. Asheville Electric Co. 138 N. C. 533, 69 L.R.A. 631, 107 Am. St. Rep. 554, 51 S. E. 62; Freshour v. Hihn, 99 Cal. 443, 34 Pac. 87; Robert v. Sadler, 104 N. Y. 229, 58 Am. Rep. 498, 10 N. E. 428.

No penalty could be awarded in this action.

Sierra County v. Butler, 136 Cal. 547, 69 Pac. 418; Chipman v. Emeric, 5 Cal. 239.

The facts do not entitle the plaintiff to a penalty.

Wright v. Austin, 143 Cal. 236, 65 L.R.A. 949, 101 Am. St. Rep. 97, 76 Pac. 1023; Colegrove Water Co. v. Hollywood, 151 Cal. 429, 13 L.R.A.(N.S.) 904, 90 Pac. 1053; Gurnsey v. Northern California Power Co. 160 Cal. 699, 36 L.R.A.(N.S.) 185, 117 Pac. 906; Lancaster v. Richardson, 4 Lans. 136; People v. DeWinton, 113 Cal. 403, 33 L.R.A. 374, 54 Am. St. Rep. 357, 45 Pac. 708; Freshour v. Hihn, 99 Cal. 443, 34 Pac. 87; Cordan v. Wright, 159 Cal. 622, 115 Pac. 227, Ann. Cas. 1912C, 1044.

The plaintiff is not entitled to damages.

John A. Roebling's Sons Co. v. Gray, 139 Cal. 607, 73 Pac. 422; Merrill v. Chapman, 34 Cal. 251; Treat v. Dorman, 100 Cal. 623, 35 Pac. 86; Bacon v. Robson, 53 Cal. 309.

Per Curiam:

Hollister avenue is the principal highway leading from the city of Santa Barbara in the county of the same name, to the west and north. Defendant John F. More owns a 400-acre tract of land fronting on the southerly line of the highway. The highway boundaries are, and for long have been, defined by substantial fences on either side. More than twenty years ago, More planted ornamental trees along this highway between the roadway proper and his fence. He owns the fee of the land to the center line of the highway. These trees are native black walnuts, poplars, silver leaf maples, and catalpas. They have grown to be from 1 foot to 3 feet in diameter, and some of them have reached a height of 70 feet. They afforded with other trees a shaded avenue, declared to be one of the most beautiful in the state. While these trees were thus growing, defendant More planted English walnuts upon his 400 acres. The row or rows nearest to the ornamental trees upon the highway suffered from their proximity to them. Some of the ornamental trees thrust out lateral roots to a distance equal to their height. Suckers sprang up from these roots, the soil was impoverished, the moisture from it withdrawn, and the walnuts on these near-by trees were of inferior size and quality. Defendant More upon more than one occasion sought permission of the supervisors of the county to destroy these ornamental trees, offering to substitute therefor some kind of tree, mentioning palm trees, which thrust down a deep tap root and which would not send out lateral roots to the injury of his nut orchard. The board of supervisors of Santa Barbara county delayed action upon these petitions or requests, and they were withdrawn. Then, on the 11th day of April, 1911, the defendant cut down and destroyed six of these trees upon the highway in front of his land. He was notified by the district attorney of the L.R.A.1917F.

county to cease this work of destruction, and he promised to do so, but a few days thereafter on Sunday, in violation of his promise, he employed a force of men in an effort to destroy all of the trees before he could be restrained from so doing by process of law. Twenty more trees were thus destroyed before the work was arrested by the authorities. Thereupon the county of Santa Barbara brought this action, setting forth these matters, averring that the destruction was maliciously done, and that the damage wrought by it was \$2,600. Plaintiff prayed for an injunction and for a monetary judgment in the sum of \$2,600. For answer, the defendant John F. More assumed all responsibility, asserted his ownership in the land, admitted the destruction of the trees, denied that they were wilfully or unlawfully or maliciously destroyed, and asserted a right in him so to destroy them by virtue of his ownership of the fee of the highway, setting forth in this connection the injury to his walnut orchard as above outlined. The court's findings of fact were in accord with the foregoing statement. It found that the trees had been planted by defendant More, and in their early growth nurtured by him, but that for many years the county had exercised supervision over them, pruning and caring for them. It found further that the trees were the property of the defendant John F. More, "subject to the right of the county of Santa Barbara to preserve them as part of said highway, for the use and benefit of the public, and control the cutting down, removal, or trimming of the same." It found further that the trees "are large handsome trees, and add greatly to the comfortable use and enjoyment of said highway and the economical and convenient maintenance of the same." In support of this last finding, the evidence was that, beside their esthetic value, the trees afforded a grateful shade to the traveler in warm weather and during the long period of summer drought when it was necessary to sprinkle the roadway, the better to preserve it; and that by arresting the sweep of the winds, they retarded evaporation, and thus lessened the expense of the upkeep of the highway.

The only evidence which the plaintiff offered under the allegation of damage above quoted was that of the supervisor of the district, who testified that he estimated the damage to the highway by the destruction of the trees at \$100 apiece, "considering the trees of that value." On cross-examination he explained that the basis of his estimate was the law which exacts a forfeiture of \$100 for the malicious destruction of each shade or ornamental tree on any highway. Pol. Code, § 2742. The trial court granted

the injunction prayed for. It made no specific finding upon the allegation of damage, but in its conclusions of law declared that the plaintiff "is not entitled to recover in this form of action the penalty of \$100 per tree imposed by the statute for digging up, cutting down, or other malicious injuring or destroying shade or ornamental trees upon the public highway."

From this judgment, cross appeals have been taken by the litigants; by plaintiff, whose contention is that the court erred in not fixing and awarding damages herein, insisting that it established the malicious destruction which entitled the county to recover the \$100 penalty; by the defendant, who insists that, by virtue of the ownership of the fee of the soil, he had the right absolute to remove the trees. This latter contention first demands consideration. It finds support in two adjudications. The first *Lancaster v. Richardson*, 4 Lans. 136, where the supreme court of New York held, in case of a destruction similar to the present one, that "independently of the statute, trees standing in the streets or highway, the soil of which belongs to the adjacent owners, are the exclusive property of such owners, and they may remove them at pleasure."

The second of these cases is *Bigelow v. Whitcomb*, 72 N. H. 473, 65 L.R.A. 676, 57 Atl. 680, where the precise question here under consideration was presented for determination, the court saying that the question before it was "whether, in laying out a highway under statutory authority, the public acquired a right to prohibit the landowner from removing the trees standing in the highway next to his land, for the purpose of . . . shade and ornamentation. If the public cannot deprive the owner of his trees by using them in constructing or repairing the road, can they deprive him . . . from cutting them down and using them in such a manner as he sees fit?"

The court held that the public acquired no such right, saying: "It is no more a deprivation of his property right to cut down his trees and devote them to the useful and necessary work of road construction, than it is to appropriate them standing, for the purposes of shade and ornamentation. An effective prohibition against one's use and enjoyment of his property in a usual and otherwise appropriate manner deprives him of his property, as much as its actual taking or asportation. . . . Whether the trees are useful for shade and add to the beauty of the way, or whether they are only useful for lumber and wood, cannot determine the question of his ownership. If they are his property, he is entitled to the beneficial use of them, subject to such reasonable regula-

tions as the public use of the highway may require (citing authorities)."

It is the unquestioned rule of decision in this state that the owner of the fee of a highway may exercise all such rights of dominion over his land thus subjected to the easement as are not inconsistent with, nor to the detriment of, the easement itself. *Colegrove Water Co. v. Hollywood*, 151 Cal. 425, 13 L.R.A. (N.S.) 904, 90 Pac. 1053; *Gurnsey v. Northern California Power Co.* 160 Cal. 699, 36 L.R.A. (N.S.) 185, 117 Pac. 908. But the question before us cannot be answerable by mere references to the decisions of other states without a presentation of the statute law of this state bearing upon the matter. When consideration is paid to our statutes, it will be found that the legislature has spoken decisively on the question. By § 2633 of the Political Code, an owner or occupant of land adjoining the highway is empowered to plant trees in and along the highway, and whoever wilfully injures any of these trees is liable to the owner or to the occupant "for the damage which is thereby sustained." Section 2742 of the same Code has been cited above, and it declares that "whoever digs up, cuts down, or otherwise maliciously injures or destroys any shade or ornamental tree, . . . forfeits \$100 for each . . . tree."

Section 4041, subdivision 39, of the same Code, empowers the boards of supervisors to encourage under such regulations as they may adopt, "the planting and preservation of shade and ornamental trees on the public roads and highways," and authorizes boards of supervisors to "pay to persons planting and cultivating [such trees] for every living tree thus planted, at the age of four years, a sum not exceeding \$1." Section 733 of the Code of Civil Procedure declares it to be a trespass to destroy any tree on the land of another person or in the street or highway in front of any person's house, village, or city lot, or cultivated ground; and, further, that the trespasser is liable for treble the amount of damages which may be assessed. By the statutes of 1909 (Stat. 1909, p. 1129), the board of supervisors of each county is empowered to appoint a board of forestry, "who shall have exclusive charge and control of all shade and ornamental trees, hedges, lawns, shrubs, and flowers growing or to be grown upon the public roads, highways, grounds, . . . within its respective county."

These Code sections and their statute clearly indicate the policy of the state in regard to this matter, and more than that, form the controlling substantive law. Whatever may be conceived to have been the right of the property owner to destroy such trees in the absence of the legislation upon

our books, of that right by that legislation he is absolutely deprived, unless it can be successfully said that in depriving him of that right the state has taken his property without process of law. This argument, which seems to have been the basis of the New Hampshire decision, is as above quoted. We do not think, however, that this contention can be successfully maintained. Admittedly, as a part of its police power, the state has the right directly or through its agencies to control the use of the public highways for all purposes subserving their uses as public highways. These regulations may and do take many phases, and unless so unreasonable as to work an unlawful confiscation of property, they are not subject to be overthrown. That the regulations of this state as above set forth are not only reasonable but often necessary, the acts of this defendant, which he seeks to justify as the exercise of a legal right, are themselves sufficient to establish. Aside from any consideration of the esthetic value of such an avenue, though this is by no means negligible, it is shown and found by the evidence, as above indicated, that these trees performed a utilitarian service. They add to the comfort of the traveler, and they lessen the expense of road maintenance. Here then is shown abundant reason for the existence of our regulatory laws. The situation in brief is simply this: That the owner of the fee of the soil has a limited, not an unlimited, right of property in the trees. The public upon the other hand has its limited, and not unlimited, property right in the trees. If their destruction is countenanced or ordered by the authorities, the wood of the felled trees unquestionably belongs to the owner of the fee; so as to the fruit or nuts upon fruit or nut bearing trees. But, upon the other hand, being and growing, upon public highway, and subserving useful as well as ornamental purposes, it is for the authorities to say when and under

what circumstances they may be destroyed. It would be safe to rest this upon the plain language of our statute, but authority to the same effect is not lacking, and for it reference may be made to 2 Dill. Mun. Corp. 5th ed. § 721; State v. Merrill, 37 Me. 329; Baker v. Normal, 81 Ill. 108; Donahue v. Keystone Gas Co. 181 N. Y. 313, 70 L.R.A. 761, 106 Am. St. Rep. 549, 73 N. E. 1108, 18 Am. Neg. Rep. 203; Sherman v. Butcher, 72 N. J. L. 53, 60 Atl. 336. It follows herefrom that the defendants' appeal must be denied, and the judgment appealed from affirmed.

The nature of plaintiff's appeal has been indicated. Herein appellant complains that the court refused to award it the forfeiture contemplated by § 2742.

It is unquestionably true that equity, under proper pleading and proof, will award damages where such are necessary to give adequate and complete relief. Such damages, so far as the pleadings are concerned, were alleged, but the proof to support those damages was merely evidence that the county was seeking to exact in the name of damages a penalty prescribed, which penalty has no bearing whatsoever upon the actual damage sustained. It would be the same penalty of \$100 whether the tree destroyed was a twig of a year's growth, or a monarch of the centuries. Upon the other hand, if it be said that plaintiff is seeking to recover this penalty imposed by law, then, without regard to the question as to whether or not under proper pleading the penalty would be recoverable in this action, it is sufficient to say that the complaint contains no proper averments looking to the enforcement of such a penalty. Chipman v. Emeric, 5 Cal. 239.

It follows herefrom that the trial court ruled correctly in refusing to allow damages, and upon plaintiff's appeal, the judgment is affirmed.

Annotation—Right of abutting owner to remove trees in highway.

The statute which is upheld in SANTA BARBARA COUNTY v. MORE, ante 385, involves an extreme, if not an unjustifiable, exercise of the police power, at least as applied to the facts of the case which apparently disclose an actual substantial damage to the fee owner from the continued maintenance of the trees in the highway. The opinion says: "Whatever may be conceived to have been the right of the property owner to destroy such trees in the absence of the legislation upon our books, of that right by that legislation he is absolutely de-

prived, unless it can be successfully said that in depriving him of that right the state has taken his property without process of law." To avoid the effect of the limitation thus recognized as attaching to the police power it seems necessary to find some limitation or qualification of the right of the fee owner in respect to the trees. A limitation of a property right which results from the assertion of the police power itself cannot, of course, be relied upon to supply the condition of a valid exercise of that power. The opinion in

the *MORE CASE* observes that "the owner of the fee of the soil has a limited, not an unlimited, right of property in the trees. . . . But, upon the other hand, [the trees] being and growing upon the public highway, and subserving useful as well as ornamental purposes, it is for the authorities to say when and under what circumstances they may be destroyed." As here stated, the limitation of the fee owner's right seems to be the result rather than a condition precedent, of the exercise of such power. In the case of a highway laid out after the custom has become established of maintaining trees in a highway for esthetic and utilitarian purposes, it might be reasonably urged that the easement acquired by the public impliedly includes the right to so maintain them, and that the possibility of damage to the fee owner from that source must be deemed to have been taken into consideration when the original damages were awarded. Upon that hypothesis, however, the necessity of invoking the police power is not apparent, since the right of the public to maintain the trees would be an incident of the property right inherent in its easement. Apparently, however, the court in the *MORE CASE* does not mean to assert the right of the public to maintain trees by virtue of the highway easement. At least, it does not seem to dissent from the position of *Bigelow v. Whitcomb* (1904) 72 N. H. 473, 65 L.R.A. 676, 57 Atl. 680, denying that the highway easement includes such right.

The benefits of the public from the maintenance of trees in a highway for esthetic and utilitarian reasons may furnish a proper ground for the exercise of the power of eminent domain, which renders an equivalent for the property rights taken or damaged. But the consideration of these benefits alone cannot logically justify the exercise of the police power for the purpose of extinguishing a property right, unless such property is subject to some limitation other than that which results from the exercise of the police power itself. At least, this is true if, as the opinion assumes, the exercise of the police power is subject to the limitation that one's property cannot be taken without due process of law. It must be admitted, however, that the police power not infrequently operates as a practical exception to constitutional guaranties, or at least that the apparent avoidance of a conflict rests upon a *petitio principii*, involved in the tacit L.R.A.1917F.

assumption of the police power for the purpose of postulating a limitation of the property right essential to take the right out of the protection of the constitutional guaranty.

If the damage to the defendant in the *MORE CASE* from the continued maintenance of the trees had been an insignificant one, the statute might perhaps have been upheld on the theory suggested in the opinion in *Noble State Bank v. Haskell* (1911) 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487, that an ultimate public advantage may justify a comparatively insignificant taking of private property without compensation. Upon the facts, however, the damage to the defendant in the *MORE CASE* seems to have been a substantial one; and it would seem that, if the public benefits required the extinction of his right,—assuming that such right had not, independently of the statute itself, been extinguished by the public's acquisition of the highway easement,—it ought to have been extinguished by the exercise of the power of eminent domain rather than of the police power.

In the *Bigelow Case*, as already indicated, the assertion of the right of the public to maintain the trees in the highway without compensating the fee owner was predicated upon the proposition rejected by the court, that he had no property right in respect to the removal of the trees because the right of the public to maintain them in the highway to his damage was included in and was a part of the highway easement. As shown in the opinion in that case, the legislature had recognized that there might be a private ownership in trees located within the limits of the highway, and had provided means by which such private ownership might be legally terminated by the public upon due compensation therefor. In other words, the statute shown in that case provided for the exercise of the power of eminent domain, not of the police power. The controversy in the case arose because the public authorities based their proceedings upon the theory founded upon their conception of the highway easement, that the trees were not private property, and that the owner of the fee of the soil had no legal rights thereto, and therefore was not entitled to the compensation contemplated by the act.

So far as the preservation of the trees in the highway subserves a mere esthetic purpose, the exercise of the police

power seems to be opposed to the weight of authority, as is shown in the notes to *Haller Sign Works v. Physical Culture Training School*, 34 L.R.A.(N.S.) 998, and *Byrne v. Maryland Realty Co.* L.R.A.1917A, 1220. It was perhaps in recognition of this that the court in the *MORE CASE* emphasized the utilitarian advantage of the trees.

Aside from the *Bigelow Case*, already commented on, but few cases have been found upon the exact question involved in the *MORE CASE*. The decision in *Lancaster v. Richardson* (1871) 4 Lans. (N. Y.) 136, referred to in the *MORE CASE*, as to the right of an abutting landowner to remove trees standing in the highway, seems to be based, in part at least, on the absence of statutory authority depriving a landowner of the right to destroy or remove trees. In holding that the trees in the highway were the property of the adjoining owner, which he might cut down if he chose, and that a village ordinance for the protection of such trees applied only to other persons, the court said: "A law that would place trees planted for the purpose of ornament or shade in a public street or highway under the care of the public officers charged with the care of the streets, and secure them against injury done by the owner or other person by proper penalties, would be a very wholesome and just exercise of legislative power. There would be no injustice in treating the planting of trees in a street or highway as an appropriation of them to the public use for the purposes of ornament or shade, and prohibiting either the owner or the public officers from removing them without the consent of the other. But until such legislation is provided trees planted in the streets or highways must be deemed the property of the owner, and all by-laws passed for the protection of such trees can apply only to other persons. Before the public can assume to say that a man cannot cut down his own trees, they must have acquired an interest therein by purchase or by the right of eminent domain. To prevent a man from using his property is virtually taking it from him to a certain extent, and that cannot be done without compensation."

In *Baker v. Normal* (1876) 81 Ill. 108, in holding that a town ordinance which prohibited a lot owner from hitching his horse to a shade tree planted by him in the highway in front of his own premises was not void the court said: "The town under its charter has the

control of the streets, may improve them and adorn them. It may permit its citizen to improve and adorn that part of the street in front of his lot, but the improvement and adornment does not thereby become the property of the citizen. The planting of a shade tree in the street by a citizen by permission of the village or city authorities is a gratuity to the public and the citizen has no more right to control the shade tree so planted than he would have had it been planted by the city authorities. The control is in the public."

But in *Dyer v. Danbury* (1911) 85 Conn. 128, 39 L.R.A.(N.S.) 405, 81 Atl. 958, Ann. Cas. 1913A, 784, it was held that forbidding the removal, without a permit, of trees standing in the street, does not prevent the owner of the trees from removing branches therefrom which have become dangerous to persons using the street.

And see *Blalock v. Atwood* (1913) 154 Ky. 394, 46 L.R.A.(N.S.) 3, 157 S. W. 694, which held that a property owner whose title runs to the center of the street may maintain an action against the adjoining property owner for removing a tree between the sidewalk and the curb, which was on the boundary line between the two lots.

Generally, as to rights in respect to trees in the highway, see L.R.A. Indexes, under the title, "Highways," subtitle, "Rights as to trees and material in street." J. H. B.

CALIFORNIA SUPREME COURT. (Department No. 1.)

RE ESTATE OF GUSTAV DREYFUS, Deceased.

PHILIP HERBOLD et al., Appts.

(— Cal. —, 165 Pac. 941.)

Will — holographic — typewritten.

A will written on a typewriter does not comply with the requirements of a statute that a holographic will shall be entirely written, dated, and signed by the hand of the testator, and is therefore not admissible to probate as such will.

For other cases, see *Wills, II.* in *Dig. 1-52 N. S.*

(June 9, 1917.)

Note. — As to violation of requirement that holographic will shall be written by testator, see annotation following this case, post, 393.

APPEAL by petitioner et al., from an order of the Superior Court for Los Angeles County, refusing to admit to probate a certain document as the will of Gustav Dreyfus, deceased. Affirmed.

The facts are stated in the opinion.

Messrs. Neighbours, Hoag, & Burke and M. J. Platshek, for appellants:

If the act is the act of the decedent, it is of no importance whether he used a pen or a typewriter, so long as it was executed by his hand, without the assistance of any other person, as our law provides that writing includes typewriting.

Hunt v. Dexter Sulphite Pulp & Paper Co. 100 App. Div. 119, 91 N. Y. Supp. 279; Benson v. McMahon, 127 U. S. 457, 32 L. ed. 234, 8 Sup. Ct. Rep. 1240.

A typewritten instrument, executed by the testator, constitutes a valid holographic will.

Re Aird, Rap. Jud. Quebec, 28 C. S. 235; Re Noyes, 20 Ann. Cas. 371, note; Re Fay, 145 Cal. 82, 104 Am. St. Rep. 17, 78 Pac. 340; 1 Underhill, Wills, p. 16, note 3; Hannah v. Peake, 2 A. K. Marsh. 133.

Typed, printed, stamped, and autographic signatures have been held valid in:

Pennington v. Bachr, 48 Cal. 565; Williams v. McDonald, 58 Cal. 529; Hewel v. Hogin, 3 Cal. App. 248, 84 Pac. 1002; Landecker v. Co-operative Bldg. Bank, 71 Misc. 517, 130 N. Y. Supp. 780; Garton Toy Co. v. Buswell Lumber & Mfg. Co. 150 Wis. 341, 136 N. W. 147; Deep River Nat. Bank's Appeal, 73 Conn. 341, 47 Atl. 675; Equitable Life Assur. Soc. v. Meuth, Ann. Cas. 1913B, 663, note; Robb v. Pennsylvania Co. 186 Pa. 450, 41 L.R.A. 695, 65 Am. St. Rep. 868, 40 Atl. 969, 41 Atl. 49; Jenkins v. Gaisford, 3 Swabey & T. 93, 32 L. J. Prob. N. S. 122, 9 Jur. N. S. 630, 8 L. T. N. S. 517, 11 Week. Rep. 854; Emerson's Goods, Ir. L. R. 9 Eq. 443; Dan. Neg. Inst. 6th ed. § 74, p. 110; Page, Wills, § 172.

Shaw, J., delivered the opinion of the court:

Philip Herbold filed a petition for the admission to probate of a document, as the last will of the decedent, Gustav Dreyfus. The petition alleges that this paper was not attested by any witness, that it was wholly in typewriting, except the signature of the decedent thereto, that said signature was written by the decedent with pen and ink, and that the remainder of the document, including the proper date, was written by the decedent himself by the manipulation of a typewriting machine. The evidence was to the same effect. Thereupon the court below made its order refusing to admit the document to probate as a will. From this order the petitioner and said Maurice Blumlein, L.R.A.1917F.

the latter being the sole beneficiary under the purported will, have appealed.

Our Code requires that a holographic will shall be "entirely written, dated, and signed by the hand of the testator himself." Civ. Code. § 1277.

To ascertain the meaning of this requirement, we must look to the reasons which led to its enactment, the conditions then existing, and the object sought to be attained thereby. Originally in England, by the ecclesiastical law and the common law, wills could be made by oral declaration. Gould v. Safford, 39 Vt. 505; Ex parte Thompson, 4 Bradf. 154; Harrington v. Stees, 82 Ill. 50, 25 Am. Rep. 294; 30 Am. & Eng. Enc. Law, 580. This was found to be so fruitful of fraud and perjury that the Statute of Frauds was enacted, providing that nuncupative wills could be made only by persons in their last sickness, to be proved by three witnesses, or by soldiers in service or mariners at sea, and that in all other cases a will must be a signed writing, attested, and subscribed by at least three credible witnesses. Statutes prescribing the manner of executing wills of all kinds and the degree of proof necessary to establish them have for their prime object the prevention of frauds and perjuries; or, as the supreme court of Louisiana puts it, "to prevent imposition and abuse." Knight v. Smith, 3 Mart. (La.) 162. Our Code provision allowing holographic wills was first enacted in 1872. The commissioners who drafted the Civil Code, in their note, recommend it on the ground that it "may not, and indeed, it is confidently claimed in those countries where holographic wills are recognized, does not, give rise to as many attempts at fraudulent will-making and disposition of property as where it does not exist."

From time immemorial letters and words have been written with the hand by means of pen and ink or pencil of some description, and it has been a well-known fact that each individual who writes in this manner acquires a style of forming, placing, and spacing the letters and words which is peculiar to himself, and which, in most cases, renders his writing easily distinguishable from that of others by those familiar with it or by experts in chirography who make a study of the subject and who are afforded an opportunity of comparing a disputed specimen with those admitted to be genuine. The provision that a will should be valid if entirely "written, dated, and signed by the hand of the testator," is the ancient rule on the subject. There can be no doubt that it owes its origin to the fact that a successful counterfeit of another's handwriting is exceedingly difficult, and that therefore the requirement that it should be

in the testator's handwriting would afford protection against a forgery of this character. In 1872 the only mode of writing in use was by pen and ink or pencil. There were then in existence some crude machines for imprinting letters on paper by means of small levers similar to those now used in typewriters; but the practical modern typewriter, now in almost universal use, was unknown. It was not perfected until 1875, and did not come into general use until several years thereafter. The language of § 1277, by the common usage of the language in 1872, or even at the present time, would mean that the entire will must be in the "handwriting" of the testator. This would not include any sort of printing by the use of type, whether on a printing press or placed at the end of a rod manipulated by keys.

While it is true that a will made wholly by the testator and by means of a typewriter may be said to have been made "by the hand of the testator himself," it would not be true, accurately speaking, that such a will had been "written" by him. The process of making letters on paper with a typewriter is essentially a process of printing. The type fixed on a bar is stained with ink and then pressed against the paper, leaving its

imprint precisely as in a printing press. The word "written," as used in § 1277, in the year 1872, had no such signification. There are cases where a word in a statute aptly describing a thing then well known has been extended so as to include some other thing afterwards invented or used to accomplish the same or a similar purpose and within the general statutory intent an object. For example, "carriage," meaning a wheeled vehicle, has been held to include the subsequently invented bicycle. But the reasons for these extensions of meaning have no application here. They were made to carry out the spirit and object of the statutory provision. The meaning here contended for would greatly enlarge the opportunities for successful forgeries by taking away the means of detection which the legislature had in mind, and would defeat the purpose of the statute by destroying the safeguards which its requirements were designed to secure.

The order is affirmed.

We concur: Sloss, J.; Victor E. Shaw, Judge pro tem.

Petition for rehearing denied July 5, 1917.

Annotation—Violation of requirement that holographic will shall be written by testator.

This note is supplemental to the note to *Re Noyes*, 26 L.R.A.(N.S.) 1145, in which note and in the opinion in the case there annotated the earlier cases are collected.

The decision in *RE DREYFUS*, ante, 391, that the requirement that a holographic will must be entirely written by the hand of the testator is not satisfied by an instrument typewritten by the testator himself, except the signature, which was written with a pen, is opposed by the decision in *Re Aird* (1905) Rap. Jud. Quebec, 28 C. S. 235 (cited in the note in 26 L.R.A.(N.S.) 1145).

An extrinsic document not in the handwriting of the testator cannot be made a part of his holographic will by reference to it therein, where, by the statute, a holographic will must be "wholly written" by the testator. L.R.A.1917F.

Hewes v. Hewes (1916) 110 Miss. 826, 71 So. 4.

In *Maris v. Adams* (1914) — Tex. Civ. App. —, 166 S. W. 475, the court reversed a judgment admitting to probate as a holographic will several instruments together, including a promissory note made out on a printed blank, the decision being partly for the reason that the note was not "wholly written by the testator," as required by the statute.

It may be noted that in *Fernando v. Villalon* (1904) 3 Philippine, 386, where the court considered that an alleged holographic will was neither written nor signed by the alleged testatrix, it is stated that even if the signature was authentic, the document was still invalid as not written in its entirety by the testatrix. B. B. B.

MARYLAND COURT OF APPEALS.

AMERICAN AGRICULTURAL CHEMICAL COMPANY, Appt.,
v.

HAROLD B. SCRINGER et al., Admr.,
etc., of Samuel M. Tracey, Deceased.

(— Md. —, 100 Atl. 774.)

Executor and administrator — distribution before passing of accounts — rights of creditors.

1. No rights of creditors of a distributee of an estate are infringed by the payment by the administrator to the distributee of his distributive share without notice to the creditors, and before the passing of his account, although the statute provides that the administrator may appoint a meeting of the distributees, and distribution may be there made under the court's direction and control.

For other cases, see Executors and Administrators, IV. a, 3, in Dig. 1-52 N. S.

Garnishment — after delivery of check in payment.

2. An administrator is not subject to garnishment for the share of a distributee of the estate after the delivery of a post-dated check for the amount of such share, although his account has not been passed by the court.

For other cases, see Garnishment, I. b, in Dig. 1-52 N. S.

(March 13, 1917.)

APPEAL by plaintiff from a judgment of the Superior Court of Baltimore City, in its favor, for less than demanded, in a garnishment proceeding to reach funds alleged to belong to Summerfield S. Tracey. **Affirmed.**

The facts are stated in the opinion.

Mr. Ridgely P. Melvin for appellant.

Mr. Irvin B. Scrimger for appellees.

Pattison, J., delivered the opinion of the court:

The appellant in this case sued out of the circuit court for Anne Arundel county an attachment upon a judgment recovered by it in said court against one Summerfield S. Tracey, which was laid in the hands of the appellees as administrators of Samuel M. Tracey, deceased. The garnishees filed their plea, alleging that they had not, at the time of the laying of the attachment, nor have they had at any time since, in their hands any goods, chattels, or credits of the judgment debtor. The case came up for trial in the superior court of Baltimore city, and was tried by the court sitting as a jury.

Note. — As to garnishment of debt after delivery of check in payment, see annotation following this case, post, 396.
L.R.A.1917F.

The following are the undisputed facts of the case:

Summerfield S. Tracey, the judgment debtor, was one of the distributees of the estate of Samuel M. Tracey, deceased. There was distributed to him under the first administration account dated January 21, 1915, the sum of \$515. This account, though not filed until January 21st, had been previously stated, and was in the hands of the administrators on the 20th day of January, 1915. On the last-named day the administrators gave to Irving B. Scrimger, a son of Harold B. Scrimger, and attorney for Summerfield S. Tracey, a check dated January 21, 1915, upon the Fidelity Trust Company of Baltimore, Maryland, for the sum of \$1,235.31. This check was in full payment of the amount so distributed to Summerfield S. Tracey and of the amount distributed to one Bessie Stewart, likewise a client of Irving B. Scrimger. Later in the day on January 20th, about 6 o'clock in the afternoon, the attachment was laid in the hands of the administrators.

Mr. Harold B. Scrimger, one of the administrators, when called by the plaintiff, testified that the only object he had in dating the check ahead was to conform to said administration account which was to be filed the next day. He also stated that he knew that Summerfield S. Tracey and Bessie Stewart had an appointment with Irving B. Scrimger, their counsel, on that day, to receive their respective distributive shares of the estate, and as he (Harold B. Scrimger) was not expected to be at his office that day, he gave to Irving B. Scrimger, for his clients Tracey and Miss Stewart, the check above referred to, and at the same time gave to him two other checks, one drawn to Watensheidt, attorney for other distributees, and the other drawn to the register of wills for the balance of collateral taxes and court costs, with the request that he deliver said checks to the respective parties to whom they were drawn. He further stated that on the 20th he was sick, and after signing the checks and giving them to Mr. Irving B. Scrimger he left the office and went home. It was there that the attachment was served upon him about 6 o'clock in the afternoon.

There was, however, a further distribution of a second administration account by which \$15.17 was distributed to Summerfield S. Tracey. This amount came into the hands of the administrators after the laying of the attachment and before the case was heard in court. At the conclusion of the testimony the plaintiff offered the following prayer: "The plaintiff prays the court to rule that it appears from the undisputed testimony that the writ of garnishment was served on the garnishees on January 20,

1915, at 6 o'clock, P. M., and that at that time there were funds of Summerfield S. Tracey, the judgment debtor herein, in the hands of said garnishees, and that, accordingly, the finding of the court, sitting as court and jury, is for the plaintiff for the amount of plaintiff's judgment." etc.

The court rejected this prayer, and the plaintiff excepted to its ruling thereon. The court thereafter rendered a verdict for the plaintiff for the sum of \$15.17, upon which a judgment was entered in favor of the plaintiff for said sum. It is from that judgment that this appeal is taken.

The contention is made by the appellant that at the time of service of the writ upon the garnishees the relation of debtor and creditor had not arisen between the administrators and the distributees inasmuch as the administration account had not at that time been passed by the orphans' court, and that the alleged payment of the judgment debtor's distributive share of the estate, by means of said check, was prematurely made; and, second, if at that time such relation existed, the debt owing by the administrators to the judgment debtor was not extinguished by the aforesaid check dated January 21st, delivered to the debtor on January 20th.

Section 143 of article 93 of the Code of 1860, provides that "any administrator shall be entitled to appoint a meeting of persons entitled to distributive shares or legacies, or a residue, on some day by the court approved, and payment or distribution may be there made under the court's direction and control."

This section has since been amended, but only in respect to the requirement as to notice of the meeting to be given to such persons; and by providing that the distribution and payment so made "under the direction and control of the court shall protect and indemnify the administrator or executor acting in obedience to it." Code Pub. Civ. Laws, art. 93, § 143. This court in *Donaldson v. Raborg*, 28 Md. 56, in construing this section as it stood before the amendment, said: "Ordinarily it would be safer for an administrator to pursue the course pointed out by this latter section, but there is no express command of the law that he should do so. The duty is cast upon him, in the first instance, to ascertain who the distributees and persons entitled are, . . . and if he pays the right parties their proper shares he is protected, whether it is done under the sanction of the court or not, and it makes no difference whether such payments be made before or after the passing of an account, showing the balance for distribution. Such payments, where estates are solvent, are frequently made before such an L.R.A.1917F.

account is passed, and in some cases an administrator will be compelled to make them. Code, Pub. Gen. Laws, art. 93, §§ 140, 141." *Biays v. Roberts*, 68 Md. 513, 13 Atl. 366.

There is no duty cast upon the administrators or executors to ascertain the creditors, if any, of the distributees, or to notify them of his intention to distribute the estate, and he assumes no risk, so far as they are concerned, in paying to the distributees, before the passing of an account, the distributive shares to which they are entitled; therefore if the administrator in this case paid to the distributee the amount to which he was entitled, though paid before the passage of the administration account, no rights of an attaching creditor have been infringed upon.

We must now determine whether the check dated January 21st and delivered on January 20th was an extinguishment of the debt. If so, the ruling of the court upon the plaintiff's prayer was correct, and the judgment should be affirmed.

Mr. Morse in his treatise on Banks and Banking, § 543, says: "A check is always so far payment until dishonored that, after its delivery, the drawer cannot be garnished as debtor of the payee in respect to the debt for which the check is given."

And in support of this principle he states the case of *Getchell v. Chase*, 124 Mass. 366. In that case the writ was dated March 15, 1877, and served on the same day. Michael Englehardt, summoned as trustee, answered that on March 14, 1877, he owed the defendant \$110, and gave him his check for that amount, which the defendant accepted in settlement of the debt; that there were sufficient funds deposited in the bank, on which the check was drawn, to his credit to pay the check on presentation; that the check was presented by the defendant and paid at the bank on March 16, 1877; that when the writ was served upon him, he informed the officer that he had given to the defendant a check for all he owed him, and that the service was too late; and that, at the time of the service upon him, he did not know whether the check had been duly presented to the bank, or in whose possession it was, and made no inquiry in regard to it. Chief Justice Gray, in deciding the case, said: "Upon the facts stated in the trustee's answer, the check was evidently given by him and received by the principal defendant as payment, and operated as such, at least, until presentment and refusal, which in this case did not happen. Nothing, therefore, was due from the trustee to the defendant at the time of the service of this process." *National Park Bank v. Levy Bros.* 17 R. I. 746, 19 L.R.A. 475, 24 Atl. 777.

In the case of *Prewitt v. Brown*, 101 Mo.

App. 254, 73 S. W. 897, Prewitt obtained a judgment against Coquard in the circuit court of the city of St. Louis, October 16, 1900, and on November 25, 1901, an attachment was issued thereon by way of execution, and laid in the hands of Brown. Brown had bought of Coquard his membership in the St. Louis Stock Exchange at and for the sum of \$3,500. Brown's check to pay for Coquard's seat was made out and delivered by him on November 22d, but was not in fact cashed until November 30th, or five days after the service of garnishment on Brown. The plaintiff insisted that it was incumbent upon Brown to stop payment on the check when he was summoned as garnishee, and as he failed to do so and afterwards allowed it to be paid to Coquard, he was answerable to the plaintiff as garnishee. The court there said: "Underlying this contention is the notion that the check did not constitute payment; that Brown was still indebted to Coquard on the original contract of sale. It is true enough that as between the parties a check on a bank does not constitute full payment, but the original liability may be sued on if the check is dishonored when presented for payment. *Johnson-Brinkman Commission Co. v. Central Bank*, 116 Mo. 558, 38 Am. St. Rep. 615, 22 S. W. 813; *Hall v. Missouri R. Co.* 50 Mo. App. 179. But it is equally true that a purchaser in good faith who has given his check to a seller for the price of an article bought has so far paid for the article that he is not subject to garnishment as the seller's debtor. *Getchell v. Chase*, 124 Mass. 366; *National Park Bank v. Levy Bros.* 17 R. I. 746, 19 L.R.A. 475, 24 Atl. 777; *Pearce v. Davis*, 1 Moody & R. 365; *Waples, Attachm. Garnishment*, 2d ed. § 364; 2 Morse, Banks & Bkg. 4th ed., § 545. The reason of this rule is that the drawer of a check is under no duty or obligation to stop payment when garnished, for the benefit of the garnishing plaintiff; [and he] has no moral right to do so. He gave the check in lieu of cash to the seller with the understanding that the seller would get cash when he presented it for payment.

To countermand the check would therefore be in derogation of an implied agreement that it should be honored when presented. A different rule prevails when the drawer of the check learns before payment that the vendor sold his property in fraud of his creditors; and in such instances the drawer, after notice of the fact, is bound to stop payment if the check is still in his control. *Arnholt v. Hartwig*, 73 Mo. 485; *Dougherty v. Cooper*, 77 Mo. 528; *Keet-Roundtree Shoe Co. v. Lisman*, 149 Mo. 85, 50 S. W. 276."

There is no intimation of fraud in this case either on the part of the judgment debtor or the garnishee, or of any collusion between them. The explanation of Mr. Harold B. Scrimger as to the delivery of the check to the counsel for the distributee for the payment of his distributive share of the estate upon the day preceding the passage of the account, and the dating of the check on the day succeeding its issuance, is perfectly satisfactory, and is thoroughly consistent with an honest intention and purpose on his part.

The fact that the check was postdated does not, we think, affect the question here presented. A postdated check is a perfectly legal and proper instrument, and, like any other check, is payable immediately upon the day of its date. It is simply and unquestionably payable on demand, so soon as the day of its date is reached. *Morse, Banks & Bkg.* § 389; *Mohawk Bank v. Broderick*, 10 Wend. 304.

In this case it was given to the judgment debtor, payable upon that day, and was received by him in full payment of his distributive share in the estate, and, unless dishonored, was an extinguishment of the debt. It was not dishonored, and on the day of the passage of the account, as shown by the facts stated in the case, the distributee filed his release dated as of that day.

The court was right in refusing the plaintiff's prayer, and the judgment will be affirmed.

Judgment affirmed, with costs to the appellee.

Annotation—Garnishment of debt after delivery of check in payment.

As to check as affecting garnishment of deposit, see annotation to *Kaesemeyer v. Smith*, 43 L.R.A.(N.S.) 100, and the later case of *Farrington v. Fleming Commission Co.* 47 L.R.A.(N.S.) 742.

A garnishee's liability in a case of a debt due from him is grounded upon and is limited by his liability to the defendant in the garnishment proceeding; from which it follows that the answer to the question whether or not the drawer of a

check can be garnished in respect to such debt in turn depends upon the question whether the giving of the check be regarded as a payment, or at least a conditional payment, of the debt.¹ Upon these questions there is some conflict of authority; but, in the main, the rules

¹ Generally as to payment by commercial paper, see annotation to *A. Leschen & Sons Rope Co. v. Mayflower Gold Min & Reduction Co.* 35 L.R.A.(N.S.) 1.

upon the specific point under annotation herein are fairly well established. Thus, it has been generally ruled that a check is so far payment (at least a conditional payment) that, until dishonored, the drawer cannot, in the absence of fraud, be garnished as the debtor of the payee in respect of the debt for which it was given;² especially where it appears that at the time of the service of the garnishment the check had passed beyond the control of the drawer, so that it could not have been recalled,³ and was received by the defendant as payment under an agreement or understanding that it should be so accepted,⁴ the theory of the rule being that, after the giving and acceptance of the check, the payee has no right of action against the drawer unless the check, upon presentation to the bank upon which it is drawn, is dishonored.⁵ And, as a matter

of fact, the drawer of a check which has been delivered in good faith is under no legal duty to countermand payment thereof upon subsequent service upon him of a summons of garnishment.⁶ But it has been ruled that where the check is still within the control of the drawer at the time of the service of the writ upon him, it is his duty to exercise reasonable diligence to stop delivery.⁷ And where the check has not been delivered at the time of the service of the summons upon the drawer, it is revocable and the debt is still owing and consequently subject to garnishment.⁸ And this is true even though the check had been deposited in the postoffice, if, under the regulation of such office, the sender had a right to withdraw it from the mail, unless the payee had agreed to accept a check in payment of the debt, or had directed that a check be mailed.⁹

² American Exch. Nat. Bank v. Superior Ct. (1915) 29 Cal. App. 8, 154 Pac. 279; Parker-Fain Grocery Co. v. Orr (1907) 1 Ga. App. 628, 57 S. E. 1074; Watt-Harley-Holmes Hardware Co. v. Day (1907) 1 Ga. App. 646, 57 S. E. 1033; Andrews v. Sasser (1916) 17 Ga. App. 482, 87 S. E. 717; AMERICAN AGRI. CHEMICAL Co. v. SCRIMGER, ante, 394, holding that fraud was not shown by the postdating of the check; Barnard v. Graves (1834) 16 Pick. (Mass.) 41; Getchell v. Chase (1878) 124 Mass. 366 (set out and quoted in AMERICAN AGRI. CHEMICAL Co. v. SCRIMGER); Prewitt v. Brown (1903) 101 Mo. App. 254, 73 S. W. 897 (also set out and quoted in the SCRIMGER CASE). And see Hemphill v. Yerkes (1890) 132 Pa. 545, 19 Am. St. Rep. 607, 19 Atl. 342.

³ Parker-Fain Grocery Co. v. Orr (1907) 1 Ga. App. 628, 57 S. E. 1074; Andrews v. Sasser (1916) 17 Ga. App. 482, 87 S. E. 717; Barnard v. Graves (1834) 16 Pick. (Mass.) 41; National Park Bank v. Levy Bros. (1892) 17 R. I. 746, 19 L.R.A. 475, 24 Atl. 777 (check passed into hands of a third person as absolute owner); Moreau River State Bank v. Japinga (1916) 37 S. D. 404, 158 N. W. 786.

⁴ Getchell v. Chase (1878) 124 Mass. 366; National Park Bank v. Levy Bros. (1892) 17 R. I. 746, 19 L.R.A. 475, 24 Atl. 777; Campbell v. Hanney (1895) 19 R. I. 300, 33 Atl. 444; Larsen v. Allan Line S. S. Co. (1907) 45 Wash. 406, 9 L.R.A. (N.S.) 258, 122 Am. St. Rep. 926, 88 Pac. 753.

⁵ American Exch. Nat. Bank v. Superior Ct. (1915) 29 Cal. App. 8, 154 Pac. 279; Larsen v. Allan Line S. S. Co. (1907) 45 Wash. 406, 9 L.R.A. (N.S.) 258, 122 Am. St. Rep. 926, 88 Pac. 753.

⁶ Parker-Fain Grocery Co. v. Orr (1907) 1 Ga. App. 628, 57 S. E. 1074; Watt-Harley-Holmes Hardware Co. v. Day (1907) 1 Ga. App. 646, 57 S. E. 1033; Andrews v. Sasser (1916) 17 Ga. App. 482, 87 S. E. L.R.A. 1917F.

717; Prewitt v. Brown (1903) 101 Mo. App. 254, 73 S. W. 897 (holding that a purchaser of property who has given his check in payment is under no duty or obligation to stop payment thereon upon being garnished, unless he learns before payment that the property was sold to him in fraud of his vendor's creditors); Larsen v. Allan Line S. S. Co. (Wash.) supra.

⁷ Binkley v. Clay (1904) 112 Ill. App. 332 (holding that a garnishee who, prior to service of the writ upon him, had drawn a check and forwarded it to his bank, with a request for a draft and delivery of the draft to a certain bank for transmission to his creditors in a foreign country, was subject to garnishment where he was served with summons in time to prevent delivery of the draft by the drawee bank); Curle v. Jones (1897) 18 Ky. L. Rep. 785, 38 S. W. 677 (holding that a lien was acquired by service of summons in garnishment although the garnishee had already delivered a check for the amount to the agent of the defendant, where he had not thereby surrendered control over the fund, as was shown by the fact that he afterward deposited the money in court, subject to its order); Dennie v. Hart (1824) 2 Pick. (Mass.) 204 (holding that a debtor could be held as trustee after giving a check in payment of his indebtedness, where the check had never been presented and was in possession of his clerk, so that he could control it and revoke it when he pleased).

⁸ Parker-Fain Grocery Co. v. Orr (1907) 1 Ga. App. 628, 57 S. E. 1074; Watt-Harley-Holmes Hardware Co. v. Day (1907) 1 Ga. App. 646, 57 S. E. 1033.

⁹ Watts-Harley-Holmes Hardware Co. v. Day (Ga.) supra. In this case it was said that, upon being properly mailed pursuant to direction, a check became the property of the addressee and could not be recalled.

And even after delivery, if the garnishee effectually stops payment of the check after he is served, he may be held to answer for the debt, for in such a case it is as if the check had never been given.¹⁰ And the same is true if the garnishee's creditor has not accepted the check as payment, or, in a stronger case,

has expressly refused to accept it at all upon the terms under which it was tendered; and this even though it be retained by him.¹¹ The latter rule, of course, would not hold in those jurisdictions where the delivery of the check is regarded as an assignment pro tanto of the fund drawn upon.

¹⁰ *Cohen v. Hale* (1878) L. R. 3 Q. B. Div. (Eng.) 371, 47 L. J. Q. B. N. S. 496, 39 L. T. N. S. 35, 26 Week. Rep. 680.

¹¹ *Kirby Planing Mill Co. v. Titus* (1913)

14 Ga. App. 1, 80 S. E. 18. In this case

the payee drew a line through an indorsement that the check was to be in full settlement, but retained it after refusal of the drawee bank to pay same.

G. J. C.

NEBRASKA SUPREME COURT.

ARTHUR J. KOENIGSTEIN, Exr., etc., of
Friedrich Finke, Deceased, Appt.,
v.

GRAND LODGE OF THE ORDER OF THE
HERMAN SONS of the State of Nebraska
et al.

HATTIE LINDSAY, Intervener, Appt.

(— Neb. —, 163 N. W. 758.)

Insurance — dependent — who is.

1. The statute should be liberally construed in determining whether the beneficiary named by the insured in a fraternal beneficiary association is a "dependent" within the meaning of the statute.

For other cases, see *Insurance, II. b, in Dig.* 1-52 N. S.

Same — contract for support.

2. When the beneficiary named performs continued and necessary personal services for the insured under an agreement that the insured will contribute to her support by making provision for her for that purpose in his will, she is to that extent dependent upon him, and should be so held in construing the statute. The insured would be morally, if not legally, bound by such agreement.

For other cases, see *Insurance, II. b, in Dig.* 1-52 N. S.

Same — change of beneficiary.

3. If the insured in pursuance of such agreement makes her the beneficiary in his

will, and the company has notice of that fact, and of the reason for so doing, and does not object, but allows all parties to believe that such beneficiary will be recognized as such by the company, and afterwards, in an action upon the certificate by such beneficiary and the administrator of the estate of the insured, pays the money into court and makes no defense, this will be a sufficient change of beneficiaries in favor of the person so named by the insured. For other cases, see *Insurance, IV. b, in Dig.* 1-52 N. S.

(July 3, 1917.)

APPEAL by plaintiff and intervener from a judgment of the District Court for Madison County in favor of defendant Finke in an action brought to recover the amount alleged to be due on a benefit certificate. Reversed.

The facts are stated in the opinion.

Messrs. William V. Allen and William L. Dowling, for intervener appellant:

Friedrich Finke, the deceased, had an undoubted right to change the beneficiary in the certificate.

Baker v. Hardy, 96 Neb. 377, 148 N. W. 80; 1 Bacon, Ben. Soc. 1904, § 305, pp. 749 et seq.

The facts averred in Mrs. Lindsay's petition of intervention estop the defendant lodge from contesting her right to the fund. They equally estop Albert Finke.

Splawn v. Chew, 60 Tex. 532; 1 Bacon, Ben. Soc. 1904, § 308, p. 764 et seq.

Headnotes by HAMER, J.

Note. — The question, Who is a dependent within the statute or rules defining beneficiaries of mutual benefit societies, is discussed in the notes to *Caldwell v. Grand Lodge*, A. O. U. W. 2 L.R.A.(N.S.) 653; *Royal League v. Shields*, 36 L.R.A.(N.S.) 208; *Goff v. Supreme Lodge*, R. A. 37 L.R.A.(N.S.) 1191; and *Duenser v. Supreme Council*, R. A. 51 L.R.A.(N.S.) 726; and see also the case of *Supreme Lodge*, N. E. O. P. v. *Sylvester*, L.R.A.1917C, 925.

As to change of beneficiary by will, see notes to *Re Harton*, 4 L.R.A.(N.S.) 939; and *Brinsmaid v. Iowa State Traveling* L.R.A.1917F.

Men's Asso. 42 L.R.A.(N.S.) 1161; and later case, *Ellis v. Fidelity & C. Co.* L.R.A.1915A, 109.

Generally, as to the right of one to whom a policy of life or benefit insurance was assigned by insured to proceeds where provisions as to change of beneficiary were not complied with, see note to *Johnson v. New York L. Ins. Co.* L.R.A.1916A, 877.

Generally, as to agreements to compensate for services by provisions in will, see L.R.A. Indexes under the title, "Wills," subtitle, "Agreement for," and cross references thereunder to other titles.

A by-law is for the benefit of the association and may be waived, and if waived by the association, a member may change his beneficiary by will.

Kepler v. Supreme Lodge, K. H. 45 Hun, 274; Splawn v. Chew, supra; Woodruff v. Tiltman, 112 Mich. 188, 70 N. W. 420; Grand Lodge, A. O. U. W. v. Noll, 90 Mich. 37, 15 L.R.A. 350, 30 Am. St. Rep. 419, 51 N. W. 268.

A court of equity will recognize the designation of a beneficiary by any other method which may manifest the deceased's intention to exercise the right.

Grand Lodge, A. O. U. W. v. Child, 70 Mich. 163, 38 N. W. 1; Raub v. Masonic Mut. Relief Asso. 3 Mackey, 68.

Hattie Lindsay was in a strict sense a dependent of Friedrich Finke.

Goff v. Supreme Lodge R. A. 90 Neb. 578, 37 L.R.A.(N.S.) 1191, 134 N. W. 230; Richelieu v. Union P. R. Co. 97 Neb. 360, 149 N. W. 772; Alexander v. Parker, 144 Ill. 355, 19 L.R.A. 187, 33 N. E. 183.

Mr. Arthur J. Koenigstein in propria persona.

Mr. Arthur C. Mayer, for appellee Finke:

The insured cannot change the beneficiary appointed and named by him in the certificate in any other manner than the one prescribed by the constitution and laws of the order.

Shaw v. Coster, 8 Paige, 339, 35 Am. Dec. 695; Grand Lodge, A. O. U. W. v. Connolly, 58 N. J. Eq. 180, 43 Atl. 286; Pilcher v. Puckett (Modern Woodmen v. Puckett) 77 Kan. 284, 17 L.R.A.(N.S.) 1083, 94 Pac. 132; McLaughlin v. McLaughlin, 104 Cal. 171, 43 Am. St. Rep. 83, 37 Pac. 865; Jory v. Supreme Council, A. L. H. 105 Cal. 20, 26 L.R.A. 733, 45 Am. St. Rep. 17, 38 Pac. 524; Rollins v. McHatton, 16 Colo. 203, 25 Am. St. Rep. 260, 27 Pac. 254; Eastman v. Provident Mut. Relief Asso. 62 N. H. 555; Worley v. Northwestern Masonic Aid Asso. 10 Fed. 227; Wendt v. Iowa Legion of Honor, 72 Iowa, 682, 34 N. W. 470; Felix v. Grand Lodge, A. O. U. W. 31 Kan. 81, 47 Am. Rep. 479, 1 Pac. 281; Supreme Council, A. L. H. v. Smith, 45 N. J. Eq. 466, 17 Atl. 770; Holland v. Taylor, 111 Ind. 121, 12 N. E. 116; Stephenson v. Stephenson, 64 Iowa, 534, 21 N. W. 19; Weisert v. Muehl, 81 Ky. 336; McCarthy v. Supreme Lodge, N. E. O. P. 153 Mass. 314, 11 L.R.A. 144, 25 Am. St. Rep. 637, 26 N. E. 866; Mellows v. Mellows, 61 N. H. 137; Vollman's Appeal, 92 Pa. 50; Iowa State Traveling Men's Asso. v. Moore, 19 C. C. A. 662, 34 U. S. App. 670, 73 Fed. 750; Daniels v. Pratt, 143 Mass. 216, 10 N. E. 166.

Heirs in the certificate mean none other than those who could inherit under the in-L.R.A.1917F.

testacy laws of the state that created the order, and not such a one as might have been designated by the testator, the latter being merely a technical, and not a natural, definition of the term heirs.

Hodge's Appeal, 8 W. N. C. 209; Murray v. Strang, 28 Ill. App. 608.

And this being so, creditors, such as is the intervener, are certainly not entitled to the fund, whether she had or had not been designated.

Clarke v. Schwarzenberg, 164 Mass. 347, 41 N. E. 655; Supreme Council, C. M. B. A. v. Priest, 46 Mich. 420, 9 N. W. 481; Bishop v. Curphey, 60 Miss. 22; Fisher v. Donovan, 57 Neb. 362, 44 L.R.A. 383, 77 N. W. 778; Warner v. Modern Woodmen, 67 Neb. 233, 61 L.R.A. 603, 108 Am. St. Rep. 634, 93 N. W. 397, 2 Ann. Cas. 660; Counsman v. Modern Woodmen, 69 Neb. 710, 96 N. W. 672, 98 N. W. 414; Urick v. Western Travelers Acci. Asso. 81 Neb. 327, 116 N. W. 48; Leumann v. Grand Lodge, A. O. U. W. 85 Neb. 803, 124 N. W. 475.

Because the intervener has a valid claim against the estate of the deceased is no reason for satisfying it out of a fund that did not belong to his estate, and which he is charged with the knowledge of. Intervener's remedy undoubtedly is against the estate of the deceased member, and not against the fund herein.

Dennis v. Modern Brotherhood, 119 Mo. App. 210, 95 S. W. 967; Jackson v. Roberts, 14 Gray, 546.

The fund, in the event of a failure of the beneficiary, always goes according to the by-laws of the order, and not to the administrator or executor of the estate.

Lister v. Lister, 73 Mo. App. 99; Warner v. Modern Woodmen, 67 Neb. 233, 61 L.R.A. 603, 108 Am. St. Rep. 634, 93 N. W. 397, 2 Ann. Cas. 660; Gould v. United Traction Employees Mut. Aid Asso. 26 R. I. 142, 58 Atl. 624; Southwell v. Gray, 35 Misc. 740, 72 N. Y. Supp. 342; Pfeifer v. Supreme Lodge, B. S. B. S. 173 N. Y. 418, 66 N. E. 108; Pease v. Supreme Assembly, R. S. G. F. 176 Mass. 506, 57 N. E. 1003; Daniels v. Pratt, 143 Mass. 216, 10 N. E. 166; Supreme Council, A. L. H. v. Perry, 140 Mass. 580, 5 N. E. 634; Modern Woodmen v. Little, 114 Iowa, 109, 86 N. W. 216; Clark v. Supreme Council, R. A. 176 Mass. 468, 57 N. E. 787; Grand Lodge, A. O. U. W. v. Gandy, 63 N. J. Eq. 692, 53 Atl. 142; Fink v. Fink, 171 N. Y. 616, 64 N. E. 506; Eagan v. Eagan, 58 App. Div. 253, 68 N. Y. Supp. 777.

Hammer, J., delivered the opinion of the court:

Arthur J. Koenigstein, as executor of the last will and testament of Friedrich Finke,

deceased, bought this action as plaintiff in the district court for Madison county against the Grand Lodge of the Order of the Herman Sons of Nebraska and Albert Finke, defendants. Hattie Lindsay became Intervener. The action is brought upon a beneficiary certificate for \$500 issued by a fraternal insurance company to Friedrich Finke. Albert Finke is the brother of Friedrich Finke. The intervener, Hattie Lindsay, filed an amended petition of intervention. After the filing of the petition the fraternal association paid the money into court, where it awaits the rendition of a proper judgment. Albert Finke demurred to the plaintiff's petition and the petition in intervention as amended, as not stating "a cause of action in favor of the plaintiff and against the defendant Grand Lodge of the Herman Sons, or against this demurring defendant," and judgment was entered in his favor, from which the administrator and the intervener appeal. The intervener assigns the following errors: (1) The district court erred in sustaining the demurrer of Albert Finke; (2) the association has paid the money into court, and therefore waives any right it may have in the premises, and declines to become a litigant in the case. This leaves the sole question to be determined whether Mrs. Lindsay's petition of intervention states a cause of action on her account against the fund in court.

She alleges the existence of the company at the time the benefit certificate was issued to Friedrich Finke and its existence now, also that he was eligible to insurance in the association, and was insured for \$500 in the event of his death, and that he died in good standing in the order May 4, 1912, having complied with all the requirements of said beneficiary certificate and with the by-laws of the defendant, and that said certificate then became due and payable; that said Friedrich Finke had no friends or relatives living in the United States, and for a long time prior to his death was greatly afflicted with tuberculosis, and was thereby so incapacitated as to require the constant attendance of a nurse; that many months prior to his death said Friedrich Finke orally contracted with the petitioner, who was not related to him by blood or marriage; that in consideration that she would take him into her home and would nurse and would care for him, and furnish him with food, raiment, shelter, medicine, and medical attendance, and such things as his condition required until his death, that he would assign and transfer to her said beneficiary certificate or policy of insurance, and would make her the beneficiary thereof, and would make and sign an instrument in writing, L.R.A.1917F.

which he did April 11, 1912, purporting to be his last will and testament, and would thereby assign and transfer to her said beneficiary certificate, and make her the beneficiary thereof; that in pursuance thereof said Hattie Lindsay did all that she had agreed to do; that said Germania Lodge, well knowing of the performance on the part of the petitioner of her part of said contract, and upon the strength thereof, relying upon the fact that she was to be considered and treated by the said Friedrich Finke as the beneficiary of said benefit certificate or policy of insurance, the said Germania Lodge No. 1 of Norfolk, Nebraska, which is a part of defendant's organization, by and through its officers, assented to said substitution of the petitioner as the beneficiary of said benefit certificate or policy of insurance, and that said defendant never protested against or warned the petitioner that her claim to said benefit certificate or policy of insurance would be contested or objected to on its part, whereby the intervening petitioner avers that the defendant waived any right it might have in the premises to protest against or object to the substitution of the petitioner as the beneficiary of said benefit certificate or policy of insurance, and is estopped to deny the petitioner's right to recover herein; that by reason of the insurance of said beneficiary certificate and the assigning thereof and the death of said Friedrich Finke said sum of \$500 became due and owing to the intervener with 7 per cent interest thereon from May 4, 1912.

The fund is in the custody of the law. It is a fund in the hands of the court. The contract made and the work which Mrs. Lindsay was doing for the testator were known to the Grand Lodge of the Order of the Herman Sons of the State of Nebraska, and it made no protest or opposition thereto. It seemingly acquiesced in all that was done. By its silence it became estopped to deny the validity of the contract and its performance by the intervener. Did Friedrich Finke exercise his right to substitute a new beneficiary? The beneficiary certificate contained the clause: "At the time of admission every brother has to state in his application the person or persons who are to be the beneficiary of the insurance money after his death. However, the brother may at any time withdraw these names and make any other person the beneficiary of the insurance money; providing, however, that the Grand Lodge received a written notice thereof. To make such a transfer binding, he must hand in such a request to the Grand Secretary which will be certified by the secretary of his lodge, with the lodge seal. The fee for this is 50 cents, which the

brother has to pay. As receivers of the insurance sum, only the wife, children, or other blood relatives, also foster parents or other legally recognized representatives, may be designated."

It would seem that there was an earnest purpose on the part of the order of the Sons of Herman to pay the sum of \$500 upon the decease of a brother in good standing to the person who might be the beneficiary.

The first section of article 1, relating to the objects of the order, contemplates that: "Widows and orphans and other survivors . . . may be supported properly and kept from want at the time when help is most needed; that is, when the support has been taken away from them."

It will be seen that it need not be a widow or an orphan; it may be "other survivors." Should it apply to one situated as the intervener is here? Mrs. Lindsay was taking care of the insured, who was sick unto death, and was giving him food and medicine and shelter. She was acting as a nurse and in a menial capacity. This and other similar allegations are sufficient, in the absence of any motion to make the pleading more definite and certain, to admit proof that she needed the support which this policy would give her, and that she depended upon it for the comforts and necessities of life. If he did not take care of her, no one else would. He had nothing with which to reward her except this insurance policy, but he had promised to use that, and that was as substantial as if he had money in his pocketbook, or other property in his possession, which he might have given this woman. When she had labored to the end and death had laid its cold hand upon the man who was to provide for her, had she nothing to expect from the Grand Lodge of Sons of Herman? It was not objecting. It seems to have consented to it. The principal ground for supporting the trial court in sustaining the demurrer to the intervener's petition was that the statute provides that benefits shall not be paid except to certain relatives named or to dependents. It would seem that the provision of the statute relates to the contract to pay, and to its binding force upon the company. In any event it does not relate to the right to make voluntary settlements in accordance with the strongest kind of moral obligations. If, therefore, every person interested in any manner in this company had formally expressed his consent to pay this insurance to this woman, the statute would not be a bar to their doing so. Some courts have held that the local lodge cannot consent for the members, but we have uniformly held that notice to the local authorities, who should be the ones to consent to a transfer of bene-

fiary, is notice to all the persons interested in the company. But we do not need to put our decision upon that ground. First, was the contract of the deceased, followed up by his will and the performance on the part of this woman, a sufficient designation of the beneficiary under the circumstances, there being no objection on the part of the company? Second, was this woman a dependent under the allegations of these pleadings, within the meaning of the statute?

In 1 Bacon, Ben. Soc. 2d ed. § 308, the supreme court of Texas is quoted as saying, in *Splawn v. Chew*, 60 Tex. 532: "The right to change the disposition of [the] money being established in the member, the next question is: How is it to be exercised? It is contended by appellees that it can be exercised only in the manner pointed out in the third section of the third by-law, which reads as follows: 'Members may at any time, when in good standing, surrender their certificate, and have a new one issued, payable to such beneficiary or beneficiaries dependent upon them as they may direct, upon payment of a certificate fee of 50 cents.' This section is in further recognition of the right to make the alteration, and it seems to be admitted that a surrender of the old certificate and the issuance of a new one under this section would effect a change in the beneficiaries of the policy. But is this the only way in which such a change can be effected? The right to make the change is given by a different section of the by-laws, and exists in the insured so long as he remains a member of the order. A method by which he may accomplish it to the satisfaction of the order is pointed out in the section last recited, but we do not consider this as exclusive of all other ways of effecting the same object. The design of this section is to protect the interests of the corporation. The company are entitled to know who are the parties entitled to the benefit money, and this is an effectual and certain means of giving that information. But, like all such provisions in the by-laws of private corporations, it may be waived at the option of the corporation, being for its benefit alone. This has been held in reference to such provisions when prescribed in mandatory terms. If they can be waived in such cases, much stronger would seem to be the reason why this can be done when the course to be pursued is directed, as in this instance, in permissive language alone. . . . As a by-law of the order this provision entered into the understanding between the company and the member effecting the insurance, and the rights of interested parties are not strengthened by the fact that the same provision is found in the certificate. It is still a condition for the benefit of the company,

to be insisted upon or waived according to their election."

In *Goff v. Supreme Lodge, R. A. 90 Neb. 578, 37 L.R.A. (N.S.) 1191, 134 N. W. 239*, it was held as stated in the syllabus: "Where a woman who is without means in good faith leaves her own home and work and assumes and for years faithfully performs the duties of a housekeeper for a member of a fraternal beneficiary association, not related to her by consanguinity, under an agreement that in consideration for such services he will support her and at his death leave her his estate, and no evidence is offered showing any improper relations between them, held that she thereby becomes a dependent upon such member, and as such is eligible as a beneficiary in a certificate of membership issued to him by the association of which he is a member."

In *Keener v. Grand Lodge, A. O. U. W. 38 Mo. App. 543*, it is said: "I would not restrict dependents to those whom one may be legally bound to support, nor yet to those to whom he may be morally bound, but the term should be restricted to those whom it is not unlawful for him to support."

We think, if the insured is under an obligation to help a person in her manner of living, she is a dependent, within the meaning of the statute, and we ought not to seek for a more technical definition of a dependent in order to defeat her claim. In fact this court has already so decided. In the *Goff Case*, above cited, it was said: "No case has been cited, nor do we think one will ever be decided, holding that a woman

who without means in good faith leaves her own home and work and assumes and for years faithfully performs the duties of housekeeper for a man who agrees, in consideration therefor, to support her and at his death leave her his estate, does not thereby become a dependent upon him, and especially so where there is an entire absence of evidence to show any improper relations between them."

If this woman had means of her own so that she did not depend upon the promise to reimburse her, and so that she could abundantly afford to support him in his last days as an act of charity, that fact does not appear in the pleadings demurred to, and no such presumption ought to be indulged.

The sister of the deceased, one of the original beneficiaries, made no claim to the money. It is said that the sister is dead, but of course this does not appear in the pleading, and it is not shown, of course, by the demurrer of the brother, Albert Finke.

It will be seen that under the case above cited the intervenor might have a home and some money, and may have had the capacity to earn other money, and yet be a dependent within the meaning of the statute. We think that the demurrer of Albert Finke should be overruled. As it is agreed between the parties that a final disposition of the rights of the parties shall be made upon a consideration of the demurrer, it is ordered that the District Court pay this money to the intervenor.

Reversed and remanded for this order to be carried out.

NEW YORK COURT OF APPEALS.

JAMES G. MARTIN, Respt.,
v.

HUGH N. CAMP, JR., Exr., etc., of Frederick E. Camp, Deceased, Impleaded, etc., Appt.

(219 N. Y. 170, 114 N. E. 46.)

Attorney and client — discharge — damages.

1. An attorney is not entitled to damages for discharge before completing the service for which he was employed, unless he has changed his position or incurred expense or was employed under a general retainer for a fixed period, but may recover only the reasonable value of the services actually performed.

For other cases, see *Attorneys, II. a*, in *Dig. 1-52 N. S.*

Note. — As to remedy of attorney discharged without cause before completing service, or before expiration of time for which he was employed, see annotation following this case, post, 406.
L.R.A.1917F.

Limitation of actions — claim of attorney for discharge.

2. The Statute of Limitations begins to run against the claim of an attorney discharged before the completion of the work for which he was employed, at the time of the discharge, although his compensation was to be paid out of an award which was not secured until a later period.

For other cases, see *Limitation of Actions, II. b*, in *Dig. 1-52 N. S.*

(October 3, 1916.)

APPEAL by defendant Camp from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a Special Term for Westchester County in plaintiff's favor in an action brought to recover damages for breach of a contract of professional employment. Reversed.

The facts are stated in the opinion.

Messrs. George Edwin Joseph and Henry C. Quinby, for appellant:

Plaintiff's claim is barred by the Statute of Limitations.

Adams v. Ft. Plain Bank, 36 N. Y. 255; *Bathgate v. Haskin*, 59 N. Y. 533.

The relation of attorney and client may be terminated at the will of the client, with or without cause, and the client thereupon becomes liable for the reasonable value of the attorney's services up to the time of the termination of the relation.

Andrewes v. Haas, 214 N. Y. 255, L.R.A.—, —, 108 N. E. 423; *Re Dunn*, 205 N. Y. 398, 98 N. E. 914, Ann. Cas. 1913E, 536; *Re Robbins*, 189 N. Y. 422, 82 N. E. 501; *Tenney v. Berger*, 93 N. Y. 524, 45 Am. Rep. 263; *Bathgate v. Haskin*, 59 N. Y. 533; *Gustine v. Stoddard*, 23 Hun, 99; *Johnson v. Ravitch*, 113 App. Div. 810, 99 N. Y. Supp. 1059; *Anglo-Continental Chemical Works v. Dillon*, 111 App. Div. 418, 97 N. Y. Supp. 1081.

Mr. Barclay E. V. McCarty, for respondent:

The defendant's testator, Frederic E. Camp, became personally liable under the contract of employment with the plaintiff's assignors.

Schmittler v. Simon, 101 N. Y. 554, 54 Am. Rep. 737, 5 N. E. 452.

Defendant's plea as to the Statute of Limitations is untenable.

Re Mt. Vernon Ave. 127 App. Div. 650, 111 N. Y. Supp. 895, affirmed in 193 N. Y. 658, 87 N. E. 1123; *Greater New York Charter*, § 986; *Ga. Num v. Palmer*, 202 N. Y. 483, 36 L.R.A.(N.S.) 922, 96 N. E. 99; *Wood, Limitations*, 3d ed. § 119; *Brooklyn Bank v. Barnaby*, 197 N. Y. 210, 27 L.R.A.(N.S.) 843, 96 N. E. 834; *Koster v. Lafayette Trust Co.* 207 N. Y. 336, 100 N. E. 1117; *Bartlett v. Odd Fellows' Sav. Bank*, 79 Cal. 218, 12 Am. St. Rep. 139, 21 Pac. 743; *Kelly v. Security Mut. L. Ins. Co.* 186 N. Y. 16, 78 N. E. 584, 9 Ann. Cas. 661.

Plaintiff's assignors, admittedly, were dismissed without cause; and, consequently, upon the confirmation of the commissioners' report, they became entitled to recover the entire stipulated compensation.

March v. Holbrook, 3 Abb. App. Dec. 176; *Carlisle v. Barnes*, 102 App. Div. 573, 92 N. Y. Supp. 917, 183 N. Y. 272, 76 N. E. 27; *Martin v. Camp*, 161 App. Div. 610, 146 N. Y. Supp. 1041; *Barney v. Fuller*, 133 N. Y. 605, 30 N. E. 1007; *Andrewes v. Haas*, 214 N. Y. 255, L.R.A.—, —, 108 N. E. 423, 160 App. Div. 421, 144 N. Y. 1060; *Murray v. Waring Hat Mfg. Co.* 142 App. Div. 514, 127 N. Y. Supp. 78; *Re Albers Realty Co.* 140 App. Div. 277, 125 N. Y. Supp. 179.

Seabury, J., delivered the opinion of the court:

This is an action by the assignee of a firm of attorneys and counselors at law to L.R.A.1917F.

recover damages for the breach of a contract of professional employment. The plaintiff's assignors were retained by the appellant's testator to recover an award in condemnation proceedings. The contract stipulated that the compensation to be paid should be contingent upon success, and fixed the sum that was to be paid in event of success as a proportion of the amount recovered. The plaintiff's assignors rendered substantial services under their contract, and were discharged by the appellant without cause. The first question which we are called upon to determine is whether an attorney employed for a single litigation who is dismissed by his client without cause may maintain an action for damages for the breach of that contract, or whether he is limited to a recovery based upon a quantum meruit. The learned appellate division were not in agreement upon this question, although the majority were of the opinion that an action for damages might be maintained under such circumstances. While the precise question has not been determined by this court, the nature and character of the contract of employment of an attorney by a client has been clearly defined. It is evident that the question now presented for decision must be determined in accord with the legal principles which define the nature and character of such a contract. The contract under which an attorney is employed by a client has peculiar and distinctive features which differentiate it from ordinary contracts of employment. In ascertaining the nature of such a contract little assistance is to be derived from the consideration of analogous contracts under the English common law.

In the early case of *Adams v. Stevens*, 26 Wend. 451, 455, the whole subject was learnedly discussed by Chancellor Walworth. After commenting upon the practice existing under the civil and common law the chancellor said: "Whatever may be the practice of other countries, however, the principle never has been adopted in this state that the professions of physicians and counselors are merely honorary, and that they are not of right entitled to demand and receive a fair compensation for their services; especially where there is an agreement to pay them a fixed compensation, or such a reasonable remuneration for their services as those services shall be deemed to be worth."

Substantially the view which Chancellor Walworth expressed is now embodied in statute form in § 474 of the Judiciary Law, Consol. Laws, chap. 30. That section provides that "the compensation of an attorney or counselor for his services is governed by

agreement, express or implied, which is not restrained by law."

Notwithstanding the fact that the employment of an attorney by a client is governed by the contract which the parties make, the peculiar relation of trust and confidence that such a relationship implies injects into the contract certain special and unique features. In *Marsh v. Holbrook*, 3 Abb. App. Dec. 176, the question whether an attorney could recover upon a quantum meruit merely or might recover in an action for damages for breach of contract was discussed. Two members of the court who participated in the decision of that case were of the opinion that the attorney was entitled to recover the whole contract price. The question was not, however, determined, Judge Woodruff pointing out that the question was not necessarily before the court as the attorney had not appealed from the judgment. Since the decision of that case the nature of the contract existing between attorney and client has been the subject of frequent discussion. *Re Dunn*, 205 N. Y. 398, 98 N. E. 914, Ann. Cas. 1913E, 536, and cases cited; *Andrewes v. Haas*, 214 N. Y. 255, 259, L.R.A.—, —, 108 N. E. 423. These cases, and many others that might appropriately be cited to the same effect, establish that while so far as the attorney is concerned the contract is entire and the attorney cannot recover unless he completely performs, the client with or without cause may terminate the contract at any time. The substance of the rule declared in these cases was expressed by Judge Hiscock in *Re Dunn*, supra. In that case it was said: "It is well established in the case of the client that he may at any time for any reason which seems satisfactory to him, however arbitrary, discharge his attorney." 205 N. Y. 402.

That the client may at any time for any reason or without any reason discharge his attorney is a firmly established rule which springs from the personal and confidential nature of the relation which such a contract of employment calls into existence. *Re Dunn*, supra. If the client has the right to terminate the relationship of attorney and client at any time without cause, it follows as a corollary that the client cannot be compelled to pay damages for exercising a right which is an implied condition of the contract. If in such a case the client can be compelled to pay damages to his attorney for the breach of the contract, the contract under which a client employs an attorney would not differ from the ordinary contract of employment. In such a case the attorney may recover the reason-

able value of the services which he has rendered, but he cannot recover for damages for the breach of contract. The discharge of the attorney by his client does not constitute a breach of the contract, because it is a term of such contract, implied from the peculiar relationship which the contract calls into existence, that the client may terminate the contract at any time with or without cause.

We are aware that in certain jurisdictions a contrary rule has been adopted, and that it has been held that where the attorney is employed to perform services for an agreed sum and is discharged without cause and thereby prevented from the performance of the contract, the attorney may recover the full contract price. *Scheinesohn v. Lemonek*, 84 Ohio St. 425, 95 N. E. 913, Ann. Cas. 1912C, 737; *Bartlett v. Odd Fellows' Sav. Bank*, 79 Cal. 218, 12 Am. St. Rep. 139, 21 Pac. 743; *French v. Cunningham*, 149 Ind. 632, 49 N. E. 797; *Moyer v. Cantieny*, 41 Minn. 242, 42 N. W. 1060; *Kersey v. Garton*, 77 Mo. 645; *Myers v. Crockett*, 14 Tex. 257; *Mt. Vernon v. Patton*, 94 Ill. 65.

In *Scheinesohn v. Lemonek*, supra, it was held that because the attorney had performed no services under his contract, and the client had not been in any way benefited, the rule of quantum meruit was inapplicable.

In *French v. Cunningham*, 149 Ind. 632, 49 N. E. 797, the court held (p. 638) that the ordinary rule that the attorney could recover the reasonable value of his services does not apply "if the party doing the work has been prevented from completing it by the other party, in violation of the contract."

In *Myers v. Crockett*, 14 Tex. 257, the court said that: "Where the attorney had entered upon and was proceeding to perform the services contracted for, and the conduct of the case was thus wrested from him by his client, without any fault on his part, there would seem to be much reason in holding that he was entitled to recover the full amount of the fee contracted to be paid for the services contemplated by the contract."

These decisions in other jurisdictions are not consistent with the principles which define the nature of the contract under which an attorney is employed, as those principles have been declared by the decisions of this court. Our own decisions clearly established the right of the client to terminate the contract with or without cause, and it follows from this rule, by necessary implication,

that if the client has the right to terminate the contract, he cannot be made liable in damages for doing that which under the contract he has a right to do.

In *Tenney v. Berger*, 93 N. Y. 524, 529, 45 Am. Rep. 263, this precise subject was under discussion, and Judge Earl said: "While the attorney is thus bound to entire performance, and the contract as to him is treated as an entire contract, it is a singular feature of the law that it should not be treated as an entire contract upon the other side, for it is held that a client may discharge his attorney arbitrarily, without any cause, at any time, and be liable to pay him only for the services which he has rendered up to the time of his discharge."

In *Johnson v. Ravitch*, 113 App. Div. 810, 812, 99 N. Y. Supp. 1061, Mr. Justice Gaynor said: "Every attorney enters into the service of his client subject to the rule that his client may dismiss or supersede him at will; and if he makes a contract for future services to his client, it is necessarily subject to such rule, and made with full knowledge that he may never perform such service, for the reason that his client may not keep him, and that in that event he will not be paid therefor, but will be entitled to compensation only for the services he has actually rendered."

The extracts just quoted from these two last-mentioned decisions correctly declare the rule of law which is applicable in this state. The rule secures to the attorney the right to recover the reasonable value of the services which he has rendered, and is well calculated to promote public confidence in the members of an honorable profession whose relation to their clients is personal and confidential. What has been said declaratory of the rule that the attorney is limited to a recovery upon a quantum meruit does not relate to a case where the attorney in entering into such a contract has changed his position or incurred expense, or to a case where an attorney is employed under a general retainer for a fixed period to perform legal services in relation to matters that may arise during the period of the contract. The plaintiff's right of action is limited to a recovery for the reasonable value of services rendered.

It is claimed by the appellant that as the plaintiff's assignors were discharged under the contract March 30, 1900, and the present action was not commenced until October 15, 1908, this action is barred by the Statute of Limitations.
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The contract of an attorney with his client being an entire and continuous contract, the Statute of Limitations does not begin to run against a claim for services under such contract until the final service has been performed. *Eliot v. Lawton*, 7 Allen, 274, 83 Am. Dec. 683; *Powers v. Manning*, 154 Mass. 370, 376, 13 L.R.A. 258, 28 N. E. 290. If, however, the services are brought to an end, the cause of action on behalf of the attorney is complete and the statute commences to run against the claim. As was said in *Adams v. Ft. Plain Bank*, 36 N. Y. 255, 260: "The test, therefore, being whether the statute begins to run or not, is, Could an action be commenced at once for the demand?"

In *Bathgate v. Haskin*, 59 N. Y. 533, 535, Judge Andrews said: "No right of action accrues for each successive service in the progress of the cause, and the statute does not begin to run against his claim for compensation until his relation as attorney in the suit has terminated. The client may terminate it at his pleasure."

On behalf of the respondent it is urged that the plaintiff's claim is not barred by the statute because the contract under which the plaintiff's assignors were employed makes the compensation of the attorneys contingent upon the result of an award being made to the client. The award to the client was not made until October 20, 1902, and it is argued that the cause of action did not accrue until this time and, therefore, the claim of the plaintiff is not barred by the statute. If the plaintiff's assignors had not been discharged their cause of action would not have accrued until the contingency happened upon which their right to compensation was, by the contract, made to depend. *Ga Nun v. Palmer*, 202 N. Y. 483, 36 L.R.A.(N.S.) 922, 96 N. E. 99. The cause of action of the plaintiff's assignors, however, accrued when they were discharged by their client and the contract of employment terminated. That date was March 30, 1900, and the claim that then arose was barred by the Statute of Limitations when this action was commenced on October 15, 1908.

It follows that the judgment must be reversed, with costs in all courts, and the complaint dismissed.

Willard Bartlett, Ch. J., and Hiscock, Collin, Cuddeback, Hogan, and Pound, JJ., concur.

Petition for rehearing denied November 28, 1916.

Annotation—Remedy of attorney discharged without cause before completing service, or before expiration of time for which he was employed.

I. Introduction, 406.

II. Employment for specified purpose, 406.

III. Employment for specified time, 413.

I. Introduction.

The present note has been confined to cases dealing with the rights of an attorney who has been discharged without cause before the purpose for which he was employed has been accomplished or before the period of his employment has expired. The rights of an attorney whose client has settled the litigation so that the attorney's employment is terminated, have not been considered.

The right of an attorney to withdraw from a suit because of client's misconduct is discussed in the note to Genrow v. Flynn, 35 L.R.A.(N.S.) 960.

The right to discharge an attorney employed for a contingent fee is discussed

in the note to Louque v. Dejan, 38 L.R.A.(N.S.) 389. That note is in general confined to a discussion of the abstract question of the right to discharge. The present note considers the rights of the discharged attorney as to compensation; that is, whether he can recover the agreed compensation, or is relegated to an action in damages for breach of the contract, or can recover only a quantum meruit for the service performed by him previous to the discharge.

II. Employment for specified purpose.

Whatever other rights an attorney employed for a specified purpose may have, it is well settled that such an attorney is, upon a discharge without cause before the purpose is accomplished, entitled to recover on a quantum meruit for the services which have been rendered by him.¹ This has been held where the contract of employment makes no spe-

¹ Hall v. Gunter (1908) 157 Ala. 375, 47 So. 155 (dictum; suit was compromised, but attorney was not discharged); French v. Cunningham (1898) 149 Ind. 632, 49 N. E. 797 (attorney employed to contest a will to be paid a stated sum is successful); Dempsey v. Dourance (1910) 151 Mo. App. 429, 132 S. W. 33 (attorney employed to defend an action); Shevalier v. Doyle (1911) 88 Neb. 580, 130 N. W. 417 (attorney employed to defend client for a stipulated fee).

Myers v. Crockett (1855) 14 Tex. 257, an attorney employed to conduct a litigation for a stated sum, who had been discharged before the completion of the litigation and who thereupon sued for the stipulated compensation, was by the jury given a verdict for the value of the services which he had actually performed. Upon an appeal by the client the court gives reasons for allowing the attorney to recover the full contract price, but states that it is not necessary to decide that question, since the attorney is not appealing.

In Philbrook v. Moxey (1906) 191 Mass. 33, 77 N. E. 520, an attorney had been employed to effect a settlement for his client. Subsequently the client determined to litigate the matter, discharged his attorney, and employed others. In an action by the attorney for the contract price, a recovery was allowed for the value of the services actually rendered by him before his discharge. Upon an appeal by the client this was sustained, the court stating that though the client had the right to discharge his attorney at any time, he must pay for the L.R.A.1917F.

services which had been rendered up to the time of such discharge. It is then stated that if the contract between the client and the attorney for the stated compensation was binding, the client must pay damages for its breach.

In Henry v. Vance (1901) 111 Ky. 72, 63 S. W. 273, where an attorney was employed by an heir to collect a sum due from an estate for a per cent of the amount recovered, it is stated that an attorney discharged without cause after he has entered upon and performed part of the services is undoubtedly "entitled to recover at least to the extent of the value of the services rendered. But generally the attorney should be relegated to an action to recover on quantum meruit where he has been prevented by the client, or other facts not his fault, from fully discharging the services contemplated by his contract." See further as to this case *infra*, text to notes 5 and 6.

An attorney employed to collect a claim for a stated fee, payable upon certain conditions, was held, in Sulzbacher v. Wilkinson (1880) 1 Tex. App. Civ. Cas. (White & W.) 555, entitled to recover the value of the services rendered, where the client abandoned the method decided upon for the collection of the claim and adopted another course.

See Scobey v. Ross (1854) 5 Ind. 445, *infra*, note 10.

See Du Bois v. New York (1904) 69 C. C. A. 112, 134 Fed. 570, *infra*, note 30.

But see Scheinesohn v. Lemonek, *infra*, note 8.

cific provision as to fees,² also where the contract provides for a stipulated fee,³ or a percentage contingent upon recovery.⁴

In one case⁵ involving the discharge of attorneys employed by an heir to collect a sum due from an estate, compensation to be a percentage of the amount collected, in which the attorneys were discharged, the court says that "the question should be submitted to the jury as to what, under the circumstances, would be a reasonable compensation to appellees for the services actually rendered before notice of their discharge. And in estimating such value the jury should consider the extent of services rendered, and those to be rendered, allowing the contract price, abated by such sum as is reasonably represented by the unperformed part of the labor."⁶ The court then takes into consideration an element which seems to be one of damages purely; it states: "In this connection it would be proper also to estimate, in arriving at that value, the fact, if it was a fact, of their being prevented from accepting employment from the other side by reason of their connection with the cause of appellant. Should the fact on another trial be substantially as shown in this record, then the following instruction on behalf of the plaintiffs ought to be given: 'If the jury believe from the evidence that the contract sued on was fairly and understandingly entered into between the parties, and that defendant without cause discharged plaintiffs from further connection with the matter, and that plaintiffs continued to hold themselves in readiness at all times to continue their services to completion, the jury will find for the plaintiffs [the agreed compensation], less such

proportion of that sum as is reasonably represented by the labor and attention and expense that would have been required of plaintiffs to complete their undertaking, but which they did not do.'"

That a discharged attorney can recover on the quantum meruit does not necessarily negative his right to other remedies. The right to other remedies receives consideration below.

Upon a suit on the quantum meruit, the attorney is entitled to recover what his services are reasonably worth; the measure of recovery is not the benefit to the client.⁷

The right to recover on a quantum meruit has been denied in an action by an attorney employed to collect a claim for a per cent of the amount collected, and who was discharged before he had rendered any service and before he was given a reasonable time to make the collection.⁸

A recovery upon the contract for the work done before discharge has been allowed where the contract was severable and there had been a partial performance before discharge.⁹

The question which the courts do not uniformly answer is whether there is a breach of contract where the attorney has been discharged without cause before the work which he was employed to do is performed. The court in *MARTIN v. CAMP*, ante, 402, takes the position that there is no breach of contract in such a case. The reasoning by which the court arrives at this conclusion is, in brief, this: "That the client may at any time for any reason or without any reason discharge his attorney is a firmly established rule. . . . If the client has the right to terminate the relationship of attorney and client at any time with-

² *Dempsey v. Dorrance* (1910) 151 Mo. App. 429, 132 S. W. 33. It is not necessary in such a case for the attorney to wait until the case in which he is employed is ended.

³ *Shevalier v. Doyle* (1911) 88 Neb. 560, 130 N. W. 417.

See *Philbrook v. Moxey* (1906) 191 Mass. 33, 77 N. E. 520, note 1.

⁴ *Hall v. Gunter* (1908) 157 Ala. 375, 47 So. 155 (dictum); *French v. Cunningham* (1898) 149 Ind. 632, 49 N. E. 797; *Henry v. Vance* (1901) 111 Ky. 72, 63 S. W. 273.

⁵ *Henry v. Vance* (Ky.) supra.

⁶ This part of the discussion is approved in the subsequent cases of *Breathitt Coal, Iron & Lumber Co. v. Gregory* (1904) 25 Ky. L. Rep. 1507, 78 S. W. 148, and *Goodin v. Hays* (1905) 28 Ky. L. Rep. 112, 88 S. W. 1101.

In *Joseph v. Lapp* (1904) 25 Ky. L. Rep. 1875, 78 S. W. 1119, it is stated that an L.R.A.1917F.

attorney discharged without cause after he has actually performed services in the line of his employment is entitled to recover the value of such services.

⁷ *French v. Cunningham* (1898) 149 Ind. 632, 49 N. E. 797.

⁸ *Scheinesohn v. Lemonek* (1911) 84 Ohio St. 424, 95 N. E. 913, Ann. Cas. 1912C, 737.

⁹ An attorney employed by a municipality to collect certain claims for a compensation of a certain percentage of the amount collected was held entitled to commission on all claims that had been placed in judgment previous to his removal. *Morel v. New Orleans* (1857) 12 La. Ann. 485.

A similar decision appears in *Commandeur v. Carrollton* (1860) 15 La. Ann. 7; *Bright v. Hewes* (1866) 18 La. Ann. 666. Nothing appears as to cause of dismissal in these cases.

out cause, it follows as a corollary that the client cannot be compelled to pay damages for exercising a right which is an implied condition of the contract." It is unquestionably true that the power of the attorney to represent his client may be terminated by the client at any time without cause, just as the power of an agent to represent his principal may be terminated by the principal unless the agency be one coupled with an interest. But this power thus to terminate the attorney's authority must be distinguished from the right to do so. If the attorney is not employed for a definite time nor for a specified purpose, it seems clear that the power to terminate the employment corresponds with the right to do so. But if the client has employed the attorney for a definite time, he has negated this right by his contract. While the client may still terminate the authority of the attorney to represent him, he has breached his contract in doing so, and must respond for the breach. This is recognized in *MARTIN v. CAMP*, for the court there limits its decision to cases of employment for a specified purpose, expressly excepting therefrom employment "under a general retainer for a fixed period to perform legal services in relation to matters that may arise during the period of the contract." In case of an employment for a specified

purpose, the same result seems to follow; that is, a negating of the right to terminate the employment until such purpose is accomplished. In such a contract the court in *MARTIN v. CAMP* holds there is an implied condition that the client may discharge the attorney at any time. It seems that such an implied condition is directly contrary to the agreement in the contract employing the attorney for a specified purpose.

The court in *MARTIN v. CAMP*, however, seemingly limits its decision to a very narrow field, for it is stated that "what has been said declaratory of the rule that the attorney is limited to a recovery upon a quantum meruit does not relate to a case where the attorney in entering into such a contract has changed his position or incurred expense." Just what change of position would work this result is not stated by the court, but it seems that an attorney, by the very act of accepting employment, has changed his position in that he thereby disqualifies himself from accepting employment by the other party.

The majority of courts do not agree with the conclusion of *MARTIN v. CAMP*, but hold that the discharge of an attorney employed for a specified purpose, before the purpose has been accomplished, is a breach of the contract,¹⁰ at least if the services have been sub-

¹⁰ *Brodie v. Watkins* (1878) 33 Ark. 545, 34 Am. Rep. 49 (attorney employed to prosecute a suit under an agreement that he should receive a per cent of the amount collected); *Moyer v. Cantieny* (1889) 41 Minn. 242, 42 N. W. 1060 (attorney employed to secure a pardon for a stipulated sum); *Shevalier v. Doyle* (1911) 88 Neb. 560, 130 N. W. 417 (attorney employed to defend client for a stipulated price); *Dorshimer v. Herndon* (1915) 98 Neb. 421, 153 N. W. 496, 154 N. W. 207 (attorney employed to conduct litigation for a stipulated sum); *Carlisle v. Barnes* (1905) 102 App. Div. 573, 92 N. Y. Supp. 917, appeal dismissed in 183 N. Y. 567, 76 N. E. 1090. But see New York cases, *infra*, note 30, *Scheinesohn v. Lemonek* (1911) 84 Ohio St. 425, 95 N. E. 913, Ann. Cas. 1912C, 737 (attorney employed to collect claim for a per cent of the recovery); *Smith v. Lipscomb* (1855) 13 Tex. 532 (attorney employed to render personal services for a stated sum); *Cyre v. O'Neal* (1911) — Tex. Civ. App. —, 135 S. W. 253 (attorney employed to defend client for a stated compensation); *Sessions v. Warwick* (1907) 46 Wash. 165, 89 Pac. 482 (attorney employed to conduct litigation for a stated sum); *Such v. Bank of State* (1903) 121 Fed. 202 (attorney employed to conduct certain litigation and in event of recovery to be paid a per cent of recovery).

In *Mt. Vernon v. Patton* (1879) 94 Ill. L.R.A.1917F.

65, an attorney who had been employed by a town to conduct litigation was held entitled to recover under the contract, although he had been prevented from performing the contract by the officers of the town; whether the full contract price was recovered is not stated.

In *Scobey v. Ross* (1854) 5 Ind. 445, attorneys who had been employed to collect a judgment, to be paid a stated sum from said judgment when the same should be collected, and who had collected a part of the judgment, which they refused to pay to the client upon demand, were discharged and other attorneys employed to collect the judgment. Subsequently an action was brought against the attorneys first employed for the sum of money thus collected by them. In this case it is stated that, supposing the contracts of employment of the attorneys valid, but broken and rescinded, then the claim of the attorneys would only be for a reasonable compensation for services actually performed, with, perhaps, damages for the breach of the contract. It is held, however, that that could not be allowed in this suit because of the nature of the pleadings. The court in *French v. Cunningham* (1898) 149 Ind. 632, 49 N. E. 797, after referring to this case, says: "It is clear that in said case, if the proper pleading had been filed, that the attorneys would have been entitled to a rea-

stantially rendered, only a small residue remaining to be performed.¹¹ This is assumed rather than decided in some cases that have proceeded upon the theory that the discharge was wrongful, and allowed the attorney to recover for the breach.¹²

The discharge of an attorney without cause before he has performed the work which he was employed to do, being wrongful, or at least a breach of contract, the attorney has a right of action therefor.

If the attorney accepts his discharge in the sense of waiving any claim of breach of contract, the express contract

sonable compensation for their services in said cause in the collection of said \$200 and damages for any breach of the contract by the client."

See *Philbrook v. Moxey* (1906) 191 Mass. 33, 77 N. E. 520, supra, note 1.

An attorney employed by heirs to recover their share in an estate for a percentage of the recovery, who has failed to recover in an action brought by him, is not entitled to a share adjudged to his clients in a subsequent action after he had been prevented by his clients from further prosecuting their demand. *Johnston v. Cutchin* (1903) 133 N. C. 119, 45 S. E. 522. It is stated, however, that he may have his remedy against his clients by a civil action.

While the court in *Henry v. Vance* (1901) 111 Ky. 73, 63 S. W. 273, regards it as a right of a client to dismiss the attorney at any time, in a case of dismissal of an attorney employed for a specified purpose before that purpose has been accomplished, the court states that in such a case "generally the attorney should be relegated to an action to recover on quantum meruit." But in fixing the recovery some elements were allowed in this case which are elements of damages, and it is stated near the close of the opinion that "the measure of damages may be, and frequently in such cases is, difficult to establish. . . . As to what would be the resulting damages from such breach, where the action is for a breach of the contract, would necessarily depend upon the circumstances of the particular case."

¹¹ *MacKie v. Howland* (1894) 3 App. D. C. 461.

An attorney employed to do the necessary legal work in connection with the consolidation of certain corporations, who was found to have substantially performed the services for which he was employed, was held entitled to recover the compensation in *Eastman v. Blackledge* (1912) 171 Ill. App. 404, although he had not performed the legal services in connection with the purchase of the property of one of the company, because not permitted to do so by one of the persons in charge.

In *Kent v. Fishblade* (1915) 247 Pa. L.R.A.1917F.

is abrogated, and an implied contract arises to pay him the reasonable value of the services rendered.¹³ But it is not necessary that he acquiesce in the discharge in this sense. He may bring an action in damages for breach of the contract.¹⁴

According to some courts,¹⁵ the attorney has practically the same remedies that a discharged servant has: (a) He may acquiesce in the breach and sue on a quantum meruit for the value of his services to the date thereof; (b) he may wait until the end of the term, then sue for the agreed compensation; (c) or he may sue at once for damages. Other

361, 93 Atl. 509, an attorney employed to conduct a litigation for a percentage of the amount involved was held entitled to recover the contract price, although discharged, where it appeared that before he was discharged he had procured an offer of settlement which would practically have given his client all she claimed.

Where the work for which the attorney has been employed has been completed, he is entitled to the agreed compensation. *Bermant v. Keveney* (1915) 88 Misc. 527, 150 N. Y. Supp. 949, affirmed in (1915) 170 App. Div. 898, 154 N. Y. Supp. 1111, holding an attorney who had been employed upon a contingent fee to collect a claim against the street railway company for interference with easements, and who had secured an offer from the street railway company and submitted it to his client, advising against the acceptance thereof, entitled to his commission where the client thereafter discharged him and subsequently accepted the offer.

¹³ See particularly *Bartlett v. Odd Fellows' Sav. Bank* (1889) 79 Cal. 218, 12 Am. St. Rep. 139, 21 Pac. 743, infra, note 25.

¹⁴ *Shevalier v. Doyle* (1911) 88 Neb. 560, 130 N. W. 417.

See also cases of recovery in quantum meruit, supra, notes 1 et seq.

¹⁵ In *French v. Cunningham* (1898) 149 Ind. 632, 49 N. E. 797, an action by the attorney upon a quantum meruit for the reasonable value of his services, the dismissal of the attorney is stated to be wrongful, and he is entitled to recover on the quantum meruit, "or he may sue upon the contract for the breach thereof, and the measure of damages is the amount that will compensate him, which will include the reasonable value of his work, as well as his loss, if any, on account of not being allowed to complete the same."

See *Philbrook v. Moxey* (1906) 191 Mass. 33, 77 N. E. 520, note 1.

And see cases cited in notes 18-26, infra, which sustain actions in damages.

¹⁶ *Weil v. Finneran* (1902) 70 Ark. 509, 69 S. W. 310 (attorney employed by an heir to collect her share in the estate of ancestor on a percentage basis).

courts have denied the right to recover as for constructive service.¹⁶ Some cases have allowed a recovery of the agreed compensation on the theory that this is the only method of compensating the attorney.¹⁷

As just stated, an attorney employed for a specific purpose who has been discharged may sue at once for breach of the contract.¹⁸ The measure of damages is in some cases held to be the full contract price agreed upon.¹⁹ In the case of an attorney employed to collect a claim for a per cent of the recovery, he has been held entitled to the agreed compensation if he establishes the collectability of the claim.²⁰

It is pointed out in one case²¹ that while ordinarily the measure of damages for breach of contract is the actual loss sustained, not the whole contract price, where from the nature of the contract no possible mode is left for ascertaining the damage unless the price agreed upon be accepted as such measure, the price must be accepted from necessity.

In another case²² holding that if the attorney establishes the collectability of the claim he is employed to collect, he is entitled to recover the full contract price, the court states with reference to the measure of damages that "no rule seems wholly free from objection. The attorney [in this case] had performed no service; hence the rule of quantum meruit does not apply; nor does it appear

that the defendant had been in any way benefited. But the value of the attorney's anticipated services had been fixed by the agreement of the parties. In the absence of any other ascertained rule of damages, why may not this sum be taken as the one nearest in contemplation of the parties, and the one nearest a fair solution? The majority think it is, and that a recovery on that basis, properly ascertained, might attain a result not involving injustice and at the same time afford reasonable recompense to the party who, by the wrong of the other party, has lost the advantage of a valuable contract."

Under a Code provision that no person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance, an attorney who has agreed to defend a criminal prosecution for a stated sum and furnish physician, detectives, and help when necessary, cannot recover where there is no evidence of the necessary expenditures in this regard, as the sum that would remain is merely conjectural.²³

In some jurisdictions in which the discharged attorney is held to have the options mentioned above, when he has selected an action by way of damages for breach of contract, the damages he may recover are not always clearly stated.²⁴

The right of an attorney employed for

¹⁶ *Henry v. Vance* (1901) 111 Ky. 72, 63 S. W. 273.

¹⁷ See text to notes, 21, 22 and 26, *infra*.

¹⁸ *Weil v. Finnerman* (1902) 70 Ark. 509, 69 S. W. 310; *Scheinesohn v. Lemonek* (1911) 84 Ohio St. 425, 95 N. E. 913, Ann. Cas. 1912C, 737.

Although it is expressly stated in *Henry v. Vance* (Ky.) *supra*, that a client has the right to discharge his attorney at any time without cause, in other parts of the opinion such a discharge is treated as a breach of the contract. The right to discharge is apparently treated as going to the representative capacity only.

In *Such v. Bank of State* (1903) 121 Fed. 202, upon a motion for an order of substitution of attorney, in which the attorney superseded had a contract by which he was to prosecute the cause and in the event of final recovery was to be paid a certain percentage of the proceeds, the court states that "by insisting that another attorney shall now be substituted, plaintiff is presumably breaking that contract, and in the proper way and at the proper time the attorney will presumably have an opportunity to recover damages for that breach. It would, therefore, be improper upon this application to fix compensation for services actually rendered to date, upon any con- L.R.A.1917F.

sideration of the future course of the litigation. No doubt, upon assessment of damages for breach of contract, the tribunal which disposes of the question will deduct from the amount awarded to the attorney, should he be held entitled to recover, the sum already paid him as retainer, and now to be paid as a condition for order of substitution."

¹⁹ *Webb v. Trescony* (1888) 76 Cal. 621, 18 Pac. 796 (attorney employed to defend a certain action for a stipulated sum).

In *Graut v. Langley* (1901) 34 Misc. 776, 68 N. Y. Supp. 820, it is stated that where an attorney is retained for a particular case and is discharged without cause, the measure of damage is ordinarily the stipulated compensation.

²⁰ *Scheinesohn v. Lemonek* (1911) 84 Ohio St. 424, 95 N. E. 913, Ann. Cas. 1912C, 737. Such right does not depend on whether the claim is afterwards in fact collected by someone else. Proof of such fact might establish the collectability of the claim, but it is not essential to plaintiff's right to recover.

²¹ *Webb v. Trescony* (Cal.) *supra*.

²² *Scheinesohn v. Lemonek* (Ohio) *supra*.

²³ *Newmire v. Ford* (1913) 22 Cal. App. 712, 136 Pac. 504.

²⁴ *Weil v. Finneran* (1902) 70 Ark. 509,

a specified purpose to recover the agreed compensation has been affirmed in other cases which apparently, although not clearly, rest upon the theory of damage.²⁵ The theory of these cases is well stated in an action by an attorney employed to secure a pardon for his client's son, who was discharged before the pardon was granted, to recover the stipulated compensation.²⁶ It is stated that the attorney is "entitled to the benefits of this particular contract, and not mere-

ly to recover the value of such services as he had then rendered, estimated without regard to the agreed compensation. Just what he would be required to do to accomplish the contemplated result, the extent of the service that might be involved, was indefinite and uncertain when the contract was entered into. It might prove to be more or less than was then anticipated. He assumed the risk of that, and the stipulated compensation, contingent upon his success, was the

69 S. W. 310. The court does not go into the question of damages, as it was not necessary under the state of the pleadings in this case, but in the course of the opinion the case of *Van Winkle v. Satterfield* (1894) 58 Ark. 621, 23 L.R.A. 853, 25 S. W. 1113, a case involving a servant, is referred to, and a citation given therefrom to the effect that upon such a suit the discharged servant "can recover the damages which he has sustained down to the day of the trial, which is limited to a compensation for the injury suffered by the breach of the contract. The loss of the wages which his employer agreed to pay him constitutes the injury. What therefore he has suffered by reason of the loss of the wages, as a rule, is the amount of the damages he is entitled to recover."

Upon a second appeal of this case (1906) 78 Ark. 87, 93 S. W. 568, an instruction to the effect that the attorney is entitled to recover sums expended by him which the client had promised to repay, and is also "entitled to recover damages for a breach of his contract of employment in any sum which the jury may feel warranted from the evidence in awarding to him," not exceeding the sum claimed, was held to correctly state the law.

²⁵ *Bartlett v. Odd Fellows' Sav. Bank* (1889) 79 Cal. 218, 12 Am. St. Rep. 139, 21 Pac. 743 (attorney employed to conduct a suit, the compensation to defend upon the amount of recovery). It is stated that if the client by his wrongful conduct prevents the performance of acts which would entitle the attorney to a specific recompense, "it would seem that such amount and interest from the time they became due may be recovered in an action which sets forth such a state of facts." The principal question involved in this case, however, as shown by the points made for a reversal of the judgment, was as to the Statute of Limitations; that is, whether the attorney's right of action accrued at the time of the discharge or at the time of the acquisition of the money by the client.

Crye v. O'Neal (1911) — Tex. Civ. App. —, 135 S. W. 253; *Sessions v. Warwick* (1907) 46 Wash. 165, 89 Pac. 482.

In *Smith v. Lipscomb* (1855) 13 Tex. 532, where an attorney employed to render professional services for a stated sum had been discharged before completing his service, and was suing for the agreed compensation, the court, in holding him entitled to recover L.R.A.1917F.

states that the rule is well established "that where a party in whose favor something is to be done in consideration of his promise to pay a certain sum of money to another prevents that performance, and the other is not in default, the money may be recovered as if the act had been performed."

An attorney employed to recover land for a fee contingent upon success was held entitled to recover the fee in *Kersey v. Garton* (1883) 77 Mo. 645, where he was prevented from completing his contract by his client dismissing the suit.

It is stated in *McElhinney v. Kline* (1878) 6 Mo. App. 94, that an attorney retained for a particular case who does work and is discharged without fault on his part may recover the price agreed upon for the work, the court stating that that is the only measure of damages, as the nature of the engagement exempts the case from the rule by which the contract price in ordinary cases of service is made merely *prima facie* evidence. The attorney, however, was not discharged in this case, but the suit was compromised.

An attorney who had been employed to recover certain overcharges on customs from the United States government for a percentage of the recovery was held entitled to the agreed percentage, although the client failed to furnish him the data required to enable him to present the claim, and, repudiating the contract with the attorney, employed another attorney to prosecute and collect the claim, in *Carlisle v. Barnes* (1905) 102 App. Div. 573, 92 N. Y. Supp. 917. A motion to dismiss an appeal from the judgment in this case to the court of appeals on the ground that the appeal had been taken pursuant to an order of the judge of the court of appeals granting permission to appeal, and that said order had been thereafter vacated by the court, was granted (1906) 183 N. Y. 567, 76 N. E. 1090. Whether this case comes within the exception that is noted in *Martin v. Camp*, ante, 402, as to where the attorney has changed his position or incurred expense is not clear. If it does not, it can no longer be regarded as the law.

See *Bermant v. Keveney* (1915) 88 Misc. 527, 150 N. Y. Supp. 949, note 11, and *Myers v. Crockett* (1855) 14 Tex. 257, note 1, *supra*.

²⁶ *Moyer v. Cantieny* (1889) 41 Minn. 242, 42 N. W. 1060.

consideration. This agreed, an entire price was not for doing this or that specific thing, but for doing all that should be done to secure the results. If, upon the eve of success, or at any time after the plaintiff entered upon the undertaking, the other party assumed to put an end to the contract, it would be impossible to justly measure the plaintiff's damages by any apportionment of the sum agreed upon. He was not only entitled to compensation for what he had done, measured by the nature and terms of the contract, but he was entitled either to be allowed to perform it, and thus to secure the agreed sum, or else to be indemnified for not being allowed to do so. It might be that what he had already done was sufficient, and that without other efforts the pardon would have been granted, although he did not in fact cease his efforts. In any view of the case, no other reasonable and adequate measure of damages could have been applied than the stipulated compensation."

The doctrine of constructive service has been applied to sustain a recovery

of the contract price. Thus, it has been held that an attorney whose compensation is agreed as a per cent of the recovery may hold himself continually ready to serve and in case of a recovery claim the whole compensation agreed upon less any expenses he would necessarily have incurred in completing performance.²⁷

Where the attorney's compensation is based upon the amount recovered in the suit, recovery of the contract price cannot be had before the amount of the client's recovery has been ascertained.²⁸ In case of a contract specifying a stated sum without reference to the outcome of the suit, an attorney who has at all times been ready and willing to perform may recover the agreed compensation without reference to the outcome of the suit.²⁹

A few cases hold to the rule applied in *MARTIN v. CAMP*, ante, 402, that a client has a right at any time to dismiss an attorney employed for a special purpose, without committing a breach of contract.³⁰ Some cases limit this to a dismissal before the litigation has sub-

²⁷ *Brodie v. Watkins* (1878) 33 Ark. 545, 34 Am. Rep. 49. The court here states that "the value of the legal services proper will not be apportioned; but whilst, upon the one hand, the attorney will not be put upon the quantum meruit, he ought not to recover more than he would have made if he had gone on with the case. His time, however, does not belong wholly to his client, and no deduction can, in ordinary cases, be justly made on the presumption that it was wholly occupied in other professional business. Such a case might perhaps be made out, but it would be exceptional, and stand upon its own circumstances." In this case the amount on which the attorneys' fees were to be based had been collected by other attorneys, who continued the case after the plaintiff had been discharged. He was allowed to recover the agreed per cent less a proper deduction made for expenses which he would necessarily have incurred.

Attorneys who had been employed to prosecute a claim against a foreign government were held entitled to the agreed compensation in *MacKie v. Howland* (1894) 3 App. D. C. 461, although a short time before success crowned their efforts their power of attorney was revoked. The court states that if the principal could revoke the power of attorney, he certainly could not thus abrogate the contract or escape the liability that had been incurred under the contract when the stipulated services had all been substantially rendered and the attorney was ready, willing, and able to complete the small residue of the contract that remained to be performed.

²⁸ *Weil v. Finneran* (1902) 70 Ark. 509, 69 S. W. 310. L.R.A.1917F.

²⁹ *Dorshimer v. Herndon* (1915) 98 Neb. 421, 153 N. W. 496, 154 N. W. 207; *Cantrell v. Chism* (1857) 5 Sneed (Tenn.) 116 (attorney employed to defend a criminal prosecution; dictum).

³⁰ *Roake v. Palmer* (1907) 119 App. Div. 64, 103 N. Y. Supp. 862 (attorney employed to sue a claim for a per cent of recovery); *Re Rosedale Ave.* (1916) 219 N. Y. 192, 114 N. E. 49; *Louque v. Dejan* (1911) 129 La. 519, 38 L.R.A.(N.S.) 386, 56 So. 427. See cases cited in notes 31-34, infra.

The court in *Ronald v. Mutual Reserve Fund Life Assn.* (1887) 30 Fed. 228, does not clearly define the rights of an attorney employed to collect a life insurance policy for a percentage of the recovery, where he had been supplanted by another. The opinion was rendered on a motion to substitute attorneys, and the court states that contracts for contingent fees do not prevent the client from changing attorneys, nor give the original attorney an absolute control of the litigation to the end. Continuing, the court states: "The agreement should be regarded as providing for the mode of compensation only, and subject to such reasonable changes and provisions as subsequent circumstances may make proper. The attorney has a lien upon the papers in his possession for his contingent fees, in case of final recovery, to the extent of the proportion of services already rendered." The court then states that the motion for substitution should be granted upon a stipulation being filed with an order entered herein declaring the present attorney's lien pro rata upon any moneys or judgment hereafter recovered, "to the extent that may be hereafter determined."

stantially been completed.³¹ Upon such dismissal the client is liable for the reasonable value of the services performed,³² and only for such reasonable value.³³ It has been held that the terms of the original contract do not furnish the measure of the reasonable value of the services thus partly performed.³⁴

In *Dubois v. New York* (1904) 69 C. C. A. 112, 134 Fed. 570, where a litigant who had moved for a substitution of attorney was required to pay the attorneys originally employed a fair and reasonable compensation for the services actually rendered and disbursements made by them as a condition of substitution. The appellate court in affirming this judgment states that although the litigant had an undoubted right to change his attorneys, it should be upon condition that he pay them fair remuneration for services already performed. Continuing, the court states that the agreement here was that the attorneys should receive a contingent fee dependent upon ultimate success. If permitted to discharge them without condition, the complainant would deprive them of the opportunity to earn the contingent fee and leave them dependent upon the efforts of other counsel, in whose selection they have had no participation, thus leaving them practically remediless. It does not appear whether the attorneys or the litigant appealed.

³¹ *Parish v. McGowan* (1912) 39 App. D. C. 184 (dictum; attorney employed to prosecute a claim upon a per cent of the recovery); see *Mackie v. Howland*, supra, note 11.

³² *Parish v. McGowan* (D. C.) supra.

³³ *Roake v. Palmer* (1907) 119 App. Div. 64, 103 N. Y. Supp. 862. In this case an attorney was employed to collect a claim. After suit had been brought and issue joined, the attorney at the instance of the client gave a substitution. Subsequently he brought an action for his agreed percentage of the claim. There was no evidence that any amount had ever been realized upon the claim. The court states that the attorney did not make out a cause of action upon the contract. "The intention of the parties is not that the attorney absolutely and in any event should receive as compensation one quarter of the amount of the claim. . . . The contract does not intend that if there be a 'substitution therein,' then, irrespective of any realization upon the claim, the plaintiff should receive absolutely and in any event one fourth of the amount of the claim, but that provision is likewise conditional upon collection upon the claim." The court then cites from *Tenney v. Berger* (1883) 93 N. Y. 524, 45 Am. Rep. 263, to the effect that a client may discharge his attorney arbitrarily without any cause at any time and be liable to pay him "only for the services which he has rendered up to the time of his discharge." The foregoing statement in *Tenney v. Berger* is obiter. In that case an attorney who had withdrawn from L.R.A.1917F.

III. Employment for specified time.

It has been held that an attorney employed for a fixed time cannot be discharged without cause before the expiration of that time without committing a breach of the contract.³⁵ It is assumed in other cases dealing with the dismissal

a case because of dissatisfaction with another attorney employed was suing to recover for legal services rendered; there was no question of discharge by the client.

In *Johnson v. Ravitch* (1906) 113 App. Div. 810, 99 N. Y. Supp. 1059, upon a motion made to substitute attorneys, the superseded attorney having a contract by which he was to receive a percentage of the recovery, the court fixed the amount to be paid the superseded attorney at the value of his services. Upon the appeal it is stated that if the order be reversed it can only be on the ground that the amount allowed is too small, and it is further stated that "as to his contract, it is at an end, for the law will not permit him to be paid for services which he does not perform."

In *Powers v. Rich* (1898) 184 Pa. 325, 39 Atl. 62, an action by an attorney employed to conduct litigation who had been discharged before the end of the litigation, to recover the reasonable value of his services on the theory that he had performed the entire work, the trial court ruled that he could only recover the value of the services he actually performed before his discharge upon an appeal by the client from a judgment against him. A verdict for the attorney under this charge was affirmed by the supreme court upon an appeal by the client.

See *Kent v. Kishblate*, supra, note 11.

Friedman v. Mindlin (1915) 91 Misc. 473, 155 N. Y. Supp. 295, holding to the contrary, must be regarded as overruled.

If the attorney who has filed a lien on an award which he was employed to recover at a percentage of the recovery makes no attempt to prove the value of his services to the date of the discharge, the entire award will be paid to the client. *Re Rosedale Ave.* (1916) 219 N. Y. 192, 114 N. E. 40.

³⁴ *Parish v. McGowan* (D. C.) supra.

³⁵ *Horn v. Western Land Assn.* (1876) 22 Minn. 233; *Orphan Asylum v. Mississippi M. Ins. Co.* (1835) 8 La. 181.

In *Price v. Western Loan & Sav. Co.* (1909) 35 Utah, 379, 100 Pac. 677, 19 Ann. Cas. 589, an attorney employed by a loan association upon a monthly salary sued the loan association upon a discharge, upon a quantum meruit, and recovered the difference between the value of his services and the salary which had been paid him. In reversing this judgment, the court states that when the discharge of an attorney is without cause, the attorney may recover for the services "already performed by him under his contract of employment." It is then stated that in this case the attorney had been paid the contract price for his services.

of an attorney employed for a stated time that such a dismissal is wrongful.³⁶ It has been held that an attorney thus discharged, who has entered upon the performance of his contract and continued during the period thereof ready and willing to perform, and who does not by any act or engagement incompatible therewith incapacitate himself from its performance, may recover the stipulated sum agreed upon as compensation for his services.³⁷

A recovery of the entire sum agreed upon has been allowed without reference to the ability and willingness to complete the term of service.³⁸ An action in damages for a breach of an agreement by a bank to employ an attorney for a year has been sustained where the attorney was discharged without cause about a month after the beginning of the year.³⁹

³⁶ Dixon v. Volunteer Co-op. Bank (1913) 213 Mass. 345, 100 N. E. 655.

³⁷ Horn v. Western Land Assn. (1875) 22 Minn. 233.

³⁸ Orphan Asylum v. Mississippi M. Ins. Co. (La.) supra.

³⁹ Dixon v. Volunteer Co-op. Bank (Mass.) supra. W. A. E.

PENNSYLVANIA SUPREME COURT.

SAMUEL D. HALL

v.

PENNSYLVANIA RAILROAD COMPANY.

(— Pa. —, 100 Atl. 1035.)

Limitation of actions — fraudulent concealment — tolling.

1. A false assurance by a carrier, in response to complaints that it was giving freight rebates to competitors of complainant, referring not to the practice at the time of complaints, but to a general practice of rebating, that no rebates were being given, is such fraudulent concealment as to toll the running of the Statute of Limitations against a claim for damages because of such rebates.

For other cases, see *Limitation of Actions*, II. c, in *Dig. 1-52 N. S.*

Evidence — destruction of record.

2. Instructions to destroy evidence of rebating, given after discovery of a fraudulent concealment of the fact that it was being done, may be considered upon the question of bad faith from the beginning.

For other cases, see *Evidence*, XI. c, in *Dig. 1-52 N. S.*

Pleading — amendment — increasing claim for damages — limitation period.

3. An amendment of a claim for damages against a carrier for rebating so as to include additional sums growing out of the same transaction may be allowed after the limitation period has elapsed.

For other cases, see *Limitation of Actions*, IV. a, in *Dig. 1-52 N. S.*

Same — claim for treble damages.

4. A claim against a carrier for damages for rebating contrary to the provisions of a particular statute may be amended after the lapse of the limitation period so as to claim treble damages if the statute expressly provides that the carrier shall be liable for damages treble the amount of injury suffered.

For other cases, see *Limitation of Actions*, IV. a, in *Dig. 1-52 N. S.*

Damages — for rebating — delay in payment.

5. A recovery under a statute allowing treble damages against a carrier for rebating cannot include an allowance for delay in payment for the injury suffered, which is not provided for by the statute.

For other cases, see *Damages*, III. d, in *Dig. 1-52 N. S.*

Same — discrimination by carrier — difference in amounts paid.

6. The difference in the charges paid by complainant and what he would have paid had he been given the rate allowed a favored customer is the basis of damages in an action against a carrier for allowing rebates on coal shipments to one coal dealer not allowed to another under like circumstances, under a statute requiring all rates and drawbacks to be alike to all persons under like circumstances, and giving an injured person damages in treble the amount of the injury suffered.

For other cases, see *Damages*, III. d, in *Dig. 1-52 N. S.*

Courts — jurisdiction — state and Federal — carriage between points in same state.

7. State courts have no jurisdiction of

Note. — The general subject of the relation of new pleadings to the Statute of Limitations is discussed in the notes to *Missouri, K. & T. R. Co. v. Bagley*, 3 L.R.A.(N.S.) 259; *Bourdreaux v. Tucson Gas, Electric Light & P. Co.* 33 L.R.A.(N.S.) 196; and *Philadelphia, B. & W. R. Co. v. Gatta*, 47 L.R.A.(N.S.) 932; and see later cases, *Motzenbocker v. Shawnee Gas & E. Co.* L.R.A. 1916B, 910, and *Curtice v. Chicago & N. W. R. Co.* L.R.A. 1916D, 316. L.R.A. 1917F.

The presumption against the destroyer (spoliator) of evidence is discussed in the note to *Hay v. Peterson*, 34 L.R.A. 581.

The question whether the transportation between points in the same state over a route part of which is in another state constitutes interstate commerce is considered in the note to *Missouri, K. & T. R. Co. v. Leibengood*, 28 L.R.A.(N.S.) 985.

actions against carriers for unlawful discrimination in rates between shippers, although the transportation is between different points in the state, if the route for a portion of the distance enters another state. *For other cases, see Courts, II. a, 1, in Dig. 1-52 N. S.*

(July 1, 1916.)

CROSS APPEALS from a judgment of the Court of Common Pleas for Philadelphia County in favor of defendant, notwithstanding a verdict for plaintiff, in an action brought to recover damages for unlawful discrimination in freight rates; plaintiff appealing from so much of the judgment as denied his motion for treble damages as to certain shipments, and defendant appealing from so much as allowed plaintiff an amount representing rebates paid by defendant to plaintiff's competitors. Reversed.

The facts are stated in the opinion.

Messrs. Francis Shunk Brown and William Findlay Brown for plaintiff.

Messrs. Francis I. Gowen, John G. Johnson, and Sellers & Rhoads for defendant.

Frazer, J., delivered the opinion of the court:

Plaintiff, a retail coal dealer, sued to recover damages from defendant for unlawful discrimination in freight rates for coal hauled between the anthracite coal regions and the city of Philadelphia. The action was brought February 1, 1906, and the damages claimed were for a period of alleged discrimination between June 1, 1891, and July 23, 1901. The original statement claimed damages to the extent of \$100,000, which plaintiff alleged he suffered by reason of the fact that defendant "did charge, demand, and receive from plaintiff for the transportation of said coal a sum in excess of that charged and received by defendant from divers other persons upon like conditions, under similar circumstances, and during the same periods of time, and allowed such other persons, firms, and corporations concessions in rates and drawbacks which were not allowed to plaintiff, all in violation of the Constitution of Pennsylvania and the statutes passed in pursuance thereof." There is a further averment that defendant also paid the rent of the coal yard and offices of a favored shipper of coal; and the statement then sets forth that by reason of fraudulent concealment by defendant, plaintiff was prevented from discovering the fact of overcharge until within a year prior to beginning suit. An amended statement was filed in 1909, in which plaintiff charged defendant's acts were "in violation of the Consti-

tution of Pennsylvania and statutes passed in pursuance thereof, and particularly Act June 4, 1883 (P. L. 72)." Issue was joined on the pleas of not guilty and the Statute of Limitations. A stipulation signed by counsel was filed, in which it was agreed the total number of tons of coal consigned to plaintiff during the period of time named was 268,136.05, of which 52,525.05 tons were shipped within six years of the beginning of suit, and 215,611 tons previous thereto. Of the former amount 36,092.19 tons, and of the latter amount 174,175.16 tons were purchased from James Boyd & Company, alleged agents for defendants; the remainder elsewhere. The court charged the jury that if there was a fraudulent concealment which prevented plaintiff from making the discovery of rebates prior to the time of such alleged concealment, accepted by counsel as November 1, 1893, they might find damages that had accrued at that time, and also damages for rebates allowed within six years of the time suit was commenced. There was a verdict for plaintiff for \$25,870.62 single damages, to which the jury added \$25,219.17, as damages for delay in payment, making a total of \$51,089.79. The effect of this verdict was a finding that Boyd & Company were defendant's agents, and the Statute of Limitations had been tolled by reason of fraudulent concealment as to shipments before November 1, 1893. Plaintiff subsequently moved for judgment for treble damages as to shipments included in the verdict, and also as to other shipments previous to the six-year period, but subsequent to November 1, 1893. This motion was denied and judgment n. o. v. was entered for defendant for all of the verdict above the sum of \$3,624.69, representing the rebate paid to Downing Brothers, as to which amount judgment was entered for plaintiff. The effect of this judgment is to hold plaintiff's evidence of Boyd & Company's agency insufficient to submit to the jury, and, consequently, plaintiff could not claim damages on coal bought from them; that evidence of concealment of rebates was insufficient to toll the statute; and that no claim for treble damages or for damages for delay could be allowed. From the judgment entered as above stated both plaintiff and defendant appealed. As the various questions involved in the two appeals are more or less dependent upon each other, and required joint consideration in disposing of them, they will be considered together in this opinion.

The verdict, which is amply supported by the evidence, establishes that during the time covered by the statement of claim the firm of Downing Brothers, coal dealers in Philadelphia and competitors of plaintiff, paid

the regular freight charges on coal shipped to them at the same rate as plaintiff paid for coal, under identical conditions and circumstances, and subsequently received rebates of 50, 25, and 15 cents a ton from defendant, and also received, in the years 1897 to 1900, inclusive, the sum of \$9,500 a year to pay rent for their coal yard. Defendant contends the coal sold plaintiff by Boyd & Company was sold at a price delivered in Philadelphia, and that Boyd & Company paid the freight, hence plaintiff was not injured by the alleged rebate; there being no contractual relation between defendant and plaintiff, the right of action, if any, was against Boyd & Company. This view was sustained by the court below on demurrer to plaintiff's original statement of claim. In his amended statement plaintiff averred payment of the freight by him to defendant. It appears from the testimony of Downing and plaintiff's clerk, Smedley, that both plaintiff and Downing Brothers received from Boyd & Company the coal billed at the price at the mines, plus freight to Philadelphia. The verdict establishes that freight charges were added to the price of the coal, and paid by plaintiff to Boyd & Company, and the question arises whether there was sufficient evidence that Boyd & Company were agents of defendant to warrant its submission to the jury. In entering judgment non obstante veredicto the court below decided this question in the negative.

George H. Ross, a witness for defendant, testified that Boyd & Company were sales agents in the Philadelphia district for the Susquehanna Coal Company, a corporation owned or controlled by defendant W. C. Downing, of the firm of Downing Brothers, to whom the rebates complained of had been paid, testified Boyd & Company were agents of defendant for collection of freight on coal, and that he paid freight to them as such. This witness also testified to having seen an agreement of their employment as agents in 1897 or 1898, that he read it throughout, and it contained provisions for collection of freight from consignees by Boyd & Company, for which service the latter were to receive a certain commission. At the trial plaintiff called for the production of this agreement, and in reply to the call defendant's counsel stated they had no such agreement, and officials of defendant, called for cross-examination, denied all knowledge of the existence of such contract. Other witnesses also testified Boyd & Company were agents for defendant company; and it appears freight on coal purchased by others than Boyd & Company was always paid direct to defendant, while on purchases from Boyd & Company it was paid to them. Although the testimony of Downing was not definite as to the L.R.A.1917F.

period of time covered by the contract of agency which he claims to have seen, and he was not clear whether the agreement was a new one or the renewal of a former one, his testimony, with the other evidence in the case, was sufficient to submit to the jury on the question whether or not Boyd & Company were agents of defendant for receiving freight charges. *Hertzler v. Geigley*, 196 Pa. 419, 79 Am. St. Rep. 724, 46 Atl. 366; *Singer Mfg. Co. v. Christian*, 211 Pa. 534, 60 Atl. 1087.

The court below, in its opinion refusing a new trial, limited the damages to a period of six years preceding the beginning of the suit, thus holding plaintiff had not met the burden imposed upon him of proving facts sufficient to take the case out of the Statute of Limitations. *Campbell v. Boggs*, 48 Pa. 524.

The evidence relied upon by plaintiff for this purpose was, inter alia, an interview by himself with William H. Joyce, defendant's general freight agent, on November 1, 1893, when the following conversation took place:

A. I called on Mr. Joyce and stated to him that there was somebody underselling us in coal, and we could not hold our trade, and I thought they must have a lower rate of freight or a rebate, and he assured me we were all paying the same rate of freight, and that no rebates were being paid to anyone. I told him I could not understand it because they were offering coal from 25 to 50 cents a ton lower than we were, on the same coal, shipped by the same people; so he says, "I cannot do anything for you, Mr. Hall," and he never did.

Q. You told him where your coal was coming from?

A. Yes, sir.

Q. From where, what did you tell him?

A. Pennsylvania Railroad Company coal, Lehigh and Wyoming regions.

Q. What did you tell him? Did you tell him you were paying Boyd the freight?

A. Told him we paid Mr. Boyd for his coal and freight.

Q. And he said nobody was getting any better rates than you?

A. Yes, sir.

Q. Did you believe what Mr. Joyce told you?

A. I certainly did.

The court below held this conversation insufficient to toll the statute on the ground that mere denial of guilt did not necessarily amount to a fraudulent concealment of the wrongful act, nor did such denial convert the original wrong into a fraud, relying upon the case of *Despeaux v. Pennsylvania R. Co.* (C. C.) 87 Fed. 794, and *Mitchell*

Coal & Coke Co. v. Pennsylvania R. Co. 241 Pa. 536, 88 Atl. 743. In the former case the inquiry concerning the acts referred to the time of the interview, and not to the time the wrongful acts were committed, and there was no fraudulent concealment of the prior act. In the latter case, there was a promise to plaintiff that in the future he would receive the same concessions as other shippers, and a breach of this promise was held not such a fraudulent concealment as would toll the statute. Mere silence or failure to keep a promise is not sufficient to stop the running of the Statute of Limitations. There must be a separate and distinct act of concealment. *Smith v. Blachley*, 198 Pa. 173, 53 L.R.A. 849, 47 Atl. 985; *Cloyd v. Reynolds*, 44 Pa. Super. Ct. 81. But where some affirmative act of concealment takes place it is not material whether the concealment is previous, or subsequent, to the beginning of the cause of action. The question is whether there was a design to prevent the discovery of the facts which gave rise to the action, and whether the act operated as a means of concealment. *Whitesell v. Strickler*, 167 Ind. 602, 119 Am. St. Rep. 524, 78 N. E. 845; *Boyd v. Boyd*, 27 Ind. 429; *Jackson v. Jackson*, 149 Ind. 238, 47 N. E. 963. In *Cook v. Chicago, R. I. & P. R. Co.* 81 Iowa, 551, 9 L.R.A. 764, 25 Am. St. Rep. 512, 3 Inters. Com. Rep. 383, 46 N. W. 1080, it was held a statement that no rebates or concessions were allowed any shipper was sufficient to toll the statute.

The statement of Joyce, that no rebates were being given, was calculated to deceive by preventing inquiry as to rebates, both before and after the time of the interview. While no rebates may have been given at the precise moment plaintiff and Joyce met, and the statement may, therefore, have been true in a literal sense, yet plaintiff's inquiry and Joyce's answer were not limited to that exact time, but referred to a general practice of rebating, both before and after their interview. The statement was therefore untrue in a broader sense, and the one in which plaintiff must have understood it, and amounted to an affirmative act of concealment of a course of rebating which the jury found existed before, at the time of, and subsequent to, the conference. The answer tended to disarm suspicion and prevented inquiry as to past, present, and future rebating. In addition to the evidence of the interview with Joyce, there was evidence that about the same time Boyd, found by the jury to be defendant's agent, told plaintiff all dealers were getting the same rates, and Downing testified the rebates to him were paid through a third person in order to conceal the transaction, and that in L.R.A. 1917F.

1907 he was directed by one of defendant's officials to destroy all his records showing rebates.

While the instructions to destroy the records were subsequent to the time of the discovery of the fraud by plaintiff, they may properly be considered as tending to support other evidence of bad faith from the beginning. *Cummings v. Cummings*, 5 Watts & S. 553; *McHugh v. McHugh*, 186 Pa. 197, 41 L.R.A. 805, 65 Am. St. Rep. 849, 40 Atl. 410; *Com. v. Marion*, 232 Pa. 413, 423, 81 Atl. 423. On the whole, we deem the evidence sufficient to warrant the conclusion of the jury that there was such active concealment by defendant as to toll the Statute of Limitations.

The fact that defendant had been paying rebates was discovered by plaintiff in September, 1905, and this suit was brought February 21, 1906. The original statement of claim is for damages to the extent of \$100,000 which plaintiff alleges he suffered by reason of the unlawful payments of rebates by defendant to other shippers. There is no express reference in this statement to Act June 4, 1883 (P. L. 72), but defendant's acts are alleged to be "in violation of the Constitution of Pennsylvania and the statutes passed in pursuance thereof." On May 8, 1909, an amendment was filed which alleged defendant's acts were "in violation of the Constitution of Pennsylvania and statutes passed in pursuance thereof, and particularly Act June 4, 1883 (P. L. 72)." This amendment contains no express statement that the claim is for treble damages. During the trial of the case on April 18, 1913, an amendment was offered, but refused by the trial judge, increasing the amount of damages claimed to \$400,000, and alleging plaintiff "is entitled to and seeks to recover three times the actual damages suffered by him, in accordance with the statutes in such case made and provided." Subsequently to the verdict, on May 1, 1913, a motion to increase the verdict by imposing treble damages was made and refused by the court below.

The right of plaintiff in a suit under the Act of 1883 to have damages trebled on motion has been recognized by this court in a number of instances, the only question in such case being whether or not the jury in the verdict rendered had or had not included treble damages. One of the most recent decisions is the case of *Cox v. Pennsylvania R. Co.* 240 Pa. 27, 87 Atl. 581, where it is said: "The verdict for single damages was conclusive as to the question of undue and unreasonable discrimination. This left nothing to be considered by the jury in connection with the trebling of the

damages. The statute made provision for that."

The action of the court below in the present case makes it clear that no treble damages were included in the verdict, and the question, therefore, is whether the amendment offered at the trial, followed by the motion for treble damages, sets up a new cause of action which was barred by the Statute of Limitations, because the claim was not made within six years following the time the fraud was discovered in September, 1905. The proposed amendment of April 18, 1913, increases the damages claimed in the first paragraph of the statement of claim to \$400,000. This additional damage claimed is not by virtue of a distinct cause of action, but merely increases the amount of plaintiff's claim for the cause already alleged in the original statement. The amendment is, therefore, within the rule that an increase in the measure of damages claimed is not a new cause of action, and may be allowed even after the Statute of Limitations has run. In *Armstrong v. Philadelphia*, 249 Pa. 39, 94 Atl. 455, Ann. Cas. 1917B, 1082, an amendment which introduced an additional element of damage drawn out of the same circumstances was held proper after the statutory period, and in *Puritan Coal Min. Co. v. Pennsylvania R. Co.* 237 Pa. 420, 85 Atl. 426, Ann. Cas. 1914B, 37, an amendment claiming a larger amount of damage as a consequence of certain acts of illegal discrimination in the distribution of coal cars was permitted to be made after the statutory period. This amendment in the present case was proper, therefore, in so far as the increase of the amount of claim to \$400,000 is concerned.

The amendment sought to be made at the trial, claiming treble damages, stands on a different footing. An action of trespass at common law is brought to recover compensation for the injuries sustained by plaintiff by reason of defendant's wrongful acts. An action under a statute like the one in question is brought to recover the penalty imposed by the act, and an amendment changing the form of action from one at common law to an action under the statute for a penalty has been uniformly considered by our courts as setting up a new cause of action, and therefore not allowed if the Statute of Limitations has run at the time the amendment is offered. *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.* 241 Pa. 536, 88 Atl. 743. The trial in this case occurred more than six years after suit was begun; and unless the claim for treble damages was included within the scope of the original statement of claim, or the amendment of 1909, the claim for treble damages

cannot be allowed. The original statement of claim contains no express reference to any particular statute, but merely refers to the violation of the provisions of the Constitution and statutes passed in pursuance thereof. The amendment of 1909 charges a violation of the Constitution and statutes in the same general language, but adds, "particularly Act June 4, 1883 (P. L. 72)," making no express claim, however, for treble damages. Is this a sufficient notice to defendant that the action was brought for treble damages under the provisions of that act? The common-law rule is that where an offense is created by statute and a penalty inflicted, the mere statement of the facts constituting the offense will be insufficient, for there must be an express reference to the statute, as by the words "contrary to the form of the statute," etc., in order that it may appear that plaintiff grounds his case upon, and intends to bring it within, the statute. 1 Chitty, Pl. 16th ed. *237. And where the act or omission which is the foundation of the suit was not an offense at common law, it is necessary in all cases to conclude "against the form of the statute" or "statutes," or to show at least that the declaration is founded on the statute by introducing the words "de placito transgressionis et contemptus contra formam statuti." 1 Chitty, Pl. 16th ed. *387. In *Howser v. Melcher*, 40 Mich. 185, which was an action on a statute allowing treble damages for forcible entry, the declaration did not refer to the statute as the basis of plaintiff's right to recover. The court said (40 Mich. 189): "Pleading the statute is stating the facts which bring the case within it; and counting on it, in the strict language of pleading, is making express reference to it by apt terms to show the source of right relied on."

Our own decisions seem to agree that it is sufficient to recite the facts constituting a cause of action within the statute and then follow by a reference to the act itself. In *Rees v. Emerick*, 6 Serg. & R. 286, 288, which was an action for damages for illegal distraint of goods, it was said: "It is a general principle, that where a statute gives increased damages, the writ should conclude, against the form of the statute."

In *Hughes v. Stevens*, 36 Pa. 320, 324, where an action of trespass at common law was brought for damages for cutting timber on plaintiff's land, it was said: "The third error is to the action of the court in trebling the damages found by the jury. The counts in the narr. are in accordance with the common-law actions, and there is in them no reference whatever to the statute under which the recovery of treble damages is claimed. This is undoubtedly an

omission which precluded the plaintiff's right to treble the damages. . . . If the statutory action be intended, the defendant should be apprised of it in the usual way, namely, in the narr., so that he may shape his defense accordingly. We have held it to be sufficient that the narr. conclude with an averment that the trespass was against the act of assembly," etc.

The Act of June 4, 1883 (P. L. 72), is entitled, "An Act to Enforce the Provisions of the Seventeenth Article of the Constitution Relative to Railroad and Canals." It contains three sections. Section 1 makes unlawful any undue discrimination in freight charges or facilities by common carriers or any officer, superintendent, manager, or agent thereof. Section 2 provides that the charges shall be uniform, and concessions in rates and drawbacks shall be allowed to all alike, and all undue discrimination is forbidden. Section 3, in the language of the Constitution, forbids any president, director, officer, agent, or employee of any canal or railroad company to be interested directly or indirectly in furnishing material or supplies, etc., to such company, and, for a violation of the act in this respect, imposes a penalty of fine or imprisonment. The only provision allowing an action to the shipper is the concluding sentence of § 2, as follows: "Any violation of this provision shall make the offending company or common carrier liable to the party injured for damages treble the amount of injury suffered."

When the only right of action provided by the act is a liability to the party injured for treble the amount of the injury suffered, it is difficult to see how a reference to the act could fail to notify defendant that the suit was brought to recover treble damages. No other kind of damages are mentioned under the express wording of the statute.

The case of *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.* 241 Pa. 536, 88 Atl. 743, relied upon by defendant, does not establish a different rule, as in that case there was no reference either to the act or to the fact that treble damages were claimed.

It follows from a consideration of the above cases and the Act of 1883 that the amendment proposed on the trial should have been allowed, as it did not introduce a cause of action different from that covered by the previous pleadings. As counsel have agreed on the facts as to shipment of coal, etc., the judgment can be entered as if the amendment had been made.

If plaintiff is permitted to recover treble damages under the Act of 1883, it would seem he cannot at the same time claim damages for delay in payment of the injury L.R.A.1917F.

sustained by him under the common law. The remedy given by the Act of 1883 is penal in character and will not be construed to include other damages not covered by the wording of the act. In *Hughes v. Stevens*, 36 Pa. 320, it is said in regard to a similar statute: "The statutory action is cumulative to the common-law remedy, or perhaps rather an optional or alternative remedy, for a resort to either would be a bar to the other."

In *Dunbar Furnace Co. v. Fairchild*, 121 Pa. 563, 15 Atl. 656, which was an action to recover damages for cutting timber, it was held error for the court to treble the amount of a verdict which included interest as well as single damages. This case was followed in *McCloskey v. Powell*, 138 Pa. 383, 400, 21 Atl. 151, where it is said: "The jury found the value of the timber trees, and computed interest thereon at \$641.88. The court directed judgment to be entered for three times the value of the timber, and excluded the interest therefrom. The precise point was ruled in *Dunbar Furnace Co. v. Fairchild*, supra, and is clear upon principle. The treble damages are given as a penalty, and we know of no case in which a penalty bears interest until the plaintiff's right to it has been settled by judgment. The learned judge of the court below was right, therefore, in excluding the interest, and entering the judgment for three times the single value of the trees cut and carried away."

Under the above decisions the allowance of damages for delay is inconsistent with the action for statutory penalty under the Act of 1883, and must be disallowed.

The first question raised by defendant's appeal is whether the measure of damages of a shipper who had not received the benefit of a concession in rates given a competitor is the amount of rebate given the latter. The trial judge charged that if defendant, or its agents, paid rebates or allowances to any other person, which were not also allowed plaintiff, the latter might recover the difference between the amount paid him and the amount he would have paid at the lowest rate charged or received from any person for like services and under similar circumstances and conditions. The correctness of this ruling must depend upon a proper construction of § 2 of Act June 4, 1883 (P. L. 72), which provides that "no railroad company or other common carrier engaged in the transportation of property, shall charge, demand or receive from any person, company, or corporation, for the transportation of property or for any other service, a greater sum than it shall charge or receive from any other person, company or corporation for a like service,

from the same place, upon like conditions and under similar circumstances; and all concessions in rates and drawbacks shall be allowed to all persons, companies or corporations alike, for such transportation and service, upon like conditions, under similar circumstances and during the same period of time. Nor shall any such railroad company or common carrier, make any undue or unreasonable discrimination between individuals, or between individuals and transportation companies for the furnishing of facilities for transportation. Any violation of this provision shall make the offending company or common carrier liable to the party injured for damages treble the amount of the injury suffered."

In *Hoover v. Pennsylvania R. Co.* 156 Pa. 220, 22 L.R.A. 263, 36 Am. St. Rep. 43, 27 Atl. 282, an action was brought by a coal dealer to recover the amount of a rebate of a certain sum per ton which was paid to a manufacturing establishment by defendant. The lower court there instructed the jury that plaintiff's measure of damages would be the difference between the charge to the manufacturing company and to plaintiff. This court held the instruction erroneous, saying (156 Pa. 244): "It does not at all follow that the amount of injury suffered is the difference in the rates charged. It might be, or it might not be, but, in any event, it must be a subject of proof, and there was no proof in the case of the actual damage sustained."

Mitchell Coal & Coke Co. v. Pennsylvania R. Co. supra, seemingly contradicts that decision. There the complaint was by one coal shipper of a rebate allowed another, under the same circumstances and conditions, and the referee stated the measure of damages was the amount of concession which would have been paid plaintiff had he received the same rebate as the favored shipper. The *Hoover* Case was cited before the court at that time; the finding of the referee was, however, affirmed, this court saying (241 Pa. 540): "The effect of the rebate was to cause damage to the plaintiff to the extent of the rebate. The services of the defendant company to the Gallitzen Colliery after October, 1899, were similar to those rendered the three favored companies, Altoona, the Glen White, and the Milwood, and the plaintiff was injured to the extent of the rebates allowed these companies."

A comparison of the facts in the above cases shows the decisions are not inconsistent with each other. In the *Hoover* Case plaintiff was a coal dealer, and the favored company a manufacturing establishment, and it was held in that case there was no equality of conditions which would justify plaintiff in demanding the same rate given

the manufacturing company. In the *Mitchell Company Case* this discrimination was made between companies operating under like conditions and circumstances. The "injury suffered," within the meaning of the term used in the Act of 1883, may be either the difference in the rates charged under the provisions requiring the allowance of the same concessions and drawbacks to all persons "upon like conditions, under similar circumstances, and during the same period of time" as in the *Mitchell Coal & Coke Company Case*, or it may be the injury suffered by reason of "undue or unreasonable discrimination," though the conditions differ, in which case the injury would not necessarily be the difference in charges, but would be the damage suffered by reason of failure to furnish equal facilities or other requirements of shippers. The case of *Union P. R. Co. v. Goodridge*, 149 U. S. 680, 37 L. ed. 986, 13 Sup. Ct. Rep. 970, involved the construction of a Colorado statute similar to our own statute, requiring railroads to make the same concessions to all persons alike. It was there held the measure of damages was the amount of the rebate allowed other shippers. The case of *Pennsylvania R. Co. v. International Coal Min. Co.* 230 U. S. 184, 57 L. ed. 1446, 33 Sup. Ct. Rep. 893, Ann. Cas. 1915A, 315, relied upon by defendant as establishing a different rule, is distinguishable from the present case, as it involved a construction of the Interstate Commerce Act, which makes the published rates the legal rate, and provides a penalty for departing therefrom. In the present case as in the *Goodridge Case*, the question involved is the construction of a state statute which makes the lowest rate of freight the legal one, and requires all concessions to be made to all persons alike, providing the conditions and circumstances are the same. This distinction was pointed out in *Pennsylvania R. Co. v. International Coal Min. Co.* supra. Under the above authorities, there was no error in the charge in regard to the measure and proof of damages.

Objection is also made that the state courts are without jurisdiction of an action for unlawful discrimination in freight rates as to such part of the coal as was shipped plaintiff from the Pennsylvania anthracite mining regions by a route which extended for a part of the way into the state of New Jersey; the contention being that jurisdiction over such shipments is within the exclusive province of the Federal courts. The right to regulate commerce between the states is vested in Congress by the Constitution of the United States, and, in so far as Congress has acted with reference to the particular subject-matter, the states are

without power to interfere. While the mere creation of the Interstate Commerce Commission, and the granting to it of a large measure of control over commerce between the states, does not, in the absence of action taken by it, destroy the power of the state to regulate incidental matters relating to interstate commerce, and affecting the welfare and convenience of its citizens (*Missouri P. R. Co. v. Larabee Flour Mills Co.* 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214; *Puritan Coal Min. Co. v. Pennsylvania R. Co.* 237 Pa. 420, 85 Atl. 428, Ann. Cas. 1914B, 37), the question before us in the present case is one of unlawful discrimination in freight rates, which specific subject-matter has been covered by Federal legislation, and all disputes relating thereto are within the exclusive jurisdiction of the Federal courts.

The cases of the *Puritan Coal Min. Co. v. Pennsylvania R. Co.* supra; *Walnut Coal Co. v. Pennsylvania R. Co.* 237 Pa. 410, 85 Atl. 440, *Sonman Shaft Coal Co. v. Pennsylvania R. Co.* 241, Pa. 487, 88 Atl. 746, and others relied on by plaintiff, were all actions for damages for unlawful discrimination in the furnishing of cars, and it was there held, in effect, that as neither Congress nor the Interstate Commerce Commission had undertaken to legislate concerning the particular subject-matter, which was one of local concern, the Federal and state jurisdictions were concurrent, even though the cars were ultimately to be used in interstate commerce. In *Clark Bros. Coal Min. Co. v. Pennsylvania R. Co.* 241 Pa. 515, 88 Atl. 754, the various decisions were discussed by the court below in an opinion which was affirmed on appeal, and it was said the coal, which it appeared was sold f. o. b. cars at the mines, did not become the subject of interstate commerce until actually in transit to points without the state. In this respect the cases are within the express provisions of the Interstate Commerce Act of February 4, 1887, 24 Stat. at L. 379, chap. 104, and its amendment of June 29, 1906, 34 Stat. at L. 584, chap. 3591, Comp. Stat. 1916, § 8563, which prevent the application of the act to the "transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one state and not shipped to or from a foreign country from or to any state or territory as aforesaid." In the present case the subject-matter is discrimination in rates by the allowance of rebates on coal actually transported, and is clearly within the regulations established by Congress and the Interstate Commerce Commission if the passage outside of the state, in the course of its journey from one point to another within the state, is sufficient to bring it within the definition of interstate commerce, and the exclusive jurisdiction of the Federal courts.

This question was decided in the negative in *Com. v. Lehigh Valley R. Co.* 129 Pa. 308, 18 Atl. 125, and affirmed in *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192, 36 L. ed. 672, 4 Inters. Com. Rep. 87, 12 Sup. Ct. Rep. 806. It appears in that case the matter objected to was taxation on transportation receipts on goods hauled between points within the state, but passing for a short distance outside the state. This case was commented on and limited in its effect, by the United States Supreme Court in *Hanley v. Kansas City Southern R. Co.* 187 U. S. 617, 621, 47 L. ed. 333, 336, 23 Sup. Ct. Rep. 214. It was there pointed out that the *Lehigh Valley R. Co. Case*, 145 U. S. 192, 36 L. ed. 672, 12 Sup. Ct. Rep. 806, was merely one of a local tax on property within the state, based on receipts from transportation wholly within the state, and without including receipts on property which passed outside its borders, in the course of carriage between intrastate points. The rule laid down in the *Hanley Case* has been followed in later cases. *West Virginia R. Co. v. Baltimore & O. R. Co.* 26 Inters. Com. Rep. 622; *United States v. Delaware, L. & W. R. Co.* (C. C.) 152 Fed. 269. In the latter case it was held the word "wholly," as used in the provision of the Interstate Commerce Act, which declares it shall not apply to "transportation of property or to the receiving, storage, delivery, or hauling of property wholly within one state," includes within the act shipments which pass outside the state in the course of their journey between points within. Since the subject-matter in the present case is one on which Congress has legislated and the goods in transportation come within the Interstate Commerce Acts by virtue of their passage outside the state, the state courts have no jurisdiction for the recovery of damages as to such part of the goods as were carried through New Jersey.

It follows that the judgment of the court below must be reversed, and judgment entered for plaintiff for an increased amount. The amount of the judgment will be computed by taking the difference between the sum of \$93,111.88, which sum is made up as per computation based upon a stipulation entered into between the parties as to the tonnage and rebates allowed thereon, and the sum of \$10,225.75 being the amount of rebates on tonnage which passed outside the state of Pennsylvania in the course of shipment, to wit, \$82,886.13, which, multiplied by three, makes \$248,658.39, the amount of the judgment.

Judgment reversed, and judgment for plaintiff for \$248,658.39.

A petition for rehearing having been granted, the following *Per Curiam* response was handed down on March 12, 1917:

These appeals were first heard January 18, 1915, and a reargument, ordered of our own motion, was heard March 13, 1916. On July 1, 1916, an opinion was filed by Mr. Justice Frazer, entering judgment for the plaintiff for \$248,658.39. A second reargument was ordered on the application of

learned counsel for the defendant, to enable them to reargue the questions of the application of the Statute of Limitations and of the right of the plaintiff to recover treble damages. This last argument was heard January 5, 1917. After due and careful consideration of all that has been earnestly and ably urged in asking for a modification of the judgment entered July 1, 1916, we are of one mind that it ought not to be disturbed, in view of all the facts in the case, and the prothonotary is directed to remit the record.

WASHINGTON SUPREME COURT.
(Department No. 2.)

MARTIN GRUBER, Respt.,
v.

CATER TRANSFER COMPANY, Appt.

(— Wash. —, 165 Pac. 491.)

Master and servant — driver of moving van — authority to invite passengers.

1. The driver of a moving van has no implied authority to invite the owner of the goods to accompany them on the van, so as to render the owner of the van liable for injury inflicted upon him by the careless driving of the van.

For other cases, see Master and Servant, III. a, 2, in Dig. 1-52 N. S.

Evidence — custom — permitting riding on vans.

2. A custom to permit owners to ride on moving vans with their goods is not shown by testimony of a driver of one of the vans that he had allowed others to ride upon the seat with him.

For other cases, see Evidence, XII. k, in Dig. 1-52 N. S.

(June 4, 1917.)

APPEAL by defendant from a judgment of the Superior Court for Spokane County in plaintiff's favor, in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Smith & Mack, for appellant:

The testimony of the driver of the van was clearly insufficient to establish a custom.

Williams v. Ninemire, 23 Wash. 393, 63 Pac. 534; *Johns v. Jaycox*, 67 Wash. 403, 39 L.R.A.(N.S.) 1151, 121 Pac. 854, Ann. Cas. 1913D, 471.

The defendant was not liable, as the cvi-

Note. — As to liability of master for injury to person riding with servant by latter's invitation or permission, see annotation following this case, post, 425. L.R.A.1917F.

dence shows that the servants had no right or authority to let anybody ride and the rule of the company was not to do so.

Scott v. Peabody Coal Co. 163 Ill. App. 103; *Schulwitz v. Delta Lumber Co.* 128 Mich. 559, 85 N. W. 1075; *Mahler v. Scott*, 129 Mich. 614, 89 N. W. 340, 11 Am. Neg. Rep. 264; *Driscoll v. Scanlon*, 165 Mass. 348, 52 Am. St. Rep. 523, 43 N. E. 100; *Dover v. Mayes Mfg. Co.* 157 N. C. 324, 46 L.R.A.(N.S.) 199, 72 S. E. 1067; *Robinson v. McNeill*, 18 Wash. 163, 51 Pac. 355; *Daugherty v. Chicago, M. & St. P. R. Co.* 137 Iowa, 257, 14 L.R.A.(N.S.) 590, 126 Am. St. Rep. 282, 114 N. W. 902; *Formall v. Standard Oil Co.* 127 Mich. 496, 86 N. W. 946, 10 Am. Neg. Rep. 402; *Curtis v. Tenino Stone Quarries*, 37 Wash. 355, 79 Pac. 955; *Morris v. Brown*, 111 N. Y. 318, 7 Am. St. Rep. 751, 18 N. E. 722; *Bowler v. O'Connell*, 162 Mass. 319, 27 L.R.A. 173, 44 Am. St. Rep. 359, 38 N. E. 498; *Foster-Herbert Cut Stone Co. v. Pugh*, 115 Tenn. 688, 4 L.R.A.(N.S.) 804, 112 Am. St. Rep. 881, 91 S. W. 199, 19 Am. Neg. Rep. 553; *Shafer v. Tacoma Eastern R. Co.* 91 Wash. 164, L.R.A.1916F, 114, 157 Pac. 485; *Fischer v. Columbia & P. S. R. Co.* 52 Wash. 462, 100 Pac. 1005; *Clark v. Colorado & N. W. R. Co.* 19 L.R.A.(N.S.) 988, 91 C. C. A. 358, 165 Fed. 408; *Wileox v. San Antonio & A. P. R. Co.* 11 Tex. Civ. App. 487, 33 S. W. 379; *Atchison, T. & S. F. R. Co. v. Lindley*, 42 Kan. 714, 6 L.R.A. 646, 18 Am. St. Rep. 515, 22 Pac. 703; *Atchison, T. & S. F. R. Co. v. Headland*, 18 Colo. 477, 20 L.R.A. 822, 33 Pac. 185; *Johnson v. Ashland Water Co.* 71 Wis. 553, 5 Am. St. Rep. 243, 37 N. W. 823; *Atlanta & W. P. R. Co. v. West*, 121 Ga. 641, 67 L.R.A. 701, 104 Am. St. Rep. 179, 49 S. E. 711; *Mickelson v. New East Tintic R. Co.* 23 Utah, 42, 64 Pac. 463; *Holmes v. Cromwell & S. Co.* 51 La. Ann. 352, 25 So. 265; *Lygo v. Newbold*, 9 Exch. 302, 156 Eng. Reprint, 129, 23 L. J. Exch. N. S. 108, 2 C. L. R. 449, 2 Week. Rep. 158; *Potts v. Fortune*, 80 Wash. 302, 141 Pac. 697; *Mercer v. Lloyd Transfer Co.* 59 Wash. 560, 110 Pac. 399.

It is only the duty of the master towards the licensee not to wantonly injure.

Shafer v. Tacoma Eastern R. Co. 91 Wash. 164, L.R.A.1916F, 114, 157 Pac. 485; *Thiele v. McManus*, 3 Ind. App. 132, 28 N. E. 327; *Siak v. Crump*, 112 Ind. 504, 2 Am. St. Rep. 213, 14 N. E. 381; *Mathews v. Bense*, 51 N. J. L. 30, 16 Atl. 195; *Fitzpatrick v. Cumberland Glass Mfg. Co.* 61 N. J. L. 378, 39 Atl. 675, 4 Am. Neg. Rep. 193; *Kentucky Distilleries & Warehouse Co. v. Leonard*, 25 Ky. L. Rep. 2046, 79 S. W. 281; *Cowen v. Kirby*, 180 Mass. 504, 62 N. E. 968, 11 Am. Neg. Rep. 261; *Taylor v. Haddonfield & C. Turnp. Co.* 65 N. J. L. 102, 46 Atl. 707.

Messrs. Roche & Onstine, for respondent:

The driver fully represented defendant, and was acting in the scope of his authority.

Burger v. Taxicab Motor Co. 66 Wash. 678, 120 Pac. 519; *Knuist v. Bullock*, 59 Wash. 141, 109 Pac. 329; *Kneff v. Sanford*, 63 Wash. 503, 115 Pac. 1040, 2 N. O. C. A. 422; *Birch v. Abercrombie*, 74 Wash. 486, 50 L.R.A.(N.S.) 59, 183 Pac. 1020; *Switzer v. Sherwood*, 80 Wash. 24, 141 Pac. 181, Ann. Cas. 1917A, 216.

After plaintiff was permitted to ride, it was the positive duty of the driver of said automobile to exercise reasonable care not to injure him.

Baird v. Northern P. R. Co. 78 Wash. 72, 138 Pac. 325; 3 Thomp. Neg. §§ 2667-2676; 6 Cyc. 544, note 59.

Defendant is liable for the careless acts of the driver if he was acting within the scope of his authority.

Chase v. Knabel, 46 Wash. 487, 12 L.R.A.(N.S.) 1155, 90 Pac. 642; *Bardsley v. Truax*, 64 Wash. 402, 116 Pac. 1075; *Leland v. Chelalis Lumber Co.* 68 Wash. 632, 123 Pac. 1086; *Purdy v. Sherman*, 74 Wash. 309, 133 Pac. 440; *Penson v. Inland Empire Paper Co.* 73 Wash. 344, L.R.A.1915F, 15, 132 Pac. 39.

Parker, J., delivered the opinion of the court:

The plaintiff, Gruber, seeks recovery of damages for personal injuries which he alleges he received from the negligence of the defendant transfer company in the operation of one of its transfer automobile trucks while he was riding thereon by consent of the driver thereof. Trial in the superior court, sitting with a jury, resulted in verdict and judgment in favor of the plaintiff, awarding him damages, from which the defendant has appealed to this court.

Appellant is a corporation engaged in the transfer business in the city of Spokane, using both automobile and horse-drawn trucks in its business. It apparently is not engaged at all in the carrying of passengers. L.R.A.1917F.

In any event, the automobile truck here in question was in no sense a passenger-carrying vehicle nor intended to be used as such, as its appearance plainly so indicated. About 9 o'clock in the morning on April 9, 1915, respondent called the office of appellant by telephone and arranged for it to send a moving truck to his residence to move some trunks and household goods to another part of the city, some blocks distant. The contract thus made plainly did not contemplate the transportation of respondent himself. Appellant sent an automobile truck with two of its employees in charge to respondent's residence, when it was loaded with the goods respondent desired transferred, the employees being informed of the place where the goods were to be taken. The employees were very familiar with the city, and needed no one to go along and show them the way. The goods being loaded and the truck ready to start upon its journey, respondent said to the driver, "Hain't I better go up and show you where to put that stuff?" The driver replied, "Yes," "All right," or "Come on." Respondent himself gave these different versions of what the driver then said to him. The driver and the other employee of appellant occupied the seat on the front of the truck leaving no room for another person to ride there. The sides of the body of the truck were some 18 inches high. The rear end gate was down. A small trunk was on the floor of the truck, a foot or two from the rear end. Respondent sat down upon this trunk facing the rear. The truck then proceeded upon its way, and, while passing over a crossing raised somewhat above the level of the roadway, respondent was thrown or fell out, striking upon his head and shoulders, and causing the injuries for which he here seeks recovery. He claims that he was thrown out as the result of the reckless driving of the truck by appellant's employee. We think no statement of the facts can be made from the record before us more favorable to respondent's contentions than this summary. Indeed, it is respondent's own version, in substance, of the facts.

Appellant, by timely and appropriate motions made upon the trial of the case, challenged the sufficiency of the evidence to warrant any recovery against it, whatever the negligence of the driver may have been; the principal argument being that respondent was not upon the truck with the knowledge or consent of appellant, and that the driver had no real or apparent authority from appellant to consent to respondent being upon the truck as he was. The refusal of the trial court to so rule as a matter of law is the principal claimed error here relied upon.

It seems to us that the proper disposition of this case is controlled by our decision in *Fischer v. Columbia & P. S. R. Co.* 52 Wash. 462, 100 Pac. 1006. In that case the plaintiff contemplated becoming a passenger upon a freight train of the defendant company to which there was a caboose attached for the carrying of passengers. It was a long train, and plaintiff was near the front end, and it seemed doubtful whether he would be able to walk back to the caboose before the train started. The engineer, noticing this situation, told the plaintiff to get on the engine and ride. The plaintiff did so, and, because of defective brakes, the crew lost control of the train, resulting in plaintiff's injury, which would not have occurred had the plaintiff been riding in the caboose which was provided for passengers. It was held as a matter of law that the company was not liable because the plaintiff was not upon the engine by consent of the company or any of its agents who had authority to invite him to ride there, and no facts were shown pointing to any real or apparent authority on the part of the engineer to invite the plaintiff to ride there, so that the authority of the engineer in that respect could not become a question for the jury. Judge Gose, speaking for the court, quoted with approval the general rule as stated in *Waterbury v. New York, C. & H. R. R. Co.* (C. C.) 17 Fed. 671, 10 Am. Neg. Cas. 694, as follows: "Undoubtedly the presumption of law is that persons riding upon a train of a railroad carrier, which is palpably not designed for the transportation of persons, are not lawfully there. And if they are permitted to be there by the consent of the carrier's employees, the presumption is against the authority of the employees to bind the carriers by such consent."

In the decision so quoted from, however, the question of implied authority of the engineer to invite the plaintiff to ride upon the engine was, because of the plaintiff's being a shipper of stock on the train and certain proof of custom introduced in evidence, held proper to be left for the jury to decide. After citing and reviewing a number of authorities, Judge Gose concluded the opinion of the court as follows: "We conclude, therefore, that the engineer, in inviting the appellant to get onto the engine, did not act within the real or apparent scope of his authority; that the appellant was required to take notice of this fact; that the appellant was not a passenger; that the company owed him no affirmative duty; and that he cannot recover."

It seems to us that the presumption is equally strong in this case that appellant's driver did not have authority to invite or permit respondent to ride upon the truck, L.R.A.1917F.

especially in the position in which he did ride. Nothing could seem plainer than that the nature of the truck and the purpose for which it was being used would tell respondent that appellant never contemplated persons other than its employees riding thereon, and we think there is no evidence in the record which tends to affirmatively show to the contrary. Among the decisions cited and reviewed by Judge Gose in that opinion as lending support to the conclusion reached are: *Chicago & A. R. Co. v. Michie*, 83 Ill. 427; *Atchison, T. & S. F. R. Co. v. Johnson*, 3 Okla. 41, 41 Pac. 641, 6 Am. Neg. Cas. 187; *Flower v. Pennsylvania R. Co.* 69 Pa. 210, 8 Am. Rep. 251, 12 Am. Neg. Cas. 524; *Snyder v. Hannibal & St. J. R. Co.* 60 Mo. 413; *Duff v. Alleghany Valley R. Co.* 91 Pa. 458, 36 Am. Rep. 675; and *Atchison, T. & S. F. R. Co. v. Lindley*, 42 Kan. 714, 6 L.R.A. 646, 16 Am. St. Rep. 515, 22 Pac. 703.

Our decision in *Baird v. Northern P. R. Co.* 78 Wash. 67, 138 Pac. 325, might seem to lend some support to respondent's contentions, but in that case an employee of the railway company, in accordance with a custom which was known to the company, and assented to by it, was riding home upon the engine of a work train after working hours, when he was injured by the negligent operation of the engine. That decision goes no further than holding that, these facts appearing in the complaint, it stated a cause of action, and that proof of the alleged facts made the question of the authority of the operators of the engine in allowing him there one for the jury to decide. The following authorities lend support to our conclusion: *Robinson v. McNeill*, 18 Wash. 163, 51 Pac. 355; *Foster-Herbert Cut Stone Co. v. Pugh*, 115 Tenn. 688, 4 L.R.A.(N.S.) 804, 112 Am. St. Rep. 881, 91 S. W. 199, 19 Am. Neg. Rep. 553; *Dougherty v. Chicago, M. & St. P. R. Co.* 137 Iowa, 257, 14 L.R.A.(N.S.) 590, 126 Am. St. Rep. 282, 114 N. W. 902; *Clark v. Colorado & N. W. R. Co.* 91 C. C. A. 358, 19 L.R.A.(N.S.) 988, 165 Fed. 408; *Dover v. Mayes Mfg. Co.* 157 N. C. 324, 46 L.R.A.(N.S.) 199, 72 S. E. 1067; *Schulwitz v. Delta Lumber Co.* 126 Mich. 559, 85 N. W. 1075; *Mahler v. Stott*, 129 Mich. 614, 89 N. W. 340, 11 Am. Neg. Rep. 264; *Scott v. Peabody Coal Co.* 153 Ill. App. 103; *Lygo v. Newbold*, 9 Exch. 302, 156 Eng. Reprint, 129. The last-cited case seems to be exactly parallel to the one before us. The decision is well epitomized in the syllabus thereof, which reads: "The plaintiff, a person of full age, contracted with the defendant to carry certain goods for her in his cart. The defendant sent his servant with the cart, and the plaintiff, by the permission of the servant, but without the defendant's authority, rode in the cart with her goods. On the

way, the cart broke down, and the plaintiff was thrown out and severely injured. Held that, as the defendant had not contracted to carry the plaintiff, and as she had ridden in the cart without his authority, he was not liable for the personal injury she had sustained."

We see no escape from the conclusion that appellant cannot be held liable for the injuries received by respondent, and that it must be so decided as a matter of law.

We do not understand counsel for respondent to seriously contend here that appellant's driver was guilty of gross negligence or of wantonly causing respondent's injury. Indeed, we see no room for such contention in the light of the evidence. Besides, the trial court in its instructions submitted the case to the jury upon the theory of appellant being in no event liable to respondent except upon its failure to exercise ordinary care for his safety, and we do not find in the record any exceptions to these instructions or request for instructions sub-

mitting to the jury the question of gross negligence or wanton action on the part of appellant's driver.

We find in the record no evidence worthy of consideration pointing to any custom of allowing persons other than appellant's employees to ride upon its transfer trucks. The only evidence which could have any bearing whatever upon this question was the testimony of one of appellant's drivers of one of its horse-drawn trucks that he had allowed others to ride upon the seat with him. But even he testified that he never allowed anyone to ride on the back part of his truck where goods were being carried. This, we think, is no evidence of custom available to respondent.

We conclude that the judgment must be reversed, and the case dismissed.

It is so ordered.

Ellis, Ch. J., and Mount, Fullerton, and Holcomb, JJ., concur.

Annotation—Liability of master for injury to person riding with servant by latter's invitation or permission.

This question, so far as children are concerned, has been treated generally in the note to *Dover v. Mayes Mfg. Co.* 46 L.R.A.(N.S.) 199, and specifically with reference to children invited or permitted to ride on engines or cars in the note to *Lovejoy v. Denver & R. G. R. Co.* L.R.A.1915E, 888. The present note is confined to road vehicles, wagons or automobiles.

GRUBER v. CATER TRANSFER Co. ante, 422, is sustained in *McQueen v. People's Store Co.* (1917) — Wash. —, 166 Pac. 626, holding the master not liable where the driver of an automobile truck used in the delivery of merchandise invited a lady acquaintance to ride on the step, and, after going a short distance, she was injured either by jumping or being thrown from the car. The court said: "In inviting the girls to ride upon the truck Buhre was engaged in furthering his own pleasure, and not in furthering his master's business. His employment was to drive the truck. In inviting these girls to ride with him he was neither doing it as a means nor for the purpose of performing that work. It had no connection with his work, either directly or indirectly. In extending this invitation Buhre was acting without any reference to the business in which he was employed. It was an independent and private purpose of his own, contributing to his pleasure, but not to his L.R.A.1917F.

service. While so acting he was his own master irrespective of the fact that the facilities afforded him to do his work were instrumental in inflicting the injuries complained of."

In *Adams v. Tozer* (1914) 163 App. Div. 751, 149 N. Y. Supp. 163, in its facts a case similar to the *GRUBER CASE*, but reaching a conclusion different therefrom, one hired a van for the removal of his household goods, and while riding, on the invitation of the driver, was injured through the latter's negligence by the overturning of the van. The owner of the goods was said to be a licensee to whom the owner of the van owed the duty of exercising reasonable care. The court said that "the appellant [owner of goods] was engaged with the driver in the common enterprise of removing two loads of household goods from a car to the house which appellant was to occupy. The work could not well be done by the driver alone, but the assistance of the appellant was necessary both as to the loading and unloading of the van, and it was evidently in the contemplation of the appellant and respondent [owner of van] at the time of hiring the van that the necessary assistance should be furnished by the appellant to supplement the work of the driver and the team. The van was fitted with a seat for the use of the driver and of any other person who might have

the right to use it. The obligation of the respondent was to move the goods from the car to the house, and the driver, representing the respondent, had the authority to do what was reasonable and necessary for that purpose. The route from the car to the house, through the various streets, was given, indicating that the car and house were not in proximity; but the distance was not stated. While it was not shown that it was customary for the persons assisting in the work of moving goods to ride back in the wagon returning empty, it may fairly be assumed that, in the interest of expediting the work and conserving the strength of the workers, such course was practical and reasonable and fairly within the contemplation of the parties at the time the bargain was made, and we think the driver was not acting outside of his authority in inviting the appellant and his father to ride. By taking his place upon the seat of the van at the invitation of the driver, the appellant did not thereby assume charge of the driver and team, nor did he become a trespasser; but he became a licensee on behalf of whose safety the respondent owed the duty of exercising reasonable care. Whether or not, as the servant of the respondent, the driver did exercise such care, was, we think, under the evidence, fairly a question of fact which should have been submitted to the jury." (As to liability of master for injury to volunteer, see note to *Pooler v. Sargent Lumber Co.* L.R.A. 1915F, 1125, and other notes there referred to.)

In *Royal Indemnity Co. v. Platt & W. Ref. Co.* (1917) 98 Misc. 631, 163 N. Y. Supp. 197, the court, upon the authority of *Grimshaw v. Lake Shore & M. S. R. Co.* (1912) 205 N. Y. 371, 40 L.R.A. (N.S.) 563, Ann. Cas. 1913E, 571, 98 N. E. 762, and *Adams v. Tozer* (N. Y.) supra, held that one riding in defendant's automobile by invitation of defendant's employee, who was using the automobile at the time in his work of soliciting orders for oil for the defendant, was a licensee of the defendant, to whom it owed the duty of exercising care, and that it was responsible for an injury to him through the negligence of the employee in running the automobile. This seems to have been held independently of the fact, which the court apparently refers to merely as an additional reason for its decision, that the injured person testified that the defendant's employee was, during the trip, soliciting an order for oil from him. Apart from that fact, how-

ever, there is some doubt as to the authority of the cases cited for the result. In the *Adams Case*, as above shown, the person was injured while accompanying his own goods; and in the *Grimshaw Case* the person was injured while riding on an engine, with the consent of the engineer, and was himself a railroad employee, although not an employee of defendant.

In *Powers v. Williamson* (1914) 189 Ala. 600, 66 So. 585, a father allowed his son the use of his automobile for a pleasure trip, provided a certain person whom the father considered an experienced chauffeur should run the car; the latter, on invitation of the son, consented to operate the car, and, without the father's knowledge, invited a woman to form one of the party; during the trip the car ran into an obstruction and the woman was injured; the father was held not liable for injury received by such woman through the driver's negligence, the latter not being the father's servant so far as she was concerned. The court said: "In so far as Miss Powers is concerned, certainly the relation of master and servant did not exist between Will Skeggs [driver] and the defendant. While the defendant's son was in the car with the three young ladies who were his guests, Miss Reba Powers became the guest of Will Skeggs,—all the evidence shows this,—and as to her, without regard to the rights of the other members of the party, Will Skeggs cannot be regarded as the servant of the owner of the automobile. In so far as Miss Powers is concerned, her rights are to be determined just as if Will Skeggs had been the owner of the automobile and acting as his own chauffeur. If Will Skeggs was, as to third parties, and as to the son and the three young ladies who were his guests,—a matter which is not before us,—the servant of the father, he was not the servant of the father in so far as Miss Powers is concerned."

(Generally as to liability of owner or operator of automobile for injury to guest, see notes to *Beard v. Klusmeier*, 50 L.R.A. (N.S.) 1100, and *Perkins v. Galloway*, L.R.A. 1916E, 1193.)

It was stated in *Wink v. Weiler* (1891) 41 Ill. App. 336, that where a servant, after he had ceased work, was, for his own accommodation, driven by a fellow servant to a point near his home, and, while in the act of alighting from the wagon, was injured by reason of a defective step thereon, the relation of master and servant having ceased, the owner of the wagon did not owe the person

injured the duty of furnishing him a safe and sufficient wagon.

So, where an employee who was operating an automobile belonging to a customer permitted another employee, who was on his way home after work, to ride with him, in violation of a rule of the master, the master was, in *Walker v. Fuller* (1916) 223 Mass. 566, 112 N. E. 230, held not liable for injuries sustained by the latter employee in a collision, the court stating that, at the time such em-

ployee was injured, he was not riding in the automobile by reason of any invitation of the defendant, or of anyone in his employ who was authorized by him to extend such an invitation; that he was a trespasser and could not recover.

The case of *Lygo v. Newbold* (1854) 9 Exch. 302, 156 Eng. Reprint, 129, 23 L. J. Exch. N. S. 108, 2 C. L. R. 449, 2 Week. Rep. 158, is sufficiently set out in *GRUBER v. CATER TRANSFER CO.*

J. D. C.

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

VICTOR VON ARX, Plff. in Err.,
v.

W. A. SHAFER et al.

(241 Fed. 649.)

False imprisonment — liability of marshal.

1. A marshal who, upon arresting an alleged offender, postpones compliance with a statute requiring him to be taken before a magistrate without delay, until he can get his dinner, change his clothes, and look after witnesses, is guilty of false imprisonment.

For other cases, see False Imprisonment, II, b, in Dig. 1-52 N. S.

Same — liability of magistrate.

2. A magistrate is guilty of false imprisonment who, knowing of an arrest, fails to have the alleged offender brought before him without delay as required by statute, and permits him to be imprisoned without bail until the following day.

For other cases, see False Imprisonment, II, b, in Dig. 1-52 N. S.

(May 7, 1917.)

ERROR to the District Court of the United States for the First Division of the District of Alaska (Jennings, District Judge) to review a judgment in favor of defendants in an action brought to recover damages for alleged false imprisonment. Reversed.

The facts are stated in the opinion.

Argued before Gilbert and Hunt, Circuit Judges, and Wolverton, District Judge.

Mr. J. H. Cobb, for plaintiff in error:

The law prohibits arresting without warrant and confining the person so arrested in jail longer than reasonably necessary to take him before a magistrate for examination or trial.

Note. — As to liability of magistrate for failing to have prisoner brought before him, see annotation following this case, post, 429.
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19 Cyc. 354; *Low v. Evans*, 16 Ind. 487; *Stewart v. Feeley*, 118 Iowa, 524, 92 N. W. 670; *Brock v. Stimson*, 108 Mass. 520, 11 Am. Rep. 390; *Harness v. Steele*, 159 Ind. 286, 64 N. E. 878; *Leger v. Warren*, 51 L.R.A. 193, 216, 217, and note, 62 Ohio St. 500, 78 Am. St. Rep. 738, 57 N. E. 506.

Messrs. Cheney & Ziegler, for defendants in error:

The provision in the statute that the defendant must in all cases be taken before the magistrate without delay is directory only.

State v. Belding, 43 Or. 95, 71 Pac. 330.

Gilbert, Circuit Judge, delivered the opinion of the court:

The parties hereto will be designated plaintiff and defendants as in the court below. The plaintiff brought an action against the defendants to recover damages for false imprisonment. The defendant Shafer was the city marshal of the town of Douglas, Alaska, and the defendant Henson was the city magistrate. During the progress of the trial the court directed a nonsuit as to Henson, and at the close of the evidence instructed the jury to return a verdict for the defendant Shafer. The court was clearly in error in both rulings.

The plaintiff and the defendant Shafer engaged in a personal altercation and fist fight on a street in Douglas. Bystanders separated them, and thereupon Shafer drew his revolver and told the plaintiff that he was under arrest. He took the plaintiff to the jail, and without lodging a complaint against him, or taking him before the magistrate, he confined him in jail, where the plaintiff remained from 1 o'clock in the afternoon until 10 o'clock the following morning, when he was brought into the court room, and Henson, the magistrate, made out a complaint. Henson testified that he made up his mind that the case was not strong enough to be prosecuted on the charge of resisting an officer, and that he thereupon wrote a complaint charging the plaintiff with using obscene and profane language, in violation of an ordinance of the town of

Douglas. Thereafter plaintiff was found guilty by the magistrate, but on appeal to the district court he was acquitted. At the time when the plaintiff was brought to the jail, Henson was present. He testified to the following conversation at that time: "He [Shafer] said, 'I have got Von Arx down here.' And I said, 'You look as though you had got somebody.' And he was mud from head to foot, his face was scratched, and that is all I said. He said, 'I am going on to get my dinner and cleaned up;' and that is all I saw of the marshal."

Fuesi, a hardware merchant, testified that in the afternoon of the day of the arrest, in company with one Hunsaker, he went to Henson and said that he and Hunsaker would "go good" for the plaintiff; "Let him out; let him go home;" and that Henson said, "Nothing doing until to-morrow at 10 o'clock." It is not denied that Fuesi and Hunsaker were men of property, and on the trial Henson admitted that he knew that the plaintiff could furnish any reasonable bail. He denied, however, that Fuesi and Hunsaker offered to go bail for the plaintiff; but he admitted that at 5 o'clock that afternoon he had a conversation with Fuesi, in which the latter said: "What are you holding Von Arx for? You have no right to arrest him." I said, "Well, I don't know about that; well, he is in jail." He said, "I know he is; I heard so, but you cannot keep him in jail." I said, "Well, I guess I can; I guess we can."

Upon the facts as they are admitted by both the defendants, a gross and wanton outrage was committed upon the plaintiff. He was a property owner, and for twelve years had been a resident of the town of Douglas. He was arrested and deprived of his personal liberty, the right to which is most jealously guarded in American jurisprudence, and imprisoned in jail for a period of twenty-one hours without a warrant, without the semblance of legal process, and upon no charge of violation of law. The plaintiff testified that before he was put in jail he asked Shafer to bring him into court, that Shafer made no answer, and that on approaching the jail he said to Shafer, "Here is Mr. Henson in the doorway," and that Shafer took his club and said, "Come on to jail," and immediately put him in jail. Shafer denied that the plaintiff made any such request, and he testified that after he put the plaintiff in jail he went out home to his dinner, then took his clothes to the cleaners, and afterwards was engaged in looking after witnesses on the case, up to about 4 o'clock, and that he then went to Henson to make out a complaint, but failed to find him in the office at that time.
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The laws of Alaska applicable to the case are not materially different from those which prevail generally in the states. Section 2389, Compiled Laws, provides: "That the defendant must in all cases be taken before the magistrate without delay."

And § 2408 provides "that when the defendant is brought before a magistrate upon an arrest, either with or without warrant, on a charge of having committed a crime, the magistrate must immediately inform him of the charge against him and of his right to the aid of counsel before any further proceedings are had."

It was the plain duty of Shafer, upon arresting the plaintiff, to take him forthwith to the magistrate. He had no right to defer this in order to eat his dinner, clean his clothes, or look after witnesses. *Harness v. Steele*, 159 Ind. 286, 64 N. E. 875; *Ocean S. S. Co. v. Williams*, 89 Ga. 251; *Keefe v. Hart*, 213 Mass. 476, 100 N. E. 558, Ann. Cas. 1914A, 716. In the case last cited the court said: "The defendants had no right to detain the plaintiff to enable them to make a further investigation of the charge against him. It was their duty to bring him before the court as soon as reasonably could be done. . . . It cannot be said as matter of law that their delay for an hour and a quarter was reasonable."

It was the plain duty of Henson, when he saw that the marshal had the plaintiff under arrest, to cause the plaintiff to be brought before him, and a charge to be made against him, and to afford him a hearing or the opportunity of bail. Instead of so doing, he permitted the marshal to imprison the plaintiff, and later in the day, when his right to hold the plaintiff in jail was challenged, his answer was, "Well, I guess I can; I guess we can;" and further said: "Nothing doing. I don't want to talk to you any more. There is nothing doing until to-morrow morning at 10 o'clock."

This is not a case in which Henson can claim immunity from responsibility by reason of his office of magistrate. He never acquired jurisdiction of the person of the plaintiff, or the authority to hold him in jail. Instead of obeying the plain provisions of the law, he pursued a course wholly different in nature. "When he does this, he steps over the boundary of his judicial authority, and is as much out of the protection of the law in respect to the particular act as if he held no office at all." *Cooley, Torts*, 416; *Brosde v. Sanderson*, 86 Wis. 368, 57 N. W. 49; *Piper v. Pearson*, 2 Gray, 120, 61 Am. Dec. 438; *Clarke v. May*, 2 Gray, 410, 61 Am. Dec. 470; *La Roe v. Roeser*, 8 Mich. 537; *Truesdell v. Combs*, 33 Ohio St. 186; *Robinson v. Dow*, 1 Hayw.

& H. 239, Fed. Cas. No. 11,950; Pratt v. Hill, 16 Barb. 303.

It is equally clear, upon the facts as they are admitted, that Shafer also is answerable in damages for false imprisonment. In 11 R. C. L. 801, it is said: "The duty of the one making such an arrest to bring the prisoner before a proper magistrate or prosecuting officer, that proceedings for the trial of the prisoner may be instituted, and that he may have an opportunity to give bail or otherwise procure his release, is even more imperative than if a warrant had been issued before arrest."

In *Ocean S. S. Co. v. Williams*, 69 Ga. 251, the court said: "That it was the duty of the party making or causing the arrest to convey the person arrested, without delay, before the most convenient officer authorized to receive an affidavit and issue a warrant, is too plain to admit of cavil or dispute. . . . Time is not given to make an investigation of the facts of the transaction, but to procure the warrant. . . . The arrest is allowed only for the purpose of carrying the party before a magistrate."

In *Harness v. Steele*, supra, the court said: "But the power of detaining the person so arrested, or restraining him of his liberty, in such a case, is not a matter within the discretion of the officer making the arrest. He cannot legally hold the person arrested in custody for a longer period of time than is reasonably necessary, under all of the circumstances of the case, to obtain a proper warrant or order for his further detention from some tribunal or officer authorized under the law to issue such a warrant or order. If the person arrested is detained or held by the officer for a longer period of time than is required under the circumstances, without such warrant or au-

thority, he will have a cause of action for false imprisonment against the officer and all others by whom he has been unlawfully detained or held."

In *Leger v. Warren*, 62 Ohio St. 500, 508, 51 L.R.A. 193, 78 Am. St. Rep. 738, 57 N. E. 508, it was said: "To afford protection to the officer or person making the arrest, the authority must be strictly pursued; and no unreasonable delay in procuring a proper warrant for the prisoner's detention can be excused or tolerated. Any other rule would leave the power open to great abuse and oppression."

In *Brock v. Stimson*, 108 Mass. 520, 11 Am. Rep. 390, Judge Gray said: "The statute authorizes the arrest without a warrant only as a preliminary step towards taking the prisoner before a court."

And the court held that, if the officer omits to take the prisoner before the court, he is liable to him for assault and false imprisonment.

In *Markey v. Griffin*, 109 Ill. App. 212, the court said: "The right to release upon bail is so firmly grounded in our system of jurisprudence by Federal and state Constitutions, and statute and common law, that one accused of crime, whether guilty or innocent, cannot be deprived of the right with impunity. Whether bail shall be granted, or a party deprived of it, is not to be left to the determination of a city marshal or police officer."

Other cases of similar import are *Schoette v. Drake*, 139 Wis. 18, 120 N. W. 393; *Jackson v. Miller*, 84 N. J. L. 189, 86 Atl. 50; *Burke v. Bell*, 36 Me. 317; *Judson v. Rear-don*, 16 Minn. 431, Gil. 387.

The judgment is reversed, and the cause is remanded for a new trial.

Annotation—False imprisonment: liability of magistrate for failing to have prisoner brought before him.

This note does not include the effect of proceeding with a case in the absence of the accused.

For the general subject of liability of judicial officer to civil action for acts of judicial nature, see the notes in 14 L.R.A. 138; 27 L.R.A. 92; and 44 L.R.A. (N.S.) 164.

As to liability of officer for making an arrest, see note to *Brown v. Hadwin*, L.R.A. 1915B, 505, and earlier notes there referred to.

The decision in *VON ARX v. SHAFER*, ante, 427, is supported by the authorities.

In *Edwards v. Ferris* (1836) 7 Car. & P. (Eng.) 542, it was held that the magistrate was liable where constables L.R.A. 1917F.

arrested the plaintiff on Sunday night for disorderly conduct and were taking him on Monday noon to the magistrate, who, meeting them in the street, said: "Take him back, I will see him tomorrow," and he was kept in prison for another day.

Where, late Saturday night a justice issued a warrant indorsed with a direction to commit the accused till Monday for examination, and he was then arrested and remained in jail till Monday, the justice and the arresting officers were held liable to the accused. *Pratt v. Hill* (1853) 16 Barb. (N. Y.) 303.

In *Touhey v. King* (1882) 9 Lea

(Tenn.) 422, the trial court in an action against a magistrate for false imprisonment instructed the jury that "in case of misdemeanors, when committed in presence of magistrates, they have the power to cause the arrest of the party without warrants, and to commit to imprisonment." The appellate court in reversing the judgment said and held: "While . . . a magistrate may order the arrest of anyone for a public offense committed in his presence, he has no power to at once, without an examination or hearing, or without informing the offender of the charge against him, commit him to prison. If there be good cause for postponing the hearing, and the offender fail to give bail in a bailable case, then he may be committed until the hearing. But for a magistrate to order the arrest of anyone for a misdemeanor committed in his presence, and at once, without a hearing, or without cause postponing the hearing to another time, or giving him an opportunity to have counsel or give bail, peremptorily order him to prison, is contrary to the very spirit of our Bill of Rights and the pointed provisions of our statutes."

Where one suspected of robbery was brought to the house of a magistrate, who detained him there for eighteen days, did not examine him, but delivered him over to his successor, it was held that he was liable to the accused for false imprisonment, "for a justice of peace cannot detain a person suspected in prison but during a convenient time, only to examine him, which the law intends to be three days, and within that time to take his examination, and send him to prison; for he ought not to detain him as long as he pleaseth, as he here did eighteen days; neither ought he to detain him in prison in his own house, but he is to commit him to the common goal of the county." *Scavage v. Tateham* (1601) Cro. Eliz. pt. 2, 829, 78 Eng. Reprint, 1056.

But a justice of the peace in whose custody a person had been left by an officer, with the discharge of whose duties such person was interfering, until a disposition could be made of the case, is not liable in damages for preventing, without unreasonable force, such person from leaving his custody and detaining her for about an hour, during which time she refused to submit to the justice and by her angry manner and language contributed to the delay, although the statute requires that an offense charged against one brought before a magistrate shall be forthwith examined into by him. L.R.A.1917F.

Myers v. Dunn (1907) 126 Ky. 548, 13 L.R.A.(N.S.) 881, 104 S. W. 352.

And "a party cannot, for his own benefit, make a stipulation to appear at a future day for his own convenience, and receive a parol, and then complain that he was not immediately taken before a magistrate." *Nowak v. Waller* (1890) 10 N. Y. Supp. 199.

In *Wiggins v. Norton* (1889) 83 Ga. 148, 9 S. E. 607, where it does not appear whether the magistrate of the district was a defendant or not it was held that "when an officer arrests a prisoner in a district or village where there is excitement at the time, and there is danger of a riot at the commitment trial, and the magistrate of the district is consulted about carrying the prisoner to another district before a magistrate there, and assents thereto, it is within the discretion of the arresting officer to carry the prisoner to the other district."

While beyond the scope of the note, reference may be made to *Pepper v. Mayes* (1884) 81 Ky. 673, holding that a justice committed no error where, having issued a warrant for the plaintiff's arrest on an affidavit of the plaintiff's son stating that his father had threatened to take his life and that it would be endangered so long as his father was not restrained of his liberty, the plaintiff was brought before the justice at 11:30 Saturday evening, very drunk, and the justice issued a mittimus stating that the prisoner refused to give bail, and he was kept in custody until the following evening.

It is not intended to include the question whether a commitment for re-examination was for too long a period. See, for example, *Davis v. Capper* (1829) 10 Barn. & C. 28, 109 Eng. Reprint, 362, 5 Mann. & R. 53, 4 Car. & P. 134, 8 L. J. M. C. 67; *Washer v. Iler* (1905) 29 Ohio C. C. 319, affirmed in (1907) 75 Ohio St. 638, 80 N. E. 1134. B. B. B.

ARKANSAS SUPREME COURT.

A. SORRELS, Appt.,
v.

W. A. CHILDERS et al.

(— Ark. —, 195 S. W. 1.)

Homestead — purchase of mortgage by widow — effect.

A widow who advances her own funds to

Note. — As to purchase of homestead by widow under foreclosure of lien, see annotation following this case, post, 433.

purchase a mortgage on the homestead can acquire no right to the fee by foreclosing the mortgage, as against the infant children of herself and her deceased husband, which she can convey to a stranger.

For other cases, see Guardian and Ward, II. in Dig. 1-52 N. S.

(May 14, 1917.)

APPEAL by defendant from a decree of the Chancery Court for Pope County in plaintiffs' favor in a suit to set aside a sale of mortgaged land. Affirmed.

Statement by Wood, J.:

The facts in this case are succinctly stated by counsel for appellant as follows:

On the 17th day of February, 1896, G. W. Childers and Sarah E. Childers, his wife, mortgaged to A. J. Sisney a tract of land in Pope county, consisting of 120 acres, to secure the payment of a promissory note given by Childers on that date for the sum of \$600. G. W. Childers died on the 17th of August, 1902, leaving the note, with accrued interest thereon for more than two years, unpaid.

On the 21st of March, 1904, Mrs. Sarah E. Childers, the widow, sold a tract of land which she owned in her own right and used the money thus obtained to purchase the note and mortgage given by G. W. Childers to A. J. Sisney, and Sisney, the mortgagee, duly assigned the same to Mrs. Childers.

On the 22d of October, 1904, 39 acres of the land embraced in the mortgage were sold by Mrs. Sarah E. Childers under the power of sale contained in the mortgage, and at this sale Mrs. Childers bought the land for the sum of \$765, the amount of the note and mortgage debt, with interest due to that date.

During the year 1904 Mrs. Childers was married to T. J. Holland, and some time after this marriage Holland and his wife, Sarah E., mortgaged the 39 acres which Mrs. Childers had bought at the mortgage sale to one Correthers to secure a loan obtained from him in the sum of \$600.

On September 9, 1910, Mrs. Holland and T. J. Holland, her husband, sold the 39 acres which they had mortgaged to Correthers to A. Sorrels for the consideration of \$2,000, and used the money thus obtained in paying off the mortgage debt on the land to Correthers and for the support of the minor children of G. W. Childers. Sorrels at the time of the purchase had full knowledge of the nature of the transaction.

This suit was instituted by Nettie T. Webb and W. A. Childers and Emma Childers in their own right, and by W. A. Childers as next friend of the other appellees, L.R.A.1917F.

who were minors, all of the appellees being the children and only heirs at law of G. W. Childers.

It was alleged in the complaint that the land embraced in the mortgage by Childers to Sisney was the homestead of G. W. Childers at the time of his death; that 39 acres of the land which Mrs. Childers sold under the power contained in the mortgage and which she purchased at such sale and afterwards sold to Sorrels was a part of such homestead. They alleged that the sale to Sorrels was a fraud upon their rights; that Mrs. Childers (now Holland) did not have the title to the lands, and conveyed the same without right; that she only had a lien on the lands for the sum due to repay her the amount she had paid to satisfy the original mortgage debt of G. W. Childers to Sisney; that on the death of Childers the lands embraced in the mortgage, including the land in controversy, descended to them, subject to the mortgage lien of Sisney, and that Mrs. Sarah E. Childers (now Holland), in paying off the mortgage debt, became subrogated to the rights of A. J. Sisney, and that her acts in paying off the mortgage debt and in protecting their title to the land against the mortgage was done by her as trustee, and would inure to their benefit; that Sorrels was fully informed as to the condition and nature of the title at the time of his purchase, and knew that such title rested in the appellees, subject alone to the mortgage lien and the homestead rights of the surviving widow and minor children of G. W. Childers. They prayed that the sale to Sorrels be set aside, and that the title to the land be vested in them, subject to whatever rights Mrs. Holland acquired under the mortgage and to her rights as the widow, and the rights of the minor children in the homestead.

Mrs. Holland answered, setting up substantially the facts as above stated by counsel.

Sorrels answered, denying that he knew that the fee-simple title was vested in the plaintiffs, and alleged that he purchased the lands for a valuable consideration.

The testimony developed the facts substantially as above stated, and the court in its decree so found, and declared that Sarah E. Childers was a trustee for the minor heirs of G. W. Childers, and that she and Sorrels acquired nothing more than an equitable lien in the purchase of an outstanding indebtedness and the mortgage securing the sum in controversy in the suit. He found that Sorrels was entitled to a balance due him in the sum of \$671.65, and decreed the same a lien on the lands in controversy, and ordered the same sold to satisfy such lien if the amount of the decree was not paid

within thirty days, and the appellant brings this appeal.

Mr. James H. Johnson, for appellant:

The legal estate in mortgaged property passes to the mortgagee, subject to be defeated by the performance of the condition of the mortgage.

Whittington v. Flint, 43 Ark. 504, 51 Am. Rep. 572.

If the legal title in mortgaged property passes to the mortgagee under the mortgage, it would certainly pass to the assignee of the mortgage on the assignment thereof.

Penzel v. Brookmire, 51 Ark. 105, 14 Am. St. Rep. 23, 10 S. W. 15; Kerby v. Wade, 101 Ark. 543, 142 S. W. 1121; Lanigan v. Sweany, 53 Ark. 185, 13 S. W. 740; 27 Cyc. 1297, ¶ C.

A power of sale contained in a mortgage or deed of trust is not revoked by the death of the grantor or mortgagor.

27 Cyc. 1453, ¶ B; Hudgins v. Morrow, 47 Ark. 515, 2 S. W. 104.

A widow may, on payment by her of the amount due on a mortgage given by her husband in his lifetime on property in which she has a dower right, compel an assignment of such mortgage to her or to a person designated by her.

Moore v. Smith, 95 Mich. 71, 54 N. W. 701; Bayles v. Husted, 40 Hun, 376; Hopkins Mfg. Co. v. Ketterer, 237 Pa. 285, 85 Atl. 421, Ann. Cas. 1914B, 558.

The naked legal title to lands included in a mortgage or deed of trust passes to the mortgagee or to the trustee to make the security available in the payment of the debt, and for no other purpose, and the beneficiary does not acquire title absolute except on foreclosure, as the law requires.

Foreman v. Holloway, 122 Ark. 341, 183 S. W. 763.

The acts of a widow in purchasing the mortgaged homestead at foreclosure sale, and conveying a portion of the premises to the mortgagee in payment of the debt, operate as a mere redemption of that portion of the homestead not conveyed, and though she takes the title in her own name, she will be deemed in equity as holding the same as trustee for her infant children.

Burel v. Baker, 89 Ark. 168, 116 S. W. 181.

Mr. J. T. Bullock, for appellees:

Upon payment of the mortgage debt and interest plaintiffs are entitled to recover the land in controversy.

Equity prohibits a purchase by parties placed in a relation of trust or confidence with respect to the subject of the purchase; so that no party can be permitted to purchase for his own benefit and interest, where L.R.A.1917F.

he has a duty to perform which is inconsistent with the character of purchaser.

Brittin v. Handy, 20 Ark. 381, 73 Am. Dec. 497; Clements v. Cates, 49 Ark. 242, 4 S. W. 776; Hindman v. O'Connor, 54 Ark. 627, 13 L.R.A. 490, 16 S. W. 1052; Imboden v. Hunter, 23 Ark. 622, 79 Am. Dec. 116; Burel v. Baker, 89 Ark. 168, 116 S. W. 181; Haynes v. Montgomery, 96 Ark. 573, 132 S. W. 651; Van Horne v. Fonda, 5 Johns. Ch. 407; Sneed v. Atherton, 6 Dana, 276, 32 Am. Dec. 70; Venable v. Beauchamp, 3 Dana, 321, 28 Am. Dec. 74; Rothwell v. Dewees, 2 Black, 618, 17 L. ed. 311; Mandeville v. Solomon, 39 Cal. 125; Freeman, Cotenancy & Partition, 2d ed. §§ 151-163; Bispham, Eq. §§ 92, 93.

Wood, J., delivered the opinion of the court:

The contention of counsel for appellant is shown in the concluding portion of his brief, wherein he says that, "had Sisney foreclosed the mortgage under the power of sale contained in same as Mrs. Holland did, he could have purchased all or any part of same at his sale, made himself." The conclusion of counsel is unsound for the simple reason that Mrs. Childers (afterwards Holland), as the mother of the minor children of G. W. Childers, stood in the relation to them as natural guardian. She, jointly with the minor children, occupied the homestead that was the subject of the mortgage. This fiduciary relation precluded her from dealing with the lands embraced in the mortgage, constituting the homestead, in any manner that would not inure to their benefit as well as hers.

In Foreman v. Holloway, 122 Ark. 341, 183 S. W. 763, we held: "Although the naked legal title to lands included in a mortgage or deed of trust passes to the mortgagee, or to the trustee, for the purpose of making the security available in the payment of the debt, it passes for no other purpose, and the beneficiaries in such instruments do not acquire title absolute, except upon foreclosure, as the law requires."

Appellant contends that under this rule Mrs. Childers acquired the absolute title in the tract of land which she purchased at the foreclosure of the mortgage. But again this rule is not applicable, for the same reason, that is, because of the trust relation that Mrs. Childers sustained as the natural guardian of her children in dealing with the land which constituted their homestead, as well as hers.

The case here is controlled by the general principles announced in Hindman v. O'Connor, 54 Ark. 627, 13 L.R.A. 490, 16 S. W. 1052, and Burel v. Baker, 89 Ark. 168, 116 S. W. 181. In the latter case we quoted

from *Hindman v. O'Connor*, as follows: "As a general rule, a party occupying a relation of trust or confidence to another is, in equity, bound to abstain from doing everything which can place him in a position inconsistent with the duty or trust such relation imposes on him, or which has a tendency to interfere with the discharge of such duty. Upon this principle no one placed in a situation of trust or confidence in reference to the subject of a sale can be the purchaser, on his own account, of the property sold. If such a one purchases the property, it is in the option of the person interested in the property, and to whom the relation of trust or confidence was sustained, to set aside the sale within a reasonable time, however innocent the purchaser may be."

And continuing further, the court, in *Burel v. Baker*, said: "Mrs. Fletcher was, at the time she purchased the land in controversy at the foreclosure sale, in possession of it jointly with her infant children, enjoying it as the homestead of the deceased husband and father. She paid nothing for the land, and the effect of her purchase was in equity and good conscience merely to redeem it from the mortgage for the benefit of herself and her children. She had no right to deprive her children of their homestead in this manner. It was her duty to protect the rights of her children, rather than to extinguish them, and when she violated that duty a court of equity will hold her to be a trustee for the children, and deal with the acquired title accordingly."

True, the case at bar is distinguished from *Burel v. Baker*, supra, in the fact that here Mrs. Childers used her own money to purchase the mortgage, and to thus remove the encumbrance from the homestead. But while that would subrogate her to the rights of the mortgagee to have the lands fore-

closed to pay off the mortgage debt which she had satisfied with her own funds, it did not change her relation of trustee to her minor children, and on account of that relation, as already stated, she could not become a purchaser at the sale under which the mortgage which she had acquired was foreclosed, because, as purchaser, if she could acquire the absolute title for herself, and thus ignore the interests of her minor children, she might obtain the absolute title to the property, and would be interested in acquiring the same for the amount of her mortgage debt, or even less. But, as the guardian and trustee of her minor children, it was her duty, in the protection of their interests as the owners of the fee, to make the land at the sale bring the highest price possible. Therefore her individual interests and the interests of the children, which she had to conserve, would conflict.

As is said in *Clements v. Cates*, 49 Ark. 242, 4 S. W. 776: "The law forbids a trustee, and all other persons occupying a fiduciary or quasi fiduciary position, from taking any personal advantage touching the thing or subject as to which such fiduciary position exists; or, as expressed by another, 'wherever one person is placed in such relation to another, by the act or consent of that other, or the act of a third person, or of the law, that he becomes interested for him or interested with him in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interest he has become associated.'"

See, in addition to above cases, *Haynes v. Montgomery*, 96 Ark. 573, 132 S. W. 651.

The familiar principles announced in the above cases are controlling here. The court below was guided by these, and its decree is in all things correct, and it is affirmed.

Annotation—Purchase of homestead by widow under foreclosure of lien.

As appears from the opinion in *SORRELS v. CHILDERS*, ante, 430, the decision therein is supported by the case of *Burel v. Baker* (1909) 89 Ark. 168, 116 S. W. 181.

In *Rowland v. Wadly* (1903) 71 Ark. 273, 72 S. W. 994, a widow, being joint tenant with her minor children of the homestead, suffered it to be sold for taxes, procured one to become purchaser at the sale, reimbursed him for his outlay, and had him assign the certificates to her vendee of the land. It was held that this was no more than a device to get rid of the children's interest, and amounted to nothing more than a

redemption from the tax sale by the widow.

Similarly, in *Carter v. Monarch* (1916) 171 Ky. 345, 188 S. W. 379, it was held that a widow living on her husband's land with her daughter and son-in-law could not deprive her son of his one-half interest in the land subject to her homestead right, by permitting the property to be sold for taxes and having the purchase assigned to the son-in-law.

It has been held, however, where the right of children to a homestead expired at their majority, that after that time they could not recover compensation for the loss of the right to occupy the home-

stead during their minority, by means of a bill to set aside an order of the probate court directing a sale of the property under which the widow, their stepmother, purchased, where the order and sale had no connection with the fact that they had not been allowed to occupy the homestead, as they had lived separate from their stepmother before such order. *Denk v. Fiel* (1911) 249 Ill. 424, 94 N. E. 672.

Haynes v. Montgomery (1910) 96 Ark. 573, 132 S. W. 661, cited in *SORRELS v. CHILDERS*, was a case of a guardian acquiring land of his ward through a foreclosure sale.

For the general subject of rights of child or children in homestead of parent, see the note to *Batthey v. Barker*, 56 L.R.A. 33. B. B. B.

MASSACHUSETTS SUPREME JUDICIAL COURT.

FREDERICK J. LACKER

v.

ALEXANDER STRAUSS.

(226 Mass. 579, 116 N. E. 236.)

Animals — unlicensed dog — negligent killing — liability.

That a dog was unlicensed does not relieve one negligently killing it in a highway from liability in damages to its owner.

For other cases, see Animals, I. b, in Dig. 1-52 N. S.

(May 23, 1917.)

EXCEPTIONS by defendant to rulings of the Superior Court for Middlesex County, made during the trial of an action brought to recover damages for the alleged negligent killing by defendant's automobile of plaintiff's dog, which resulted in a verdict in his favor. Overruled.

The facts are stated in the opinion.

Messrs. F. E. Dunbar and A. C. Spalding, for defendant:

The owner of an unlicensed dog has no such property therein as will enable him to maintain an action for its value against one who unintentionally but negligently kills it, even though such negligence be gross and wanton.

Holden v. McGillicuddy, 215 Mass. 563, 102 N. E. 923; *Morewood v. Wakefield*, 133 Mass. 240; *Moore v. Mills*, 191 Mass. 56, 77 N. E. 638; *Chapman v. Decrow*, 93 Me. 378, 74 Am. St. Rep. 357, 45 Atl. 295; *Dickerman v. Consolidated R. Co.* 79 Conn. 427, 65 Atl. 289, 8 Ann. Cas. 417; *Tower v. Tower*, 18 Pick. 262; *Cummings v. Perham*, 1 Met. 555; *Blair v. Forehand*, 100 Mass. 136; *Dudley v. Northampton Street R. Co.* 202 Mass. 443, 23 L.R.A. (N.S.) 561, 89 N. E. 25.

Messrs. Fuller & Toye, for plaintiff:

Even if the defendant, through his chauffeur, did not owe plaintiff's dog the duty to

exercise reasonable care in the operation of the car so that injury would not befall him, yet if the jury found, even though he was a trespasser or a bare licensee upon the public highway, that the conduct of the chauffeur in the operation of the car amounted to a wilful and reckless disregard of the rights of a trespasser or bare licensee on the public highway, and an utter disregard of the injurious consequences of his act, the plaintiff could recover.

Davies v. Mann, 10 Mees. & W. 546, 152 Eng. Reprint, 588, 12 L. J. Exch. N. S. 10, 6 Jur. 954, 19 Eng. Rul. Cas. 190; *Romana v. Boston Elev. R. Co.* 218 Mass. 76, L.R.A. 1915A, 510, 105 N. E. 598, Ann. Cas. 1917A, 893; *Banks v. Braman*, 188 Mass. 367, 74 N. E. 594; *James v. Boston Elev. R. Co.* 201 Mass. 263, 87 N. E. 474; *Bresnahan v. Boston Elev. R. Co.* 216 Mass. 114, 103 N. E. 299; *Devine v. Boston & A. R. Co.* 159 Mass. 348, 34 N. E. 539; *Smith v. Jagoe*, 172 Mass. 538, 52 N. E. 1088; *Zamore v. Boston Elev. R. Co.* 198 Mass. 594, 84 N. E. 858; *Callahan v. Boston Elev. R. Co.* 215 Mass. 171, 102 N. E. 330.

Pierce, J., delivered the opinion of the court:

By the common law a dog is property for an injury to which an action will lie. *Wright v. Ramscot*, 1 Wms.' Saund. 84, 85 Eng. Reprint, 93; 2 Bl. Com. 393; *Chapman v. Decrow*, 93 Me. 378, 74 Am. St. Rep. 357, 45 Atl. 295; *Uhlein v. Cromack*, 109 Mass. 273; *Cummings v. Perham*, 1 Met. 555; *State v. M'Duffie*, 34 N. H. 523, 69 Am. Dec. 516; *St. Louis Southwestern R. Co. v. Stanfield*, 63 Ark. 643, 37 L.R.A. 659, 40 S. W. 126, 2 Am. Neg. Rep. 298; 4 Bl. Com. 235.

"By the common law, as well as by the law of most, if not all, the states, dogs are so far recognized as property that an action will lie for their conversion or injury." *Sentell v. New Orleans & C. R. Co.* 166 U. S. 698, 41 L. ed. 1169, 17 Sup. Ct. Rep. 693, 1 Am. Neg. Rep. 773.

The defendant concedes his negligence, but claims that liability to respond in an action of tort for damages for injury to an

Note.—As to liability for unintentionally killing or injuring unlicensed dogs, see annotation following this case, post, 435. L.R.A.1917F.

unlicensed dog arises only when the acts complained of are intentional, wanton, or reckless. This position is supported by the case of *Jemison v. Southwestern R. Co.* 75 Ga. 444, 58 Am. Rep. 476, now somewhat weakened by *Columbus R. Co. v. Woolfolk*, 128 Ga. 681, 10 L.R.A.(N.S.) 1136, 119 Am. St. Rep. 404, 58 S. E. 152, and by *Dickerman v. Consolidated R. Co.* 79 Conn. 427, 65 Atl. 289, 8 Ann. Cas. 417. The basis of this last decision is that no person can have such property in an unregistered dog as will enable him to maintain an action for the negligent killing of the animal. The court refuses to decide whether or not one might, under any circumstances, have a right of action for a wilful killing of an unregistered dog, or for the negligent killing of a registered dog. The *Dickerman* Case and the case at bar in their facts are alike only to the extent that an unlicensed dog may be killed by an officer of the law under the Maine statute, by virtue of a warrant; under the Connecticut statute, without a war-

rant. The general rule, supported by the weight of authority, is that an owner of a dog, licensed or unlicensed, may maintain an action for damages against any person or corporation wilfully or negligently killing or injuring the animal. *Louisville & N. R. Co. v. Fitzpatrick*, 129 Ala. 322, 87 Am. St. Rep. 64, 29 So. 859; *St. Louis Southwestern R. Co. v. Stanfield*, *ubi supra*; *Smith v. St. Paul City R. Co.* 79 Minn. 254, 82 N. W. 577, 7 Am. Neg. Rep. 638; *Harper v. St. Paul City R. Co.* 99 Minn. 253, 6 L.R.A.(N.S.) 911, 116 Am. St. Rep. 415, 109 N. W. 227. We are of opinion the general rule should be followed as one sound in principle. The unlicensed dog was not a trespasser and outlaw upon the public highway. The case in this respect is governed by *Carlington v. Worcester Consol. Street R. Co.* 222 Mass. 119, 109 N. E. 828.

It follows that the case was submitted to the jury rightly and that the exceptions should be overruled.

So ordered.

Annotation—Liability for unintentionally killing or injuring unlicensed dogs.

For the right to kill dogs, see *Graham v. Smith*, 40 L.R.A. 510; *State v. Churchill*, 19 L.R.A.(N.S.) 835; *State v. Clifton*, 28 L.R.A.(N.S.) 673; *Thurston v. Carter*, L.R.A.1915C, 359, and the notes thereto.

Generally as to the liability of a railroad for killing dogs, see *St. Louis Southwestern R. Co. v. Stanfield*, 37 L.R.A. 659, and note.

For the duty of railroads or street railways with respect to dogs on tracks, see *Harper v. St. Paul City R. Co.* 6 L.R.A.(N.S.) 911, and the note thereto.

In view of the decision of the Massachusetts supreme judicial court in *LACKER v. STRAUSS*, ante, 434, that the fact that a dog was unlicensed does not relieve one negligently killing it in a highway from liability in damages to its owner, it is interesting to observe that the same court has held that no recovery for an injury to an unregistered automobile or its occupants can be had against another, in the absence of wanton and wilful negligence on the latter's part. (See note to *Armstead v. Lounsberry*, L.R.A.1915D, 628, on "Operating automobile on highway without license." That note is supplemented by the note to *Southern R. Co. v. Vaughan*, L.R.A.1916E, 1225.) The decision in *LACKER v. STRAUSS* is, however, in accord with the weight of authority, both as to unlicensed dogs and unlicensed automobiles. L.R.A.1917F.

In *Smith v. St. Paul City R. Co.* (1900) 79 Minn. 254, 82 N. W. 577, 7 Am. Neg. Rep. 638, an action against the railway company for negligently killing a dog which was not licensed, it was held that a municipal ordinance authorizing a police officer to destroy a dog which is unlicensed or not wearing a collar or muzzle, as required thereby, did not relieve a third party from damages for negligently killing such dog.

In *Selma Street & Suburban R. Co. v. Martin* (1911) 2 Ala. App. 537, 56 So. 601, an action against a street railway company for damages for the negligent killing of a dog, the court sustained an objection to a question asked of plaintiff on cross-examination as to whether he had paid the dog tax on the dog, under an ordinance requiring a tax on all dogs, and making it unlawful for them to run on the streets unless the tax had been paid, the court saying that if the plaintiff did allow his dog to run at large on the street without having paid the tax prescribed by the ordinance, that fact would not affect his right to maintain an action for the wrongful killing of the dog while on the street; nor would the fact that he had failed to pay such tax shed any light upon the question of the value of the dog. The judgment in favor of plaintiff in this case was reversed in (1912) 177 Ala. 473, 59 So. 169, on the ground that a statute concerning the burden of proof, applied at the trial, was

inapplicable in the case of street railway companies; but the correctness of the decision on the question under consideration was not questioned by the court.

In *Heisrodt v. Hackett* (1876) 34 Mich. 283, 22 Am. Rep. 529, it was held that a statute requiring the owner of a dog to procure a license and to cause a collar to be worn around the dog's neck, and making it lawful for any person, and the duty of certain officers, to kill all dogs going at large, not licensed and collared, would not be extended by construction so as to release from liability for damages a defendant whose dog had killed an unlicensed dog.

See also *Klein v. St. Louis Transit Co.* (1906) 117 Mo. App. 691, 93 S. W. 281, an action against the transit company for the negligent killing of a dog by one of its street cars, in which the court disapproved of an instruction to the effect that if plaintiff had secured a license for the dog, which was admitted, the dog had a right to be on the public highway, saying: "We do not think that because 'Sport' wore a collar showing that his master had paid a license tax on his head, that the dog was thereby entitled to the freedom of the city. His collar conferred upon him no greater privileges than are enjoyed by other dogs not thus decorated, except to exempt him from the raids of the dog catcher, and the instruction that plaintiff's dog was licensed to roam at will upon the streets,

alleys, and vacant lots of the city was misleading if not erroneous."

But the statute requiring a license may be in such form that the right to recover for the killing or injuring of an unlicensed dog is excluded.

Thus, in *Sentell v. New Orleans & C. R. Co.* (1897) 166 U. S. 698, 41 L. ed. 1169, 17 Sup. Ct. Rep. 693, 1 Am. Neg. Rep. 773, an action for damages for the negligent killing by the railroad company of a dog, the court held, that a statute providing that no dog should be entitled to the protection of the law unless placed upon the assessment rolls, and that in civil actions for the killing of or injury to a dog the owner could not recover a greater amount than the value of such dog as fixed by himself in the last assessment preceding the killing or injury, was constitutional, and sustained a judgment in favor of defendant, it appearing that plaintiff had not shown compliance with the law.

And in *Dickerman v. Consolidated R. Co.* (1907) 79 Conn. 427, 65 Atl. 289, 8 Ann. Cas. 417, an action against a street railway company for the negligent killing of a dog which was not licensed, it was held, under a statute requiring dogs to be registered, licensed, and collared, and providing a civil and criminal liability for the stealing, confining, secreting, or injuring as well as killing of a registered dog, that plaintiff was not entitled to maintain the action. R. L. S.

MINNESOTA SUPREME COURT.

STATE OF MINNESOTA EX REL. DEBORAH M. PETTIT

v.

PROBATE COURT OF THE COUNTY OF HENNEPIN, STATE OF MINNESOTA, et al.

(— Minn. —, 163 N. W. 285.)

Tax — inheritance — widow's support.

1. Neither upon the allowance made for the support of the widow and her family out of her deceased husband's estate, pending the administration thereof, nor upon the personal property which she, as widow, is

Headnotes by *HOLT, J.*

Note. — The question as to succession or inheritance tax upon property received by surviving spouse is treated in the annotation following *Re Bullen*, L.R.A.1916C, 675; and see later cases, *Re Williams*, L.R.A. 1917C, 602, and *Re McKelway*, L.R.A.1917E, 1143. L.R.A.1917F.

entitled by law to select out of the estate, may the state inheritance tax be imposed. For other cases, see *Taxes*, V. c, in *Dig.* 1-52 N. S.

Same — dower rights.

2. The widow of a testate, who renounces the will and elects to take her statutory one third, must pay the tax upon the third so given, less the exemption specified in the law.

For other cases, see *Taxes*, V. c, in *Dig.* 1-52 N. S.

(June 15, 1917.)

PETITION for a Writ of Certiorari to review an order of the Probate Court imposing an inheritance tax upon relator. Order modified.

The facts are stated in the opinion.

Mr. James E. O'Brien, for relator:

Where a husband devises all of his property and leaves surviving him his widow, who renounces the will and elects to take the provisions allowed her by statute, the one third of all of his lands other than his

homestead and the one third of all personal property are not taxable as inheritances under the Inheritance Tax Law of the state of Minnesota.

Re Bullen, 47 Utah, 96, L.R.A.1916C, 670, 151 Pac. 533; Kohny v. Dunbar, 21 Idaho, 258, 39 L.R.A.(N.S.) 1107, 121 Pac. 544, Ann. Cas. 1913D, 492; 23 Cyc. 41, notes, 40, 41; Re Page, 39 Misc. 220, 79 N. Y. Supp. 382; Re Rienmann, 42 Misc. 648, 87 N. Y. Supp. 731; Crenshaw v. Moore, 124 Tenn. 528, 34 L.R.A.(N.S.) 1161, 137 S. W. 924, Ann. Cas. 1913A, 165; Re Sanford, 90 Neb. 410, 45 L.R.A.(N.S.) 228, 133 N. W. 870; Re Strahan, 93 Neb. 828, 142 N. W. 678; McDaniel v. Byrkettt, 120 Ark. 294, 179 S. W. 491; Re Weiler, 122 N. Y. Supp. 608; Re Starbuck, 137 App. Div. 866, 122 N. Y. Supp. 584; Re Green, 68 Misc. 1, 124 N. Y. Supp. 863; Re Shields, 68 Misc. 264, 124 N. Y. Supp. 1003; Marsal's Succession, 118 La. Ann. 212, 42 So. 778; Ross, Inheritance Taxn. § 56; Blakemore & B. Inheritance Taxes, § 108; Dos Passos, Inheritance Tax Law, § 38.

The amount allowed to the widow under order of court for support during settlement of the estate, and the property set apart to the widow, including wearing apparel, household goods, and other personal property, were no part of the widow's distributive share, and should not have been included in the amount upon which an inheritance tax was fixed.

Sammons v. Higbie, 103 Minn. 448, 115 N. W. 265; Stromberg v. Stromberg, 119 Minn. 325, 138 N. W. 428; Smith's Estate, 161 Wis. 588, 155 N. W. 109; Crenshaw v. Moore, 124 Tenn. 528, 34 L.R.A.(N.S.) 1161, 137 S. W. 924, Ann. Cas. 1913A, 165; Louisville, N. O. & T. R. Co. v. Kennedy, 90 Tenn. 185, 16 S. W. 113; Re Kennedy, 157 Cal. 517, 29 L.R.A.(N.S.) 428, 108 Pac. 280; Gallup's Appeal, 76 Conn. 617, 57 Atl. 699; Re Gihon, 169 N. Y. 443, 62 N. E. 561; Pepper's Estate, 159 Pa. 508, 28 Atl. 353; Re Blackburn, 51 Mont. 234, 152 Pac. 31; Ross, Inheritance Taxn. §§ 59, 60; Blakemore & B. Inheritance Taxes, § 108; Re Page, 39 Misc. 220, 79 N. Y. Supp. 382.

Messrs. Lyndon A. Smith, Attorney General, and Egbert S. Oakley, Assistant Attorney General, for respondents:

An inheritance tax is not a tax upon the property, but a tax upon the transfer or right of succession.

State ex rel. Smith v. Probate Ct. 124 Minn. 508, 50 L.R.A.(N.S.) 262, 145 N. W. 390, Ann. Cas. 1915B, 861, 128 Minn. 371, L.R.A.1916A, 901, 150 N. W. 1094.

The right to take property by devise or descent is the creature of the law,—a privilege, and not a natural right; and therefore L.R.A.1917F.

the authority which confers this right may impose conditions upon it.

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 288, 42 L. ed. 1037, 1040, 18 Sup. Ct. Rep. 594; People v. Griffith, 245 Ill. 532, 92 N. E. 313.

A wife, during her husband's lifetime, has no vested right to any of his property of which she cannot be deprived by legislative enactment.

Griswold v. McGee, 102 Minn. 114, 112 N. W. 1020, 113 N. W. 382, 12 Ann. Cas. 186; State Law Examiners v. Hart, 104 Minn. 88, 17 L.R.A.(N.S.) 585, 116 N. W. 212, 15 Ann. Cas. 197; Scott v. Wells, 55 Minn. 274, 56 N. W. 828; Merrill v. Security Trust Co. 71 Minn. 61, 70 Am. St. Rep. 312, 73 N. W. 640.

Intestate laws are those laws of the state which govern the devolution of the estates of persons, which estates do not pass by will.

Billings v. People, 189 Ill. 472, 59 L.R.A. 807, 59 N. E. 798; People v. Richardson, 269 Ill. 275, 109 N. E. 1033; People v. Forsyth, 273 Ill. 141, 112 N. E. 378; Re Moffitt, 153 Cal. 359, 20 L.R.A.(N.S.) 207, 95 Pac. 653, 1025.

The so-called statutory one-third interest of the surviving spouse, the award for maintenance during the settlement of the estate, and the setting apart of household goods and other personal property to the widow, are subject to a transfer tax, unless within the amount of the exemption granted by statute.

Billings v. People, *supra*; People v. Forsyth, 273 Ill. 141, 112 N. E. 378.

Holt, J., delivered the opinion of the court:

This is a proceeding to review an order of the probate court wherein an inheritance tax was imposed upon the allowance made to the widow of a deceased during the administration, upon the personal property and effects set apart to her as surviving spouse, and also upon the one third she took under the law; she having renounced the provisions made for her in her husband's will.

As to the first two items, we are of the opinion that no intention to impose a tax thereon is manifest in the statute. The law provides for support of the widow and family of a decedent pending the administration. This, as well as expenses of administration, taxes, funeral expenses, and debts legitimately consume part of the estate, and only what remains is distributed under the will or intestate statutes. The same with respect to the personal property which the widow is permitted to select out of her husband's estate. The inheritance tax is a tax upon the privilege of succession or inher-

ance, and not upon the estate. By express provision of the statute that part only of a decedent's estate is for distribution which remains after his widow has selected \$500 in value of the household goods and his wearing apparel, together with \$500 in value from his other personal property, after she has received the allowance for herself and family during the administration, and after the expenses of administration, funeral expenses, and debts of deceased have been paid. Gen. Stat. 1913, § 7243. In respect to the personal property which the widow is entitled to select, §§ 7307 and 7308, Gen. Stat. 1913, provide that it shall be assigned to her and shall not be treated as assets in the hands of the executor or administrator. It is no part of the residue to be distributed. *Stromberg v. Stromberg*, 119 Minn. 325, 138 N. W. 438. No court, so far as we are aware, save the supreme court of Illinois (*People v. Forsyth*, 273 Ill. 141, 112 N. E. 378), has held the allowance to the widow and family of the deceased pending administration, or the articles she is entitled to select out of the estate, subject to an inheritance tax. To the contrary, see *Re Page*, 39 Misc. 220, 79 N. Y. Supp. 382; *Re Kennedy*, 157 Cal. 517, 29 L.R.A.(N.S.) 428, 108 Pac. 280; *Smith's Estate*, 161 Wis. 588, 155 N. W. 109; *Crenshaw v. Moore*, 124 Tenn. 528, 34 L.R.A.(N.S.) 1161, 137 S. W. 924, Ann. Cas. 1913A, 165; *Re Blackburn*, 51 Mont. 234, 152 Pac. 31.

Is the one third given the surviving spouse by statute subject to the inheritance tax? Counsel concedes the right of the state to impose such tax thereon, but contends the present law does not reach it. This is a special tax, and relator is correct in the claim that, if there be room for construction, it should be construed most favorably to her. The courts construe such statutes strictly against the government. *Re Harbeck*, 161 N. Y. 211, 55 N. E. 850; *McDaniel v. Byrnett*, 120 Ark. 295, 179 S. W. 491. But, even so, were it not for the common-law notion of dower, there would hardly be room for the suggestion that our inheritance statute is open to construction. Dower, as known to the common law, was abolished in this state long prior to the enactment of the Inheritance Tax Law. However, statutes were enacted making provisions in lieu of dower. The statutory benefits thus conferred are greater than dower gave. Like dower, the right has its inception with marriage and consummation when the husband dies. *Griswold v. McGee*, 102 Minn. 114, 112 N. W. 1020, 113 N. W. 382, 12 Ann. Cas. 186. But it remains true that, dower being expressly abolished, the widow now takes what the statutes give. The question then comes down to this: Are the statutes re-

ferred to embraced within the designation "the intestate laws of this state?" For the Inheritance Tax Law (Gen. Stat. 1913, § 2271), imposes a tax "when the transfer is by will or by the intestate laws of this state from any person dying possessed of the property while a resident of the state." We have no laws in terms designated "intestate laws," but we do have statutes relating to the disposition of the property of intestates, namely, Gen. Stat. 1913, §§ 7237, 7238, and 7243. The first two cover real estate, and the last personal property. In those three sections are found the rights of both widow and heirs in the undisposed property of a decedent, and nowhere else. Hence there can be no doubt that these sections are the ones referred to in the inheritance tax laws as "the intestate laws of this state," just as plainly as if they had been specified by their appropriate numbers. The word "transfer," in the connection used, can have no restricted technical meaning. The inheritance tax laws of some states employ the expression "property passing by will or by intestate laws," or "inheritance" laws. The meaning is the same and refers to the change in possession and ownership of property when the owner dies. It may also be worthy of note that we must assume an intention on the part of the legislature to treat all fairly and impose the burden of the tax as equally as may be. The law exempts a stated amount to the widow. This in itself indicates an intention to tax the balance. If this exemption is to obtain only when she takes under the will of her husband, it leads to what, in many instances, results in unjust and unequal burdens. Frequently wills give to the surviving spouse either somewhat more or somewhat less than the statutory amount, and again for the sake of avoiding the cumbersome manner of caring for the property left behind, where there are minor children, a husband often makes a will leaving all to the wife, well knowing that she will manage and conserve the estate for the best interest of the children. To say that in such cases the tax was designed to be imposed, and not where such wills are renounced by the widow, or where there is no will, leads to an unjust and inequitable imposition of the tax. Some courts have attempted to overcome this objection by holding that the dower, or the widow's statutory provision in lieu thereof, should be deducted in case of testate estates and the tax imposed only on the balance, if any. *Re Sanford*, 91 Neb. 752, 45 L.R.A.(N.S.) 236, 137 N. W. 864. Others, although of the same view, that (in case of intestacy) the inheritance tax does not reach the dower interest, or the interest given in lieu of dower, refuse to make

any deduction when the widow takes under her husband's will. *Re Riemann*, 42 Misc. 648, 87 N. Y. Supp. 731; *Re Barbey* (Sur.) 114 N. Y. Supp. 725. We think a fair operation of the law requires the tax to be imposed on all the property designed to be awarded the widow by the final decree of distribution in the probate court, less the amount which the Inheritance Law itself exempts.

Counsel for relator earnestly contends that the statutory provision for the surviving spouse of one third of the decedent's estate is not transferred or passed by the intestate laws, but is a right acquired by the marriage relation, vesting in possession and complete title when the relation is broken by death. It is asserted that such title is not taken by inheritance as heir or by succession. It must be conceded that the decided weight of authority is with relator. *Re Strahan*, 93 Neb. 828, 142 N. W. 678; *Re Weiler* (Sur.) 122 N. Y. Supp. 608; *Re Starbuck*, 137 App. Div. 866, 122 N. Y. Supp. 584; *Commonwealth's Appeal*, 34 Pa. 204; *Kohny v. Dunbar*, 21 Idaho, 258, 39 L.R.A.(N.S.) 1107, 121 Pac. 544, Ann. Cas. 1913D, 492; *Re Bullen*, 47 Utah, 96, L.R.A. 1916C, 670, 151 Pac. 533; *Crenshaw v. Moore*, 124 Tenn. 528, 34 L.R.A.(N.S.) 1161, 137 S. W. 924, Ann. Cas. 1913A, 165; *McDaniel v. Byrket*, 120 Ark. 295, 179 S. W. 491. As forceful a statement of this position as may be found in any of the decisions cited is the following, by Mr. Justice Barnes, in *Re Strahan*, supra: "It has been held by the great weight of authority that dower is not immune because it is dower, but because it, like the right to the homestead, and to the distributive share of the widow, of the estate of her deceased husband, belonged to her inchoately during his life, and vested fully in her at his death. The widow's share of the estate of her deceased husband, by the present inheritance law, is given . . . in lieu of dower, and it follows that the interest of the appellant in her deceased husband's estate, both real and personal, comes within the test of immunity. Under the present statute, the wife takes her interest in the estate of her deceased husband by operation of law. She cannot be deprived of that interest by his will. It is something which belongs to her absolutely and independently of any right of inheritance or succession. . . . The share of the realty and personalty, which, under our law, go to the widow independent of any will or act of the husband, is not, so to speak, a part of his estate, and is no more liable to a succession tax at his death than is her individual property derived from her own ancestors and held in her own name, though the husband may have had the man-

agement and control of the estate during his lifetime."

The only authority supporting the state's right to impose this tax upon the widow's statutory one third, under laws similar to our own, is *Billings v. People*, 189 Ill. 472, 59 L.R.A. 807, 59 N. E. 798, and adhered to in *People v. Forsyth*, 273 Ill. 141, 112 N. E. 378. The cases from California seem to rest upon a peculiar interpretation of their statutes in respect to community property of husband and wife, holding that the wife "takes such property solely by succession as an heir of the husband." *Re Kennedy*, 157 Cal. 517, 29 L.R.A.(N.S.) 428, 108 Pac. 280. Notwithstanding this preponderance of authority in favor of relator, we reach the conclusion that the view taken in *Billings v. People*, supra, is the proper construction to place upon the inheritance tax law with reference to dower, or to the interest given by our statutes in lieu thereof. There, as here, the widow renounced the provisions made for her by the will, and the ingenious argument, in opposition to the right to impose the inheritance tax, was made that had she taken under the will she would have taken as a purchaser, and not as a devisee or legatee; that the provision in the will was a mere offer by the testator to purchase, for the benefit of the estate, her legal share therein, which he was powerless to eliminate, and had she accepted she would have stood in the position of a purchaser, not liable to a tax; hence, it was said, she should be in no worse position when she took that share by renouncing the provisions of the will. However, the court, while recognizing the rule that a widow, by accepting the provision of her husband's will, may be treated under certain circumstances in equity as a purchaser having exchanged her dower right, holds it inapplicable against the state where the question is not only one of power of the state to tax her succession, but of the interpretation of a statute designed to exercise such power and make the tax uniform in operation. Then, after speaking of the comprehensive features of the law, the court proceeds: "It will be noticed that neither dower nor any provision made in lieu of dower is exempted, but that the wife is entitled to an exemption of \$20,000. . . . If appellants' contention were sustained, it would seem that there would have been no necessity of an exemption in the statute for the wife, for whether she accepts the provision made for her in the will or renounces it, or whether there is a will or not, her interests, according to appellants' argument, are exempt, for the reason that if she accepts she takes by purchase, and not by will, and if she renounces, or in case there is no will, she

takes in her own right at common law, as widow, and not under the intestate laws of the state."

The court says the argument proves too much, leading, to the conclusion that the widow cannot be taxed at all, a proposition which is unhesitatingly rejected.

We are clear that the legislature never intended to impose a tax upon the allowance for the widow and family of a decedent pending a settlement of the estate, or upon the limited articles of personal property she is permitted to select from the estate, for no part thereof is property subject to distribution; it, in fact, is entirely withdrawn and excluded from the assets of the estate, as hereinbefore stated. We are equally clear that the legislature did not intend to omit the statutory interest of the surviving spouse of an intestate from the tax. This interest, in many instances, amounts to large fortunes, and it is not believable that these were meant to escape the burdens laid upon others who receive part of the estates of intestate decedents, or upon the widows and others who take by will. The only question is: Giving the law as it reads a reasonably strict construction in favor of those claiming immunity from this special tax, does it impose a tax upon that part of the estate of a deceased husband which is provided for the wife by § 7238, and subdivision 6 of § 7243? We think it does; because those sections, in respect to the property here involved, constitute our intestate laws or laws of descent prescribing the right of the wife in her husband's estate upon his death. A change with respect to her relation to the property then takes place; it may not be strictly a succession by her or a devolution upon her, but, in virtue of the statutes referred to, she comes into full possession and ownership of the property.

It is true, a husband cannot dispose of the one third of the personal property of which he dies possessed by will, nor can he by will or deed dispose of the one third of the real estate of which, at any time during coverture, he stood seised; but this is a right given by statute and may be extended, abridged, or abolished at the will of the legislature. So may the right of children to inherit, and their shares of inheritance; also, the right of a person to dispose of property by will. All these statutory rights are with the legislature. When these rights come into enjoyment under existing statutes, the legislature may affix a tax upon the recipients. The Inheritance Tax Law was, no doubt, designed to impose such a tax upon all, including a widow, except as to the specified exemption.

Counsel for relator in his argument stated a concrete case to prove that a widow's

statutory right in her husband's real estate does not, in case of his death, come to her by any intestate laws, namely: If, during coverture, he conveyed any part of his estate, without her joining, and she survived him, such real estate so conveyed would not constitute a part of his estate, yet his widow could recover her share therein the same as if he had not conveyed and it had constituted a part of his estate. The writer hereof admits the argument, based upon the supposed case, to be almost unanswerable in favor of relator's contention, from a logical standpoint. From a practical view, the answer is that the legislature intended to impose the tax only upon the property derived from the estate of which the person dies seised or possessed; that is, only upon property which is usually distributed by the final decree of the probate court, and upon such property as would have been thus distributed but for transfers made in contemplation of death and with the view to avoid the tax. It may also be observed that the relator cannot well make the same argument by supposing a case involving personal property. And here again it is not to be presumed that the legislative intention was to discriminate between personal and real property in the imposition of this tax.

We have not referred to the alleged interpretation given the law, since its enactment, by the authorities charged with the duty of enforcing the tax; for, aside from other considerations, we think the record presents nothing from which the court should take cognizance of such interpretation.

The cause is remanded, with direction to modify the order so as to conform with the views herein expressed.

MINNESOTA SUPREME COURT.

JAY GREER, Appt.,

v.

EQUITY CO-OPERATIVE EXCHANGE et al., Resp'ts.

(— Minn. —, 163 N. W. 527.)

Trover — contesting right of assignee to recover.

1. Action in trover for the conversion of a carload of wheat shipped over the Great Northern Railway. Unintentionally and innocently the railway company and defend-

Headnotes by HOLT, J.

Note. — For assignment of a chose in action to one of the parties liable thereon as affecting defenses and equities as between the assignee and the other party, see annotation following this case, post, 443.

ants converted the wheat. Thereafter the railway company paid the owners for the wheat and took from them an assignment to plaintiff of the wheat and the cause of action, and instituted this suit. Plaintiff has no personal interest in the matter. It is held: Defendants could set up the defense that, as between them and the railway company, the latter could not purchase and assert the claim of the shippers, since it committed the first act in the conversion of the wheat, out of which grew the connection of defendants with the transaction.

For other cases, see Assignment, III. in Dig. 1-52 N. 8.

Evidence — as to real party plaintiff.

2. Therefore it was proper to receive evidence showing that plaintiff had no interest in the assignment or cause of action, and that the railway company paid the shippers and took the assignment for its own benefit, and instituted the action.

For other cases, see Evidence, XI. r, in Dig. 1-52 N. 8.

Evidence — sufficiency.

3. There is no reversible error. The undisputed facts entitled defendants to a verdict.

For other cases, see Appeal and Error, VII. m, in Dig. 1-52 N. 8.

(June 29, 1917.)

APPEAL by plaintiff from an order of the District Court for Ramsey County overruling a motion for judgment non obstante veredicto, or for a new trial, after a directed verdict for defendants in an action brought to recover for the conversion of a carload of grain. Affirmed.

The facts are stated in the opinion.

Messrs. Otis & Otis, for appellant:

It is no concern of the respondents who paid the consideration for the assignment to the assignor, or what agreement, if any, the assignee may have made with any other person with reference to the proceeds.

Castner v. Sumner, 2 Minn. 44, Gil. 32; *Elmqvist v. Markoe*, 45 Minn. 305, 47 N. W. 970.

A recovery by plaintiff will fully protect the defendants, and they have no interest in the equities between him and his assignor.

Jackson v. Sevaton, 79 Minn. 278, 82 N. W. 634; *Citizens State Bank v. E. A. Tessman & Co.* 121 Minn. 34, 45 L.R.A. (N.S.) 606, 140 N. W. 178; *Klein v. Funk*, 82 Minn. 3, 84 N. W. 460; *Triggs v. Jones*, 46 Minn. 282, 48 N. W. 1113; *Longfellow v. McGregor*, 61 Minn. 406, 63 N. W. 1032; *Wines v. Rio Grande Western R. Co.* 9 Utah, 228, 33 Pac. 1042; 5 C. J. 994, ¶ 199; *Dolliff v. Robbins*, 83 Minn. 498, 85 Am. St. Rep. 466, 86 N. W. 772.

Messrs. M. D. Munn and Ambrose Tighe, for respondents:

Plaintiff cannot maintain this suit for L.R.A.1917F.

the reason that he is not the real party in interest.

Central Trust Co. v. Burton, 74 Wis. 329, 43 N. W. 141; *Benson v. Markoe*, 37 Minn. 30, 5 Am. St. Rep. 816, 33 N. W. 38; *Probstfield v. Czizek*, 37 Minn. 420, 34 N. W. 896; *Travelers' Ins. Co. v. Walker*, 77 Minn. 438, 80 N. W. 618.

Holt, J., delivered the opinion of the court:

Action in trover for the conversion of a carload of wheat. At the close of the testimony each side moved for a directed verdict. Defendant's motion was granted. Plaintiff made a motion in the alternative for judgment or a new trial. It was denied in toto, and this appeal followed.

The evidence presents no material dispute, as to the facts, so far as these were attempted to be brought out. It appears that on October 11, 1915, J. J. Wolsted and O. A. Wolsted, farmers at Brookland, North Dakota, owned 1,500 bushels of wheat which they loaded into car No. 15251 of the Great Northern Railway Company for shipment to Marfield Grain Company, at Duluth, Minnesota. The railway company had no depot or station agent at Brookland, so that shipping bills or bills of lading could not be issued there. It was therefore the practice for the shipper, after a car was loaded, to make out shipping bills in triplicate and hand them to the conductor picking up the car at Brookland. These bills would be delivered to the agent at Rutland, the next station having an agent, who signed two, one of which became the bill of lading and the other the memorandum thereof, and returned them to the conductor, to be taken back to Brookland on his return trip and handed to the shipper, or placed in a box accessible to shippers, and the other would be retained by the railway, and from it the agent makes out the waybill accompanying the shipment. In this instance the shippers pursued the usual practice and made out in triplicate the form for a straight bill of lading for this car of wheat; consignors, Wolsted Brothers; consignee, Marfield Grain Company; destination, Duluth, Minnesota. The car moved under the waybill from one division point to another; but, instead of arriving at Duluth, it was diverted at Willmar and sent to St. Paul. The waybill, produced by the railway company at the trial, was received in evidence, and appears to have the signature of the first conductor out of Rutland. In this waybill the destination is St. Paul, C. H. Clark the consignor, and Equity Co-operative Exchange the consignee. The only bill of lading in the record corresponds to this waybill. Mr. Wolsted testified that the original bill of lading

received by him was sent to Marfield Grain Company, the consignee therein named, at Duluth; but it was not produced at the trial. An inspection of the waybill and the bill of lading, in this record, discloses the same handwriting in both. The testimony shows that the name of the agent at Rutland is Phillips. The name of the agent purporting to have issued the bill of lading is Wapelon. There is no direct evidence that the waybill in the record is not the one under which the car moved from Rutland to St. Paul. However, Brady, the first conductor out of Rutland, says the entries in his record made from the waybill indicate Duluth as destination; so does the conductor who took the car to Willmar and delivered the waybill to the agent at that division point.

Reading between the lines, it is manifest that some one practised a fraud upon the carrier and falsified its records; but whether this was done by one of its agents or by C. H. Clark, the consignee in the bill of lading in evidence, is not in any manner disclosed. It is difficult to see how the fraud could have been carried through unless some servant of the carrier actively participated therein, for the waybill was always in the possession of its servants and agents. In the forenoon of October 15, 1915, a person claiming to be C. H. Clark appeared in St. Paul at the office of defendant the Equity Co-operative Exchange Company, the consignee named in the waybill, stating that this and another carload of wheat had by him been consigned to it for sale on commission, and desired to know if the cars had arrived. By telephone it was ascertained that this car was then in St. Paul. Later in the day the Exchange Company received notice in the customary way, by mail, from the railroad company of the arrival of the car. At the direction of Clark, said defendant, as commission broker, sold the car on the market to defendants Hohle Brothers. Immediately after the sale, and presumably in the forenoon of the same day, the Equity Co-operative Exchange Company, at Clark's request, advanced him money on the car, pending the adjustment of the total purchase price by weighing and turning it over to the purchasers, and received the bill of lading in question. Thereafter the bill of lading was surrendered to the carrier, who accepted the same and issued another to the purchasers upon a reconignment of the car of wheat. The balance of the purchase price was paid Clark some time in November. Wolsted Brothers soon thereafter learned that the wheat had not reached the intended destination, and asserted a claim against the Great Northern Railway Company, the carrier; and in January, 1916, L.R.A.1917F.

the company paid Wolsted Brothers in full for the wheat, and procured them to assign the same and their claim to plaintiff, an employee of the Marfield Grain Company. It is conceded that plaintiff has no personal interest in the cause of action. It belongs to the railway company and is prosecuted by it.

The car of wheat belonged to Wolsted Brothers. They had a cause of action against anyone who, without express or implied authority from them, disposed of it. This would include both defendants, for neither attempts to derive any right to the wheat or its disposition from Wolsted Brothers, the owners. Under *Johnson v. Martin*, 87 Minn. 370, 59 L.R.A. 733, 94 Am. St. Rep. 706, 92 N. W. 221, the defendant Equity Exchange Company exercised enough dominion over the wheat, in making the sale as a commission broker, to hold it liable for conversion; and if plaintiff, as representing the Great Northern Railway Company, can stand in Wolsted Brothers' shoes in respect to defendants, the verdict should have been directed for him, and not for defendants. As a general proposition, it is true that a claim good in the hands of an assignor is equally good and free from defenses in the hands of his assignee. Plaintiff states: "We are willing to admit that a counterclaim might be set up as against one plaintiff, whereas it could not be set up as against another, in a case where the cause of action is the same; but a defense must be something that can be maintained against the claim itself without regard to the person who owns it."

The proposition is plausible, but we think the theoretical distinction between counterclaim and defense must sometimes yield to what is practical in the administration of justice. In a case of this sort, involving the liability as between parties who have unintentionally converted some third person's property, we think a defense may be available though not strictly a counterclaim or set-off. Suppose a servant had innocently converted this carload of wheat at the bidding of his master. Both would have been liable to Wolsted Brothers. Could the master have paid Wolsted Brothers, taken an assignment of the wheat and claim, and then sued his servant, without the servant's being able to defend successfully by alleging the facts, viz., that what he did was at the assignee's behest? To state the proposition is sufficient demonstration of the availability of the defense. We must ascertain in what relation the railway company and these defendants stand to this conversion, and to one another therein, in order to see whether the defense asserted by defendants is good as to them.

In taking this assignment the railway company was not a voluntary purchaser. It could not escape the payment it did make to Wolsted Brothers for its conversion of their wheat. The company, by taking the assignment, could, without doubt, become subrogated to the rights of Wolsted Brothers as against Clark, or as against the one who practised the fraud whereby its unintentional conversion of the grain was brought about. But as to these defendants, whose innocent part in the conversion occurred subsequent to the railway company's wrongful act, and, in a measure, because thereof, and in reliance upon its conduct in the premises, we think, plaintiff is not in a position to claim as assignee of Wolsted Brothers and with the same rights. The defendants Hohle Brothers obtained possession of the wheat and paid for it when the railway company accepted as its genuine bill of lading the one turned over by Clark. As between Hohle Brothers and the company, the latter should be held to know whether or not the instrument was valid and issued by its agent. There is no suggestion that Hohle Brothers did not purchase and pay for the car of wheat in the utmost good faith. The same may also be said of what the Equity Co-operative Exchange did in the premises. On inquiry of the railway company it learned that this wheat was consigned to it. This was confirmed by written notice later in the day or next morning. Clark tendered a bill of lading therefor, purporting to be issued by the railway company. This, as already stated, was recognized as valid by the company and accepted by it when the wheat was re-consigned by Hohle Brothers. Had the railway company then repudiated the bill, there would have been a chance for both defendants to have averted the loss, at least to a certain extent, for Clark was not paid the full amount until the following month.

Assuming the bill of lading to be a for-

gery, there is no pretense that either defendant had notice thereof, or of facts arousing the slightest suspicion in that direction. The railway company in legal contemplation converted the wheat when, at Willmar, it undertook to haul the car to St. Paul instead of to Duluth. Defendants' connection with the wheat grew out of that wrongful act of the railway company. As between the real parties to this action, the railway company was the first in the conversion, and more at fault than defendants, or either of them; and under that situation, it cannot now claim that the transaction with Wolsted Brothers was a purchase of the wheat, so as to eliminate the equities existing as between it and defendants.

At the trial plaintiff took the position that it was no concern of defendants whether he held the assignment from Wolsted Brothers in his own right or for the benefit of the railway company, and cites *Anderson v. Reardon*, 46 Minn. 185, 48 N. W. 777; *Longfellow v. McGregor*, 61 Minn. 494, 63 N. W. 1032; *Klein v. Funk*, 82 Minn. 3, 84 N. W. 460; *Dolliff v. Robbins*, 83 Minn. 498, 85 Am. St. Rep. 466, 86 N. W. 772. We are of the opinion that it was. Had plaintiff obtained the assignment from Wolsted Brothers in behalf of C. H. Clark, and sued the railway company in conversion, surely a defense would have been permitted grounded on facts creating an estoppel against Clark. The evidence was therefore properly admitted, showing that the railway company had the transaction with Wolsted Brothers, what the transaction was, and that plaintiff was merely a nominal party, having no personal interest in the suit.

We have examined the other errors assigned on other rulings at the trial, and find nothing requiring a different conclusion than the one reached by the learned trial court.

Order affirmed.

Annotation—Assignment of chose in action to one of the parties liable thereon as affecting defenses and equities as between the assignee and the other party.

Generally, as to effect of assignment of a claim *ex delicto* to one against whom it has been asserted to enable him to maintain an action over against a third person upon such claim, see *Tanner v. Bowen*, 7 L.R.A. (N.S.) 534, and the note appended thereto, which treats the question as affected by the element of extinguishment of the claim by satisfaction, and not as one of contribution between joint tortfeasors.

GREER v. EQUITY CO-OP. EXCH. ante, L.R.A.1917F.

440, seems to have been the only case to pass upon the right of a carrier to take an assignment of a claim for conversion of freight in which it participated, and recover over against the other wrongdoer; but the decision therein, to the effect that such other could set up the defense that the railroad company could not assert the shippers' claim which had been assigned to it where it had committed the first act in conversion, or, in other words, that the equities and de-

fenses between the wrongdoers may be set up in such a case, and that the company is not entitled to claim as assignee of the shippers, and with the same rights, where it was the first at fault, seems to be in accord with reason and legal principles.

And in fact an extended search has disclosed no other case wherein the exact question of the effect of an assignment of a chose in action to one of the parties liable thereon, upon any existing defenses or equities as between the assignee and the other party, has arisen. However, a somewhat similar question has been passed upon in cases involving the respective rights of contractors and subcontractors under construction contracts where one has paid claims and taken assignments thereof. Thus, in *Moore v. Taylor* (1886) 42 Hun (N. Y.) 45, where A contracted to construct a railroad, B was a subcontractor of A, and C was a subcontractor of B, and, upon the failure of C to pay his employees, A paid them and took assignments of their claims, which were good against the property of the railroad company, it was held that

A could apply the amount paid in satisfaction thereof on his indebtedness to B, the court maintaining that, since the railroad company could compel A to reimburse it for any amount paid by it in satisfaction of claims of laborers, A had such an interest in seeing that such claims were paid by subsequent contractors for the work as entitled him to treat the payments as made for such contractors, and that the taking of the assignments could not be treated as an obstacle to the application of the amount paid in reduction of the recovery for work done on account of which the money was advanced. And in *Root v. Moriarity* (1872) 39 Ind. 85, where A contracted to do certain work with B as his surety, and afterwards in a suit by A against B it was adjudged that B should pay all claims against A on account of the contract, it was held that B was liable to A upon all claims assigned to him by creditors under the contract, but this was upon the theory that by the first judgment the claims assigned to A had become the debts of B and were no longer the debts of A. G. J. C.

PENNSYLVANIA SUPREME COURT.

JAMES G. HARDIE et al., Appts.,
v.

WILLIAM M. BARRETT, President of the
American Express Company.

(— Pa. —, 101 Atl. 75.)

Automobile — permitting reckless driving by chauffeur.

1. One who, without protest, permits the chauffeur of a hired automobile to drive at a manifestly dangerous speed on the wrong side of the road, cannot hold the owner of a vehicle with which the car comes into collision liable for the resulting injury to himself.

For other cases, see Negligence, II. e, 1, in Dig. 1-52 N. S.

Highway — absence of lights on vehicle — liability for accident.

2. Failure of one driving along a highway at night to carry the lights required by statute does not render him liable for injury caused by collision with an automo-

bile if the lights on it were sufficient to enable its driver to see and avoid the vehicle. *For other cases, see Negligence, I. d, in Dig. 1-52 N. S.*

(March 5, 1917.)

A PPEAL by plaintiffs from a judgment of the Court of Common Pleas, No. 1, for Philadelphia County, in defendant's favor in consolidated actions brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. Sydney Young, for appellants:

The charge of the court as to the question of the contributory negligence of the plaintiffs was improper.

Dean v. Pennsylvania R. Co. 129 Pa. 514, 6 L.R.A. 143, 15 Am. St. Rep. 733, 18 Atl. 718; *Jones v. Lehigh & N. E. R. Co.* 202 Pa. 81, 51 Atl. 590; *Little v. Hackett*, 116 U. S. 366, 29 L. ed. 652, 6 Sup. Ct. Rep.

Note.—The question of the imputed or contributory negligence of a passenger riding in an automobile driven by another, precluding recovery against a third person for injury, is considered in the note to *Rebillard v. Minneapolis, St. P. & S. Ste. M. R. Co.* L.R.A.1915B, 953; and see later cases. *Anthony v. Kieffer*, L.R.A.1915F, 876; *St. Louis & S. F. R. Co. v. Bell*, L.R.A.1917A, 543; and *Jacobs v. Jacobs*, ante, 253. L.R.A.1917F.

The general subject of imputed negligence of driver to passenger is considered in the notes to *Schultz v. Old Colony Street R. Co.* 8 L.R.A.(N.S.) 597, and *Christopherson v. Minneapolis, St. P. & S. Ste. M. R. Co.* L.R.A.1915A, 761.

Generally as to liability for automobile accidents, see L.R.A. Indexes, under the title, "Automobiles."

391; Trumbower v. Lehigh Valley Transit Co. 235 Pa. 397, 84 Atl. 403.

Messrs. John Lewis Evans and Thomas DeWitt Cuyler, for appellee:

The passenger is not relieved of responsibility for his own personal negligence in voluntarily going into danger in a vehicle driven in a manifestly dangerous manner; and defendant's evidence was ample to require this question to be submitted to the jury, and to sustain the learned trial judge's charge on the subject.

Crescent Twp. v. Anderson, 114 Pa. 643, 60 Am. Rep. 367, 8 Atl. 379; Dean v. Pennsylvania R. Co. 129 Pa. 514, 6 L.R.A. 143, 15 Am. St. Rep. 733, 18 Atl. 718; Winner v. Oakland Twp. 158 Pa. 405, 27 Atl. 1110, 1111; Dryden v. Pennsylvania R. Co. 211 Pa. 620, 61 Atl. 249; Thompson v. Pennsylvania R. Co. 215 Pa. 113, 64 Atl. 323, 7 Ann. Cas. 351, 20 Am. Neg. Rep. 483; Kunkle v. Lancaster County, 219 Pa. 52, 67 Atl. 918; Walsh v. Altoona & L. V. Electric R. Co. 232 Pa. 479, 81 Atl. 551; Wachsmith v. Baltimore & O. R. Co. 233 Pa. 465, 82 Atl. 755, Ann. Cas. 1913B, 679; Trumbower v. Lehigh Valley Transit Co. 235 Pa. 397, 84 Atl. 403; Senft v. Western Maryland R. Co. 246 Pa. 446, 92 Atl. 553.

Moschzisker, J., delivered the opinion of the court:

On the evening of August 22, 1913, James G. Hardie, and Olive M., his wife, hired an automobile with its driver, one Louis S. Chester, Jr., to convey them, with two women guests, from Sea Isle City, New Jersey, to a near by yacht club. On the way a collision occurred between the car in which they were riding and a one-horse express wagon belonging to the defendant company. Both Mr. Hardie and his wife were injured; they sued for damages, and by express agreement of record their cases were tried together, the issues involved were submitted to the jury, and in each instance the verdict favored the defendant, judgments were entered accordingly, and the plaintiffs have appealed.

The testimony on all the important issues was most conflicting; but, when viewed in the light of the verdicts rendered, the following facts can be found therefrom: The accident happened on a rainy evening, between 8:30 and 9 o'clock. Mr. Hardie occupied a front seat in the automobile, beside the chauffeur, while Mrs. Hardie, her mother, and the other woman were in the tonneau. The car was equipped with five lights, "two large acetylene gas lamps on the head, two on the side, and one red light in the rear." The headlights illuminated the road so that one in the car "could see 200 feet in front," and made the way "bright
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enough to see distinctly the curb." The part of the road upon which the accident happened had a curb on the west side and a single track trolley line on the east, with a space of 22 feet between. The automobile was traveling southward, on the left-hand, or wrong, side of the road, at an estimated speed of 40 miles an hour. The wagon was traveling northward on the right-hand, or proper, side of the road, the horse going at "a very slow trot." The driver of the latter vehicle, in an endeavor to avoid the collision, had his horse "nearly half way over" the trolley track when the accident occurred. The automobile struck the wagon on the near front wheel; both vehicles were badly damaged.

On the foregoing facts, it may be seen that the chauffeur, and not the driver of the horse and wagon, was the one guilty of the negligence which caused the accident; but the plaintiffs complain that the trial judge committed substantial error by the manner in which he submitted certain issues to the jury. In disposing of these complaints, we shall first consider together assignments 1 and 2.

In brief, the trial judge instructed that, if the automobile was being driven with "manifest improper speed," or if the chauffeur had his car "manifestly on the wrong place in the road," and these faults, or either of them, contributed to the happening of the accident, if the plaintiffs made no effort to "get him to go at a proper rate of speed" or "over on the right side of the road," they would be guilty of contributory negligence; but that they could not be found so guilty unless the before-mentioned alleged faults on the part of the chauffeur were "manifest."

In reviewing these instructions, it must be kept in mind that the plaintiffs did not endeavor to excuse the fact that the chauffeur was on the wrong side of the road by explaining he was temporarily and justifiably out of the regular track; on the contrary, they called him as their witness, and each of them gave testimony to substantiate his story that, at the time of the accident and prior thereto, he had been continually driving on the proper side of the road, at a speed not exceeding 15 miles an hour, which was much lowered immediately before the collision. Both plaintiffs not only stood upon but reiterated this account of the manner in which the automobile was alleged to have been handled; and, of course, ex necessitate, it excluded the possibility of a remonstrance on their part having been made to the chauffeur, by eliminating all possible reasons therefor. Moreover, the plaintiffs' attitude at trial, in a manner, adopted, or set their seal of approval upon, the chauffeur's

feur's real conduct, as the jury found it to be.

The rule is well established that, when possible dangers arising out of the negligent operation of a hired vehicle or a conveyance in which one is riding as an invited guest are manifest to a passenger who has any adequate opportunity to control the situation, if he sits by without protest and permits himself to be driven on to his injury, this is negligence which will bar recovery. In other words, the negligence of the driver is not imputed to the passenger, but the latter is fixed with his own negligence when he joins the former in testing manifest dangers. For discussion and, in some instances, application of this rule, see *Crescent Twp. v. Anderson*, 114 Pa. 643, 60 Am. Rep. 367, 8 Atl. 379; *Dean v. Pennsylvania R. Co.* 129 Pa. 514, 6 L.R.A. 143, 15 Am. St. Rep. 733, 18 Atl. 718; *Winner v. Overland Twp.* 158 Pa. 405, 27 Atl. 1110, 1111; *Dryden v. Pennsylvania R. Co.* 211 Pa. 620, 61 Atl. 249; *Thompson v. Pennsylvania R. Co.* 215 Pa. 113, 64 Atl. 323, 7 Ann. Cas. 351, 20 Am. Neg. Rep. 483; *Kunkle v. Lancaster County*, 219 Pa. 52, 67 Atl. 918; *Walsh v. Altoona & L. V. Electric R. Co.* 232 Pa. 479, 81 Atl. 551; *Wachsmith v. Baltimore & O. R. Co.* 233 Pa. 465, 82 Atl. 755, Ann. Cas. 1913B, 679; *Trumbower v. Lehigh Valley Transit Co.* 235 Pa. 397, 84 Atl. 403; *Senft v. Western Maryland R. Co.* 246 Pa. 446, 92 Atl. 553; *Dunlap v. Philadelphia Rapid Transit Co.* 248 Pa. 130, 93 Atl. 873.

Here, the clear, strong, preponderating evidence shows that the chauffeur was seen by numerous disinterested witnesses, some three or four blocks north from the point of the accident, driving in a reckless manner, at an estimated speed of 40 miles an hour, on the wrong side of the road, quite close to the trolley track; furthermore, the admissions of the plaintiffs show that they both were familiar with automobiles and able to appreciate the possible dangers of this highly improper course of conduct. As already indicated, since the story told by the plaintiffs as to the management of the motor was rejected by the jury, the position assumed by the former at trial left but one conclusion possible, i. e., that they had joined the chauffeur in testing the dangers of the situation created by the way in which the car was in fact being driven. Under the circumstances, we see no error in the instructions complained of.

At this point it is but fair to say that the instructions in question were coupled with a correct and fair presentation of the plaintiffs' side of the case, and the jurors were plainly told that, if they believed the L.R.A.1917F.

latter's testimony, they should render a verdict accordingly.

One other assignment calls for consideration. There is an act of assembly in New Jersey which requires all vehicles to have lights displayed thereon during specified hours, covering the time when this accident happened; and the defendant admitted there was no light on its wagon. The trial judge directed attention to this state of affairs, and instructed the jurors that, if the absence of a light "contributed to the accident, if that . . . prevented the plaintiffs' chauffeur from seeing the horse and wagon, that may be considered by you as an act of negligence, which caused the accident; . . . and, . . . if . . . there was no negligence on the part of the plaintiffs, the plaintiffs would be entitled to your verdict." These instructions were practically the last word to the jury, and we think them as favorable to appellants as they had a right to expect. Had there been a light on the wagon, it might have saved the plaintiffs from the result of their own negligence in permitting the car occupied by them to be driven in the manner in which it was operated on the night of the accident; but even this is hardly probable, since the plaintiffs said the acetylene gaslights on the front of their automobile enabled them to see at least 200 feet ahead. On the other hand, if the absence of a light on the wagon was not the proximate cause of the accident, even though an act of negligence on the part of the defendant, it would not justify recovery by the plaintiffs (*Christner v. Cumberland & E. L. Coal Co.* 146 Pa. 67, 23 Atl. 221); and this in effect is what the trial judge said to the jury.

The assignments of error are overruled, and the judgments affirmed.

PENNSYLVANIA SUPREME COURT.

ELEANOR WALKER ALLEN

v.

JOHN SCHEIB, Sr., et al., Appts.

(— Pa. —, 101 Atl. 102.)

Easement — private way — use for gas pipes.

The right to use a private way for access from a highway to land not abutting thereon does not include the right to lay gas pipes in the way.

For other cases, see Easements, III. in Dig. 1-52 N. S.

(March 5, 1917.)

Note. — For easement of way as including the right to lay pipes, see annotation following this case, post, 449.

A PPEAL by defendants from a decree of the Court of Common Pleas for Allegheny County enjoining them from interfering with the construction of a gas line and also with plaintiff's free use and maintenance of a private road, in an action brought to determine the rights of the respective parties to the road. Modified and affirmed.

The facts are stated in the opinion.

Mesars. McKenna & McKenna, for appellants:

An owner of a road has no corporeal interest in the land, and therefore cannot use the soil or surface for laying a pipe line or for planting trees and posts either on or along the surface.

Kister v. Reeser, 98 Pa. 4, 42 Am. Rep. 608; 23 Am. & Eng. Enc. Law, 4; Moffitt v. Lytle, 165 Pa. 173, 30 Atl. 922; Kirkham v. Sharp, 1 Whart. 323, 29 Am. Dec. 57; United States Pipe Line Co. v. Delaware, L. & W. R. Co. 62 N. J. L. 257, 42 L.R.A. 572, 41 Atl. 750; 14 Cyc. 1207, note 98, 1215.

Plaintiff has no right to use the strip of land other than as a roadway.

Moffitt v. Lytle, 165 Pa. 173, 30 Atl. 922; 3 Waahb. Real Prop. p. 379.

Where title to land is in dispute, ejectment is the proper remedy.

Mirkil v. Morgan, 134 Pa. 144, 19 Atl. 628; Barclay's Appeal, 93 Pa. 50; North Shore R. Co. v. Pennsylvania Co. 193 Pa. 641, 44 Atl. 1083; Pennsylvania Canal Co. v. Middletown & H. Turnp. Co. 1 Pa. Dist. R. 663; New Castle v. Raney (McClain v. New Castle) 130 Pa. 546, 6 L.R.A. 737, 18 Atl. 1066; Coward v. Llewellyn, 200 Pa. 582, 58 Atl. 1066; Tillmes v. Marsh, 67 Pa. 507.

Defendant is the owner of the land on both sides of the road, and therefore is seized of the fee of the land subject to the right of way over the same by the plaintiff.

Newhall v. Ireson, 8 Cush. 595, 54 Am. Dec. 790; Morgan v. Livingston, 6 Mart. (La.) 19; Kreiter v. Bigler, 101 Pa. 94; Paul v. Carver, 24 Pa. 207, 64 Am. Dec. 649; 5 Cyc. 909; Witter v. Harvey, 1 M'Cord, L. 67, 10 Am. Dec. 650.

Mr. J. W. Collins for appellee.

Walling, J., delivered the opinion of the court:

This equitable action is to determine the rights of the respective parties to a certain strip of land situate in Richland township, Allegheny county, and used as a private road. The Butler plank road extends through said township in a northerly direction, and the farm of the late John Scott, containing 142 acres, is located thereon. He died in 1875, and clause 4 of his will pro-L.R.A.1917F.

vides: "I give and devise to my grandson, John Scott Teacher, 15 acres of my Bakers-town farm; to my daughter, Catherine Harbison, 10 acres; to my granddaughter, Sarah Harbison, 5 acres; to my daughter Jane Harbison, 10 acres, all to be divided out of my Bakerstown farm west of the plank road."

He left other heirs and devisees aside from those above mentioned; and, by some family arrangement made shortly after his death, the 40 acres mentioned in the clause was set aside to the devisees therein named out of the northwest corner of the farm, away from the public highway. To afford access to the 40-acre tract it seems to have been a part of the agreement that a private road or lane, of the width of 16½ feet, should be opened, extending eastwardly from the southeast corner of the 40-acre tract, about 1,295 feet, to the Butler plank road, which lane was later fenced and opened, and has been used for about twenty years last past by the occupants of the 40 acres, the same having been partitioned in 1876, among the devisees above named. This is shown by a map made that year by Charles Gibson, at the instance of one of the devisees. The purparts thereby allotted were sold from time to time, and the deeds therefor include fractional parts of the lane, corresponding to the size of the respective purparts, for example, each deed for 15 acres includes three eighths of the lane. In 1901 the title to the 40-acre tract, together with whatever interest the owners thereof had in the lane, became vested in John Scott Harbison, who conveyed same to plaintiff in 1911. The lane was also used by the owners of the balance of the John Scott farm, as their necessities required.

So far as appears the family arrangement above stated was not in writing, and there is no record of any conveyance from the John Scott heirs to plaintiff's predecessors for the 40 acres or the lane. Plaintiff contends that the lane was included in the 40 acres. There is a part of the John Scott farm containing about 33 acres, some 24 acres of which lie between the 40 acres and the Butler plank road and north of the lane, as to which he seems to have died intestate. In 1881, all of the heirs of John Scott joined in a conveyance of the 24-acre tract to James D. Harbison, wherein the southern boundary is described as "thence along a certain road or lane between the land herein conveyed and the land of John Stirling."

Another part of the Scott farm, containing about 30 acres, and called the Stirling tract, is on the west side of the plank road and bounded on the north by the 40-acre tract and the lane.

By sundry conveyances the title to the

24-acre and the 30-acre tracts became vested in Thomas Morrow, who in 1910 conveyed same with other land to defendant, John Scheib, Sr., the deed for which in one of the courses mentioned "a point at the corner of a private road," and the general description therein includes the lane and the land on both sides thereof. After Mr. Scheib bought this land there was a controversy about the use of the lane, between Mr. Harbison and plaintiff on one side, and the defendants, "John Scheib, Sr., and John G. Scheib, on the other, each side claiming to own the same. One of the findings of the court below is: "Sixth. That said John Scheib, Sr., by destroying drains along said private road, taking out posts and trees planted by plaintiff, and by other acts, has repeatedly interfered with plaintiff in the use of said private road."

The defendants, or those in their employ, also drove their stock across this lane, and in so doing obstructed it with wires, and repeatedly suffered the same to remain in that condition, to the annoyance and damage of plaintiff.

In 1913, plaintiff entered into a contract with one Sebastian Mueller, for the construction and maintenance of a line of gas pipe in the lane, which defendants by opposition and threats prevented being done. Thereafter plaintiff filed her bill in this case, joining said Mueller as a defendant, but the bill as to him was dismissed. The learned trial judge, sitting as a chancellor, found that plaintiff had a good title in fee simple to the strip of land herein called the lane, and entered a final decree, *inter alia*, enjoining defendants from interfering with the construction of the gas line, and also from interfering with plaintiff's free use and maintenance of the private road. Defendants concede that plaintiff has a right to the use of the lane as a passageway; in fact, that is the only means of access to her property. We fully agree with the learned chancellor that under all the facts and circumstances defendants should be enjoined from interfering with plaintiff's free use and enjoyment of the said private road as such.

But plaintiff's right to lay or authorize another to lay a line of gas pipe therein depends upon the nature of her ownership. If an easement, then she can use it only for the purpose for which it was established or dedicated, and cannot lay a pipe line therein. *United States Pipe Line Co. v. Delaware, L. & W. R. Co.* 62 N. J. L. 254, 42 L.R.A. 572, 41 Atl. 759; 14 Cyc. 1207, note 98.

As an easement it cannot lawfully be used for a purpose different from that for which it was dedicated. *Kirkham v. Sharp*, 1 L.R.A.1917F.

Whart. 323, 29 Am. Dec. 57; *Mershon v. Fidelity Ins. Trust & S. D. Co.* 208 Pa. 292, 57 Atl. 569; 14 Cyc. 1215.

As above stated, the chancellor finds that plaintiff owns the fee. If so, she may, of course, construct the gas line therein; but a careful examination of the record fails to disclose any sufficient evidence to support that conclusion. As above stated, there is no deed or other writing showing any conveyance by the Scott heirs of the so-called private road. True, the road is recognized in their deed to James D. Harbison as above quoted, "thence along a certain road or lane between the land herein conveyed and the land of John Stirling;" but that does not show that the title to the fee thereof has passed from the Scott heirs. The term "road," and especially "private road," is indicative of an easement rather than a fee. See *Kister v. Reaser*, 98 Pa. 1, 42 Am. Rep. 608. Plaintiff relies largely on the evidence of her grantor, John S. Harbison, as tending to establish a parol partition of the Scott farm made in 1876, by which this lane is alleged to have been allotted to the owners of the 40-acre tract, and as a part thereof. But he does not say that all of the Scott heirs were present, and shows they were not when he names those who were there. The chancellor, in one part of his exhaustive discussion, says: "Respecting plaintiff's right to the uninterrupted use of the road there is no room for dispute. Respecting the precise limits of her rights, whether she has a fee or a mere easement, is a debatable question. . . . Whether Mr. Scheib has the fee in the 16½-foot strip of land or the mere right to use it in common with the plaintiff, or any right in it, he has no right to fill up necessary drains, or otherwise prevent the free use and proper maintenance of the road, and plaintiff is entitled to an injunction restraining him from interfering with her in the exercise of her lawful rights."

The John Scott heirs, aside from those named in clause 4 of the will, were not parties to the partition of the 40-acre tract, nor to the Gibson survey, nor, so far as the record shows, bound thereby. And certainly they were not bound by the recitals in the deeds from the owners of the respective purparts of the 40-acre tract. One cannot create a fee in land merely by including it in his conveyance. And the above-cited reference to this road or lane in the deed from the Scott heirs to James D. Harbison, and also in the deed from Morrow to defendant, are certainly as consistent with an easement as with a fee. The mere reference in a conveyance to a private road does not tend to show ownership in fee thereof in the party for whose use it may have been

established. Such road, or alley, may, *prima facie*, be used by all abutting owners, and defendants as such would have standing to object to an additional use being made thereof by the construction therein of a gas line, especially as this is proposed to be constructed on the surface of the ground.

Plaintiff, as the owner of the 40-acre tract, undoubtedly has an easement in the private road and a right to the fee and uninterrupted use thereof as a way for purposes of passage over and upon the same; and, so far as appears, defendants may lawfully make such use thereof as will not interfere with the rights of plaintiff.

The burden was upon plaintiff to establish her ownership to the fee of the land included in the road, and therein her proofs fail, and the finding of the court below in her favor as to that cannot be sustained; nor can the decree in so far as it restrains defendants from interfering to prevent plaintiff from the construction of a gas line in the road.

The defendants, John Scheib, Sr., and John G. Scheib, did not, by demurrer or answer, question the jurisdiction of the court upon the ground that the suit should have been brought at law, but filed an answer to

the merits of the case without asking for an issue as to any questions of fact, and thereby the right of trial by jury seems to have been waived, under the provisions of § 1 of the Act of June 7, 1907 (P. L. 440; 5 Purdon's Dig. p. 6061). The defendants first raised the question of jurisdiction in requests for findings after the evidence was submitted; this was not a compliance with the statute. *Nanheim v. Smith*, 253 Pa. 380, 98 Atl. 602. However, the proviso to this section is "that this shall not alter or affect the duty of the chancellor to dismiss the bill if the facts therein averred, as showing or tending to show the right to relief, be not substantially proved at the trial,"—and by reason thereof plaintiff is not entitled to relief based on her alleged ownership of the fee of the land in question; for such claim is not substantially proven.

The final decree entered by the court below is therefore modified by striking out so much thereof as restrains defendants, John Scheib, Sr., and John G. Scheib, from interfering with plaintiff in the construction and maintenance of a gas line in or upon said private road. The costs on this appeal to be paid by the appellee.

Annotation—Easement of way as including the right to lay pipes.

The decision in *ALLEN v. SCHEIB*, ante, 446, that an easement of way does not include the right to lay pipes, is supported by the few cases in point.

Thus, one having merely a right of way in an alley has no right to lay water mains therein. *Buehler v. Emery* (1912) 21 Pa. Dist. R. 1098.

A right to ingress and egress along a private way does not include a right to lay pipes in the soil to secure a water supply. *Watson v. French* (1914) 112 Me. 371, L.R.A.1915C, 355, 92 Atl. 290, where the court said: "His only means of ingress and egress is over a private way, in which he has only a right of passage in common with others. Such a right of passage constitutes a limited easement, and gives him no such right in the soil that he could lay pipes in it to connect with the street main. He would be a trespasser, should he attempt it."

In *United States Pipe Line Co. v. Delaware, L. & W. R. Co.* (1898) 62 N. J. L. 254, 42 L.R.A. 572, 41 Atl. 759, it was held that a pipe line for oil laid underground in a wagon road or crossing under a railroad track, which, by stipu-

lation in a deed to the railroad company, it is required to construct and maintain for the grantor, so as to enable him to travel and cross freely between his lands on each side of the railroad, is not within the easement reserved, but constitutes a trespass, even if it does not injure the railroad.

But a covenant whereby the owners and occupiers of certain houses were to have the full use and enjoyment of certain roads, "in as full, free, complete, and absolute manner to all intents and purposes whatsoever as if the same were public roads," included the right to have gas pipes laid in such roads by a gas company; for public roads could be used for other purposes than those of transit, and although, at the time of the covenant, gas companies had no right to lay pipes in public roads, the covenant would include new modes of use and enjoyment of public roads. *Selby v. Crystal Palace Gas Co.* (1862) 4 DeG. F. & J. 246, 45 Eng. Reprint, 1178, 6 L. T. N. S. 790, 31 L. J. Ch. N. S. 595, 8 Jur. N. S. 830, 10 Week. Rep. 636.

B. B. B.

PENNSYLVANIA SUPREME COURT.

BRUNO HENSCHKE et al., Doing Business as Haensel & Company,
v.

EDGAR B. MOORE et al., Doing Business as E. B. Moore & Company, Appts.

(— Pa. —, 101 Atl. 308.)

Contract — restraint of trade — validity.

A contract by a licensee of a patented machine, that after surrender of the license he would not engage in the United States, directly or indirectly, in the manufacture or sale of a product competing with that of the machine, is an invalid restraint of trade. For other cases, see *Contracts*, III. c, 2, in *Dig. 1-52 N. S.*

(March 19, 1917.)

APPEAL by defendants from a decree of the Court of Common Pleas No. 4 for Philadelphia County in favor of plaintiffs in a suit to restrain the infringement of certain letters patent. Reversed.

The facts are stated in the opinion.

Messrs. John G. Johnson, Charles H. Edmunds, and M. H. Regensburger for appellants.

Mr. Henry J. Scott, for appellees:

A contract unlimited as to time and covering the entire United States, obligating the covenantor not to engage in any business which may compete with the product of the covenantee's patented machine, is not invalid as being in restraint of trade or in violation of the Sherman Act.

Harrison v. Glucose Sugar Ref. Co. 53 L.R.A. 915, 53 C. C. A. 484, 116 Fed. 304; *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 409, 32 L. ed. 979, 984, 9 Sup. Ct. Rep. 553; *Barrows v. McMurry Mfg. Co.* 54 Colo. 432, 131 Pac. 430; *New York Bank Note Co. v. Kidder Press Mfg. Co.* 192 Mass. 391, 78 N. E. 463; *New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co.* 180 N. Y. 280, 73 N. E. 48; *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351, 40 L. J. Ch. N. S. 338, 42 L. T. N. S. 679, 28 Week. Rep. 623, 44 J. P. 663; *Moerich v. Fenestre*, 61 L. J. Ch. N. S. 737, 2 Reports, 102, 67 L. T. N. S. 602; *Badische Anilin und Soda Fabrik v. Schott* [1892] 3 Ch. 447, 61 L. J. Ch. N. S. 698, 67 L. T. N. S. 281; *Underwood & Sons v. Barker* [1899] 1 Ch. 300, 68 L. J. Ch. N. S. 201, 47 Week. Rep. 347, 80 L. T. N. S. 306, 15 Times L. R.

177; *Nordenfeldt v. Maxim Nordenfeldt Guns & Ammunition Co.* [1894] A. C. 535, 63 L. J. Ch. N. S. 908, 11 Reports, 1, 71 L. T. N. S. 489, 6 Eng. Rul. Cas. 413; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419; *Leslie v. Lorillard*, 110 N. Y. 519, 1 L.R.A. 456, 18 N. E. 363; *United States Cordage Co. v. Wall's Sons Rope Co.* 90 Hun, 430, 35 N. Y. Supp. 978; *Wood v. Whitehead Bros. Co.* 165 N. Y. 545, 59 N. E. 357; *Angelica Jacket Co. v. Angelica*, 121 Mo. App. 226, 98 S. W. 805; *Artistic Porcelain Co. v. Boch*, 76 N. J. Eq. 533, 74 Atl. 680; *Monongahela River Consol. Coal & Coke Co. v. Jutte*, 210 Pa. 288, 105 Am. St. Rep. 812, 59 Atl. 1088, 2 Ann. Cas. 951; *Carter v. Alling*, 43 Fed. 208; *Southworth v. Davison*, 106 Minn. 119, 19 L.R.A.(N.S.) 769, 118 N. W. 363, 16 Ann. Cas. 253; *Smith v. Webb*, 176 Ala. 596, 40 L.R.A.(N.S.) 1191, 58 So. 913; *Smith v. Brown*, 164 Mass. 584, 42 N. E. 101; *Marshall Engine Co. v. New Marshall Engine Co.* 203 Mass. 410, 89 N. E. 548; *Prame v. Ferrell*, 92 C. C. A. 374, 166 Fed. 702; *Hall Mfg. Co. v. Western Steel & Iron Works*, L.R.A.1916C, 620, 142 C. C. A. 220, 227 Fed. 588; *Standard Oil Co. v. United States*, 221 U. S. 1, 59, 55 L. ed. 619, 644, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; *Re Greene*, 52 Fed. 104; *Dueber Watch-Case Mfg. Co. v. E. Howard Watch & Clock Co.* 14 C. C. A. 14, 35 U. S. App. 16, 66 Fed. 637; *United States v. Trans-Missouri Freight Assn.* 166 U. S. 348, 41 L. ed. 1030, 17 Sup. Ct. Rep. 540; *Matthews v. Associated Press*, 136 N. Y. 333, 32 Am. St. Rep. 741, 32 N. E. 981; *Eastern States Retail Lumber Dealers' Assn. v. United States*, 234 U. S. 600, 609, 58 L. ed. 1490, 1498, L.R.A.1915A, 788, 34 Sup. Ct. Rep. 951; *Mackinnon Pen Co. v. Fountain Ink Co.* 16 Jones & S. 442; *Dr. Miles Medical Co. v. John D. Park & Sons Co.* 220 U. S. 402, 55 L. ed. 516, 31 Sup. Ct. Rep. 376; *Jarvis v. Peck*, 10 Paige, 118; *Alcock v. Giberton*, 5 Duer, 76; *Tabor v. Hoffman*, 118 N. Y. 34, 16 Am. St. Rep. 740, 23 N. E. 12; *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664.

Potter, J., delivered the opinion of the court:

The form of the bill filed by complainants in this case indicates that they sought to restrain the infringement of certain letters patent of the United States granted to

Note. — The validity of an agreement in restraint of trade, ancillary to the sale of the business or profession, as affected by its territorial scope, is treated in the notes to *Fleckenstein Bros. Co. v. Fleckenstein*, 24 L.R.A.(N.S.) 913, and *Hall Mfg. Co. v. Western Steel & I. Works*, L.R.A.1916C, L.R.A.1917F.

626; and see also later case, *Torian v. Fuqua*, ante, 257.

For other questions in relation to contracts in restraint of trade, see L.R.A. Indexes, under the title, "Contracts," subtitles, "Essential validity and effect" and "In restraint of trade."

Oswald Hansel for an improvement in apparatus for feeding horsehair from a bundle to a wrapping device. If that were in fact the issue involved, we would be without jurisdiction to determine it, as the infringement of a patent is a question exclusively for consideration by the Federal courts. The real controversy here turned, however, upon the force of a contract entered into concerning the use to be made of certain machines embodying the said invention, and no rights are involved except such as arise out of the contract.

It appears that on February 21, 1913, Haensel & Company, the plaintiffs, entered into a written contract with the defendant Edgar B. Moore, "acting for himself and his undisclosed associates," whereby they granted to the said defendant, in consideration of his agreement to pay certain royalties, the sole and exclusive right to manufacture and use "an apparatus for feeding horsehair from a bundle to a wrapping device," which was protected by letters patent of the United States owned by plaintiffs. Provision was made for the cancellation or surrender of the license under certain circumstances, with a stipulation that in the event of cancellation or surrender "the licensee will not thereafter, either directly or indirectly, engage in the business of manufacturing or selling the same or any competing material in the United States." This statement is not clear. The license was for the use of a machine, and the language would naturally imply an engagement not to manufacture or sell any such machines, but it is conceded that what was intended was an engagement not to manufacture or sell horsehair yarn or thread similar to the product of the machine, or which would compete therewith. As thus understood, we have, then, a contract for a license to manufacture and use a machine, with a provision that, in case of surrender of the license, the licensee shall be prohibited from making or selling, not the machines which were protected by the patent, but any horsehair yarn which would compete with the product of the machine. The court below held that complainants were entitled to the relief they sought. Exceptions were dismissed, and a final decree entered by which the defendants were enjoined "until the 7th day of March, A. D. 1928 (the expiration of the patent), from making or selling, directly or indirectly, endless horsehair yarn or cloth made therefrom similar to that under the patent of the complainants, as set forth in the bill of complainants filed in this cause, and the manufacture and sale of any competing endless hair yarn and cloth made therefrom." An accounting for profits arising out of the manufacture and sale of hair

yarn or cloth made therefrom since September 30, 1914, was also ordered. Defendants have appealed, and their counsel contend that the covenant by which the licensee was bound, in the event of the surrender of the license, not to manufacture or sell anywhere in the United States at any time material similar to that which was the product of the machine described in the patent, was a contract in restraint of trade, which a court of equity will not enforce. In a late textbook discussion of the subject, 6 R. C. L. (1915) 785, it is said: "The doctrine relating to contracts in restraint of trade appears to have undergone distinctive stages of transformation or development. According to the early common law of England, an agreement in restraint of a man's right to exercise his trade or calling was void as against public policy. . . . Although the courts continued to treat contracts in general or total restraint of trade as void, they began to enforce contracts in partial restraint of trade, provided such contracts were not unreasonable. The classification of contracts into those which are in general restraint of trade and those which are in partial restraint of trade seems to have been made for the purpose of distinguishing between restrictive agreements covering the entire country, and restrictive agreements covering a small area. This distinction is still adhered to in some jurisdictions. But, as will be seen, many of the courts have, in view of changed conditions, abandoned the rule that contracts in general restraint of trade are necessarily void. In its place they have substituted the more flexible rule that contracts in unreasonable restraint of trade are void, while contracts which impose a reasonable restraint upon trade are valid. The tendency of the modern decisions is to adopt this rule as the one governing the subject."

Our Pennsylvania cases follow the distinction between contracts in general restraint of trade and those in partial restraint. In the former case we have held the restriction to be void, and in the latter that it might be sustained if reasonable. The decision in Monongahela River Consol. Coal & Coke Co. v. Jutte, 210 Pa. 288, 105 Am. St. Rep. 812, 59 Atl. 1088, 2 Ann. Cas. 951, was cited by the court below, and is relied upon by both parties to this appeal, as defining the present state of the law upon the subject. It was there said (210 Pa. page 302): "When a contract is presented which in some degree restrains trade, we do not at once decide that it is void as against public policy, but we go further and inquire, Is it limited as to space or time, and is it reasonable in its nature?"

Mr. Justice Dean then called attention to

the facts that the contract there under consideration was limited as to time, ten years, limited as to space, the immediate territory adjacent to three navigable rivers and their tributaries; and related to the sale of the good will of a business. He expressly gave as one reason for enforcing the contract that "the time was not an indefinite period as in some of the cases."

In the case at bar the complainants do not expressly aver a breach of the covenant contained in the seventh paragraph of the contract, in which the licensee agrees that in the event of the surrender of the license he will not "engage in the business of selling the same or any competing material in the United States." The only sentence in the bill that can be construed to refer to that covenant is the averment that "respondents are continuing to take orders for and are manufacturing and have delivered large quantities of cloth containing said hair yarn of the exact appearance as that made and sold heretofore by respondents under your orator's patent." Yet the court below, without reference to the prayers of the bill that infringement of plaintiffs' patent be restrained, and for an account and award of damages for such infringement, has considered the bill as if it had been filed to enforce the contract not to manufacture and sell material similar to that which was to be produced on the machine described in the patent. The licensee was entirely within his rights in surrendering the license. The testimony shows that the machines described in the complainants' patent would not produce hair yarn which was satisfactory to defendants. That being the case, was the restriction reasonable which prevented the licensee from making hair yarn upon some other machine, after surrendering his license under complainants' patent? We are clearly of the opinion that it was not. Hair yarn, and haircloth made therefrom, were at the time old and well-known products long in public use. The license granted by complainants was merely for the use of a machine, and it did not apply at all to the hair yarn which was the product of the machine. The license covered only one method of making hair yarn. Other methods, which did not infringe the claims of the patent were open to the public. For the use which was made of the machine complainants were compensated by the royalty. When the license was surrendered, complainants received everything to which they were entitled. They had their patent then in their own hands and could use it themselves, or license others to use it. There was nothing to justify them in seeking to restrain defendants from engaging in the business of manufacturing

hair yarn by the use of any machine which did not infringe their patent. This transaction is not properly to be compared with the sale of a business in which there is an agreement upon the part of the seller not to compete with the purchaser for a limited term. To do so in such a case would be a breach of faith, as it would depreciate the value of the property or business sold. A case analogous to the present one would be that of the sale of a business in consideration of the payment of a yearly sum as compensation, coupled with a provision that, in case the purchaser exercised his right to discontinue the business, he should never be allowed to engage in the same or a similar business at any time or any place. Such a contract in restraint of trade would be clearly unreasonable. So in the present case is the attempt to restrain defendants from doing something which they were at perfect liberty to do before the granting of the license, that is, manufacture hair yarn by the use of a machine which does not infringe plaintiffs' patent. Any restriction which prevents them from doing the same thing after the surrender of the license which they in common with the public were at liberty to do before taking a license for the use of plaintiffs' machine is palpably unreasonable. Such a requirement is not at all necessary for the proper protection of the rights of the plaintiffs, and it is oppressive to defendants.

The restriction here is also unreasonable in that it is unlimited as to time. The court below endeavored to overcome this fault by enjoining defendants only during the balance of the term of plaintiffs' patent. But here again we must repeat that the patent, which was for a machine, did not apply to the subject-matter of the restriction, which was the manufacture and sale of hair yarn. The only thing to which plaintiffs had a right to protection was the subject-matter of their patent, and when the restriction went beyond that, and attempted to restrain defendants from engaging in the manufacture and sale of haircloth, a business which had been previously open to them in common with the general public, the restraint was unreasonable. In *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 22 L. ed. 315, Mr. Justice Bradley said: "It is a well-settled rule of law that an agreement in general restraint of trade is illegal and void; but an agreement which operates merely in partial restraint of trade is good, provided it be not unreasonable and there be a consideration to support it. . . . In order that it may not be unreasonable, the restraint imposed must not be larger than is required for the necessary protection of the party with whom the con-

tract is made. . . . A contract, even on good consideration, not to use a trade anywhere in England, is held void in that country, as being too general a restraint of trade; but a contract not to use a trade at a particular place, if it be founded on a good consideration, and be made for a proper and useful purpose, is valid. . . . Of course, a contract not to exercise a trade generally would be obnoxious to the rule, and would be void."

In *Union Strawboard Co. v. Bonfield*, 193 Ill. 420, 86 Am. St. Rep. 346, 61 N. E. 1038, the contract was in connection with the sale of a business, and a reasonable restriction was justified, but it was there said: "The courts will not enforce any contract which excludes a party generally from following any lawful trade or business beneficial to the community and to him."

In *Lanzit v. J. W. Sefton Mfg. Co.* 184 Ill. 326, 75 Am. St. Rep. 171, 56 N. E. 393, which also involved the sale of a business, it was held that a contract in restraint of trade throughout the United States was unreasonable and void, and also that it could not be divided so as to apply to a single state only, as such a contract would also be void.

In the case at bar the contract in restraint of trade, being unlimited as to time, and as to space extending over the entire country, must be regarded as extending the restraint further than is necessary for the reasonable protection of the covenantee. Reference to the nature and subject-matter of the restriction makes its unreasonableness more clearly apparent. As we have already indicated, payment of the royalty was full compensation for the use of the patent, and as the plaintiffs contributed nothing

but the patent, there was no consideration whatever to support that portion of the agreement which bound the licensee, after the surrender of the license, to refrain from the manufacture, by methods which did not infringe plaintiffs' patent, of an article of commerce in common use. Such a restriction upon the rights of the licensee was in its very nature unreasonable and void.

Nor is there any merit in the suggestion that plaintiffs were entitled to relief in order to protect trade secrets. The contract had no relation in any way to trade secrets! It related solely to the use of a patented machine, the specifications of which are a matter of public knowledge and record. To secure a valid patent, the law requires the specification to be plain and clear, and to describe the invention in such a manner as to enable the public to practise it from the specification alone. There was therefore no room in this case for the addition of any trade secrets to make the alleged invention workable.

Holding, as we do, that the contract in question is an illegal restraint of trade, and cannot be enforced in a court of equity, the question whether the relief sought should be confined to the single defendant Edgar B. Moore need not be considered.

Of the forty-four assignments of error, all except the last one are to the dismissal of various exceptions filed by defendants to the findings of fact and conclusions of law of the trial judge. Without disposing specifically of these assignments, it is sufficient to say that the forty-fourth, which is to the final decree, is sustained, and the decree of the court below is reversed, at the cost of the appellees.

WEST VIRGINIA SUPREME COURT OF APPEALS.

J. A. RUSMISELL

v.

WHITE OAK STAVE COMPANY et al.

N. RUTH

v.

B. H. RAWSON et al.

J. A. RUSMISELL

v.

SAME.

(Two Cases.)

(— W. Va. —, 92 S. E. 672.)

Bills and notes — misuse — right of holder.

1. The authority implied by a signature L.R.A.1917F.

to a blank note, and the credit given, are so extensive, that the party so signing will be bound to a holder for value in due course, although such note was only authorized to be used for a purpose different from that to which it has been perverted.

For other cases, see *Bills and Notes*, V. a, 2, in *Dig. 1-52 N. S.*

Notice — imputed — knowledge of officer.

2. The knowledge of an officer of a bank, acquired in a capacity other than as its representative, of an infirmity in commercial paper offered for discount, will not be

Headnotes by RITZ, J.

Note. — The imputation to the bank of the knowledge of bank officers who are personally interested in the transaction in question is treated in the notes to *Lilly v. Hamilton Bank*, 29 L.R.A.(N.S.) 558, and *First Nat. Bank v. Burns*, 49 L.R.A.(N.S.)

imputed to the bank, when such official is also an officer of the corporation seeking the discount, and has an interest in the transaction so adverse to the bank that there is a reasonable presumption that he will not communicate his knowledge to it. *For other cases, see Notice, II. a, in Dig. 1-52 N. S.*

Bills and notes — what necessary to hold indorser.

3. To hold an indorser of negotiable paper liable as such, it must be presented for payment at the place of payment, when due, and due notice given to the indorser of such presentment, and of its dishonor by nonpayment.

For other cases, see Bills and Notes, IV. in Dig. 1-52 N. S.

(May 8, 1917.)

APPLEALS by Drivers & Mechanics' National Bank of Baltimore, Central Banking & Security Company, P. E. Wagner, receiver, etc., of First National Bank of Sutton, and W. L. Armstrong, receiver, etc., of Farmers' Bank & Trust Company from decrees of the Circuit Court for Upshur County, refusing to allow their claims in proceedings to wind up the affairs of the White Oak Stave Company, and enforce claims against Rawson. Reversed in part. The facts are stated in the opinion.

Messrs. Hall Brothers, for appellants Farmers' Bank & Trust Company et al.:

If the notes came into existence by filling out printed forms signed in blank by B. H. Rawson, and were taken by the Farmers' Bank & Trust Company, in due course of business, for a valuable consideration, before maturity, and without notice of any infirmity in the notes, Rawson is liable thereon to the bank, even if the blanks were delivered to Dean for one purpose by Rawson, and Dean used them for another.

Frank v. Lilienfeld, 33 Gratt. 377; Mechanics Bank v. Chardavoyne, 69 N. J. L. 256, 101 Am. St. Rep. 701, 55 Atl. 1080; 1 Dan. Neg. Inst. 6th ed. 142-144; Douglass v. Scott, 8 Leigh, 43; Geddes v. Blackmore, 132 Ind. 551, 32 N. E. 567; Selover, Neg. Inst. pp. 25-27, 235-237.

Dean's knowledge of infirmity in the notes was not notice to the bank.

City Bank v. Bryan, 72 W. Va. 29, 78 S. E. 400; American Nat. Bank v. Ritz, 70 W. Va. 409, 40 L.R.A.(N.S.) 156, 74 S. E. 679; First Nat. Bank v. Lowther-Kaufman Oil & Coal Co. 66 W. Va. 505, 28 L.R.A.(N.S.) 511, 66 S. E. 713.

764; and see later cases, Tatum v. Commercial Bank & T. Co. L.R.A.1916C, 767; Chapman v. First Nat. Bank, ante, 300; and Baker v. Berry Hill, ante, 303.

Generally, the question as to whether the knowledge possessed by an officer of a corporation who is its sole representative in L.R.A.1917F.

Messrs. Davis, Davis, & Hall, for appellant Wagner:

The First National Bank of Sutton is a bona fide holder for value.

American Surety Co. v. Pauly, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. Rep. 552; 2 Pom. Eq. Jur. §§ 874, 675; Baker v. Berry Hill Mineral Springs Co. 112 Va. 280, ante, 303, 71 S. E. 626; Re Marseilles Extension R. Co. L. R. 7 Ch. 161, 41 L. J. Ch. N. S. 345, 25 L. T. N. S. 858, 20 Week. Rep. 254; 3 Clark & M. Corp. p. 2212; Stallo v. Wagner, 147 C. C. A. 315, 233 Fed. 379; Deepwater Council, O. U. A. M. v. Renick, 59 W. Va. 343, 53 S. E. 552; First Nat. Bank v. G. V. B. Min. Co. 89 Fed. 439, 36 C. C. A. 633, 95 Fed. 23; Bank of Overton v. Thompson, 56 C. C. A. 554, 118 Fed. 798; Hadden v. Dooley, 34 C. C. A. 338, 63 U. S. App. 173, 92 Fed. 274; Central Nat. Bank v. Pipkin, 66 Mo. App. 592; Gunster v. Scranton Illuminating, H. & P. Co. 181 Pa. 327, 59 Am. St. Rep. 650, 37 Atl. 550; Lyndon Mill Co. v. Lyndon Literary & Biblical Inst. 63 Vt. 581, 25 Am. St. Rep. 783, 22 Atl. 575; 10 Cyc. 116; 7 Dam. Neg. Inst. § 386.

Messrs. Merrick & Smith for appellant Central Banking Company.

Mr. Carlyle Barton for appellant Drivers & Mechanics' National Bank.

Messrs. J. M. N. Downes, Young & McWhorter, and H. Roy Waugh for appellees.

Ritz, J., delivered the opinion of the court:

The defendant White Oak Stave Company was engaged in the business of manufacturing and selling staves. It was a corporation, all of its stock being owned or controlled by one H. H. Dean, who was the president and treasurer of the company. It made a contract with the defendant B. H. Rawson to cut, saw, and load for it on the railroad cars the staves from a certain tract of land, at the price of \$15 per thousand. Rawson entered upon this contract and cut something like half of the timber; the Stave Company furnishing him money from time to time for the purpose of carrying on his operations. It appears that the arrangement was that he would draw checks upon the First National Bank of Sutton, of which Dean was vice president, for such money as he needed, and Dean would arrange to keep enough money in the bank to Rawson's cred-

it the transaction is chargeable to it, notwithstanding that he is interested adversely to it in the transaction, is discussed in the note to Brookhouse v. Union Pub. Co. 2 L.R.A.(N.S.) 993; and see later cases cited in the footnote to Tatum v. Commercial Bank & T. Co. L.R.A.1916C, 767.

it to meet his requirements. Before the operations upon this tract of land were concluded the suit of Rusmisseil against the White Oak Stave Company was brought for the purpose of winding up its affairs and distributing its assets to its creditors. It seems that Rawson about this time also became embarrassed financially and made a voluntary assignment to N. Ruth for the benefit of his creditors. Ruth then brought a suit against Rawson and others to have the trust created by the deed executed to him by Rawson administered under the direction and advice of a court of equity. Each of these suits was referred to the same commissioner, to ascertain and report what assets the defendants White Oak Stave Company and B. H. Rawson had, and the debts against them.

In each of said suits W. L. Armstrong, receiver of the Farmers' Bank & Trust Company, a corporation, and the said Farmers' Bank & Trust Company, a corporation, filed their joint petition and answer, setting up a claim against the defendant Rawson and also against the defendant White Oak Stave Company, consisting of six notes executed by Rawson to the White Oak Stave Company, and indorsed by the White Oak Stave Company. P. E. Wagner, receiver of the First National Bank of Sutton, and the First National Bank of Sutton, filed an answer in each of said suits, setting up a claim in favor of said receiver against said Rawson, and also against said White Oak Stave Company. Part of the claim set up against Rawson was allowed by the commissioner. The part not allowed consists of six notes made by B. H. Rawson and indorsed by White Oak Stave Company, and an overdraft of \$15.83 in the account of Rawson with the First National Bank. The appellant Central Banking & Security Company appeared before the commissioner and offered proof of a claim in its favor against said Rawson, consisting of two notes for the sum of \$1,000 each, and also a claim against the White Oak Stave Company as indorser of said two notes, and as indorser of a note of \$250 made by Standard Lumber & Manufacturing Company. The Drovers & Mechanics' National Bank of Baltimore, Maryland, filed a petition setting up a note of \$1,500 made by the defendant B. H. Rawson, and indorsed by the White Oak Stave Company, and claimed this note as a debt against both of said defendants. The commissioner declined to allow the above-mentioned claims of the appellants, Drovers & Mechanics' National Bank of Baltimore, Maryland, Central Banking & Security Company, P. E. Wagner, receiver of the First National Bank of Sutton, and W. L. Armstrong, receiver of the Farmers' Bank & L.R.A.1917F.

Trust Company, against either of said defendants. He also found that the White Oak Stave Company was indebted to B. H. Rawson in the sum of \$7,201.74.

Exceptions were filed to the report of the commissioner, in so far as he failed to allow the claims set up by the above-named parties, and also to the allowance of the claim in favor of Rawson against the White Oak Stave Company. These exceptions were overruled by the circuit court, and the commissioner's report confirmed, and the said P. E. Wagner, receiver of the First National Bank of Sutton, W. L. Armstrong, receiver of Farmers' Bank & Trust Company, Central Banking & Security Company, and Drovers & Mechanics' National Bank of Baltimore, Maryland, each prosecute appeals from the decree of the circuit court, refusing to allow their respective claims, and allowing the claim in favor of B. H. Rawson. Rawson now contends that the notes held by appellants are forgeries, and this seems to be the only question made as to the validity of these debts.

The appellant Drovers & Mechanics' National Bank of Baltimore acquired the note held by it from the First National Bank of Sutton, having rediscounted the same for that institution. The appellant Central Banking & Security Company acquired the notes held by it in like manner. These notes, together with the notes held and set up by Wagner, receiver of the First National Bank of Sutton, were all discounted by the First National Bank of Sutton for the White Oak Stave Company. The notes held by Armstrong, receiver of Farmers' Bank & Trust Company, were discounted by that institution for the White Oak Stave Company. At the time these notes were acquired by the Farmers' Bank & Trust Company H. H. Dean, the president and treasurer of the White Oak Stave Company, was the cashier of the Farmers' Bank & Trust Company. This bank transferred a large part of its assets to the First National Bank of Sutton and ceased doing business as a banking concern. Dean then became vice president and the active managing officer of the First National Bank of Sutton, and the notes held by Wagner, receiver, and by the Drovers & Mechanics' National Bank of Baltimore and the Central Banking & Security Company were discounted by this bank for the White Oak Stave Company while Dean was so actively connected with it. Of course, if these notes are forgeries, as now claimed by Rawson, they cannot be the basis of a claim against Rawson's estate.

The commissioner does not make any specific finding in regard to these claims, but we must assume that, they having been presented to him and he not having allowed

them, he found against the contention of appellants, and in favor of the contention of Rawson that these notes are forgeries; and the inquiry is: Does the evidence introduced before the commissioner justify this finding? It appears that at the time the First National Bank of Sutton suspended business the national bank examiner, who was present, found these notes now held by Wagner, receiver, among the assets of the bank. It is also shown that Dean, who had control of the assets of the Farmers' Bank & Trust Company, produced the notes set up in this suit by Farmers' Bank & Trust Company, and said to one of the directors of the First National Bank that they were part of the assets of the First National Bank. It seems now, however, that Dean was doing this to cover up his defalcations to that institution, and that in fact these notes were never transferred by the Farmers' Bank & Trust Company to the First National Bank of Sutton, but were at that time, and still are, a part of the assets of the Farmers' Bank & Trust Company. At any rate, while the receiver of the First National Bank, at the beginning of this litigation, claimed to be the owner of these notes, he now asserts no claim thereto.

At the time that the First National Bank of Sutton was closed, Rawson was advised by the bank examiner in charge that the bank held between \$25,000 and \$30,000 of his notes. He was also given this information by some of the directors of the bank. He did not deny the paper, but stated that he had executed from time to time notes in blank and turned them over to Mr. Dean, and that he was surprised that Dean had used them to that extent. He was examined before the commissioner on several different occasions, these causes being before the commissioner for several months. When first examined and asked in regard to these notes, he said that he would not say that the signatures thereto were his signatures, nor would he say that they were not his signatures. On another occasion he stated that he had signed some notes in blank and intrusted them to Mr. Dean, but that this was several years before, when he was engaged in cutting another tract of timber for the White Oak Stave Company, and he knew that Dean had not misused any of these notes, and that he had never signed any other notes in blank and intrusted them to Dean. On still another occasion he stated that he had some notes out for some machinery and equipment that he had bought to carry on this particular work, and that he had signed some notes in blank and intrusted them to Dean for the purpose of renewing these obligations, but that all of these notes were dated, and that Dean had

used them for the purpose for which they had been given him, and that he had never signed any other notes in blank and intrusted them to Dean. Finally, upon his last appearance before the commissioner, he stated unequivocally that he had not signed the notes in question.

To rebut this evidence of Rawson, which culminated in the denial of his signature to the notes, we have the fact that, when first advised that the bank held his obligations for an amount aggregating between \$25,000 and \$30,000, he did not deny them, or make any contention that they were forgeries, but stated that he had signed notes in blank and intrusted them to Dean, and expressed surprise that they had been used to that extent. There was also found in a drawer in Dean's desk, after Dean had left, seven blank notes signed by Rawson, the signatures to which he does not now deny. There was also introduced a number of people familiar with Rawson's signature, who testified that the signature to these notes was that of B. H. Rawson. Experts in handwriting were also introduced, who compared the signatures to these notes with signatures admitted by Rawson, and who, after such comparison, pronounced the signatures to these notes to be the genuine signature of B. H. Rawson. It seems, indeed, very strange that Rawson, when confronted with the fact that the bank held his paper in such a large amount, contented himself with making the explanation he did, if in fact it was not his paper. It is beyond belief that a man in Rawson's circumstances could be confronted with \$25,000 or \$30,000 of paper upon which it was claimed he was liable, and that he would not at least deny liability therefor and assert that the same was a forgery, if such was the truth. His conduct on this occasion, as testified to by several witnesses, is entirely inconsistent with his subsequent statement that he had not signed these notes. His statements before the commissioner at different times were inconsistent with each other, and are also inconsistent with the fact that there were in Dean's possession at the time the bank was closed notes signed in blank by Rawson. We are clearly of the opinion that all of these notes bore the genuine signature of Rawson.

But it is argued that, even though the signature to these notes is the genuine signature of Rawson, he should not be held liable therefor, for the reason that he intrusted the blank notes which he signed to Dean for a particular purpose, and that Dean used these notes for a purpose different from that for which they were intrusted to him. There is nothing in this contention. If Rawson signed these notes, and intrusted

them to Dean for a particular purpose, and Dean appropriated them to another use, Rawson must be held liable to holders without knowledge of the conditions upon which they were delivered by Rawson to Dean. *Frank v. Lillienfeld*, 33 Gratt. 377; *Douglas v. Scott*, 8 Leigh, 43.

It is insisted, however, that Dean, being the managing officer of the bank, and having knowledge of the purpose for which these notes were executed in blank by Rawson, his knowledge was the knowledge of the bank, and when the bank took these notes it therefore knew that they were not being used for the purpose for which Rawson signed them, and, knowing this, it cannot now seek to hold Rawson responsible therefor. This argument would be sound were it not for the fact that Dean was also the managing officer of the White Oak Stave Company, which company was interested in raising the money on these notes, and, as has been repeatedly held by this court, the knowledge of an officer of a banking institution, acquired in a capacity other than as its representative, of the infirmity or invalidity of paper acquired by such banking institution, through an instrumentality in which such officer is interested adversely to the interest of the bank, will not be imputed to the bank. *City Bank v. Bryan*, 72 W. Va. 29, 78 S. E. 400; *American Nat. Bank v. Ritz*, 70 W. Va. 409, 40 L.R.A. (N.S.) 156, 74 S. E. 679. We must therefore conclude that any information or knowledge which Dean had of the infirmity or invalidity of these notes is not imputable to the bank, and it is not shown that any other officer or agent of the bank had any knowledge or information in regard thereto at the time they were discounted. It follows that the circuit court erred in not sustaining the exceptions to the report of the commissioner, in so far as it failed to allow these notes as debts against B. H. Rawson.

There is another claim set up by the appellant Wagner, receiver, against Rawson, amounting to \$15.83; the same being an overdraft by Rawson at the time the bank was closed. We do not know why this \$15.83 was not allowed. It is not charged that the same was not made by Rawson, nor is it contended by anyone that it did not in fact exist in Rawson's account, and that the bank had not actually furnished him this amount of money in addition to the amount of money deposited by him in the bank.

Appellant P. E. Wagner asserts a claim against the defendant White Oak Stave Company for the amount of the Rawson notes, claiming that, as indorser of these notes, it is liable to the bank for the amount thereof, and in addition to the claim against it as indorser of these notes he claims an

other note of \$5,100 executed by the White Oak Stave Company to the bank. None of these claims were allowed by the commissioner. It appears that the notes now held by Wagner, receiver, were duly protested for nonpayment at their maturity, and due notice thereof given. They are all indorsed by the White Oak Stave Company, by H. H. Dean, its treasurer. These notes were all discounted by the bank in the regular course of business, and the proceeds thereof placed at the disposal of the White Oak Stave Company, which was in most instances placed to the credit of B. H. Rawson. The bank parted with the money in every instance, and, if there was any irregularity or invalidity in the same, no officer or agent of the bank had any knowledge thereof, except H. H. Dean, and, as before stated, his knowledge cannot be imputed to the bank. There appears to be no reason why this claim of Wagner, receiver, against the White Oak Stave Company, consisting of the \$5,100 note of said company, presented by him, as well as the notes of Rawson indorsed by it, should not be allowed against the said company.

The notes held by the Central Banking & Security Company, and the one set up by Drivers & Mechanics' National Bank, and which it is insisted are valid claims against the said White Oak Stave Company as indorser thereof, stand upon the same ground as the notes held by Wagner, receiver. All of these notes were originally discounted by the First National Bank of Sutton, and by it rediscounted to the present holders thereof. These notes were taken by these banks in the regular course of business. They bore the indorsement of the White Oak Stave Company by its duly authorized treasurer, and there was nothing upon the paper to indicate that there was any infirmity or invalidity therein. It is also shown, as in the case of the notes held by Wagner, receiver, that these notes were discounted by the White Oak Stave Company, and the proceeds thereof received by that company and paid over, if not entirely, at least to a large extent, to the credit of B. H. Rawson, and drawn out of the bank upon his checks. These notes were duly protested at maturity, and due notice given of their presentment for payment and protest for nonpayment. The exceptions to the commissioner's report refusing to follow them should have been sustained, and the same allowed as valid debts against the White Oak Stave Company.

The notes held by Armstrong, receiver of Farmers' Bank & Trust Company, were also asserted as a claim against the White Oak Stave Company, by reason of the fact that it was indorser on these notes. It

does not appear from the record in this case that these notes were ever presented for payment, and payment thereof refused, and due notice given of such presentment and protest for nonpayment. In fact, we have the original notes before us, they having been brought to this court upon a writ of certiorari, and it does not appear that they were ever protested for nonpayment, or that any notice was ever given of their presentment for payment, and that payment was refused. This being so, the White Oak Stave Company cannot be held liable as indorser thereon.

This leaves for consideration the claim of B. H. Rawson against the White Oak Stave Company, which was allowed by the circuit court. Rawson testifies that the White Oak Stave Company is indebted to him in the amount allowed. He shows by his evidence that he and Dean, as the managing officer of the White Oak Stave Company, had a settlement of their affairs before he entered upon the contract upon which he was working at the time of the failure, and it was found that the White Oak Stave Company owed him \$3,000 at that time. He then shows by items how the Stave Company became indebted to him after that time, making a total of something over \$29,000 that the Stave Company owed him. He swears that the Stave Company paid him, or that he drew checks which, together with all payments made to him by the Stave Company, amounted to a little more than \$22,000, leaving the amount allowed by the court re-

maining unpaid. It is contended by the appellants that this evidence of Rawson is overcome when it is shown that he actually drew out of the bank more than \$49,000 on checks signed by him, and which he does not now deny; that, instead of there being a balance remaining unpaid to him, he has been largely overpaid by the Stave Company. This contention leaves out of consideration, however, a fact that is shown in this case, that a large part of these checks, how many does not appear, were drawn by Rawson before he entered upon the contract upon which he says he drew \$22,000; and it also leaves out of consideration the fact that a large part of the money which Rawson drew out of the bank on his checks was raised on Rawson's own notes. The White Oak Stave Company could not use Rawson's notes to raise money with which to pay him, and charge him with the amount so raised on his notes, until it had paid the notes and relieved Rawson of liability thereon. There was no error in allowing this claim of Rawson.

It follows, from what we have said, that the decree complained of will be reversed in so far as it rejected the claims of appellants which we find to be valid debts against the defendants B. H. Rawson and White Oak Stave Company, and in all other respects it will be affirmed, and the cause remanded, with direction to allow the claims of appellants to the extent that they are herein held to be valid debts, with costs to the appellants.

UNITED STATES SUPREME COURT.

HENRY D. McDONALD, Plff. in Err.,
v.

F. A. MABEE.

(243 U. S. 90, 61 L. ed. 608, 37 Sup. Ct. Rep. 343.)

Constitutional law — due process — personal judgment against absent defendant.

A personal judgment for money against a person who has left the state not intending to return may not, consistently with due process of law, be rendered upon service by publication in a local newspaper, and such judgment is not merely voidable, but absolutely void.

For other cases, see Constitutional Law, II. b, 7, c, in Dig. 1-52 N. S.

(March 6, 1917.)

Note.—The question whether constructive or substituted service on a resident in an action in personam satisfies the requirement of due process of law is treated in the notes to *Pinney v. Providence Loan & Invest. L.R.A.1917F.*

ERROR to the Supreme Court of the State of Texas to review a judgment which reversed a judgment of the Court of Civil Appeals reversing a judgment of the County Court for Lamar County in defendant's favor in a suit upon a promissory note. Reversed.

The facts are stated in the opinion.

Mr. Henry D. McDonald, in propria persona, and Mr. A. P. Park, for plaintiff in error:

The doctrine announced in *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 586, applies to a judgment of a state court, rendered on service by publication only where there was no appearance, against a defendant claiming his residence in the same state, but who was sued and cited by publication as being absent from the state, the record showing that he was so absent when the suit was

Co. 50 L.R.A. 585; *Raher v. Raher*, 35 L.R.A. (N.S.) 292; and *Roberts v. Roberts*, L.R.A. 1917C, 1143. The last-mentioned note cites and analyzes *McDONALD v. MABEE*, above reported.

filed, when publication was made, and when the judgment was rendered,—in fact, so absent during the whole time from the institution of the suit to the rendition of the judgment.

Freeman v. Alderson, 119 U. S. 190, 30 L. ed. 374, 7 Sup. Ct. Rep. 165; *Riverside & D. River Cotton Mills v. Menafee*, 237 U. S. 189, 59 L. ed. 910, 35 Sup. Ct. Rep. 579; *Wilson v. Seligman*, 144 U. S. 41, 36 L. ed. 338, 12 Sup. Ct. Rep. 541; *Cooper v. Reynolds*, 10 Wall. 308, 19 L. ed. 931; *Galpin v. Page*, 18 Wall. 350, 21 L. ed. 959; *New York L. Ins. Co. v. Bangs*, 103 U. S. 438, 26 L. ed. 580; *De la Montanya v. De la Montanya*, 112 Cal. 101, 32 L.R.A. 82, 53 Am. St. Rep. 165, 44 Pac. 345; *Smith v. Grady*, 68 Wis. 215, 31 N. W. 477; *Bickerdike v. Allen*, 157 Ill. 95, 29 L.R.A. 782, 41 N. E. 740.

Mr. Joseph W. Bailey, for defendant in error:

One may be absent from the state and yet be a citizen of and resident in it, and therefore amenable to the process of its courts.

Horst v. Lightfoot, 103 Tex. 643, 132 S. W. 762.

The supreme court of Texas, in *Northcraft v. Oliver*, 74 Tex. 162, 11 S. W. 1121, makes clear that the validity, to support a purely personal judgment, of substituted service by publication upon the resident citizens of Texas, made in pursuance of the statutes of Texas, depends upon the question of residence abroad, and not of the acquisition of citizenship in the new domicile, thus following the facts in *Pennoy v. Neff*, 95 U. S. 714, 24 L. ed. 565, and recognizing the limitation upon the power of one state to send its process into another state and force the citizens of such other state to leave its territory and respond to proceedings against them in another state.

Even though a defendant were permanently a resident of another state, but was at the time within the state of Texas, and a transient person, he might be cited by publication so as to support a personal judgment against him.

Taylor v. Lide, — Tex. —, 7 S. W. 58.

Mr. Justice Holmes delivered the opinion of the court:

This is a suit upon a promissory note. The only defense now material is that the plaintiff had recovered a judgment upon the same note in a previous suit in Texas which purported to bind the defendant personally as well as to foreclose a lien by which the note was secured. When the former suit was begun, the defendant, Mabee, was domiciled in Texas, but had left the state with intent to establish a home elsewhere, his L.R.A.1917F.

family, however, still residing there. He subsequently returned to Texas for a short time and later established his domicile in Missouri. The only service upon him was by publication in a newspaper once a week for four successive weeks after his final departure from the state, and he did not appear in the suit. The supreme court of the state held that this satisfied the Texas statutes, and that the judgment was a good personal judgment, overruling the plaintiff's contention that to give it that effect was to deny the constitutional right to due process of law. — Tex. —, 175 S. W. 676.

The foundation of jurisdiction is physical power, although in civilized times it is not necessary to maintain that power throughout proceedings properly begun, and although submission to the jurisdiction by appearance may take the place of service upon the person. *Michigan Trust Co. v. Ferry*, 228 U. S. 346, 353, 57 L. ed. 867, 874, 33 Sup. Ct. Rep. 550; *Pennsylvania F. Ins. Co. v. Gold Issue Min. & Mill. Co.* decided to-day [243 U. S. 93, 61 L. ed. 610, 37 Sup. Ct. Rep. 344]. No doubt there may be some extension of the means of acquiring jurisdiction beyond service or appearance, but the foundation should be borne in mind. Subject to its conception of sovereignty even the common law required a judgment not to be contrary to natural justice. *Douglas v. Forrest*, 4 Bing. 686, 700, 701, 120 Eng. Reprint, 933, 1 Moore & P. 663, 6 L. J. C. P. 157, 29 Revised Rep. 695; *Becquet v. MacCarthy*, 2 Barn. & Ad. 951, 959, 109 Eng. Reprint, 1306; *Maubourquet v. Wyse, Jr.* Rep. 1 C. L. 471, 481. And in states bound together by a Constitution and subject to the 14th Amendment, great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact. *Baker v. Baker, E. & Co.* Jan. 8, 1917 [242 U. S. 394, 61 L. ed. 386, 37 Sup. Ct. Rep. 152].

There is no dispute that service by publication does not warrant a personal judgment against a nonresident. *Pennoy v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Riverside & D. River Cotton Mills v. Menefee*, 237 U. S. 189, 59 L. ed. 910, 35 Sup. Ct. Rep. 579. Some language of *Pennoy v. Neff* would justify the extension of the same principle to absent parties, but we shall go no farther than the precise facts of this case require. When the former suit was begun, Mabee, although technically domiciled in Texas, had left the state, intending to establish his home elsewhere. Perhaps in view of his technical position and the actual presence of his family in the state, a summons left at his last and usual place of abode would have been enough. But it appears to us that an advertisement in a local

newspaper is not sufficient notice to bind a person who has left a state, intending not to return. To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done. We repeat, also, that the ground for giving subsequent effect to a judgment is that the court rendering it had acquired power to carry it out; and that it is going to the extreme to hold such power gained even by service at the last and usual place of abode.

Whatever may be the rule with regard to decrees concerning status or its incidents (*Haddock v. Haddock*, 201 U. S. 562, 569, 632, 50 L. ed. 867, 869, 895, 26 Sup. Ct. Rep. 525, 5 Ann. Cas. 1), an ordinary personal judgment for money, invalid for want of service amounting to due process of law, is as ineffective in the state as it is outside of it (201 U. S. 567, 568). If the former judgment had been sued upon in an another state by the plaintiff, we think that the better opinion would justify a denial of

its effect. If so, it was no more effective in Texas. *De la Montanya v. De la Montanya*, 112 Cal. 101, 32 L.R.A. 82, 53 Am. St. Rep. 165, 44 Pac. 345; *Boring v. Penniman*, 134 Cal. 514, 66 Pac. 739.

The usual occasion for testing the principle to be applied would be such as we have supposed, where the defendant was denying the validity of the judgment against him. But the obligations of the judgment are reciprocal, and the fact that here the defendant is asserting and the plaintiff denying its personal effect does not alter the case. *Whittier v. Wendell*, 7 N. H. 257; *Rangely v. Webster*, 11 N. H. 299; *Middlesex Bank v. Butman*, 29 Me. 19. The personal judgment was not merely voidable, as was assumed in the slightly different case of *Henderson v. Staniford*, 105 Mass. 504, 7 Am. Rep. 551, but was void. See *Needham v. Thayer*, 147 Mass. 536, 18 N. E. 429. In *Henderson v. Staniford* the absent defendant intended to return to his state.

Judgment reversed.

ALABAMA SUPREME COURT.

BANK OF GUNTERSVILLE, Appt.,
v.

EARL M. CRAYTER.

(— Ala. —, 75 So. 7.)

Bank — set-off — notes and fiduciary fund.

A bank cannot, after the death of the depositor, set off, as against the true owner, funds deposited by a loan agent in his own name with the word "agent" appended thereto, upon unmatured notes executed to it by the depositor in his own name, for money lent him.

For other cases, see *Banks*, IV. a, 2, in *Dig.* 1-52 N. S.

(April 5, 1917.)

APPEAL by defendant from a decree of the Chancery Court for Marshall County in complainant's favor in a proceeding to establish title to a fund deposited in the defendant bank by complainant's agent. Affirmed.

Note. — The liability of a bank for failure to prevent misappropriation of funds by fiduciary, including the use of the deposit to pay the fiduciary's personal debt to the bank, is discussed in the note to *Allen v. Puritan Trust Co.* L.R.A.1915C, 518; and see later cases, *United States Fidelity & G. Co. v. United States Nat. Bank*, L.R.A. 1916E, 610, and *Bischoff v. Yorkville Bank*, L.R.A.1916F, 1059. L.R.A.1917F.

Statement by Mayfield, J.:

This is a contest in chancery between the appellant bank and the appellee as to moneys or funds deposited in the bank by one J. L. Burke, an agent of appellee, and who was also a debtor of, and depositor in, the appellant bank.

The funds were deposited by Burke in the bank, the deposit being entered in the name of "J. L. Burke, Agent," and a part thereof was drawn out on checks signed, "J. L. Burke, Agent," and these checks or the proceeds thereof were paid to appellee.

There is no dispute that the deposited moneys belonged to appellee, and that they were sent to Burke, as an agent, to be lent out for the benefit of appellee, nor that some of the funds were so lent out and the proceeds paid to appellee.

While it is not shown that the bank had any direct notice that the specified deposits were the funds of appellee, it is shown that the bank knew that Burke was a loan agent, and was lending the moneys of his clients, and, as such agent, was making deposit of the funds received by him in such capacity, in the appellant bank.

Burke was a debtor of the bank to the amount of \$550, as evidenced by his two notes, one for \$300, due November 12, 1914, on which one H. C. Henderson was surety, and one for \$250, due November 28, 1914, on which one Gordon Gilbreath was surety. Burke died on the 4th day of October, 1914, before either note was due; and on the 20th day of October, 1914, the bank applied enough of the funds deposited by J. L. Burke, agent, to pay these notes.

On the 28th day of October, 1914, eight days after the bank had thus applied the funds on deposit to the payment of the two notes, but before either note was due, appellee gave the bank written notice that the funds so deposited were the money of appellee.

The chancellor decided that the application of the funds to the payment of the notes was wrongful, and that, as between the parties, the funds belonged to appellee; and respondent appeals.

Messrs. John A. Lusk & Son for appellant.

Mr. D. Isbell for appellee.

Mayfield, J., delivered the opinion of the court:

We are of the opinion that the chancellor found and decreed correctly.

The bank was clearly chargeable with notice that the funds deposited by Burke were deposited by him in his capacity of agent for another, though the account was entered simply as that of "J. L. Burke, Agent."

The strict rules of pleading or of commercial law should not be applied to a proceeding like this in a court of equity, where no bona fide purchaser is concerned. The bank either knew absolutely or was chargeable with notice that the moneys or funds so deposited by Burke were not the property of Burke, but that of some principal or client of his; and the notice was such that, if the bank had followed it up with due diligence, the inquiry would have elicited the truth of the matter. At any rate, the bank did so ascertain the truth before the notes were due, and before it could rightly apply even the funds of the bank to the payment of such notes. The bank could not have recovered a cent of Burke on these notes had he been living when it so applied the funds to their payment, because the notes were not due; and if no recovery could be had by a suit, assuredly a court of equity will not permit the bank to collect its notes before due, and after the death of the maker, by paying them out of funds belonging to other parties. Whatever fault there was in the failure to show by the deposit entries the real ownership of the funds was either that of the bank receiving the deposit, or of the agent making the deposit, and not that of appellee except in so far as he was bound by the act of his agent. The bank, however, L.R.A.1917F.

knew that he was the agent of someone, and was not making the deposit for himself; and there is no evidence to show that the bank parted with anything of value on account of the deposit.

The bank evidently acted on the theory that a bank has a general lien on the moneys, funds, or general deposits of its customers coming into its hands in the due course of business, as for any balance due it by the particular customer as for notes or bills past due, overdrafts, etc. No such lien exists, however, as to special deposits, except as to the particular special matter or dealing. *Lehman's Case*, 64 Ala. 567; *Wynn's Case*, 168 Ala. 469, 53 So. 228; *Batson's Case*, 179 Ala. 497, 60 So. 313. See numerous cases cited in note in 111 Am. St. Rep. 419.

The reason given for the laws creating the lien is that the bank gives credit to the depositor by allowing overdrafts, or permitting notes or bills to become overdue, on the faith of the general deposit then in its hands, which it can at any time apply to the payment of its debt then past due. To justify the lien, there must be given credit upon the faith of the deposit then on hand, and it must be a general deposit, and not a special one. In such cases, if the debt to the bank is past due, it may, without the consent of the depositor, apply a general deposit to the past-due indebtedness to it. If the bank is sued by a depositor as for a general deposit, or for failure to pay a check when it has funds in hand from which the order could be paid, it may set off a debt then due it by the depositor; but it cannot, without the consent of the depositor, apply or set off a fund as against a debt not then due. *Birmingham Nat. Bank v. Mayer*, 104 Ala. 634, 16 So. 520.

This rule, however, does not apply to cases where a trustee, agent, or broker deposits funds of his beneficiary, or principal, and the bank has, or is chargeable with, actual notice of the trust character of the deposit. Nor has the bank such a lien upon funds deposited for a special purpose, if it has notice or is chargeable with notice of such special purpose.

We feel perfectly sure that the bank had no right to apply the deposit in question as it is shown it did; and the decree of the chancellor is in all things affirmed.

Anderson, Ch. J., and Somerville and Thomas, JJ., concur.

CALIFORNIA SUPREME COURT.
(Department No. 2.)

J. BOAS, Appt.,

v.

F. T. KNEWING, Respnt.

(— Cal. —, 165 Pac. 690.)

Election of remedies — notice of replevin suit — waiver of action on notes.

Notice by the indorsee of notes given for the purchase price of an automobile under a contract requiring the purchaser to return the machine to the seller in case any note is not paid at maturity, that if a matured note is not paid by a certain time he will replevin the car, followed by a surrender of the car to the vendor, precludes a suit on the notes.

For other cases, see Election of Remedies, II. in Dig. 1-52 N. S.

(June 1, 1917.)

APPEAL by plaintiff from a judgment of the Superior Court for the City and County of San Francisco in defendant's favor in an action brought to recover the amount alleged to be due on certain promissory notes. Affirmed.

The facts are stated in the opinion.

Mr. Samuel M. Samter, for appellant:

A mere attempt to collect the price would not bar an action to recover the property.

American Box Mach. Co. v. Zentgraf, 45 App. Div. 522, 61 N. Y. Supp. 417; 15 Cyc. 260; *Matthews v. Lucia*, 55 Vt. 308; *E. E. Forbes Piano Co. v. Wilson*, 144 Ala. 586, 39 So. 645; *Thomason v. Lewis*, 103 Ala. 426, 15 So. 830; *Root v. Lord*, 23 Vt. 568; *Arctic Ice Mach. Co. v. Armstrong County Trust Co.* 112 C. C. A. 458, 192 Fed. 114; *Bierce v. Hutchins*, 205 U. S. 340-346, 51 L. ed. 828-833, 27 Sup. Ct. Rep. 524; *Miller, Conditional Sales*, p. 63; *Appleton v. Norwalk Library Corp.* 53 Conn. 4, 22 Atl. 681; *Mechem, Sales*, § 625; *Beach's Appeal*, 58 Conn. 464, 20 Atl. 475; *Geist v. Stier*, 134 Pa. 216, 19 Atl. 505; *Finlay v. Ludden & B. Southern Music House*, 105 Ga. 264, 31 S. E. 180; *Matteson v. Equitable Min. & Mill Co.* 143 Cal. 436, 77 Pac. 144; *Liver v. Mills*, 155 Cal. 459, 101 Pac. 299; *Muncy v. Brain*, 158 Cal. 300, 110 Pac. 945.

Mr. H. U. Brandenstein, for respondent:

When the vendor retakes the chattel, the

vendee loses all property therein, whether general or special.

Plaintiff was not entitled both to the purchase price and the property.

Parke & L. Co. v. White River Lumber Co. 101 Cal. 37, 35 Pac. 442; *Holt Mfg. Co. v. Ewing*, 109 Cal. 353, 42 Pac. 435; *Muncy v. Brain*, 158 Cal. 301, 110 Pac. 945; *George J. Birkel Co. v. Nast*, 20 Cal. App. 651, 129 Pac. 945; *Elsom v. Moore*, 11 Cal. App. 377, 105 Pac. 271; *Van Allen v. Francis*, 123 Cal. 474, 56 Pac. 339; *Waltz v. Silveria*, 25 Cal. App. 717, 145 Pac. 169; *Manson v. Dayton*, 82 C. C. A. 588, 153 Fed. 256; *Pease v. Teller Corp.* 22 Idaho, 807, 128 Pac. 981; *Madison River Livestock Co. v. Osler*, 39 Mont. 244, 133 Am. St. Rep. 558, 102 Pac. 325; *Edmead v. Anderson*, 118 App. Div. 16, 103 N. Y. Supp. 369; *Taylor v. Esselstyn*, 62 Misc. 633, 150 N. Y. Supp. 1105; *Nashville Lumber Co. v. Robinson*, 91 Ark. 319, 121 S. W. 350; *C. W. Raymond Co. v. San Kahn*, 124 Minn. 426, 51 L.R.A. (N.S.) 251, 145 N. W. 164; *Hine v. Roberts*, 48 Conn. 267, 40 Am. Rep. 170; *Kelley Springfield Road Roller Co. v. Schlimme*, 220 Pa. 413, 123 Am. St. Rep. 707, 69 Atl. 867; *Whitney v. Abbott*, 191 Mass. 59, 77 N. E. 524; *Bailey v. Hervey*, 135 Mass. 172; *Richards v. Schreiber, C. & W. Co.* 98 Iowa, 422, 67 N. W. 569; *Alden v. W. J. Dyer & Bro.* 92 Minn. 134, 99 N. W. 784; *Fredrickson v. Schmittroth*, 77 Neb. 722, 110 N. W. 653, 112 N. W. 564; *Davis v. Millings*, 141 Ala. 378, 37 So. 737; *Perkins v. Grobben*, 116 Mich. 172, 39 L.R.A. 815, 74 N. W. 469; *Keystone Mfg. Co. v. Cassellius*, 74 Minn. 115, 76 N. W. 1028; *Laclede Power Co. v. Ennis Stationery Co.* 79 Mo. App. 302; *White v. A. W. Gray's Sons*, 96 App. Div. 154, 89 N. Y. Supp. 481; *Earle v. Robinson*, 91 Hun. 363, 38 N. Y. Supp. 178; *Seanor v. McLaughlin*, 165 Pa. 150, 32 L.R.A. 467, 30 Atl. 717; *Hollenberg Music Co. v. Bankston*, 107 Ark. 337, 154 S. W. 1139; *McBryan v. Universal Elevator Co.* 130 Mich. 111, 97 Am. St. Rep. 453, 89 N. W. 683; *Poirier Mfg. Co. v. Kitts*, 18 N. D. 558, 120 N. W. 558; *Cooper v. Payne*, 111 App. Div. 785, 97 N. Y. Supp. 863; *Frisch v. Wells*, 200 Mass. 429, 23 L.R.A. (N.S.) 144, 86 N. E. 776; *Bell v. Old*, 88 Ark. 99, 113 S. W. 1023; *Butler v. Dodson*, 78 Ark. 569, 94 S. W. 703; *Crompton v. Beach*, 62 Conn. 25, 18 L.R.A. 187, 36 Am. St. Rep. 323, 25 Atl. 446; *Smith v. Barber*, 153 Ind.

Note.—The effect of the retaking of the property by the seller on the rights and remedies of the parties to a contract of conditional sale is discussed in the annotation following *A. F. Chase & Co. v. Kelly*, L.R.A.1916A, 915. The converse question whether bringing an action for the purchase price is a waiver by the vendor of the title L.R.A.1917F.

and remedy clauses in a conditional-sale contract is discussed in the notes to *Frisch v. Wells*, 23 L.R.A. (N.S.) 144, and *Francis v. Bohart*, L.R.A.1916A, 925; and see later cases, *Filers Music House v. Douglass*, L.R.A.1916E, 613, and *Ratchford v. Cayuga County Cold Storage & Warehouse Co.* L.R.A.1916E, 615.

322, 53 N. E. 1014; *Orcutt v. Rickenbrodt*, 42 App. Div. 238, 59 N. Y. Supp. 1008; *Thompson Co. v. Murphine*, 79 Wash. 672, 140 Pac. 1073; *Stewart & H. Drug Co. v. Reed*, 74 Wash. 401, 133 Pac. 577; *C. W. Raymond v. San Kahn*, 124 Minn. 426, 51 L.R.A.(N.S.) 251, 145 N. W. 164.

Melvin, J., delivered the opinion of the court:

The plaintiff appeals from the judgment on the judgment roll.

The suit was by J. Boas upon three certain promissory notes, made payable to H. O. Harrison Company. Each of these notes was dated August 30, 1913, and bore interest at the rate of 6 per cent per annum. The first one, which was for the principal sum of \$500, was payable one month after date; the second, for \$500, payable two months after date; and the third, for \$1,000, payable four months after date. The defendant pleaded that the notes were of a series of four given for the purchase at a conditional sale of an automobile for the price of \$2,500, in accordance with a certain written agreement, which was pleaded, and it was alleged that, following the terms of said contract, the defendant had restored the property, and that the consideration for the notes had thus ceased to have any existence.

The facts as disclosed by the findings are as follows:

By the written agreement of even date with the three notes pleaded and a fourth for \$500 and interest, payable five months after date, defendant promised to pay to the order of H. O. Harrison Company the sums represented by said notes. The contract recites that the notes are given upon the consideration that the Harrison Company has promised upon payment thereof, principal and interest, at maturity (time being of the essence of the contract), to sell and transfer to F. T. Knewing a certain described automobile, which was on the day of the execution of the contract and notes "intrusted to the care" of said Knewing. It is admitted and agreed by the terms of the contract that the said property so intrusted is the property of H. O. Harrison Company, to remain "in them until they shall make the aforesaid sale and transfer" after payment of the principal and interest of the notes. By this instrument Knewing agrees to return the automobile to H. O. Harrison Company in good order "in case any or all of the above-mentioned notes remain unpaid at maturity." On September 4, 1913, the plaintiff discounted the four notes and they, with the contract, were duly indorsed and assigned to him. At the time of the filing of this suit (January 3, 1914) L.R.A.1017F.

the date of maturity of the fourth note had not arrived.

On maturity of the first note, Mr. Knewing, who had been notified of the transfer of the paper to plaintiff, called upon the latter and requested an extension of said note, which was granted, and on October 3, 1913, Mr. Boas wrote to Mr. Knewing, informing him that the time of payment of said note for \$500 had been extended until the 10th day of October, 1913. On October 11th plaintiff notified defendant that unless the note was paid by the 14th of that month, at 10 o'clock A. M., he would replevin the car. On the latter date defendant called upon H. O. Harrison Company, requested a further extension, was told that the notes and contract were owned and controlled by plaintiff, and thereupon, before the hour of 10 o'clock A. M., defendant left the automobile in the garage at the rear of the office of H. O. Harrison Company, and separated from said office by a partition. On the following day, upon the discovery of the car in the garage, H. O. Harrison Company notified plaintiff that it was there. On the 15th of October plaintiff received a letter from defendant, dated the 14th, expressing regret that the latter was unable to meet the note and interest. The letter contained also these words: "As I wished to save you the trouble and myself the inconvenience of your replevining the car which I held under lease from Harrison Company, I this morning returned the car to them at their place of business at Van Ness avenue."

In his reply Mr. Boas called attention to the fact that the notes had been discounted and that the return of the car did not recover for him the money so paid. "Some settlement of these notes must be made by you at once," he wrote; "otherwise we will be compelled to hand them to our attorney for collection."

Upon the above facts, as found substantially by the court, the conclusions of law and judgment were that plaintiff take nothing and that defendant recover costs.

Appellant interprets that part of the contract of sale, providing for the return of the automobile in case any or all of the notes remain unpaid at maturity, as a provision inserted for the sole benefit of the vendor, and as being in lieu of the usual provision in similar contracts permitting the seller to retake the possession of the chattel which is the subject of a sale on default of the vendee. The vendor (according to appellant's argument) could either enforce or waive the return of the automobile, and the buyer, he says, could not force on the seller an election to sue for the price or for the return of the chattel. But under such interpretation of the contract the vendor's

assignee by threat to replevin had indicated his election to take the car on the vendee's default rather than to waive the right of resuming possession and to sue for the price. Since plaintiff had thus indicated his election, the vendee was not bound to await an action which could only result in the recaption of the subject of the conditional sale and the super-added burden of costs. He returned the automobile to H. O. Harrison Company just as he had agreed to do in case any or all of the notes should remain unpaid at maturity. This return was not repudiated by the vendor's assignee, and the automobile at the time of the commencement of the action was still in the garage belonging to the original vendor. It has been suggested that the retaking of the property under the terms of an agreement of conditional sale does not, in and of itself, terminate the contract. *Liver v. Mills*, 155 Cal. 459, 101 Pac. 299. But here there was default on the part of the vendee, followed by his voluntary surrender, on de-

mand, of the chattel. Before resuming custody of the property, the vendor could either sue to recover it or for the purchase price, but he was not entitled to the property and the price also. *Parke & L. Co. v. White*, *River Lumber Co.* 101 Cal. 37, 35 Pac. 442; *Holt Mfg. Co. v. Ewing*, 109 Cal. 353-356, 42 Pac. 435; *Muncy v. Brain*, 158 Cal. 301-305, 110 Pac. 945; *Rayfield v. Van Meter*, 120 Cal. 416-419, 52 Pac. 666; *Van Allen v. Francis*, 123 Cal. 474-480, 56 Pac. 339. It was not necessary that election should be manifested by suit. Indeed, in the *Holt Case*, the seller's election to surrender title and depend upon payment of the price agreed upon was manifested by the presentation of a claim against the estate of Ewing. So here, the demand for the return of the automobile, when complied with, took away the right of Boas to sue for the purchase price.

The judgment is affirmed.

We concur: **Henshaw, J.; Lorigan, J.**

ILLINOIS SUPREME COURT.

CHARLES W. FLACK et al.

v.

JOHN WARNER et al., Plffs. in Err.

(278 Ill. 368, 116 N. E. 202.)

Contract — to control disposition of property — public policy.

1. A contract by relatives of a property owner to pay an attorney for services in controlling and advising the property owner with respect to the disposition of his property, so as to secure for such relatives interests in the property, is against public policy.

For other cases, see Contracts, II. c, 1, in Dig. 1-52 N. S.

Partition — equity — rights under illegal contract.

2. Attorneys who, under contract with relatives of a property owner for legal services in controlling and advising him in respect to the disposition of his property so as to secure interests in the property for such relatives, procure from him a deed of trust providing for such relatives, cannot maintain a bill in equity to partition the trust property after the owner's decease, to secure for themselves the compensation provided in their contract, since the contract is void as against public policy.

For other cases, see Contracts, II. g, 2, in Dig. 1-52 N. S.

(April 19, 1917.)

Note. — As to validity of contract to influence, by apparently disinterested advice, the conduct of a third person to whom the promisor owes no contractual duty, see annotation following this case, post, 468. L.R.A.1917F.

ERROR to the Circuit Court for McDonough County to review a decree in favor of plaintiffs in a suit for the partition of certain real estate and for the distribution of certain specified personal property. Reversed.

The facts are stated in the opinion.

Messrs. Millard R. Powers and James L. Clark, for plaintiffs in error:

The pretended title of the defendants in error, having grown out of an unconscionable contract and one contrary to public policy, and being predicated upon conveyances from their client obtained from him while acting as his attorneys about the specific property, for an inadequate consideration, is void.

Story, Eq. Jur. §§ 265, 310-313; *Jennings v. McConnell*, 17 Ill. 148; *Zeigler v. Hughes*, 55 Ill. 288; *Alwood v. Mansfield*, 59 Ill. 496; *Morrison v. Smith*, 130 Ill. 304, 23 N. E. 241; *Roby v. Colehour*, 135 Ill. 300, 25 N. E. 777; *Elmore v. Johnson*, 143 Ill. 513, 21 L.R.A. 366, 36 Am. St. Rep. 401, 32 N. E. 413; *Ross v. Payson*, 160 Ill. 349, 43 N. E. 300; *Willin v. Burdette*, 172 Ill. 117, 49 N. E. 1000; *Robinson v. Sharp*, 201 Ill. 86, 66 N. E. 209; *Cassem v. Heustis*, 201 Ill. 208, 94 Am. St. Rep. 160, 66 N. E. 283; *Mansfield v. Wallace*, 217 Ill. 622, 75 N. E. 682.

Messrs. Chipperfield & Chipperfield, C. G. Gumbart, and E. D. Grigsby, for defendants in error:

The trust deed was not obtained by duress, fraud, or undue influence.

Brower v. Callender, 105 Ill. 88; *Hagan v. Waldo*, 168 Ill. 646, 48 N. E. 89; *Rendleman v. Rendleman*, 156 Ill. 573, 41 N. E.

223; Kertling v. Hilton, 152 Ill. 663, 38 N. E. 941; Huston v. Smith, 248 Ill. 398, 94 N. E. 63; Carlson v. Koerner, 129 Ill. App. 172; Hintz v. Hintz, 222 Ill. 248, 78 N. E. 585; Sears v. Vaughan, 230 Ill. 572, 82 N. E. 881; Hurd v. Reed, 260 Ill. 154, 102 N. E. 1048; Baldwin v. Murphy, 82 Ill. 485; Stover v. Mitchell, 45 Ill. 217; Swanson v. Ijams, 63 Ill. 165; Griffin v. Griffin, 125 Ill. 436, 17 N. E. 782; Duncan v. Duncan, 203 Ill. 461, 67 N. E. 763; Massey v. Huntington, 118 Ill. 88, 7 N. E. 269; Treloar v. Hamilton, 225 Ill. 106, 80 N. E. 75; Siegel v. Andrews & Co. 181 Ill. 356, 54 N. E. 1008.

The title of complainants is sufficient to maintain partition. Contracts between an attorney and client are voidable, not void. Hence title passed.

Herr v. Payson, 157 Ill. 252, 41 N. E. 732; Dyrenforth v. Palmer Pneumatic Tire Co. 240 Ill. 35, 88 N. E. 290; Rolfe v. Rich, 149 Ill. 437, 35 N. E. 352.

Petition for rehearing.

The statement in Pomeroy's Equity Jurisprudence upon which the court relies is not supported by the authority cited.

Debenham v. Ox, 1 Ves. Sr. 276, 27 Eng. Reprint, 1029; Higgins v. Hill, 56 L. T. N. S. 425; Chesterfield v. Janssen, 2 Ves. Sr. 125, 28 Eng. Reprint, 82, 1 Atk. 301, 26 Eng. Reprint, 191, 18 Eng. Rul. Cas. 289; Menzies v. Menzies, 24 Eng. Rul. Cas. 719; 12 R. C. L. 231.

Where a contract contains distinct engagements, some of which are legal and others illegal, performance of those that are legal may be enforced.

Corcoran v. Lehigh & F. Coal Co. 138 Ill. 390, 28 N. E. 759; Granat v. Kruse, 114 Ill. App. 488; Whitbeck v. Ramsey, 74 Ill. App. 524.

Messrs. Charles W. Flack and John C. Lawyer in propria persona.

Carter, J., delivered the opinion of the court:

This was a bill in chancery filed by defendants in error October 29, 1915, in the circuit court of McDonough county, asking for the partition of certain real estate in said county and the distribution of certain specified personal property. Several of the plaintiffs in error answered, denying that defendants in error were entitled to any part of the relief prayed for, and one of them also filed a cross bill. Other persons not parties to this writ of error asked leave to file an intervening petition, which was denied. After a hearing before a master in chancery and report by him, a decree was entered in favor of defendants in error, granting the relief prayed for. From that decree this writ of error was sued out.

Jonas R. Harris, a farmer residing in L.R.A.1917F.

said county, died in 1910, intestate, leaving his widow, Mary M. Harris, but no children or descendants of children. The widow, Mary M. Harris, received from his estate approximately \$100,000, partly in real estate and partly in personal property. Shortly after his death she made a will providing for the disposition of her property, making several bequests in favor of certain intimate personal friends who were not relatives, but leaving most of her property to some of her brothers and sisters, nephews and nieces. About this time certain of her relatives went to defendants in error, who are attorneys and copartners, to consult with reference to the property of Mrs. Harris and ascertain what means they should take to obtain a share for themselves. As the result of this conference, John S. Warner, a brother of Mrs. Harris, for himself and for John Warner, a nephew of Mrs. Harris, entered into a written contract with defendants in error whereby the latter engaged to render all legal services necessary or that might be required in controlling or advising with Mrs. Harris, or in prosecuting any suit or suits for the appointment of a conservator for Mrs. Harris, or the setting aside of her will or any other legal document, or prosecuting any legal proceeding that might be necessary to secure the rights and interests of said John S. Warner and John Warner in and to Mrs. Harris's property, whether such proceeding might be taken before or after her death, the compensation of defendants in error to be one third of whatever might be thus obtained from the estate of Mrs. Harris for said John S. Warner and John Warner. Thereafter, at various times, a sister, Mrs. Eliza Davis, another brother, Ralph Warner, and various nieces and nephews, Florence Sleeter, A. Warner, Henry Warner, and Jacob Warner, signed similar contracts with defendants in error, except that the interest assigned by each of the last-named parties was one fifth instead of one third. The first one of these contracts was dated November 19, 1910. The last one was dated November 22, 1910, though Jacob Warner's, while dated November 22d, appeared to have been actually signed by him two or three weeks later.

On November 25, 1910, Mrs. Harris, through the persuasion and advice of the defendants in error and others, signed a deed of trust conveying to James C. Hammond all her property, to hold in trust for her benefit during her lifetime and after her death for the use of John S. Warner and other brothers and sisters and of certain nephews and nieces and two persons not related to her. On August 22, 1912, John S. Warner and his wife by warranty deed conveyed all interest in the real estate described

in said deed of trust to defendants in error. Said Warner and his wife also on the same day transferred and assigned to said defendants in error by another document all their right, title, and interest in and to all the real and personal property, of every kind and nature, that they might acquire or become entitled to under said deed of trust, or which said John S. Warner might inherit from Mary M. Harris. John S. Warner died prior to the death of Mrs. Harris, leaving him surviving his widow, Mary C. Warner, and two sons, Charles H. Warner and John C. Warner, all three of whom thereafter asked leave to file an intervening petition in this cause for the purpose of defending their interests in said property claimed by defendants in error, and were refused by the trial court the right so to do.

On November 21, 1910, John S. Warner, Ralph Warner, and John M. Davis signed a petition to the county court of McDonough county, alleging that Mary M. Harris was a distracted and feeble-minded person, who, by reason of her unsoundness of mind, was incapable of managing and caring for her estate, and praying that James C. Hammond, or some other fit person, be appointed her conservator. It appears that the defendants in error were the attorneys who prepared this petition and filed the same in the county court. Immediately after notice had been served on her of the filing of this petition Mrs. Harris consulted with defendant in error Flack to see if the contract she had already made with James C. Hammond with reference to the care and management of the property would not be satisfactory to her relatives. Attorney Flack told her, after seeing the contract, that he did not think it would be satisfactory, but that he thought he could prepare a document that would be. With the assistance of Attorney George D. Tunnicliff Flack prepared the deed of trust here in question, and they presented it to Mrs. Harris for her approval. She objected to certain parts, and other conditions were added. After these changes were made the evidence shows that she, with reluctance, signed and acknowledged the deed of trust and it was delivered to the trustee, James C. Hammond. On February 4, 1911, Mrs. Harris served notice on Hammond that she had canceled and forever terminated said deed of trust and his power to act thereunder. On August 30, 1911, she executed a paper, wherein she stated that she ratified in full the authority granted to said trustee under said deed of trust, and annulled the cancellation instrument of February 4, 1911. The said deed of trust provided for the management of her property by the trustee during her lifetime, the income to be used for L.R.A.1917F.

her care and the payment of taxes and for certain other objects, and upon her death the specified cestuis que trust were to become entitled to the property in certain stated proportions or amounts. Most of the cestuis were the same persons as were named as legatees under her will and codicil, but the amounts received by several of them under said deed of trust differed from the amounts left them under the will and codicil. Lizzie L. Gibson, Jesse Matheny, and the children of Alfred Warner and Jacob Warner, who are among the parties suing out this writ of error, would each receive more under the will and codicil than under the deed of trust, and, as we understand the record, the children of Eliza Davis, who has died since she entered into the contract with defendants in error, would also receive more under the will than under the deed of trust.

The decree in this case finds the deed of trust from Mrs. Harris to James C. Hammond was a valid and binding instrument, and was not obtained by duress, undue influence, or fraudulent representations, as charged in the answer of plaintiffs in error. It further found that under said deed of trust John S. Warner became a beneficiary to the extent of an undivided one seventh in said trust estate in both real and personal property, and that his interest in said real estate had been conveyed by him and his wife by warranty deed to defendants in error, and that all his other interests under said deed of trust in the real or personal property had been assigned and transferred by him and his wife to said defendants in error; that upon the death of said Mary M. Harris the beneficial interest created by said deed of trust for John S. Warner vested, under the Statute of Uses, in defendants in error; that plaintiff in error Jacob Warner, who filed the cross bill herein, became entitled to one forty-ninth interest in the property conveyed by said deed of trust, but that said interest was subject to the contract he executed with defendants in error, which provided that they should be entitled to one fifth of all his interest derived under said deed of trust. The decree further found that Ralph Warner obtained an undivided one seventh part in the property of Mrs. Harris under said deed of trust; that Alice Harris, Delphine Warner Baker, Mary Warner, Harold Warner, and Carl Warner each received a one thirty-fifth part in Mrs. Harris's property, and John Warner an undivided one-seventh part; that Jeanette Warner Simpson received an undivided one twenty-first part, and Lizzie Gibson an undivided two twenty-first parts; that Arthur Warner, Jacob Warner, Henry Warner, Sherman Warner, Florence Sleeter, Anna

Bryan, and Adella Smith each received a one forty-ninth part; that Clara Davis Harris and Thomas M. Davis each received an undivided one thirty-fifth part in the said property, and Meredith G. Davis an undivided three thirty-fifth part. The decree further found that the interests of Ralph Warner, Thomas M. Davis, Clara Davis Harris, Meredith G. Davis, Florence Sleeter, Henry Warner, Arthur Warner, and Jacob Warner were each subject to the said contracts conveying a one-fifth part of their respective interests to defendants in error, Charles W. Flack and John C. Lawyer; and the decree further found that the real estate in question covered by said deed of trust should be partitioned and divided in accordance with the interests so found, and that the trustee, James C. Hammond, should be directed to distribute the personal property in his possession and custody and held by him in trust under said deed in accordance with said interests. The decree sets forth the interests of the respective owners, and finds that the shares and portions of Ralph Warner, Clara D. Harris, Thomas M. Davis, Meredith G. Davis, Florence Sleeter, Henry Warner, Arthur Warner, and Jacob Warner are each subject to the said contracts, which convey and assign to defendants in error the undivided one-fifth part or portion of the respective shares, and said interests so conveyed and assigned are decreed to be vested in said defendants in error.

Plaintiffs in error contend in this court that the deed of trust was invalid because it was procured through undue influence and duress from Mrs. Harris. They further contend that defendants in error are estopped from setting up rights under the said deed of trust because they had procured a petition to be filed in the county court of said McDonough county, alleging that Mrs. Harris was of unsound mind. The conclusion that we have reached on other questions in this case renders it unnecessary for us to consider or decide these questions.

The contracts by which the defendants in error undertook to render legal services in controlling or advising with Mrs. Harris to prevent her from disposing of her property so as to disinherit John S. Warner or the other relatives who signed such contracts, and to secure to them certain rights and interests in her property before her death, were all contrary to public policy. Such contracts are necessarily secret and tend to encourage artifices and improper attempts to control the exercise of free judgment and will of owners of property and their right to dispose of it according to their own judgment. They tend to interfere with the natural rights and interests of third parties, L.R.A.1917F.

and offer an incentive to exert, for a money consideration, undue and improper influences, and therefore are contrary to sound morality, and calculated to be prejudicial to the public welfare. 1 Story, Eq. Jur. 13th ed. § 265; 2 Pom. Eq. Jur. 3d ed. § 931; 12 R. C. L. 231; *Chesterfield v. Jansen*, 2 Ves. Sr. 125, 28 Eng. Reprint, 82, 1 Atk. 301, 26 Eng. Reprint, 191, 18 Eng. Rul. Cas. 289; *Menzies v. Menzies*, 24 Eng. Rul. Cas. 719, 765, note. The trial court therefore erroneously found that the shares and portions of Ralph Warner, Clara D. Harris, Thomas M. Davis, Meredith G. Davis, Florence Sleeter, Henry Warner, Arthur Warner, and Jacob Warner under said deed of trust are each subject to said contracts conveying and assigning to defendants in error the undivided one-fifth part of said respective shares, and erroneously found that said one-fifth interest, under said contracts, was vested in defendants in error.

It has been the settled practice in this state that where a transaction is tainted with fraud as between the parties to it the courts will not assist either, but will leave them in the position in which it finds them. *Miller v. Marckle*, 21 Ill. 152; *Winston v. McFarland*, 22 Ill. 38; *Skeels v. Phillips*, 54 Ill. 309; *Compton v. Bunker Hill Bank*, 96 Ill. 301, 36 Am. Rep. 147; *Crichfield v. Bermudez Asphalt Paving Co.* 174 Ill. 466, 42 L.R.A. 347, 51 N. E. 552. This is a chancery proceeding. "In general, where parties are concerned in illegal agreements or other transactions, whether they are mala prohibita or mala in se, courts of equity, following the rule of law as to participants in a common crime, will not, at present, interpose to grant any relief." *Miller v. Marckle*, supra, 21 Ill. 154. "It is a principle of equity that where a contract is illegal, immoral, or against public policy, or has been entered into through fraud or to accomplish any fraudulent purpose, a court of equity will not, at the suit of one of the parties, a *particeps doli*, while the agreement is still executory, either compel its execution or decree its cancellation, nor, after it has been executed, set it aside, and thus restore the plaintiff to the property or other interest which he has fraudulently or illegally transferred. Equity will leave such parties exactly in the position in which they have placed themselves, refusing all affirmative aid to any of the participants. . . . This general rule applies not only to the original parties to an illegal, immoral, or fraudulent transaction, but to their heirs and to all parties claiming under or by title derived from them, where no equitable rights intervene to protect such parties." 10 R. C. L. 102. As to when and under what circumstances courts of equity will relieve

either of the parties to such transactions, see 1 Story, Eq. Jur. §§ 299, 305, inclusive, and cases there cited.

It may be remarked in this connection that there were no allegations in the bill, and no proof was presented, that would justify making this proceeding an exception to the general rule that equity will not take jurisdiction in a case of this kind to give affirmative relief to defendants in error in executing contracts which are against public policy. This is plainly a bill in equity for partition, and therefore comes within the general rule just laid down; but whether it were a bill in equity for partition or a proceeding under the statute for partition, under the rules already laid down no relief could be granted to defendants in error.

On this record there can be no question that defendants in error were not induced to enter into these contracts by means of any fraud, duress, or undue influence, but entered into them voluntarily, and, indeed, were active in promoting their execution, and advised and practically directed the securing of the deed of trust from Mary M.

Harris in attempting to carry out such illegal contracts. This being so, as to those defendants in the court below whose interests the bill alleged and decree found were subject to the said contracts providing for paying to defendants in error a certain proportion of the interest recovered under such contracts by their advice and assistance the bill should have been dismissed for want of equity and for lack of jurisdiction of the court to entertain it so far as those interests were concerned.

As this cause must be reversed as to that part of the decree which gives certain interests in the property of Mrs. Harris alleged to have been acquired by defendants in error through said contracts for legal services, it is unnecessary for us to consider or decide the other questions raised in the briefs.

The decree is reversed, and the cause remanded for further proceedings in harmony with the views herein expressed.

Petition for rehearing denied June 6, 1917.

Annotation—Validity of contract to influence, by apparently disinterested advice, the conduct of a third person to whom the promisor owes no contractual duty.

It will be observed that the scope of the note excludes cases involving the validity of a contract by a servant, agent, or employee to influence the action or conduct of his employer; nor are cases included which involve an element of fraud, other than that involved in disingenuous advice or persuasion.

The note, moreover, is confined to the validity and enforceability of the contract itself, and is not concerned with the collateral effects of the performance thereof, such as those involved in the question discussed in the notes to *Crossman v. Keister*, 8 L.R.A.(N.S.) 698, and *McDowell v. McDowell*, 31 L.R.A.(N.S.) 176, as to whether the share of an heir, devisee, or legatee may be impressed with a constructive trust because of his fraud in frustrating decedent's intention to give property to a third person; or in the note to *Winder v. Scholey*, 33 L.R.A.(N.S.) 996, as to whether a constructive trust may be based upon an undertaking to hold, for the benefit of another, property received through a devise or inheritance, where no actual testamentary intention has been frustrated.

The question of the rights and remedies of a prior beneficiary where the insured had been induced to change bene-

ficiaries, or the change was accomplished by fraud or undue influence, is considered in a note appended to *Ryan v. Boston Letter Carriers' Mut. Ben. Asso.* L.R.A.1916C, 1130; and a case also of interest upon this point is that of *Mitchell v. Langley*, L.R.A.1916C, 1134, passing upon the liability of a person for damages for inducing another to change his beneficiary.

It is a general rule that a contract is violative of public policy and void where its purpose is to secure the action of one of the parties thereto to influence and induce a third person imposing confidence in such party and believing that he is disinterested, to do or refrain from doing some act or thing from which the party exerting the influence or persuasion will receive some benefit or advantage, unknown to the person whose action is thereby secured. In addition to *FLACK v. WARNER*, ante, 464, in which the foregoing rule is applied to a contract to induce a third person to dispose of his property for the benefit of promisors, or to refrain from making a will which would disinherit any of them, the rule was also applied in *Warner v. Flack* (1917) 278 Ill. 303, 116 N. E. 197, which involved a contract by a brother

with attorneys, by which they were to induce the sister to refrain from making a will which would disinherit such brother. And in *De Boer v. Harmsen* (1902) 131 Mich. 91, 90 N. W. 1036, the rule is declared that a secret contract between heirs by which one of the heirs is to induce the ancestor to make a will, or to change or not change a will already made, is against public policy and void. In *Higgins v. Hill* (1887) 56 L. T. N. S. (Eng.) 426, it is held that a contract between persons having expectation of receiving benefits from the will of another, to divide the amount they received, was illegal if the purpose was to exert upon the testator an undue influence, but otherwise the contract was valid.

The rule is also applied to agreements to induce a third person to enter into a contract with one of the parties to the agreement. It was so applied and the contracts were held violative of public policy and void in the following cases:

—*Alpers v. Hunt* (1890) 86 Cal. 78, 9 L.R.A. 483, 21 Am. St. Rep. 17, 24 Pac. 846, a contract by attorneys to pay another a certain share of fees received in certain litigation for the latter's influence in securing their employment therein; to the same effect is *Langdon v. Conlin* (1903) 67 Neb. 243, 60 L.R.A. 429, 108 Am. St. Rep. 643, 93 N. W. 389, 2 Ann. Cas. 834;

—*Bollman v. Loomis* (1874) 41 Conn. 581, contract with the friend and adviser

of a prospective purchaser of property to induce the latter to make the purchase;

—*Holcomb v. Weaver* (1884) 136 Mass. 265, contract with a person to recommend the other party thereto to a third person, and to secure a contract with the latter for the erection of a building;

—*Smith v. Rose* (1916) 192 Mo. App. 580, 184 S. W. 910, contract with palmist and clairvoyant to advise her customers to purchase certain property;

—*Ridgely v. Keene* (1909) 134 App. Div. 647, 119 N. Y. Supp. 451, contract with publisher of circular letter giving financial advice, by which he was to advise his readers to purchase certain shares of stock;

—*Simon v. Garlitz* (1911) — Tex. Civ. App. —, 133 S. W. 461, contract with person to use his influence to induce another, with whom he sustained very close and confidential relations, to purchase certain property;

In *Torpey v. Murray* (1904) 93 Minn. 482, 101 N. W. 609; 9 Cyc. 468, the rule is declared that a contract is void which has for its object the practice of a deception or fraud upon a third party, or to take advantage of confidential relations with him for the purpose of drawing him into a bargain by which the party undertaking to use his influence will secretly receive a benefit from the seller.

A. G. S.

OREGON SUPREME COURT. (In Banc.)

W. I. SWANK, Appt.,
v.

A. BATTAGLIA, Resp't.

(— Or. —, 164 Pac. 705.)

Food — implied warranty by wholesaler.

1. There is no implied warranty by a wholesaler of potatoes purchased by a retailer that they are in fact sound if their appearance is good.

For other cases, see *Sale, II. c*, in *Dig.* 1-52 N. S.

Same — statutory prohibition — effect.

2. A statute making the sale of diseased

Note. — As to implied warranty of fitness upon sale of food, see annotation following this case, post, 472.

Various specific aspects of the question as to the effect of ignorance or mistake on criminal responsibility are treated in notes cited in L.R.A. Indexes to Notes, under the title, "Criminal Law," subtitle, "Effect of ignorance, mistake, or belief." L.R.A.1917F.

food a criminal offense does not apply to persons innocently selling such products, where the defects are latent, and not known at the time of sale.

For other cases, see *Criminal Law, I. a*, in *Dig.* 1-52 N. S.

(May 1, 1917.)

APPEAL by plaintiff from a judgment of the Circuit Court for Multnomah County in his favor in part only, in an action brought to recover the purchase price of potatoes sold by plaintiff to defendant. Reversed.

Statement by McBride, Ch. J.:

This is an action to recover the purchase price of 100 sacks of potatoes sold to the defendant at the agreed price of \$1.13 a sack. The answer admits the sale and delivery of the goods, but alleges that both the plaintiff and defendant are dealers engaged in selling fruit and vegetables; that the potatoes were sold to defendant for the purpose of resale as food to the citizens of

Portland; that the potatoes were infected with dry rot and unfit for food, a fact of which defendant was ignorant when he purchased them, and that they were inspected by the food inspector of the city of Portland and found to be unfit for human food and condemned; that the portion which defendant had sold was returned to him and he was compelled to make good the purchase price to his customers; and that the quantity remaining on hand was sold for \$18.50 for hog feed. The case being put at issue by appropriate denials, the court made the following findings of fact: "(1) That on or about the 23d day of May, 1916, at Portland, Multnomah county, Oregon, the plaintiff sold and delivered to defendant, at his special instance and request, 100 sacks of potatoes, at the agreed price of \$1.13 per sack, for the purpose of use as human food; (2) that the contract sale price of 100 sacks of potatoes based on the agreed price of \$1.13 per sack amounted in the aggregate to \$113, no part of which has been paid; (3) that said potatoes so sold and delivered were affected by the disease known as 'fusarium wilt' or dry rot, and by reason thereof were unfit for human food; (4) that said defect was not apparent upon casual inspection, but became apparent only upon cutting or cooking said potatoes, and was not discovered until after said sale and delivery; (5) that about five days after said sale and delivery said potatoes were condemned by the market inspector of the city of Portland, Oregon, and by the inspector of the state horticultural bureau of the state of Oregon, as being affected with fusarium wilt or dry rot and unfit for human food, notice thereof being given by said officers to both plaintiff and defendant; (6) that said defendant prior to such condemnation had sold 30 sacks of said potatoes for purposes of human food; that all but a few sacks of said potatoes so sold were returned to defendant by his customers as unfit for human food, and the purchase price refunded by defendant to such customers; (7) that the condemned potatoes and the potatoes returned to defendant were, by permission of said inspectors, sold as hog feed; that the total sum realized by defendant from such sale and from those not returned to him was \$31."

As a conclusion of law the court found that there was an implied warranty that the potatoes were fit for human food and that plaintiff was entitled to judgment for only \$31, the price received for potatoes sold to customers and not returned plus the amount received for those sold for hog feed. There was a judgment for plaintiff L.R.A.1917F.

upon these findings for the sum of \$31, from which he appeals.

Mr. Charles M. Hodges, for appellant:

Upon the sale of merchandise the seller does not become responsible for the quality of the article sold, unless he expressly warranted the quality or made some false and fraudulent representations in regard to it.

Morse v. Union Stock Yards Co. 21 Or. 291, 14 L.R.A. 157, 28 Pac. 2; Parkinson v. Lee, 2 East, 320, 102 Eng. Reprint, 389, 6 Revised Rep. 429; Farren v. Dameron, 99 Md. 323, 105 Am. St. Rep. 297, 58 Atl. 367; Goad v. Johnson, 6 Heisk. 340; Rinschler v. Jeliffe, 9 Daly, 471; Tomlinson v. Armour & Co. 74 N. J. L. 274, 65 Atl. 883; Howard v. Emerson, 110 Mass. 321, 14 Am. Rep. 608; Nelson v. Armour Packing Co. 76 Ark. 352, 90 S. W. 288, 6 Ann. Cas. 237; Julian v. Laubenberger, 16 Misc. 646, 38 N. Y. Supp., 1052.

Messrs. Johnson & Mathews, for respondent:

There was an implied warranty that the potatoes were reasonably fit for human food.

Kitchin v. Oregon Nursery Co. 65 Or. 20, 130 Pac. 408, 1133, 132 Pac. 956; Morse v. Union Stockyards Co. 21 Or. 289, 14 L.R.A. 157, 28 Pac. 2.

Defendant was entitled to his damages.

Kitchin v. Oregon Nursery Co. supra.

An illegal contract, or one contrary to public policy of this state as declared by law, will not be enforced by the courts.

Hirschfeld v. McCullagh, 64 Or. 502, 127 Pac. 541, 130 Pac. 1131; Jackson v. Baker, 48 Or. 155, 85 Pac. 512; Cullison v. Downing, 42 Or. 377, 71 Pac. 70; Ah Doon v. Smith, 25 Or. 89, 34 Pac. 1093.

McBride, Ch. J., delivered the opinion of the court:

There is but one question in this case, namely, whether there is any implied warranty of the quality of the goods sold under the circumstances disclosed here, no actual warranty being pleaded or proved. So far as the quality of goods purchased is concerned, the rule of caveat emptor usually applies, unless there is deceit or misrepresentation, which is not the case here. The external appearance of the potatoes indicated soundness and good quality. It was only when they were sliced for cooking that the defect became visible, and there is nothing in the evidence indicating that plaintiff knew of their unsoundness. The defendant testified: "They looked pretty good; they looked pretty nice from looking at them." So the case simmers down to this: The plaintiff sold the potatoes to defendant and defendant purchased them,

each supposing them to be sound and having reason to believe they were so. There is authority for the holding that, where provisions are sold to a customer at retail for immediate use, there is an implied warranty that they are reasonably fit for food. Benjamin on Sales, 7th ed. p. 661, and cases there cited. But in sales to dealers the rule is different. In such instances the rule of *caveat emptor* is applied. *Howard v. Emerson*, 110 Mass. 320, 14 Am. Rep. 608; *Wiedeman v. Keller*, 171 Ill. 93, 49 N. E. 210; *Giroux v. Stedman*, 145 Mass. 439, 1 Am. St. Rep. 472, 14 N. E. 538; *Ryder v. Neitge*, 21 Minn. 70; *Moses v. Mead*, 1 Denio, 378, 43 Am. Dec. 676; *Warren v. Buck*, 71 Vt. 44, 76 Am. St. Rep. 754, 42 Atl. 979; *Hanson v. Hartse*, 70 Minn. 282, 68 Am. St. Rep. 527, 73 N. W. 163; *Humphreys v. Comline*, 8 Blackf. 516. The case of *Howard v. Emerson*, *supra*, is typical of all those above cited. In that case *Howard*, a farmer, had sold to *Emerson*, a butcher and dealer in provisions, a cow which *Emerson* purchased for the purpose of butchering and retailing to his customers. The flesh was found unfit for food, and the purchaser refused to pay for her, and suit was brought to recover the purchase price. The court said: "The general rule of the common law is that, upon a sale of goods, if there is no express warranty of the quality of the goods sold, and no fraud, the maxim, *caveat emptor*, applies, and no warranty is implied by law. *Winsor v. Lombard*, 18 Pick. 57; *Mixer v. Coburn*, 11 Met. 559, 45 Am. Dec. 230; *French v. Vin- ing*, 102 Mass. 132, 3 Am. Rep. 440. The defendants contend that when articles of food are sold for immediate domestic use, there is an implied warranty or representation that they are sound and fit for food, and that the case at bar falls within this exception to the general rule. *Van Bracklin v. Fonda*, 12 Johns, 468, 7 Am. Dec. 339. But we think that this exception, if established, does not extend beyond the case of a dealer who sells provisions directly to the consumer for domestic use. In such cases it may be reasonable to infer a tacit understanding, which enters into the contract, that the provisions are sound. The relation of the buyer to the seller and the circumstances of the sale may raise the presumption that the seller impliedly represents them to be sound. But the same reasons are not applicable to the case of one dealer selling to another dealer; and we think the rule is settled that in the sale of provisions, in the course of general commercial transactions, the maxim *caveat emptor* applies, and there is no implied warranty or representation of quality or fitness. *Emerson v. Brigham*, 10 Mass. 197, 6 Am. Dec. 109; L.R.A.1917F.

Winsor v. Lombard, 18 Pick. 57; *Hart v. Wright*, 17 Wend. 267; *Wright v. Hart*, 18 Wend. 449; *Moses v. Mead*, 1 Denio, 378, 43 Am. Dec. 676; *Burnby v. Bollett*, 16 Mees. & W. 644, 153 Eng. Reprint, 1348, 17 L. J. Exch. N. S. 190, 11 Jur. 827. In the case at bar, the plaintiff was a farmer and the defendants were butchers and dealers in provisions . . . for immediate use as food. The fact that the plaintiff knew the purpose for which the defendants purchased the cow would not render him liable, upon an implied warranty, for unknown defects which made her unfit for that purpose. A warranty of fitness may be implied in contracts to manufacture or in executory contracts to sell, but it is not implied in executed sales of specific chattels. *Chandolor v. Lopus*, 1 Smith Lead. Cas. 5th Am. ed. 238, and notes."

The cases last above cited seem to settle the law against the contention of defendant in the instant case.

Counsel for defendant cite *Morse v. Union Stockyard Co.* 21 Or. 289, 14 L.R.A. 157, 28 Pac. 2, and *Kitchin v. Oregon Nursery Co.* 65 Or. 20, 130 Pac. 408, 1133, 132 Pac. 956, as holding a contrary view, but, when properly analyzed, it will appear that this contention is unfounded. In the former case the buyer requested the seller to send him two carloads of "good beef cattle." The seller shipped him two carloads of cattle unfit for beef. Where articles of a particular description are ordered, there is an implied warranty that those furnished answer that description, and that is what the holding in the case cited amounts to. If A requests B to send him a herd of cows for milking purposes, and B sends him a herd of Hereford steers fit only for beef, it stands to reason that he should not recover for the price of cows. Whether we treat the case as a breach of an implied warranty or a failure to perform, the result is the same. In such a case there is *prima facie* evidence of fraud on the part of the seller. The fitness of the cattle for beef could be known to the seller upon inspection of the cattle before he shipped them, and could not be known to the buyer if, as in the case cited, he resided at a distance, until they were received. Under these circumstances, and where the buyer paid for the cattle before he received them, relying upon the judgment and good faith of the seller as to their quality, the court very properly held that he could recover damages. Here there was no stipulation as to quality, and no bad faith on the part of the seller, who believed, and had a right to believe, that the potatoes sold were sound and free from disease. In the case of *Kitchin v. Oregon Nursery Co.* *supra*, the statement of the case in the opin-

ion is not full, but an inspection of the record shows the complaint alleged that plaintiff was induced to purchase by reason of certain advertisements put out by defendant to the effect that it dealt only in "reliable nursery stock," and that all trees grown by it were strong, vigorous, healthy trees, whereas the trees furnished were not such, and that defendant knew they were not. There was an element of fraud and misrepresentation charged in that case which is entirely lacking here. Mr. Justice Eakin, in discussing the doctrine of implied warranty by reason of an article being ordered for a particular purpose, expressly waives its application to the case there under consideration: "The principal contention of plaintiff is as to the liability of defendant upon its implied warranty that the articles sold shall be suitable for the purposes to which they are to be applied. This rule is well recognized by this court. *Gold Ridge Min. Co. v. Tallmudge*, 44 Or. 34, 102 Am. St. Rep. 602, 74 Pac. 325; *Lenz v. Blake*, 44 Or. 573, 76 Pac. 357; *Mine Supply Co. v. Columbia Min. Co.* 48 Or. 395, 86 Pac. 790. However, in this case it is not necessary to apply the rule because the plaintiff is not only contending that the trees were not suitable for the use to which they were to be applied, but that the trees were not sound. Defendant admits that it is bound by an implied warranty to that extent, namely, that the trees were sound and healthy, and the testimony strongly tended to establish the fact that the trees were not sound, but were unhealthy trees, having an inherent defect which caused them to die."

It may also be added in that case the defendant was a large grower of nursery

stock, selling the same at wholesale to dealers as well as at retail, and might well be included within the reasoning of that line of cases which hold that there is an implied warranty by the manufacturer of articles that they are free from latent defects, but it is not necessary to consider that phase of the question in the case at bar.

Another suggestion of counsel for defendant is that no recovery can be had because the contract is illegal, in that it was in violation of § 2227, L. O. L., which makes the sale of diseased food a criminal offense; but we do not think it was the intent of that section to punish persons innocently selling diseased food products where the defects are latent and not known at the time of the sale. In the sale of liquor to minors and like offenses it has been held that ignorance of the age of the purchaser is no defense to a prosecution for such sale; but this rule arises from the theory that dealing in such merchandise is at best an authorized nuisance in which the dealer must engage at his peril. On the contrary, the sale of food is a business beneficial to the community, and one that should be encouraged, and a dealer will not be held to have violated a law against selling diseased food unless the pernicious character of such food was known to him or he disregarded such obvious precautions in inspecting it as would be equivalent to such intent, which is not the case here.

There is neither pleading, finding, nor testimony to sustain the judgment rendered in this case, and the judgment of the Circuit Court will be reversed, and one entered here in accordance with the prayer of the complaint.

Annotation—Implied warranty of fitness upon sale of food.

This note supplements notes on the same subject appended to *McQuaid v. Ross*, 22 L.R.A. 195, and *Farrell v. Manhattan Market Co.* 15 L.R.A.(N.S.) 884.

As to the liability of manufacturer, packer, or vendor to persons not in privity of contract, for injury from defects in articles sold, see notes appended to *Tomlinson v. Armour & Co.* 19 L.R.A.(N.S.) 923, and *Mazetti v. Armour & Co.* 48 L.R.A.(N.S.) 213; L.R.A.1916B, 879; and as to liability for serving unfit food, see notes appended to *Doyle v. Fuerst & Kraemer*, 40 L.R.A.(N.S.) 480, and *Merrill v. Hodson*, L.R.A.1915B, 481. Specifically, as to implied warranty of fitness of animals sold for slaughter, see note to *Zielinski v. Potter*, L.R.A.1917D, 822.

Food for mankind.

The late cases on the subject are to L.R.A.1917F.

the effect that a sale of an article for food raises an implied warranty that the article is fit for food, and is not in an unmerchantable condition or in a condition rendering it dangerous to be used for food:

—*Thompson v. O. A. Grimshaw Grain Co.* (1914) 113 Ark. 169, 167 S. W. 699, holding that on a sale of corn by the car without opportunity for inspection, there is an implied warranty that the corn is reasonably fit for use;

—*Southern Produce Co. v. Oteri* (1910) 94 Ark. 318, 126 S. W. 1065, holding that a sale of a car of bananas through a broker, to be shipped to the purchaser some distance away, raises an implied warranty that the bananas are in a condition to stand such shipment and arrive in merchantable condition;

—Pfoh v. Porter (1913) 23 Cal. App. 59, 137 Pac. 44, holding that a sale of grapes on the vine before they are ripe, where sold for table use, raises an implied warranty that they will be good, merchantable grapes. Compare with *Carpenter v. Grogan* (1912) 18 Cal. App. 505, 123 Pac. 538, holding that the sale of a crop of olives then growing does not raise an implied warranty that they shall be fit for pickling purposes, although the contract provides that they shall be packed in a careful manner for pickling purposes, with the exception of a small quantity, which shall be delivered to be made into oil. In this case the olives delivered were apparently merchantable, but were not of a size and ripeness necessary for pickling purposes;

—*J. D. Best Mercantile Co. v. Brewer* (1911) 50 Colo. 455, 115 Pac. 726, holding that on a sale of storage eggs as May eggs, there is an implied warranty that the eggs are what is known as May eggs, and that they are of that quality;

—*Sloan v. F. W. Woolworth Co.* (1915) 193 Ill. App. 620, holding that there is an implied warranty that canned herring is fit for food where sold by a retail dealer for immediate use;

—*Chapman v. Roggenkamp* (1913) 182 Ill. App. 117, holding that there is an implied warranty that canned peas are fit for consumption when sold by a retail dealer for immediate use. In this case the goods were kept by the buyer several days before the can was opened, and the foregoing rule was applied without comment on this point;

—*Parks v. C. C. Yost Pie Co.* (1914) 93 Kan. 334, L.R.A.1915C, 179, 144 Pac. 202, 7 N. C. C. A. 100, holding that there is an implied warranty that pie sold by a dealer to the consumer for immediate use is fit for food;

—*Inter-State Grocer Co. v. George William Bentley Co.* (1912) 214 Mass. 227, 101 N. E. 147, holding that upon the sale of canned goods by their name or description there is an implied condition that the goods shall be merchantable under that name, and this is true where the sale is to a wholesaler for resale, and without reference to whether or not the seller is a manufacturer or packer. Compare with *Farrell v. Manhattan Market Co.* (1908) 198 Mass. 271, 15 L.R.A. (N.S.) 884, 126 Am. St. Rep. 436, 84 N. E. 481, 15 Ann. Cas. 1076, 21 Am. Neg. Rep. 142, *infra*;

—*Pentland v. Jacobson* (1915) 189 Mich. 339, 155 N. W. 468, holding that under a statute providing that an express warranty or condition does not

negative a warranty or condition implied thereunder, unless inconsistent therewith, there may be an implied warranty as to the condition of potatoes, where there is no express warranty in that regard;

—*Wolverine Spice Co. v. Fallas* (1914) 182 Mich. 361, 148 N. W. 701, holding that on a sale by a canning company of canned goods to a jobber for resale, there is an implied warranty that the goods are fit for food;

—*Cook v. Darling* (1910) 160 Mich. 475, 125 N. W. 411, holding that where goods are sold by a wholesaler or manufacturer to a retail dealer to be resold for family consumption, there is an implied warranty that the goods are fit for food;

—*Dulaney v. Jones* (1911) 100 Miss. 835, 57 So. 225, distinguishing between the sale of food for human beings and for animals;

—*Glasgow Mill. Co. v. Burgher* (1906) 122 Mo. App. 14, 97 S. W. 950, holding that a miller impliedly warrants that flour he sells is merchantable;

—*Neil v. Cunningham Store Co.* (1910) 149 Mo. App. 53, 130 S. W. 503, holding that there is an implied warranty that corn is sound and merchantable where it is sold by the ear to be shipped to the purchaser;

—*Stewart v. M. N. Voll & Son* (1911) 81 N. J. L. 323, 79 Atl. 1041, holding that on a sale of potatoes by the sack, although they are inspected by the buyer, there is nevertheless an implied warranty that the potatoes are free from a hidden defect rendering them worthless for food within a short time;

—*Leahy v. Essex Co.* (1914) 164 App. Div. 903, 148 N. Y. Supp. 1063, holding that there is an implied warranty that pie sold for food is fit for that purpose;

—*Race v. Krum* (1914) 162 App. Div. 911, 146 N. Y. Supp. 197, affirmed in (1914) 163 App. Div. 924, 147 N. Y. Supp. 818, holding that there is an implied warranty that ice cream sold in an ice-cream parlor or drug store is fit for food;

—*Standard Mill. Co. v. De Pass* (1913) 154 App. Div. 525, 139 N. Y. Supp. 611, affirmed in (1915) 214 N. Y. 638, 108 N. E. 1108, holding that a sale of rice without opportunity for inspection raises an implied warranty that the rice is merchantable;

—*Plumb v. J. W. Hallauer & Sons Co.* (1911) 145 App. Div. 20, 130 N. Y. Supp. 147, holding that a sale of apples by the carload without opportunity for

inspection raises an implied warranty that the apples are merchantable;

—*Lexington Grocery Co. v. Vernay* (1914) 167 N. C. 427, 83 S. E. 567, holding that a sale by the carload of beans of a certain kind, to be used for food, raises an implied warranty that the beans are fit and capable of being used for food;

—*Grocers' Wholesale Co. v. Bostock* (1910) 22 Ont. L. Rep. 130, holding that on a sale of canned fish for food, expressly warranted to be free from blown, burst, dry, and leaks, there is an implied warranty that the goods are fit for food.

It has been held that a bottler of a beverage made by another does not impliedly warrant to the ultimate consumer that a bottle of the beverage contains no injurious, harmful, or deleterious substance, and hence he is not liable on the ground of implied warranty where the goods are not fit for use. *Crigger v. Coca-Cola Bottling Co.* (1915) 132 Tenn. 545, L.R.A.1916B, 877, 179 S. W. 155, Ann. Cas. 1917B, 572, 11 N. C. C. A. 359.

In some jurisdictions the doctrine of implied warranty on the sale of an article for food only applies where the circumstances of the sale indicate that the buyer, in making the purchase, relied upon the skill or knowledge of the seller in selecting the article:

—*Jackson v. Watson* [1909] 2 K. B. (Eng.) 193, 3 B. R. C. 182, 78 L. J. K. B. N. S. 587, 100 L. T. N. S. 799, 25 Times L. R. 454, 53 Sol. Jo. 447, 16 Ann. Cas. 492, holding that upon a sale by retail dealer to a customer of canned fish, there is an implied warranty that the fish is fit for food, where the circumstances show that the buyer relied upon the seller's skill and judgment as to the article being fit for food;

—*Gearing v. Berkson* (1916) 223 Mass. 257, L.R.A.1916D, 1006, 111 N. E. 785, holding that, under a statute providing in effect that there is no implied warranty as to quality or fitness for any particular purpose of goods sold, except where the buyer expressly or by necessary implication makes known to the seller the particular purpose for which the goods are required, and relies upon the seller's skill and judgment in this regard, where the purchaser of meat leaves to the seller the selection of the meat and pays therefor the current price for sound, wholesome meat, there is an implied warranty that the meat is fit for food.

In this regard it has been held that there is no implied warranty that a fowl L.R.A.1917F.

was fit to eat unless the purchaser bought it under circumstances indicating to the seller that the purchase was made in reliance upon his skill and judgment. Such an inference does not arise where the purchaser selects the fowl from a bargain counter. *Farrell v. Manhattan Market Co.* (1908) 198 Mass. 271, 15 L.R.A.(N.S.) 884, 126 Am. St. Rep. 436, 84 N. E. 481, 15 Ann. Cas. 1076, 21 Am. Neg. Rep. 142.

—effect of local usage.

It is permissible to show that on a sale of meat by a market salesman to a butcher, it was the practice to sell without express or implied warranty. *Cointat v. Myham* [1914] W. N. (Eng.) 46, 84 L. J. K. B. N. S. 2253, 110 L. T. N. S. 749, 30 Times L. R. 282, 78 J. P. 193, 12 L. G. R. 274.

—extent of warranty.

It has been held that a sale of a quantity of oranges by one dealer to another dealer, the sale to be subject to inspection, raises no implied warranty as to quality. It does, however, raise an implied warranty that the oranges shall be merchantable or salable. *Ashford v. H. C. Schrader Co.* (1914) 167 N. C. 45, 83 S. E. 29. Also that there is no implied warranty that perishable goods are sound and merchantable. In this case the subject-matter of the sale was a quantity of eggs which were sold through a broker and shipped a considerable distance, the buyer not having an opportunity to inspect them until arrival, and it was held that he could not reject them on the ground that they were not sound and merchantable, although he could reject them if they were not of the quality of May eggs, the sale being of eggs known as May eggs. *J. D. Best Mercantile Co. v. Brewer* (1911) 50 Colo. 455, 115 Pac. 726.

A sale of butter to be of the seller's standard grade raises no implied warranty that it will be suitable for certain markets, although it was sold to be shipped to such markets. *Round & McM. Co. v. Nicholson Produce Co.* (1914) 166 Iowa, 39, 147 N. W. 305. And there is no implied warranty that flour sold by a manufacturer shall be of a quality meeting the requirements of the purchaser's customers. *Baer Grocer Co. v. Barber Mill Co.* (1915) 139 C. C. A. 449, 223 Fed. 969.

Where perishable foods, such as oysters, are shipped in good condition, there is no implied warranty that they will be fit for food when they arrive at their destination, the unfitness being due to

exceptional or accidental causes. *Barnes v. Waugh* (1900) 41 N. S. 38.

Food for animals.

In *Dulaney v. Jones* (1912) 100 Miss. 835, 57 So. 225, a distinction is made between the sale of food for a human being and food for animals. As to the former, it is said that there is an implied warranty that it is fit for food, but there is no such warranty where the article is sold for food for animals.

And it has been held that a sale of corn chops does not raise an implied warranty of fitness for food, where the seller was a broker and had never seen

the chops, and the buyer was a grain dealer who bought for the purpose of resale. *F. A. Piper Co. v. Oppenheimer* (1913) — Tex. Civ. App. —, 158 S. W. 777.

But an implied warranty that corn chops are fit for food for stock is raised where the sale is to a consumer for that purpose. *Ibid.* To the same effect is *Houk v. Berg* (1907) — Tex. Civ. App. —, 105 S. W. 1176, holding that on a sale of bran for immediate use by the buyer for stock food, there is an implied warranty that the bran is wholesome and fit for stock food. A. G. S.

WEST VIRGINIA SUPREME COURT OF APPEALS.

LIZZIE KEENE

v.

CITY OF HUNTINGTON, PH. in Err.

(— W. Va. —, 92 S. E. 119.)

Municipal corporation — nuisance — liability.

1. A municipal corporation is liable in damages for injury to real estate, where the occupancy thereof is rendered less desirable because of noisome odors emitted from an incinerator plant erected and operated by such municipal corporation near to such real estate, and because of the deposit thereon of ashes and other offensive substances by such incinerator plant.

For other cases, see Municipal Corporations, II. g, in Dig. 1-52 N. S.

Damages — nuisance — permanency.

2. If such plant is one of the instrumentalities constructed by said city for the purpose of carrying out its legitimate powers, and is fit to be used for that purpose as a permanent structure, and such damage to such near-by real estate results from the construction and proper operation of such plant, then the injury is a permanent one, and entire damages must be recovered therefor in a single suit, and the measure of such damages is the diminution in the value

of such real estate by reason of the construction and proper operation of such plant.

For other cases, see Action or Suit, II. c, in Dig. 1-52 N. S.

Same — improper operation of plant.

3. If the injury to such adjoining property arises solely from the negligent or improper operation of such plant, then such injury is of a temporary character, and damages for such injury must be recovered in successive actions.

For other cases, see Action or Suit, II. c. in Dig. 1-52 N. S.

(March 6, 1917.)

ERROR to the Circuit Court for Cabell County to review a judgment in plaintiff's favor in an action brought to recover damages for injury to plaintiff's property. Affirmed.

The facts are stated in the opinion.

Mr. F. M. Lavezey for plaintiff in error.
Messrs. Daugherty & Riggs for defendant in error.

Ritz, J., delivered the opinion of the court:

In the month of May, 1912, the plaintiff purchased a house and lot situate in the city of Huntington on Second avenue, between Fourth and Fifth streets. After her purchase of the property she made cer-

Headnotes by RITZ, J.

Note.—The temporary or permanent character of nuisances as affecting the right to successive actions for injuries inflicted thereby, or the necessity of recovering in one action for all injuries, past, present, and prospective, is discussed in the note in L.R.A.1916E, 997. According to the early decisions and the better reasoned ones among the later cases, any cause of injury that is abatable because illegal is a temporary cause. In all such cases the injured party has a right to successive actions. See page 1013 of note already referred to. Judged under this rule the facts in *KEENE* L.R.A.1917F.

v. HUNTINGTON would indicate that the structure was not a temporary, but a permanent, one. The court reached this conclusion, but under a different process of reasoning. It was willing to consider either the physical characteristics of the structure (see cases cited in note in L.R.A. 1916E, 1046), or the character of the injury inflicted (see cases cited in note in L.R.A. 1916E, 1055), as the factor determinative of the question of permanency. The fact that it reached the same conclusion is merely an incident, and not an indication that one rule is as good as another.

tain improvements thereon, and has been occupying it as a residence ever since. In the summer of 1914 the defendant purchased four lots on Second avenue immediately west of the residence of the plaintiff and erected thereon an incinerator plant, at which plant it burns garbage, dead animals, and all kinds and character of refuse which it is deemed expedient to collect and destroy. The plaintiff claims that ever since the operation of this plant her property has been very much injured; that there results from the burning of this decadent organic matter noisome odors, which are very offensive; that smoke settles upon her house and upon her furniture, and that there is left, as a result of this smoke coming in contact with the house and furniture and other property, a greasy, offensive substance; that this smoke also deposits small particles of inorganic matter. She brought this suit to recover damages resulting from this injury, claiming that the value of her property has been materially decreased. Upon the trial she introduced a number of witnesses, who testified to the facts in regard to the deposits left by the smoke, and to the offensive odors and other injuries claimed from the incinerator plant, and also witnesses as to the difference in the value of her property immediately before and immediately after the construction of the plant.

The defendant introduced witnesses to prove that this plant was the most modern plant devised for the purpose of disposing of garbage; that it was erected by the city at a cost, for the plant and the ground upon which it is situate, of something like \$12,000; that it was erected in a skillful and proper manner; and that the plant, ever since it has been in operation, has been operated properly and skillfully. It also introduced a number of witnesses, who testified that there were no odors arising from the operation of this plant; that there were no deposits left by the smoke upon articles with which it came in contact; and that there were no ashes or other substances deposited upon the ground by the plant, except that some of the defendant's witnesses stated that there were small particles of charred paper at times emitted from the stack. Before the evidence was introduced, the jury was taken to the plant to view it in operation. Again, at the conclusion of the evidence, on motion of the defendant, the jury was permitted to view the plant in operation and the effects of such operation. The cause was then submitted to the jury upon the court's instructions to the effect that if the plaintiff's property was affected in the way she and other witnesses testified, and was thereby injured, she was entitled to L.R.A.1917F.

recover, and the measure of her damages would be the difference between the value of her property immediately before and immediately after the said incinerator plant was constructed and put in operation.

The defendant contended upon the trial that the plaintiff in any event should only be allowed to recover temporary damages; that is, such damages as were proved to have been sustained prior to the institution of the suit, and this is the main contention in this court. There are some other points raised by the defendant, which we will dispose of before proceeding to the consideration of the proposition upon which the defendant mainly relies.

In the trial of the case the defendant offered to prove by witnesses T. S. Scanlon and O. H. Wells that they had observed other incinerator plants of the same type as this one in operation, and no odors arose from the operation of these other plants, and no sediment was deposited from the smoke. This evidence was rejected by the court. Both of these witnesses testified as to the operation of the particular plant in question. They observed its operation many, many times, and both testified positively and emphatically that at no time did this particular plant ever discharge any smoke containing sediment, nor was there ever any greasy or slimy substance deposited from the smoke, or any odors arising from the operation of the plant. In view of their positive evidence as to the effect of the operation of the plant in question, it can hardly be conceived why it was thought material to prove by them what they observed as to the operation of other similar plants. Ordinarily evidence of collateral facts is excluded from the consideration of the jury as having no particular force in proving the fact in issue. 1 Greenl. Ev. § 52; *Whitelaw v. Whitelaw*, 96 Va. 712, 32 S. E. 458; *Hartman v. Evans*, 38 W. Va. 669, 18 S. E. 810. We fail to see how the statements of these two witnesses as to their observations of other plants in operation could in any wise strengthen their positive statements as to the operation of this particular plant.

It is also assigned as error that the court permitted the plaintiff to prove that odors arose from the garbage wagons being driven into the incinerator, and that it was error to permit evidence to show that pieces of charred paper were emitted from the stack of the incinerator, for the reason that these matters were not charged in the declaration. It is charged in the declaration that the plaintiff's property is affected by the operation of this plant because of offensive odors coming therefrom, and particularly from the deposit of ashes therefrom. It is speci-

cally charged in the declaration that some of the odors affecting the plaintiff's property arise from the wagons containing garbage while they are being hauled into the plant; but, even if this were not so, it clearly appears that the deposit of the garbage in the plant is one of the things necessary to be done in order to its operation, and no specific averment of offensive odors arising from the wagon would be necessary, when there is a general averment of injury by reason of offensive odors arising because of the operation of the plant. The defendant repeatedly moved the court to exclude the evidence of the deposit of charred paper on plaintiff's lot. It is true the court overruled these motions, but at the end of her evidence the plaintiff submitted to such motions, and while the record does not show that the court took any particular action on it, we must conclude that where the defendant has asked for a particular thing to be done, and the other party submits to it, it is granted. Even if this were not so these deposits of charred paper emitted from the stack must be taken to be included in the terms used in the declaration. It is charged in the declaration that deposits of ashes and other substances are made upon the plaintiff's lot, which are emitted from the incinerator. This is sufficient to include the deposit of this charred paper, and the court committed no error in admitting the evidence to the jury.

The remaining proposition, and the one upon which chief reliance is placed, is as to the character of the plaintiff's injury. The plaintiff contends that inasmuch as it is shown in this case that the incinerator plant is constructed as a permanent public improvement by the city for the carrying out of its corporate powers, and from the proper operation of this plant injury results, the damages are permanent. The defendant, on the other hand, contends that the plaintiff should only be allowed such damages as she has sustained by way of decreased rental value of her property, or otherwise, up to the time of the institution of the suit; that the nuisance, if any, is of a temporary character, and one which it might well be supposed the defendant would abate rather than be subjected to permanent damages therefor. There seems to be practical uniformity in the expression of the rule as to when permanent damages will be allowed in a case like this. Wood in his work on Nuisances, vol. 2, at § 869, states the doctrine thus: "Where the damages are of a permanent character and go to the entire value of the estate affected by the nuisance, a recovery may be had of the entire damages in one action. Thus, in an action for overflowing the plaintiff's

land by a milldam, the lands being submerged thereby to such an extent, and for such a period, as to make it useless to the plaintiff for any purpose, the jury were instructed to find a verdict for the plaintiff for the full value of the land. So, too, when a railroad company by permanent erections imposed a continuous burden upon the plaintiff's estate, which deprived the plaintiff of any beneficial use of the portion of the estate so used by it, it was held that the whole damage might be recovered at once; but where the extent of a wrong may be apportioned from time to time, and does not go to the entire destruction of the estate, or its beneficial use, separate actions not only may, but *must*, be brought to recover the damages sustained. So, too, when a nuisance is of such a character that its continuance is necessarily an injury, and it is of a permanent character, so that it will continue without change from any cause but human labor, it is held that the damage is original, and may be at once fully compensated."

The doctrine is similarly stated in Joyee on Nuisances, § 495: "Where damages are of a permanent nature and affect the value of the estate, a recovery may be had of the entire damages in one action; but where the extent of the wrong can be apportioned from time to time, separate actions should be brought to recover the damages sustained. So where a permanent injury is occasioned by a permanent, lawful public structure, damages past, present, and future, may be recovered in one suit. And where the damage to plaintiff's land is permanent and irremediable, he can recover in one action all present and prospective damages, but if the injury is temporary in character and capable of being avoided without permanently injuring plaintiff's land, damages can be recovered only up to the commencement of the action, as in such case the nuisance would be a continuing one. Again, where a railway is constructed without leaving sufficient space between the embankments or it fails otherwise to provide against freshets reasonably to be expected, an injury due to that cause may be compensated for by the assessment of present and prospective damages in a single action. The measure of damages is the difference in the value of the plaintiff's land with the road so improperly constructed, and what would have been its value had the road been skilfully constructed."

In Sedgwick on Damages, vol. 1, at § 95, the author lays down the doctrine to be: "If the injury is caused by erecting a structure or making a use of land which the defendant has a right to continue, the injury is regarded as committed once for all, and

action must be brought to recover the entire damage, past and future."

Sutherland on Damages, vol. 4, § 1046, is to the same effect.

In this state a corresponding rule has been laid down in a number of cases. In the case of *Hargreaves v. Kimberly*, 26 W. Va. 787, 53 Am. Rep. 121, it is stated as follows: "Where the cause of the injury is in its nature permanent, and a recovery for such injury would confer a license on the defendant to continue the cause, the entire damage may be recovered in a single action; but where the cause of the injury is in the nature of a nuisance, and not permanent in its character, but of such a character that it may be supposed that the defendant would remove it rather than suffer at once the entire damage which it might inflict if permanent, then the entire damage cannot be recovered in a single action; but actions may be maintained from time to time, as long as the cause of the injury continues." *Spencer v. Point Pleasant & O. River R. Co.* 23 W. Va. 406; *Smith v. Point Pleasant & O. River R. Co.* 23 W. Va. 451; *Watts v. Norfolk & W. R. Co.* 39 W. Va. 196, 23 L.R.A. 674, 45 Am. St. Rep. 894, 19 S. E. 521; *Guinn v. Ohio River R. Co.* 46 W. Va. 151, 76 Am. St. Rep. 806, 33 S. E. 87; *Pickens v. Coal River Boom & Timber Co.* 51 W. Va. 445, 90 Am. St. Rep. 819, 41 S. E. 400.

The difficulty is not in ascertaining what the general rule is, but as is the case in most instances it arises in the application of the rule to the particular case. The rule as above stated is announced by the courts of this country and of England with practical unanimity, and it has been applied in a multitude of cases. Its application to the case here will be aided by citing some of the cases in which it has been applied by the courts of this and other jurisdiction, and the manner of its application. *Smith v. Point Pleasant & O. River R. Co.*, and *Spencer v. Point Pleasant & O. River R. Co.* were suits to recover damages by owners of real estate abutting on a street, occasioned to them by the laying in the street of tracks of the railroad company. The court held in these cases, under the provision of our Constitution prohibiting the taking or damaging of private property for public use without just compensation, that the railroad company would be liable for such injury as was suffered by these property owners, and it held further that the construction and operation of a railroad in a public street was such a permanent obstruction, and the injury flowing therefrom was of such a permanent character, that damages therefor must be recovered in a single action, and that successive actions

might not be maintained on account thereof.

In *Watts v. Norfolk & W. R. Co.* 39 W. Va. 196, 23 L.R.A. 674, 45 Am. St. Rep. 894, 19 S. E. 521, it was held that, where a railroad company condemns or purchases a right of way through the property of a landowner for the purpose of constructing and operating thereon a railroad, it will be taken that the owner has been compensated for all the injury and damage to the residue of his land which would naturally flow from the proper construction and proper operation of such railroad; it being held that such damages are in their nature permanent because of the character of permanence of the railroad.

In *Guinn v. Ohio River R. Co.* 46 W. Va. 151, 76 Am. St. Rep. 806, 33 S. E. 87, it was held, following the cases of *Spencer v. Point Pleasant & O. River R. Co.* and *Smith v. Point Pleasant & O. River R. Co.* supra, that the owner of property abutting on a street on which a railroad is built is entitled to recover permanent damages for the injury to his property caused by the construction and operation of such railroad in such street.

Southern R. Co. v. McMenamin, 113 Va. 121, 73 S. E. 890, was a suit to recover damages to property because of the construction and operation of railroad yards and a coal chute near the plaintiff's property, which it is claimed was damaged by soot and smoke caused from firing engines, and dirt arising from the operation of the same. The court held that plaintiff was entitled to recover permanent damages in one action for the injury inflicted upon his property by the construction and proper operation of such coal chute and railroad yards, they being necessary to the operation of the railroad.

Virginia R. Co. v. London, 114 Va. 334, 76 S. E. 306, was a suit to recover damages arising from injury to plaintiff's property by the construction near thereto by the Virginia Railway Company of its roundhouse, machine shop and coal tippie, it being contended that the operation of these plants near the plaintiff's property caused it to be infested with smoke and dirt, and otherwise injured. The court held that these structures were of such character that it could be presumed that the railroad company intended them as a permanent part of its plant, and that the plaintiff was entitled to recover permanent damages for the injury inflicted on his property, and that the measure of his damages was the difference between the value of his property immediately before the plants were constructed and put in operation, and immediately thereafter.

In *McLaughlin v. Hope*, 107 Ark. 442,

47 L.R.A.(N.S.) 137, 155 S. W. 910, it was held that where a city turns its sewage into a stream which runs by plaintiff's property, and pollutes the water therein, the plaintiff was entitled to recover permanent damages for the injury resulting to his property therefrom; it being held that a sewage disposal plant was one of the permanent instrumentalities used by the city in the proper exercise of its functions.

Powers v. Council Bluffs, 45 Iowa, 652, 24 Am. Rep. 792, was an action for damages for injury to plaintiff's property by the construction of a ditch adjacent thereto by the city. It was held in that case that the construction of the ditch by the city was such a permanent structure, and inflicted upon the plaintiff's property such injury, as that the same must be recovered in a single action, and that if he did not bring such action within the period provided by the statute, it would be barred by limitation.

In *Bizer v. Ottumwa Hydraulic Power Co.* 70 Iowa, 145, 30 N. W. 172, it was held that, where the defendant built a permanent dam across a river and caused the water to flow back on plaintiff's land, this was a permanent injury for which damages must be recovered in a single action.

In *Boise Valley Constr. Co. v. Kroeger*, 17 Idaho, 384, 28 L.R.A.(N.S.) 968, 105 Pac. 1070, it was held that damages arising by reason of the construction of a railroad so near to the property of another that it is injured thereby is single and permanent, and must be recovered in one suit brought for the purpose, and that the measure of damages is the difference between the actual cash value immediately preceding the injury and the actual cash value after the injury, with legal interest thereon to the time of the trial.

The case of *Ottawa Gaslight & Coke Co. v. Graham*, 28 Ill. 73, 81 Am. Dec. 263, was a suit to recover damages for the destruction of plaintiff's water supply, which consisted of a well, by reason of the construction of gas works so near thereto that the water in said well was rendered unfit for use. The court held that this constituted a permanent injury to the plaintiff's property, and that he could recover damages for the injury in a single suit.

Chicago & A. R. Co. v. Maher, 91 Ill. 312, was a suit to recover damages for injury to the plaintiff's dock by the construction of a pier by the railroad company, so that the means of approach to the dock were obstructed. The court held that the construction of the pier was such a permanent structure by the railroad company as to give to the plaintiff the right to recover single damages, and that the recovery of such damages would bar any future action therefor.

ages, and that the recovery of such damages would bar any future action therefor.

In *Montmorency Gravel Road Co. v. Stockton*, 43 Ind. 328, it was held that the assessment of damages to a property owner for land taken and damages to the residue by reason of the construction of a road through his land included the inconvenience and injury which would arise to the land by the operation of the road in its ordinary way, and that such damages must be awarded once for all. A similar holding was made in the case of *Lafayette Pl. Road Co. v. New Albany & S. R. Co.* 13 Ind. 90, 74 Am. Dec. 246.

In *Niagara Oil Co. v. Ogle*, 177 Ind. 292, 42 L.R.A.(N.S.) 714, 98 N. E. 60, Ann. Cas. 1914D, 67, it was held, where the productive power of land was permanently affected by the discharge thereon of oil and salt water, that permanent damages could be recovered therefor.

In *Fowle v. New Haven & N. Co.* 112 Mass. 334, 17 Am. Rep. 106, it was held that permanent damages were recoverable against a railroad company for injury caused to plaintiff's lot by having the water turned against the same from the construction of the defendant company's roadbed, and that the damages must be recovered once for all; it being held that the railroad company's roadbed was such a permanent structure as must be reasonably contemplated to continue indefinitely.

In *Babb v. University of Missouri*, 40 Mo. App. 173, suit was brought to recover permanent damages to plaintiff's land by reason of the maintenance near thereto of sewage disposal vaults, in which were deposited all sorts of sewage and garbage from the university, and from which arose odors and gases and infectious germs, all of which were injurious to plaintiff's land. It was held that this sort of a sewage disposal plant must be treated as such a structure as the defendant would permanently maintain, and that the injury to the plaintiff's land was a permanent one, and recovery should be had therefor in one action. Particular attention is called to this case because of the similarity of the matter under treatment by the defendant in that case and by the defendant in the case at bar.

In *Central Branch Union P. R. Co. v. Andrews*, 26 Kan. 702, it was held that permanent damages were properly recoverable against a railroad company for injury to real estate caused by the construction and ordinary operation of the railroad.

In *Adams v. Hastings & D. R. Co.* 18 Minn. 265, Gil. 236, it was held, where a railroad lawfully constructs its tracks and operates them in a street adjacent to the plaintiff's property, and injury results to the plain-

tiff's property from such operation, that permanent damages may be recovered therefor.

In *Elizabethtown, L. & B. S. R. Co. v. Combs*, 10 Bush, 382, 19 Am. Rep. 67, the court held that damages for injury to the ingress and egress from plaintiff's property by the construction and operation of a railroad in front thereof must be recovered in a single action, and that the measure of plaintiff's damages was the difference in the value of his property immediately before the construction and operation of said railroad and immediately thereafter.

Jeffersonville M. & I. R. Co. v. Esterle, 13 Bush, 667, was a suit for damages to recover for injury to real property by reason of the construction and operation of a railroad by the defendant, and the court held that single and permanent damages were recoverable, and that the measure thereof is the diminution in value occasioned by the location of the railroad tracks and the use to which they are being put.

Rhodes v. Durham, 165 N. C. 679, 81 S. E. 938, was a suit to recover damages from a municipal corporation for the pollution of a watercourse by the discharge of sewage therein. The court held that the plaintiff had a right to recover permanent damages because of the fact that the arrangements made by the city for the discharge of this sewage into the stream were of such a character as led to the conclusion that the same would be maintained indefinitely, and that the measure of the plaintiff's recovery was the diminution in the value of his property by reason of the pollution or the stream.

In *Louisville & N. Terminal R. Co. v. Lelleyett*, 114 Tenn. 368, 1 L.R.A.(N.S.) 49, 85 S. W. 881, the court held that in an action for damages for injury to property by the location and operation of railroad terminals near thereto the injury is permanent, and the measure of damages is the diminution in the value of the property occasioned thereby.

A similar holding was made by the supreme court of Oklahoma, in the case of *Choctaw, O. & G. R. Co. v. Drew*, 37 Okla. 396, 44 L.R.A.(N.S.) 38, 130 Pac. 1149.

The supreme court of Texas, in *Rosenthal v. Taylor, B. & H. R. Co.* 79 Tex. 325, 15 S. W. 268, made a similar holding, and held that the depreciation in the value of the property caused by the railway is the most certain measure of damages to the owner.

In *Sherman Gas & E. Co. v. Belden*, 103 Tex. 59, 27 L.R.A.(N.S.) 237, 123 S. W. 119, the court held that for injury resulting from the operation of a lighting plant the plaintiff was entitled to recover perma-

nent damages, and the measure of his recovery was the diminution in the value of the property by reason of the operation on neighboring property of such plant.

A similar holding was made in the case of *Knapp v. Great Western R. Co.* 6 U. C. C. P. 187.

This review of the authorities indicates the character of injuries to real estate which the courts have construed to be permanent within the meaning of the rule above laid down. From them the rule is deduced that, where the injury to real estate is such as to affect its value permanently, permanent damages can be recovered for that injury, or, if the character of the agency, from the operation of which the injury arises, is such that it can reasonably be expected to continue for an indefinite time and its operation in the ordinary and proper way produces the injury complained of, the plaintiff not only can, but he must, if he would recover damages at all, sue and recover permanent damages. He can have but one suit for the purpose. In this case there is no dispute but that the incinerator constructed by the defendant was constructed in a proper manner. There is no dispute but that it has been during its continuance operated in a proper manner, so that, if injury has resulted to the plaintiff's property, it has been because of the construction and operation in a proper manner of the incinerator by the defendant. This plant was constructed at a cost to the city of something like \$12,000. It is, as is shown by the testimony of the city officials, an absolute necessity, and it cannot be presumed that the city will discontinue, as is argued by counsel for the defendant, the operation of this plant. If it has injured the plaintiff's lot, this injury has inured to the benefit of all of the citizens of the city of Huntington, and it is not right that the plaintiff alone should be compelled to sustain this loss. It is true, a large number of witnesses testified that the conditions claimed by the plaintiff, and witnesses testifying on her behalf, did not exist, and never did exist, and that no injury results to the lot by reason of the construction and operation of this plant. This was a disputed question of fact. Not only did the jury have the witnesses before it, and observe their conduct and demeanor, but before the trial was commenced the jury was taken to view the plant in operation, and after the trial was concluded it was again taken upon the ground and viewed the plant in operation, and, with all of these aids before it, it came to the conclusion that the plaintiff's property had been injured by reason of the operation of this plant. Its findings on this question of fact cannot be disturbed by this court. We are forced to

the conclusion that the injury, if any, to the plaintiff's property by the construction and operation of this plant is a permanent one, that it can reasonably be assumed that the plant will be operated by the city, for the purpose for which it was constructed, indefinitely, and, this being so, the court below

properly allowed a recovery upon the basis of permanent injury.

Finding no error in the judgment complained of, it will be affirmed.

Petition for rehearing denied April 10, 1917.

INDIANA SUPREME COURT.

UNITED STATES CASUALTY COMPANY,
Appt.,
v.
GRACE GRIFFIS.

(— Ind. —, 114 N. E. 83.)

Insurance — accident — ptomaine poisoning.

Death from ptomaine poison contained in mushrooms supposed to be edible, and eaten by the insured without negligence, is within a policy insuring against death by accidental means not resulting from or contributed to, directly or indirectly, wholly or partially, by disease.

For other cases, see *Insurance*, VI. b, 3, *ee*, in *Dig.* 1-52 N. E.

(November 21, 1916.)

APPEAL by defendant from a judgment of the Circuit Court for Jay County in plaintiff's favor in an action brought to recover the amount alleged to be due on an accident insurance policy. Affirmed.

The facts are stated in the opinion.

Messrs. John B. Elam, J. W. Fessler, Harvey J. Elam, Howard S. Young, Focht & Hutchens, and LaFollette & McGriff, for appellant:

There is a well defined distinction between an accidental and violent death and a death effected through accidental and violent means.

Fidelity & C. Co. v. Carroll, 5 L.R.A. (N.S.) 657, 74 C. C. A. 409, 143 Fed. 271, 6 Ann. Cas. 955; *Schmid v. Indiana Travelers' Acci. Asso.* 42 Ind. App. 483, 85 N. E. 1032; *Lehman v. Great Western Acci. Asso.* 155 Iowa, 737, 42 L.R.A. (N.S.) 562, 133 N. W. 752; *Hamlyn v. Crown Accidental Ins. Co.* [1893] 1 Q. B. 750, 62 L. J. Q. B. N. S. 409, 4 Reports, 407, 68 L. T. N. S. 701, 41 Week. Rep. 531, 57 J. P. 663; 3 *Joyce, Ins.* § 2863; *Riley v. Interstate Business Men's Acci. Asso.* — Iowa, —,

L.R.A. —, —, 152 N. W. 617; *Feder v. Iowa State Traveling Men's Asso.* 107 Iowa, 538, 43 L.R.A. 693, 70 Am. St. Rep. 212, 78 N. W. 252; *American Acci. Co. v. Reigart*, 94 Ky. 547, 21 L.R.A. 651, 42 Am. St. Rep. 374, 23 S. W. 191; *Smith v. Aetna L. Ins. Co.* 115 Iowa, 217, 56 L.R.A. 271, 91 Am. St. Rep. 153, 88 N. W. 368; *Lovelace v. Travelers' Protective Asso.* 126 Mo. 104, 30 L.R.A. 209, 47 Am. St. Rep. 638, 28 S. W. 877; *Delaney v. Modern Acci. Club*, 121 Iowa, 528, 63 L.R.A. 603, 97 N. W. 91; *Taliaferro v. Travelers' Protective Asso.* 25 C. C. A. 494, 49 U. S. App. 275, 80 Fed. 368; *Southard v. Railway Pass. Assur. Co.* 34 Conn. 574, Fed. Cas. No. 13,182.

If a result, even though unexpected and accidental, is such as follows from ordinary means, voluntarily employed, it cannot be called a result effected through accidental means.

Atlanta Acci. Asso. v. Alexander, 104 Ga. 709, 42 L.R.A. 188, 30 S. E. 939, 4 Am. Neg. Rep. 616; *Bayless v. Travellers' Ins. Co.* 14 Blatchf. 143, Fed. Cas. No. 1,138; *Pollock v. United States Mut. Acci. Asso.* 102 Pa. 230, 48 Am. Rep. 204; *Niskerna v. United Brotherhood of Carpenters & Joiners*, 93 App. Div. 364, 88 N. Y. Supp. 640; *Hastings v. Travelers' Ins. Co.* 190 Fed. 258; *Fidelity & C. Co. v. Carroll*, 5 L.R.A. (N.S.) 657, 74 C. C. A. 409, 143 Fed. 271, 6 Ann. Cas. 955; *Southard v. Railway Pass. Assur. Co.* 34 Conn. 574, Fed. Cas. No. 13,182; *Feder v. Iowa State Traveling Men's Asso.* 107 Iowa, 538, 43 L.R.A. 693, 70 Am. St. Rep. 212, 78 N. W. 252; *Schmid v. Indiana Travelers' Acci. Asso.* 42 Ind. App. 483, 85 N. E. 1032; *McCarthy v. Travelers' Ins. Co.* 8 Biss. 362, Fed. Cas. No. 8,682; *Cobb v. Preferred Mut. Acci. Asso.* 96 Ga. 418, 22 S. E. 976; *Smouse v. Iowa State Traveling Men's Asso.* 118 Iowa, 436, 92 N. W. 53; *Re Scarr* [1905] 1 K. B. 387, 2 B. R. C. 358, 74 L. J. K. B. N. S. 237, 92 L. T. N. S. 128, 21 Times L. R. 173, 1 Ann.

Note. — For death from taking of poisonous substance as accident, or as the result of accidental means, see annotation following *Johnson v. Fidelity & C. Co.* L.R.A. 1916A, 481.

The general question as to when death or injury may be deemed to have been caused by accidental means though the voluntary act of the insured was the primary cause L.R.A.1917F.

thereof is discussed in the notes to *Fidelity & C. Co. v. Carroll*, 5 L.R.A. (N.S.) 657; *Hutton v. States Acci. Ins. Co.* L.R.A.1915E, 127; and *New Amsterdam Casualty Co. v. Johnson*, L.R.A.1916B, 1021; and see later cases, *Rock v. Travelers' Ins. Co.* L.R.A. 1916E, 1196, and *United States Bank & T. Co. v. Switchmen's Union*, L.R.A.1917E, 311.

Cas. 787; 4 Cooley, Ins. 3158; Payne v. Fraternal Acci. Asso. 119 Iowa, 342, 93 N. W. 361; Follis v. United States Mut. Acci. Asso. 94 Iowa, 435, 28 L.R.A. 78, 58 Am. St. Rep. 408, 62 N. W. 807; Matthes v. Imperial Acci. Asso. 110 Iowa, 222, 81 N. W. 484; Marx v. Travelers' Ins. Co. 39 Fed. 321; Dozier v. Fidelity & C. Co. 13 L.R.A. 114, 46 Fed. 446; Appel v. Aetna L. Ins. Co. 86 App. Div. 83, 83 N. Y. Supp. 238; Shanberg v. Fidelity & C. Co. 19 L.R.A. (N.S.) 1206, 85 C. C. A. 343, 158 Fed. 1, affirming 143 Fed. 651; 3 Joyce, Ins. § 2863; Herdic v. Maryland Casualty Co. 146 Fed. 396; Hutton v. State Acci. Ins. Co. 267 Ill. 267, L.R.A.1915E, 127, 108 N. E. 296, Ann. Cas. 1916C, 577; Newman v. Railway Officials & Employees' Acci. Asso. 15 Ind. App. 20, 42 N. E. 650; Sinclair v. Maritime Pass. Assur. Co. 3 El. & El. 478, 107 Eng. Reprint, 521, 30 L. J. Q. B. N. S. 77, 7 Jur. N. S. 367, 4 L. T. N. S. 15, 9 Week. Rep. 342; Lehman v. Great Western Acci. Asso. 155 Iowa, 737, 42 L.R.A. (N.S.) 562, 133 N. W. 752.

The terms of an accident insurance policy must be construed according to the ordinary sense of the language used, and courts are not at liberty to vary such terms.

Sharpe v. Commercial Travelers' Mut. Acci. Asso. 139 Ind. 92, 37 N. E. 353; Kaaten v. Interstate Casualty Co. 99 Wis. 73, 40 L.R.A. 651, 74 N. W. 534; Newman v. Railway Officials & Employees' Acci. Asso. 15 Ind. App. 29, 42 N. E. 650; Hatch v. United States Casualty Co. 197 Mass. 101, 14 L.R.A. (N.S.) 503, 125 Am. St. Rep. 332, 83 N. E. 398, 14 Ann. Cas. 290; Robertson v. French, 4 East, 135, 102 Eng. Reprint, 781, 7 Revised Rep. 535, 14 Eng. Rul. Cas. 1; Ripley v. Aetna Ins. Co. 30 N. Y. 136, 86 Am. Dec. 362; Spensley v. Lancashire Ins. Co. 54 Wis. 439, 11 N. W. 894; Dwight v. Germania L. Ins. Co. 103 N. Y. 347, 57 Am. Rep. 729, 8 N. E. 654; Ford v. United States Mut. Acci. Relief Co. 148 Mass. 153, 1 L.R.A. 700, 19 N. E. 169.

The rule adopted in New York, that death through accidental or unnatural means itself imports an external and violent agency, is fallacious, and has not been followed in Indiana, and should not be.

Aetna L. Ins. Co. v. Fitzgerald, 165 Ind. 317, 1 L.R.A. (N.S.) 422, 112 Am. St. Rep. 232, 75 N. E. 262, 6 Ann. Cas. 551.

In construing accident insurance policies, effect must be given to every portion thereof, so that no clause, sentence, or word shall be superfluous, void, or insignificant.

Barton v. Fitzgerald, 15 East, 541, 104 Eng. Reprint, 948, 13 Revised Rep. 519; Booth v. Cleveland Rolling Mill Co. 74 N. Y. 23; Barhydt v. Ellis, 45 N. Y. 110; Benedict v. Ocean Ins. Co. 31 N. Y. 392; Dona-

hoe v. Kettell, 1 Cliff. 141, Fed. Cas. No. 3,980; Harper v. New York City Ins. Co. 22 N. Y. 441; Ladd v. Ladd, 8 How. 28, 12 L. ed. 974; Hydeville Co. v. Eagle R. & State Co. 44 Vt. 395; McCaul v. Thayer, 70 Wis. 138, 35 N. W. 353.

To warrant recovery under the policy in suit, the means through which the injury was effected must be external, violent, and accidental. All three qualities must be present and combined.

Schmid v. Indiana Travelers' Acci. Asso. 42 Ind. App. 483, 85 N. E. 1032; Newman v. Railway Officials & Employees' Acci. Asso. 15 Ind. App. 29, 42 N. E. 650; Pollock v. United States Mut. Acci. Asso. 102 Pa. 230, 48 Am. Rep. 204; Smith v. Travelers' Ins. Co. 219 Mass. 147, L.R.A.1915B, 872, 106 N. E. 607; Cobb v. Preferred Mut. Acci. Asso. 96 Ga. 818, 22 S. E. 976; Hastings v. Travelers' Ins. Co. 190 Fed. 258; Lehman v. Great Western Acci. Asso. 155 Iowa, 737, 42 L.R.A. (N.S.) 562, 133 N. W. 752; Re Scarr [1905] 1 K. B. 387, 2 B. R. C. 358, 74 L. J. K. B. N. S. 237, 92 L. T. N. S. 128, 21 Times L. R. 173, 1 Ann. Cas. 787.

Ptomaine poisoning is a disease under the definitions last above given, and this court should take cognizance of that fact.

Dozier v. Fidelity & C. Co. 13 L.R.A. 114, 46 Fed. 446; Bacon v. United States Mut. Acci. Asso. (Stedman v. United States Mut. Acci. Asso.) 123 N. Y. 304, 9 L.R.A. 617, 20 Am. St. Rep. 748, 25 N. E. 399; Brown v. Piper, 91 U. S. 37, 23 L. ed. 200; Sinclair v. Maritime Pass. Assur. Co. 3 El. & El. 478, 107 Eng. Reprint, 521, 30 L. J. Q. B. N. S. 77, 7 Jur. N. S. 367, 4 L. T. N. S. 15, 9 Week. Rep. 342; Bryant v. Continental Casualty Co. — Tex. Civ. App. —, 145 S. W. 636.

If the death was contributed to directly or indirectly, wholly or partially, by disease, plaintiff is not entitled to recover; and the burden was on plaintiff to prove that the cause of death was within the terms of the policy sued on.

Continental Casualty Co. v. Lloyd, 165 Ind. 52, 73 N. E. 824; Sharpe v. Commercial Travelers' Mut. Acci. Asso. 139 Ind. 92, 37 N. E. 353; Clark v. Employers' Liability Assur. Co. 72 Vt. 458, 48 Atl. 639; Smith v. Travelers' Ins. Co. 219 Mass. 147, L.R.A.1915B, 872, 106 N. E. 607; Travellers' Ins. Co. v. McConkey, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360; National Asso. v. Scott, 83 C. C. A. 652, 155 Fed. 92; National Masonic Acci. Asso. v. Shryock, 20 C. C. A. 3, 36 U. S. App. 658, 73 Fed. 774; Commercial Travelers' Mut. Acci. Asso. v. Fulton, 24 C. C. A. 654, 45 U. S. App. 578, 79 Fed. 423; Fidelity & C. Co. v. Weise,

182 Ill. 496, 55 N. E. 540; *Ætna L. Ins. Co. v. Bethel*, 140 Ky. 609, 131 S. W. 523.

If, by reason of pre-existing disease, an injury is fatal, when, without the disease, it would not be, then such injury does not result independently of any and all other causes, and does result from, and is contributed to, at least indirectly and partially, by disease.

Commercial Travelers' Mut. Acci. Asso. v. Fulton, 24 C. C. A. 654, 45 U. S. App. 578, 79 Fed. 423; *Clark v. Employers' Liability Assur. Co.* 72 Vt. 458, 48 Atl. 639; *Sharpe v. Commercial Travelers' Mut. Acci. Asso.* 189 Ind. 92, 37 N. E. 353; *National Masonic Acci. Asso. v. Shryock*, 20 C. C. A. 3, 36 U. S. App. 658, 73 Fed. 774; *National Asso. v. Scott*, 83 C. C. A. 652, 155 Fed. 92.

Messrs. George H. Ward and Macy, Nichols, Goodrich, & Bales for appellee.

Morris, J., delivered the opinion of the court:

Suit by appellee against appellant on an accident policy. The first paragraph of complaint alleges that appellant insured appellee's husband, James R. Griffis, "against loss resulting directly and independently of any and all other causes from bodily injury effected solely through external, violent and accidental means;" that said James R. Griffis lost his life by such means because he ate mushrooms tainted with ptomaine poison; that the death was not contributed to by disease, either directly or indirectly. A second paragraph of complaint differed from the first, in that it alleged that the death resulted from the accidental eating or drinking of a poisonous substance the nature of which was unknown. A demurrer to each paragraph was overruled. There was a trial with verdict and judgment for appellee for \$8,645. Appellant here challenges the sufficiency of each paragraph of complaint, and also the sufficiency of the evidence.

The policy expressly exempted appellant from liability for injury "resulting from or contributed to, directly or indirectly, wholly or partially, by disease."

The evidence for appellee shows that formerly decedent Griffis was a lawyer of Randolph county; that immediately before his death he and his wife resided in Cleveland, Ohio, about 4 miles from the business center of the city; that on October 25, 1913, at about 7 o'clock P. M., Mr. and Mrs. Griffis left their place of residence and went to a restaurant in the business center of the city for the evening meal, where Mr. Griffis ate some mushrooms at about 8 o'clock P. M.; that thereupon they went home, arriving there at about 9 P. M.; that Mr. Griffis, about fifteen minutes thereafter, went to his

bedroom to prepare for retiring, while Mrs. Griffis went to the bathroom to take a bath, and where she was occupied for about thirty minutes; that she then heard water running at a sink near Mr. Griffis's bedroom and went to turn off the water; that on arriving at the sink she discovered a quantity of mushrooms that had been vomited by her husband; that she then went to Mr. Griffis's bedroom, and found him lying across his bed, dressed in his nightclothes, moaning and unconscious; that she immediately telephoned Dr. Placak, who arrived in fifteen minutes and administered medical treatment without effect; that at that time Mr. Griffis's pulse was low and rapid, his finger nails and lips were blue, and his face was cold and clammy and of a greenish white color; that a half hour later, Dr. Leichy, a physician skilled in handling ptomaine poison cases, was called into consultation; that after the latter's arrival the patient vomited up some more mushrooms, was frothing at the mouth, and was unable to swallow anything; that the two physicians resorted, without success, to various remedial measures, but death ensued shortly after midnight. Mr. Griffis never regained consciousness after his wife discovered him lying across his bed. She testified that at and before the time he partook of the mushrooms Mr. Griffis was in perfect health. Dr. Leichy testified that, in his opinion, ptomaine is an organic poison substance, produced by the action of bacteria on some nitrogenous matter, and that Mr. Griffis's death was caused solely by virulent ptomaine poison which was contained in the mushrooms eaten. Medical experts called by appellant were of the opinion that organic diseases contributed to decedent's death, but the jury manifestly accepted the opinions of Dr. Leichy and other medical experts called by appellee.

It is not contended by appellant that Mr. Griffis was guilty of any negligence in partaking of the mushrooms, or that in such act he intended to eat food containing a poisonous substance. *Paul v. Travelers' Ins. Co.* 112 N. Y. 472, 3 L.R.A. 443, 8 Am. St. Rep. 758, 20 N. E. 347, was decided by the New York court of appeals twenty-seven years ago, and has been approved quite generally by other courts. The principle there declared was similar to the one here involved. In that case one Paul was a guest at a hotel of New York city. He retired for the night and was discovered dead in his bed on the following morning. When the body was found, the air in his sleeping chamber was strongly impregnated with illuminating gas. In an action on an accident policy indemnifying the beneficiary against loss by bodily injuries "through external violent

and accidental means," the trial court held the guest's death accidental and awarded judgment to the beneficiary. The judgment was affirmed by the court of appeals, in an opinion holding that "an accident is the happening of an event without the aid and the design of the person and which is unforeseen. . . . As to the point raised by the appellant that the death was not caused by external and violent means, within the meaning of the policy, we think it a sufficient answer that the gas in the atmosphere, as an external cause, was a violent agency, in the sense that it worked upon the intestate so as to cause his death. That a death is the result of accident, or is unnatural, imports an external and violent agency as the cause."

The case was cited with approval by this court in *Ætna L. Ins. Co. v. Fitzgerald* (1905) 165 Ind. 317, 321, 1 L.R.A.(N.S.) 422, 112 Am. St. Rep. 232, 75 N. E. 262, 6 Ann. Cas. 551.

Appellant vigorously assails the New York case, and those of other jurisdictions following it, and earnestly contends that, while the death may have been accidental and violent, it was not effected by accidental and violent means; that Mr. Griffin voluntarily ate the mushrooms, and the mere fact that an unexpected result followed in no wise makes the means accidental within the meaning of the language of the policy. In support of its theory, appellant, among numerous other cases, cites that of *Smith v. Travelers' Ins. Co.* (1914) 219 Mass. 147, L.R.A.1915B, 872, 106 N. E. 607, where liability was denied in a case where the deceased was afflicted with nasal catarrh, and was in the habit of using a nasal douche. On one occasion, while using the instrument, he "snuffed" harder than usual, with the result that streptococcus germs were carried from the nostrils through the Eustachian tube in the middle ear and thence penetrated the brain and resulted in his death from spinal meningitis. The supreme judicial court of Massachusetts held that there was nothing accidental in the inhalation; that, while the deceased "snuffed" harder than he had formerly done, he intended so to do, and the external act was what he purposed; that, though the result was unexpected, the means employed was not, and recovery was proper only when the means employed was accidental. The opinion deals with *Paul v. Travelers' Ins. Co.* supra, and some other cases, in the following language: "In *Healey v. Mutual Acci. Asso.* 133 Ill. 556, 9 L.R.A. 371, 23 Am. St. Rep. 637, 25 N. E. 52, the deceased did not know that what he drank was a poison; he took and drank it accidentally. In *Jenkins v. Hawkeye Commercial Men's Asso.* 147 L.R.A.1917F.

Iowa, 113, 30 L.R.A.(N.S.) 1181, 124 N. W. 199, the swallowing of the fish bone that caused the death of the insured was a mere accident. In *Maryland Casualty Co. v. Hudgins*, 97 Tex. 124, 64 L.R.A. 349, 104 Am. St. Rep. 857, 76 S. W. 745, 1 Ann. Cas. 252, the oysters which caused the death were eaten by the deceased in ignorance of their unsound condition. In *Paul v. Travelers' Ins. Co.* supra, the deceased had no intention of inhaling the gas which caused his death. None of these decisions is inconsistent with the view which we take of the case at bar."

This case is also cited by counsel for appellee, who claim that it supports their contention that the injury here in question was caused by accidental means, and this claim appears to us as well founded. Under the facts pleaded and proven, Mr. Griffin intended only to eat wholesome mushrooms; but, unexpectedly to him, the mushrooms eaten contained a foreign substance that was a virulent poison and constituted an agency of such violent character as to subvert the normal functions of his vital organs and produce death possibly quicker than would have happened had the foreign substance been a corrosive acid poison. We quite agree with appellant's counsel when they say that the means must be accidental, and that a mere accidental result would not suffice under the language of this policy; but we are of the opinion that the unintentional taking of the poisonous substance contained in what deceased supposed to be edible mushrooms constituted an accidental means which caused the death. In support of our conclusion we cite the following: *Peele v. Provident Fund Soc.* 147 Ind. 543, 44 N. E. 661, 46 N. E. 990; *Johnson v. Fidelity & C. Co.* (1915) L.R.A.1916A, 475, and note, page 481, 184 Mich. 406, 151 N. W. 593 (a ptomaine poison case); *Bohaker v. Travelers' Ins. Co.* (1913) 215 Mass. 32, 46 L.R.A.(N.S.) 543, 102 N. E. 342; *Clark v. Iowa State Traveling Men's Asso.* 156 Iowa, 201, 42 L.R.A.(N.S.) 631, 135 N. W. 1114; *Railway Mail Asso. v. Dent*, L.R.A. 1915A, 314, 130 C. C. A. 387, 213 Fed. 981; *Hill v. Hartford Acci. Ins. Co.* (1880) 22 Hun, 187; *Kennedy v. Ætna L. Ins. Co.* (1903) 31 Tex. Civ. App. 509, 72 S. W. 602; *Pollock v. United States Mut. Acci. Asso.* (1883) 102 Pa. 230, 48 Am. Rep. 204; *Metropolitan Acci. Asso. v. Froiland* (1896) 161 Ill. 30, 62 Am. St. Rep. 359, 43 N. E. 766; *Healey v. Mutual Acci. Asso.* (1890) 133 Ill. 556, 9 L.R.A.371, 23 Am. St. Rep. 637, 25 N. E. 52; *Dezell v. Fidelity & C. Co.* (1903) 176 Mo. 253, 75 S. W. 1102; *Carnes v. Iowa State Traveling Men's Asso.* (1898) 106 Iowa, 281, 68 Am. St. Rep. 306, 76 N. W. 683; *McGlinchey v. Fidelity & C. Co.* (1888) 80 Me. 251, 6 Am. St. Rep. 190,

14 Atl. 13; *Jenkins v. Hawkeye Commercial Men's Asso.* 147 Iowa, 113, 30 L.R.A.(N.S.) 1181, 124 N. W. 199; 1 C. J. 431-433. See also *Maryland Casualty Co. v. Hudgins* (1903) 97 Tex. 124, 64 L.R.A. 349, 104 Am. St. Rep. 857, 76 S. W. 745, 1 Ann. Cas. 252.

It is contended by appellant that ptomaine poison is a disease, and that consequently a recovery for injury therefrom is expressly excluded by the terms of the policy. We are of the opinion that, under the facts disclosed here, the ptomaine poison did not constitute a disease within the meaning of the language of the policy exempting appellant from liability for injuries caused by disease. *Railway Mail Asso. v. Dent*, L.R.A. 1915A, 314, 130 C. C. A. 387, 213 Fed. 981; *Brintons v. Turvey* [1905] A. C. 230, 74 L. J. K. B. N. S. 474, 53 Week. Rep. 641, 92 L. T. N. S. 578, 21 Times L. R. 444, 7 W. C. C. 1, 2 Ann. Cas. 137 (anthrax infection case).

The complaint was sufficient to repel appellant's demurrers, and there was evidence that supported its material averments.

Appellant filed an amended fourth paragraph of answer to which the court sustained a demurrer. Appellant seeks here to challenge such ruling; but because of its failure to comply with rule 22 of this court (55 N. E. v.) in the preparation of its brief, it has waived its right to a consideration of the question.

Complaint is made of certain instructions given, and of the failure to give requested ones. What we have said in reference to the complaint and evidence disposes of appellant's principal contentions relative to instructions given and refused. In other respects we are satisfied that there was no reversible error committed.

Judgment affirmed.

Petition for rehearing denied.

MINNESOTA SUPREME COURT.

CITY OF ST. PAUL, Appt.,
v.

GREAT NORTHERN RAILWAY COMPANY, Resp't.

(— Minn. —, 163 N. W. 788.)

Railroad — duty to maintain highway bridge.

It is the uncompensated duty of a commercial railroad which intersects a public street to construct and maintain a bridge over its tracks when reasonable public necessity and safety demand. The use of a street for street railway traffic is a public use in aid of public travel. When the use of such street for a street railway line becomes an appropriate use of the street, though it was not so used at the time the bridge was constructed, it is the uncompensated duty of the railroad to strengthen it, if this be necessary, to make it fit for such use. It does not discharge its duty by maintaining a bridge adequate for passenger and vehicle traffic, and for all traffic except street railway traffic, when the use of the street for street railway traffic becomes an appropriate and needed use.

For other cases, see *Railroads*, II. b, in *Dig* 1-52 N. S.

(July 13, 1917.)

Headnote by DIBELL, C.

Note. — The power to compel a railroad to establish and maintain at its own expense an overhead or underground highway crossing is discussed in the note to *State ex rel. Isc v. Atchison, T. & S. F. R. Co.* L.R.A.1915E, 751; and see later case, L.R.A.1917F.

APPEAL by plaintiff from a judgment of the District Court for Ramsey County in plaintiff's favor for a less amount than demanded, in a proceeding to collect the amount expended for the strengthening of a bridge, for which defendant was alleged to be responsible. Reversed.

The facts are stated in the Commissioner's opinion.

Messrs. O. H. O'Neill and J. P. Kyle, for appellant:

A public bridge is a part of the highway.

Willis v. Winona City, 59 Minn. 33, 26 L.R.A. 142, 60 N. W. 814; *Dunnell's Dig.* § 1110; *State ex rel. Minneapolis v. St. Paul, M. & M. R. Co.* 98 Minn. 380, 28 L.R.A. (N.S.) 298, 120 Am. St. Rep. 581, 108 N. W. 261, 8 Ann. Cas. 1047; *Elliott, Roads & Streets*, 3d ed. §§ 31, 32; *Murphy v. Ft. Edward*, 79 Misc. 296, 140 N. Y. Supp. 885; *Norwalk v. Podmore*, 86 Conn. 658, 86 Atl. 582; *Pickens County v. Greene County*, 171 Ala. 377, 54 So. 998.

A street railway is an ordinary use of the street, and is within the implied purposes for which streets are acquired or dedicated.

Carli v. Stillwater Street R. & Transfer Co. 28 Minn. 373, 41 Am. Rep. 290, 10 N. W. 205; *Elfelt v. Stillwater Street R. Co.* 53 Minn. 68, 55 N. W. 116; *Newell v. Minneapolis, L. & M. R. Co.* 35 Minn. 112, 59 Am. Rep. 303, 27 N. W. 839; *South East*

State ex rel. St. Paul v. Chicago, M. & St. P. R. Co. L.R.A.1917C, 1174. As to highways opened subsequently to the construction of the railroad, see note to *State ex rel. Minneapolis v. St. Paul, M. & M. R. Co.* 28 L.R.A.(N.S.) 298.

& *St. L. R. Co. v. Evansville & Mt. V. Electric R. Co.* 169 Ind. 339, 13 L.R.A.(N.S.) 916, 82 N. E. 765, 14 Ann. Cas. 214; *Dill. Mun. Corp.* 4th ed. 722; *Lewis, Em. Dom.* § 124; *Elliott, Roads & Streets*, pp. 528-558; *Chicago, B. & Q. R. Co. v. West Chicago Street R. Co.* 156 Ill. 255, 29 L.R.A. 485, 40 N. E. 1008; *Atty. Gen. v. Metropolitan R. Co.* 125 Mass. 515, 28 Am. Rep. 264; *Texas & P. R. Co. v. Rosedale Street R. Co.* 64 Tex. 80, 53 Am. Rep. 739; *Galveston, H. & S. A. R. Co. v. Houston Electric Co.* 57 Tex. Civ. App. 170, 122 S. W. 287; *Harrison v. Denver City Tramway Co.* 54 Colo. 503, 44 L.R.A.(N.S.) 1164, 131 Pac. 409; *Connecticut Valley Street R. Co. v. Northampton*, 213 Mass. 54, 99 N. E. 516; *Baltimore & O. S. W. R. Co. v. Cincinnati, L. & A. Electric Street R. Co.* 52 Ind. App. 639, 99 N. E. 1018; *Michigan C. R. Co. v. Hammond, W. & E. C. Electric R. Co.* 42 Ind. App. 66, 83 N. E. 650; *Booth, Street Railways*, §§ 80-83; *Nellis, Street Railways*, p. 135; *Chicago & C. Terminal R. Co. v. Whiting, H. & E. C. Street R. Co.* 139 Ind. 297, 26 L.R.A. 337, 47 Am. St. Rep. 264, 38 N. E. 604.

Railroad corporations, such as the defendant in this case, hold their franchises subject to the right of the public to regulate their use for the preservation or promotion of the public safety, convenience, or accommodation.

New York & N. E. R. Co. v. Bristol, 151 U. S. 566, 38 L. ed. 272, 14 Sup. Ct. Rep. 437; *State v. Atlantic & N. C. R. Co.* 164 N. C. 422, 79 S. E. 447; *State ex rel. Minneapolis v. St. Paul, M. & M. R. Co.* 98 Minn. 380, 28 L.R.A.(N.S.) 298, 120 Am. St. Rep. 581, 108 N. W. 261, 8 Ann. Cas. 1047; *Twin City Separator Co. v. Chicago, M. & St. P. R. Co.* 118 Minn. 491, 137 N. W. 193; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; *Chicago, M. & St. P. R. Co. v. Minneapolis*, 115 Minn. 460, 51 L.R.A.(N.S.) 236, 133 N. W. 169, Ann. Cas. 1912D, 1029; *Cincinnati, I. & W. R. Co. v. Connersville*, 218 U. S. 336, 54 L. ed. 1060, 31 Sup. Ct. Rep. 93, 20 Ann. Cas. 1206.

The ordinance here in question, requiring the defendant to strengthen the bridge, is an exercise of the police power.

3 *Elliott, Railroads*, § 1102; *Portland & R. R. Co. v. Deering*, 78 Me. 61, 57 Am. Rep. 784, 2 Atl. 670; *Chicago & N. W. R. Co. v. Chicago*, 140 Ill. 309, 29 N. E. 1109; *Illinois C. R. Co. v. Willenborg*, 117 Ill. 203, 57 Am. Rep. 862, 7 N. E. 698; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

It is the duty of railroads crossing public streets to comply with all reasonable L.R.A.1917F.

regulations of a municipality in respect to the use of the highway.

State ex rel. Omaha v. Union P. R. Co. 94 Neb. 556, 143 N. W. 919; *Chicago, M. & St. P. R. Co. v. Minneapolis*, 115 Minn. 460, 51 L.R.A.(N.S.) 236, 133 N. W. 169, Ann. Cas. 1912D, 1029; *State ex rel. Clara City v. Great Northern R. Co.* 130 Minn. 480, L.R.A.—, —, 153 N. W. 879; *State ex rel. Railroad & W. Commission v. Great Northern R. Co.* 123 Minn. 467, 144 N. W. 155.

It is the duty of a railroad operating across a public street not to impair the public easement therein, and to restore the highway to its former condition of usefulness.

State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 35 Minn. 131, 59 Am. Rep. 313, 28 N. W. 3, 38 Minn. 246, 36 N. W. 870; *State ex rel. Minneapolis v. Minneapolis & St. L. R. Co.* 39 Minn. 219, 39 N. W. 163; *State ex rel. Duluth v. St. Paul & D. R. Co.* 75 Minn. 473, 78 N. W. 87; *State ex rel. St. Paul v. Minnesota Transfer R. Co.* 80 Minn. 108, 50 L.R.A. 656, 83 N. W. 32; *State ex rel. Duluth v. Northern P. R. Co.* 98 Minn. 429, 108 N. W. 269; *State ex rel. Minneapolis v. St. Paul, M. & M. R. Co.* 98 Minn. 380, 28 L.R.A.(N.S.) 298, 120 Am. St. Rep. 581, 108 N. W. 261, 8 Ann. Cas. 1047; *Chicago, M. & St. P. R. Co. v. Minneapolis*, 115 Minn. 460, 51 L.R.A.(N.S.) 236, 133 N. W. 169, Ann. Cas. 1912D, 1029; *State ex rel. Railroad & W. Commission v. Great Northern R. Co.* 123 Minn. 467, 144 N. W. 155; *State ex rel. St. Paul v. Chicago, M. & St. P. R. Co.* 122 Minn. 280, 142 N. W. 312; *Twin City Separator Co. v. Chicago, M. & St. P. R. Co.* 118 Minn. 491, 137 N. W. 193; *State ex rel. Clara City v. Great Northern R. Co.* 130 Minn. 480, L.R.A.—, —, 153 N. W. 879; *Missouri P. R. Co. v. Omaha*, 235 U. S. 121, 59 L. ed. 157, 35 Sup. Ct. Rep. 82.

Mr. M. L. Countryman for respondent.

Dibell, C., filed the following opinion:

This is an action to recover the amount expended by the plaintiff city in strengthening a bridge which passes over the defendant's railroad. The case was tried to the court without a jury. There were findings and judgment for the plaintiff in the sum of \$2,655.28 and interest. The plaintiff appeals from the judgment.

The facts are undisputed. In brief they are these: Dale street, a public thoroughfare of St. Paul, and the right of way of the defendant, Great Northern Railway Company, intersect. In 1890 the defendant constructed a bridge on this street over its tracks at the intersection and has since maintained it. The St. Paul City Railway

Company has a franchise from the city to operate upon the streets, and under it the city has the power to require it to extend its lines. On December 4, 1913, the city by ordinance directed the company to extend and operate its street railway on Dale street between points on each side of the bridge, provided the bridge was sufficiently strengthened by the city. On May 2, 1914, the city, by an ordinance finding and declaring the public necessity, ordered the defendant to strengthen the Dale street bridge in accordance with certain plans and specifications so as to permit the street railway line to use it with safety. No question is made of the propriety or effect of the ordinance requiring the street railway company to operate its line on Dale, nor of the necessity of strengthening the bridge for its use. The defendant refused to comply with the ordinance. The city then strengthened the bridge at the reasonable cost of \$13,047.38. Of this sum \$9,507 was expended in strengthening the bridge for street railway use and \$2,655.28 was expended in work which the defendant concededly should have done. The court found the defendant liable for the item of \$2,655.28 and not liable for the item of \$9,507, and judgment was entered for \$2,655.28 and interest. The plaintiff claims that it should have recovered both items, and that is the question.

Whether, through legislative delegation, St. Paul has power, in an appropriate case, to compel a railway company to bridge a street at a street and railway intersection, is a question of state law. *Atlantic Coast Line R. Co. v. Goldsboro*, 232 U. S. 548, 58 L. ed. 721, 34 Sup. Ct. Rep. 364. That it has such power is unquestioned. *State ex rel. St. Paul v. Chicago, M. & St. P. R. Co.* 122 Minn. 280, 142 N. W. 312. Nor is it questioned that a municipality with properly delegated police power in an appropriate case may compel railroads to construct overhead or other crossings at their own expense. *Northern P. R. Co. v. Minnesota*, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341; *Cincinnati, I. & W. R. Co. v. Connersville*, 218 U. S. 336, 54 L. ed. 1060, 31 Sup. Ct. Rep. 93, 20 Ann. Cas. 1206; *Chicago, M. & St. P. R. Co. v. Minneapolis*, 232 U. S. 430, 58 L. ed. 671, 34 Sup. Ct. Rep. 400; *Atlantic Coast Line R. Co. v. Goldsboro*, 232 U. S. 548, 58 L. ed. 721, 34 Sup. Ct. Rep. 364. The state cases are to that effect. *State ex rel. Minneapolis v. Great Northern R. Co.* 134 Minn. 249, 161 N. W. 506; *State ex rel. Clara City v. Great Northern R. Co.* 130 Minn. 480, L.R.A.—, 153 N. W. 879; *State ex rel. St. Paul v. Chicago, M. & St. P. R. Co.* 122 Minn. 280, 142 N. W. 312; *Twin City Separator Co. v. Chicago, M. & St. P. R. Co.* 118 Minn. L.R.A.1917F.

491, 137 N. W. 193; *Chicago, M. & St. P. R. Co. v. Minneapolis*, 115 Minn. 460, 51 L.R.A.(N.S.) 236, 133 N. W. 169, Ann. Cas. 1912D, 1029; *State ex rel. Duluth v. Northern P. R. Co.* 98 Minn. 429, 108 N. W. 269; *State ex rel. Minneapolis v. St. Paul, M. & M. R. Co.* 98 Minn. 380, 28 L.R.A.(N.S.) 298, 120 Am. St. Rep. 581, 108 N. W. 261, 8 Ann. Cas. 1047; *State ex rel. St. Paul v. Minnesota Transfer Co.* 80 Minn. 108, 50 L.R.A. 656, 83 N. W. 32; *State ex rel. Duluth v. St. Paul & D. R. Co.* 75 Minn. 473, 78 N. W. 87; *State ex rel. Minneapolis v. Minneapolis & St. L. R. Co.* 39 Minn. 219, 39 N. W. 153; *State ex rel. Minneapolis v. St. Paul, M. & M. R. Co.* 38 Minn. 246, 36 N. W. 870; *State ex rel. Minneapolis v. St. Paul, M. & M. R. Co.* 35 Minn. 131, 59 Am. Rep. 313, 28 N. W. 3. The duty resting upon the railway is a continuing one, exists though the character of public travel and the demands of public necessity and safety change, and the police power residing in the municipality cannot be abridged nor surrendered nor bargained away. *Northern P. R. Co. v. Minnesota*, 208 U. S. 583, 52 L. ed. 630, 23 Sup. Ct. Rep. 341; *State ex rel. St. Paul v. Minnesota Transfer R. Co.* 80 Minn. 108, 50 L.R.A. 656, 83 N. W. 32; *State ex rel. Minneapolis v. Great Northern R. Co.* 134 Minn. 249, 161 N. W. 506; *State ex rel. St. Paul v. Chicago, M. & St. P. R. Co.* 135 Minn. 277, L.R.A.1917C, 1174, 160 N. W. 773, and cases.

The defendant relies largely upon the following: *Carolina C. R. Co. v. Wilmington Street R. Co.* 120 N. C. 520, 26 S. E. 913; *Briden v. New York, N. H. & H. R. Co.* 27 R. I. 569, 65 Atl. 315; *People ex rel. Western New York & P. R. Co. v. Adams*, 88 Hun, 122, 34 N. Y. Supp. 570, affirmed without opinion in 147 N. Y. 722, 42 N. E. 725; *Conshohocken R. Co. v. Pennsylvania R. Co.* 15 Pa. Co. Ct. 445. We have examined them. While some distinctions between them or most of them and the case before us may be drawn, and are suggested in the plaintiff's brief, they directly or indirectly support the defendant's contention and we have found them helpful. They are on the theory that when an existing railway bridge is adequate for ordinary foot and vehicle traffic, a requirement that the railway strengthen it to meet the necessities of street car traffic is the imposition of an additional burden which it cannot be required to bear without compensation. In this view we do not concur. The use of a street for street railway purposes is a proper street use. It is in aid of and facilitates public travel. It is a mode of using the street by the public, and such use does not impose an additional servitude upon abutting property. *Carli v. Stillwater Street*

R. & Transfer Co. 28 Minn. 373, 41 Am. Rep. 290, 10 N. W. 205; *Newell v. Minneapolis, L. & M. R. Co.* 35 Minn. 112, 59 Am. Rep. 303, 27 N. W. 839; *Elfelt v. Stillwater Street R. Co.* 53 Minn. 68, 55 N. W. 116. A bridge is a part of the street. *Willis v. Winona City*, 59 Minn. 27, 26 L.R.A. 142, 60 N. W. 814. The railway company crossing the highway is bound to restore it as near as may be to its former condition of usefulness and to keep it so. "The duty rested upon the defendant corporation when it occupied the avenue with its tracks, to restore the same, by some reasonably safe and convenient means, to its former condition of usefulness. And this duty was a continuing one." *State ex rel. St. Paul v. Minnesota Transfer R. Co.* 80 Minn. 108, 50 L.R.A. 656, 83 N. W. 32. In *State ex rel. Minneapolis v. St. Paul, M. & M. R. Co.* 35 Minn. 131, 59 Am. Rep. 313, 28 N. W. 3, Justice Mitchell, in speaking of the duty cast upon the defendant railroad by a particular statute, said: "The legislature never intended to fix or limit the duty of the company by the necessities of the public at any one time, or under any particular state of circumstances. They intended to impose upon the company the duty, from time to time, of putting the street in such condition and state of repair as changed circumstances—such as the increased travel on the street, or increased traffic on the railroad—might render necessary to its free and proper use."

Neither is the common-law obligation fixed as of the date when it arises and discharged by what is then done in its performance. In *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175, it was held that a railway company was properly required to remove an old bridge, adequate for the flow of water at the time it was constructed, but inadequate later because of increased drainage, and construct a new one. A railway may be required to construct a new bridge or repair or replace an old one. What it may be required to do is measured by reasonable public necessity and safety. It must care for an added use or a changed use if it is a reasonable public travel use. The principle upon which its liability rests is clear. Its tracks interrupt street uses. It must restore the street to a condition of usefulness for public travel. A street railway affords one mode of public travel. The railway must make the street which it has disturbed fit for such use, whether such use was needed when the bridge was constructed or only becomes necessary afterwards. We do not find that the contention now made by the railway has been urged before in any of our numerous crossing cases, though L.R.A.1917F.

many of the bridges required to be built carried street railway tracks.

The four cases cited and relied upon by the defendant were before the court, and cited in the dissenting opinion in *Missouri P. R. Co. v. Omaha*, 117 C. C. A. 12, 197 Fed. 516, which was affirmed in *Missouri P. R. Co. v. Omaha*, 235 U. S. 121, 59 L. ed. 157, 35 Sup. Ct. Rep. 82. That action was to enjoin the city of Omaha from requiring the plaintiff railway company, by an ordinance which it had enacted, to construct a viaduct over a street according to plans and specifications contemplating its use for street railway traffic, and requiring an expenditure of \$80,000, while a viaduct costing \$30,000 was adequate for all other traffic. In holding the ordinance a valid exercise of the police power the Supreme Court said: "It may be that it would be more fair and equitable to require the street railway company to share in the expense of the viaduct, and if the municipality had been authorized so to do by competent authority, it would have been a constitutional exercise of the police power to have made such division of expenses. *Detroit, Ft. W. & B. I. R. Co. v. Osborn*, 189 U. S. 383, 389, 47 L. ed. 860, 864, 23 Sup. Ct. Rep. 540. But there is nothing in the statute requiring the municipality to divide the expense of such improvement among those responsible for the dangerous condition of the street crossing. Where a number of railroads have contributed to the condition which necessitates such improvement in the interest of public safety, it is not an unconstitutional exercise of authority, as this court has held, to require one of the companies interested to perform such work at its own expense. *Chicago, B. & Q. R. Co. v. Nebraska*, 170 U. S. 57, 76, 42 L. ed. 948, 954, 18 Sup. Ct. Rep. 513. The broad authority to require any railroad company to make such improvement, in the interest of public safety, is conferred by the legislature upon the city. The safety of the traveling public is the primary consideration, and this is accomplished by the construction of the viaduct, which is used by many people who travel across the viaduct every day. The public, when being transported by the street railway company, was exposed to the dangers of a grade crossing, which it was within the authority of the state to authorize the municipality to discontinue. Under competent legislation the city has undertaken to do this. In placing the expense entirely upon the railroad company, whose locomotives and trains are principally responsible for the resulting danger to the public, we do not find such abuse of the recognized authority of the state as has justified the courts in some cases in enjoin-

ing the enforcement of state and municipal legislation."

This case recognizes the power of the city to compel a railroad to maintain at its own expense a bridge fit to carry street railway traffic. We apply and follow it.

So far as we are advised the city was without authority to compel the street railway to strengthen the bridge to make it safe for its use. The city was compelling the street railway to extend its lines, and, so far as the record shows, it was the duty of the city to furnish an adequate street. We do not say that, in the exercise of the police power, a city might not require a street railway to keep the space occupied by its tracks in condition and repair and to relieve the city of the burden. Such question is not before us. It is not im-

portant that, in the ordinance directing the street railway to extend its line, there was a proviso to the effect that the city would strengthen the Dale street bridge. This was between the city and the street railway company. It is not correct to say that, by the subsequent ordinance requiring the defendant to strengthen the bridge, the city sought to shift the burden to the defendant. It was never upon the street railway, nor upon the city, except as a condition to the street railway extending its line. If the duty rested upon the defendant, the city could not waive or surrender it by an arrangement with the street railway or even by a contract with the defendant.

There should be judgment for the plaintiff for \$12,162.28 with interest.

Judgment reversed.

MISSOURI SUPREME COURT. (In Banc.)

LEONORA M. PHILLIPS, Resp't.,
v.

WESTERN UNION TELEGRAPH COMPANY, Impleaded, etc., App't.

(— Mo. —, 195 S. W. 711.)

Master and servant — injury by messenger on highway — liability.

A telegraph company is not liable for an injury caused to one standing on a public highway by its messenger who, while on his way to deliver a message, snatches a paper from a newsboy and in an attempt to escape runs heedlessly against the person injured. *For other cases, see Master and Servant, III. a, 2, in Dig. 1-52 N. S.*

(Woodson, J., dissents.)

(May 22, 1917.)

APPEAL by the defendant company from a judgment of the Circuit Court of St. Louis in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant's servant. Reversed.

The facts are stated in the Commissioner's opinion.

Messrs. Albert T. Benedict, Franklin Ferriss, and Henry T. Ferriss, for appellant:

Where the injury to a third party is caused by the servant's negligence in the performance of his duties, and the liability

of the master is based solely on the doctrine of respondeat superior, each is severally liable to the injured party, although for different reasons, but they are not joint tortfeasors and cannot be sued jointly.

Campbell v. Phelps, 1 Pick. 61, 11 Am. Dec. 139; Parsons v. Winchell, 5 Cush. 592, 52 Am. Dec. 745; Mulchey v. Methodist Religious Soc. 125 Mass. 487; Page v. Parker, 40 N. H. 47; Herman Berghoff Brewing Co. v. Przbylski, 82 Ill. App. 361; McNemar v. Cohn, 115 Ill. App. 31; Bailey v. Bussing, 37 Conn. 349; Western U. Teleg. Co. v. Olsson, 40 Colo. 264, 90 Pac. 841; Campbell v. Portland Sugar Co. 62 Me. 552, 16 Am. Rep. 503; Clark v. Fry, 8 Ohio St. 358, 72 Am. Dec. 590; French v. Central Constr. Co. 76 Ohio St. 509, 12 L.R.A. (N.S.) 669, 81 N. E. 751; McGinnis v. Chicago, R. I. & P. R. Co. 200 Mo. 347, 9 L.R.A. (N.S.) 880, 118 Am. St. Rep. 661, 98 S. W. 590, 9 Ann. Cas. 656; Warax v. Cincinnati, N. O. & T. P. R. Co. 72 Fed. 637; Hukill v. Maysville & B. S. R. Co. 72 Fed. 745; Helms v. Northern P. R. Co. 120 Fed. 389; Shaffer v. Union Brick Co. 128 Fed. 97; McIntyre v. Southern R. Co. 131 Fed. 985; Sessions v. Southern P. R. Co. 134 Fed. 313; Atlantic Coast Line R. Co. v. Bailey, 151 Fed. 891; Veariel v. United Engineering & Foundry Co. 197 Fed. 877.

Plaintiff's evidence failed to sustain the claim that the collision was due to the negligence of defendant Kenzell in respect to any act or deed required by or incident to his employment.

Hilsdorf v. St. Louis, 45 Mo. 94, 100 Am. Dec. 352; Walker v. Hannibal & St. J. R. Co. 121 Mo. 575, 24 L.R.A. 363, 42 Am. St. Rep. 547, 26 S. W. 360; Farber v. Missouri P. R. Co. 32 Mo. App. 378; Hartman v. Muehlebach, 64 Mo. App. 566; Collette v. Rebori, 107 Mo. App. 711, 82 S. W. 552;

Note.—The liability of master for negligent injury to third person through personal contact with servant is considered in Ryan v. Keane, 47 L.R.A. (N.S.) 142, and the note thereto.
L.R.A.1917F.

Grattan v. Suedmeyer, 144 Mo. App. 719, 129 S. W. 1038; Slater v. Advance Thresher Co. 97 Minn. 305, 5 L.R.A.(N.S.) 598, 107 N. W. 133; Geraty v. National Ice Co. 16 App. Div. 177, 44 N. Y. Supp. 659, 2 Am. Neg. Rep. 624; St. Louis Southwestern R. Co. v. Harvey, 75 C. C. A. 536, 144 Fed. 806; Guille v. Campbell, 200 Pa. 119, 55 L.R.A. 111, 86 Am. St. Rep. 705, 49 Atl. 938, 10 Am. Neg. Rep. 459; Thurston v. Kansas City Terminal R. Co. — Mo. App. —, 168 S. W. 236; S. W. Noggle Wholesale & Mfg. Co. v. Sellers & M. Roofing Co. — Mo. App. —, 183 S. W. 659.

Messrs. William H. McClarin and Jones, Hocker, Sullivan, & Angert, for respondent:

Defendants are jointly or severally liable and were properly joined as defendants.

Harriman v. Stowe, 57 Mo. 99; Steinhäuser v. Spraul, 114 Mo. 551, 21 S. W. 615, 859; Canfield v. Chicago, R. I. & P. R. Co. 59 Mo. App. 354; Jewell v. Kansas City Bolt & Nut Co. 231 Mo. 206, 140 Am. St. Rep. 515, 132 S. W. 703; Schwyhart v. Barrett, 145 Mo. App. 332, 130 S. W. 388; Stotler v. Chicago & A. R. Co. 200 Mo. 119, 98 S. W. 509; Lanning v. Chicago G. W. R. Co. 196 Mo. 647, 94 S. W. 491; McGinnis v. Chicago, R. I. & P. R. Co. 200 Mo. 347, 9 L.R.A.(N.S.) 880, 118 Am. St. Rep. 661, 98 S. W. 590, 9 Ann. Cas. 656; Hutchinson v. Richmond Safety Gate Co. 247 Mo. 71, 152 S. W. 52; Whiteaker v. Chicago, R. I. & P. R. Co. 252 Mo. 438, 160 S. W. 1009; Chicago, R. I. & P. R. Co. v. Whiteaker, 230 U. S. 421, 60 L. ed. 360, 36 Sup. Ct. Rep. 152; Alabama G. S. R. Co. v. Thompson, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161, 4 Ann. Cas. 1147; Cincinnati, N. O. & T. P. R. Co. v. Bohon, 200 U. S. 221, 50 L. ed. 448, 26 Sup. Ct. Rep. 166, 4 Ann. Cas. 1152; Chesapeake & O. R. Co. v. Dixon, 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67; Southern R. Co. v. Miller, 217 U. S. 209, 54 L. ed. 732, 30 Sup. Ct. Rep. 450; Chicago, B. & Q. R. Co. v. Willard, 220 U. S. 413, 55 L. ed. 521, 31 Sup. Ct. Rep. 460.

Defendant Kenzell was in the employ of the defendant, and at the time was engaged in and about its business as its servant.

Fleishman v. Polar Wave Ice & Fuel Co. 148 Mo. App. 117, 127 S. W. 660; Long v. Nute, 123 Mo. App. 209, 100 S. W. 511; Hays v. Hogan, 180 Mo. App. 237, 165 S. W. 1125; O'Malley v. Heman Constr. Co. 255 Mo. 386, 164 S. W. 565; Curley v. Electric Vehicle Co. 68 App. Div. 18, 74 N. Y. Supp. 35; Seaman v. Koehler, 122 N. Y. 646, 25 N. E. 353; Wyld v. Northern R. Co. 53 N. Y. 156, 5 Am. Neg. Cas. 189; Perlstein v. American Exp. Co. 177 Mass. 530, 52 L.R.A. 959, 59 N. E. 194; Tuomey v. L.R.A.1917F.

O'Reilly S. & F. Co. 3 Misc. 302, 22 N. Y. Supp. 930; Slothower v. Clark, 191 Mo. App. 105, 179 S. W. 55; Phillips v. Western U. Teleg. Co. 194 Mo. App. 458, 184 S. W. 958.

Kenzell's negligence, having been committed in the course of the performance of his duties, was the negligence of the master.

Ryan v. Keane, 211 Mass. 543, 47 L.R.A.(N.S.) 142, 98 N. E. 590; Phillips v. Western U. Teleg. Co. 194 Mo. App. 458, 184 S. W. 958; Whiteaker v. Chicago, R. I. & P. R. Co. 252 Mo. 438, 160 S. W. 1009; Garretzen v. Duenckel, 50 Mo. 104, 11 Am. Rep. 405; Meade v. Chicago, R. I. & P. R. Co. 68 Mo. App. 92; Brill v. Eddy, 115 Mo. 596, 22 S. W. 488, 8 Am. Neg. Cas. 471; Voegeli v. Pickel Marble & Granite Co. 49 Mo. App. 643; Shamp v. Lambert, 142 Mo. App. 573, 121 S. W. 770; Winfrey v. Lazarus, 148 Mo. App. 388, 128 S. W. 276; Bouillon v. Laclede Gaslight Co. 148 Mo. App. 473, 129 S. W. 401; Redd v. Missouri P. R. Co. 161 Mo. App. 522, 143 S. W. 555; Moore v. Jefferson City Light, Heat & P. Co. 163 Mo. App. 270, 146 S. W. 825.

Kenzell, not having stopped in grabbing the paper, but having grabbed it while on his way to appellant's office, had not deviated from, nor abandoned, the pursuit of his duties to the appellant, so as to relieve it from liability.

Long v. Nute, 123 Mo. App. 209, 100 S. W. 511; Slothower v. Clark, 191 Mo. App. 105, 179 S. W. 55; Vanneman v. Walker Laundry Co. 166 Mo. App. 685, 150 S. W. 1128; Jones v. Weigand, 134 App. Div. 644, 119 N. Y. Supp. 441; Webber v. Lockman, 66 Neb. 469, 60 L.R.A. 313, 92 N. W. 591; Lovejoy v. Campbell, 16 S. D. 231, 92 N. W. 24; Ritchie v. Waller, 63 Conn. 155, 27 L.R.A. 161, 38 Am. St. Rep. 361, 28 Atl. 29; Whiteaker v. Chicago R. I. & P. R. Co. 252 Mo. 438, 160 S. W. 1009.

A master is responsible for consequential damages where, by the negligence and carelessness of the servant in doing the business of his employer, another receives an injury for which the servant would himself be liable in an action of trespass.

Douglass v. Stephens, 18 Mo. 367; Pollock, Torts, Am. ed. 89, 90; Duncan v. Findlater, 6 Clark & F. 894, 7 Eng. Reprint, 934, MacLean & R. 911, 9 Eng. Reprint, 339; Farwell v. Boston & W. R. Corp. 4 Met. 49, 38 Am. Dec. 339; New Jersey S. B. Co. v. Brockett, 121 U. S. 637, 645, 30 L. ed. 1049, 1050, 7 Sup. Ct. Rep. 1039.

Brown, C., filed the following opinion:

This is a suit for damages suffered by plaintiff under the following circumstances: The defendant Western Union Telegraph Company is a New York corporation en-

gaged in the business of receiving, transmitting, and delivering communications by telegraph between different places in the United States, including the city of St. Louis, in which it had offices for that purpose among which was an office on the southwest corner of Olive street and Grand avenue. Olive street, at that place, extends east and west, while Grand avenue crosses it, extending north and south. The defendant Kennell, at the time of the injury, which occurred about December 28, 1912, was a messenger boy sixteen years old, in its service, whose duty it was to deliver telegrams. The evidence tends to show that about 7 o'clock in the evening of that day the plaintiff was standing on Grand avenue in front of the show window of a candy store on the southeast corner, waiting for an approaching automobile to pass, so that she could step down into the street and cross to the southwest corner, on which the telegraph office was situated. A newsboy with a bundle of papers under his arm stood on the sidewalk about 7 feet north of her when the defendant Kennell came running from the east along the sidewalk on the south side of Olive street with a telegram in his hand, and said to the newsboy, "Give me a paper." The newsboy refused, when Kennell snatched one from the bundle and ran, looking over his shoulder, collided with plaintiff with such force that she was knocked ten feet into Grand avenue and very seriously injured. There was a verdict and judgment for \$10,000 against both defendants, from which the telegraph company alone has taken this appeal. It does not complain of the amount, but does strenuously insist that it is not liable upon the facts as above stated, and this is the point to which our attention will be given.

1. In going into the consideration of this case it is well to have in mind that the boy who caused the injury which is the subject of the suit was not traveling on the street by permission of his codefendant, but in the exercise of a public right valuable to himself as a facility for gaining a livelihood as well as to his employer. Had he not possessed this right his employer could not have conferred it nor taken it away. It went with his service as far as it was necessary to the performance of the duty involved, and no further. In all other respects and for all other purposes it remained his own. It was, like his health and strength, a part of his own equipment for the service in which he was engaged. We cannot arbitrarily assume that by the terms of his employment he was forbidden to seek, while on these trips, his own pleasure or profit in any manner consistent with the performance of his whole conventional

duty, nor was the defendant under any obligation to so restrain his liberty of action, in the ordinary use of the public easement, although, should it authorize him to commit a wrong, as by inciting him to dangerous speed in a crowd, it would be liable for the consequences upon familiar principles unconnected with any issue in this case, and having no connection with the relation of master and servant.

On the other hand, neither beasts nor inanimate things participate in these public uses of their own right, but only have status in the public highway by right of their owners. For this reason one who employs a beast upon the street must do so under such management and control as will provide reasonably for the safety of persons and their property. Had this boy been furnished by the defendant with a horse to ride or an automobile to transport him in the performance of his duties, his management of these facilities would have been the management of his master, which would have been liable for his acts and omissions in such management.

These principles are familiar to all, and are firmly embedded in the foundation in our jurisprudence, and we would not feel that it is necessary to mention them were it not that this unfortunate accident has already been the subject of adjudication by an appellate court of this state in a suit brought by the husband of plaintiff (*Phillips v. Western U. Teleg. Co.* 194 Mo. App. 458, 184 S. W. 958), in which the liability of the appellant was upheld. While this does not constitute an adjudication of the right in favor of this respondent, it is persuasive authority as the decision by a distinguished court of the same question, and is the only authority to which counsel has directed our attention bearing upon the question which seems to us to be the controlling one in this case.

Respondent's counsel meets these simple rules with the proposition that human legs, while safe and proper instruments of transportation when carefully used, are, like automobiles and other things of a similar nature, dangerous when used negligently, and that the master has as much control over the legs of his servant as over his own animal or machine; and cites *Ryan v. Keane*, 211 Mass. 543, 47 L.R.A. (N.S.) 142, 98 N. E. 590, as an authority, and the same case is cited and quoted by the St. Louis court of appeals in *Phillips v. Western U. Teleg. Co.* supra. In the Massachusetts case the accident occurred in the stable yard of a livery, in which a customer waiting for a conveyance he had ordered was roughly pushed, run against, and injured by the employee who had been serving him, and

who was on foot. We do not see the relevancy of this case, in which the employer failed in the duty of protecting his customer from negligent injury by his own servant upon his own premises to which he had been invited, to the duty of the master to control the movements of his messenger while walking upon the public street.

The respondent has also cited the decision of this court in banc in *Maniaci v. Interurban Exp. Co.* 266 Mo. 633, 182 S. W. 981. In that case the defendant express company had in charge of its office and business at Edwardsville, Illinois, one Joiner, "a person of violent temper, quarrelsome disposition, and without control over his passions," and "a dangerous and unfit person to place in such a position," which it well knew; a dispute had arisen between Joiner and plaintiff over the refusal of plaintiff to sign a receipt for a consignment of fruit previously delivered to him, and Joiner had telephoned him to come to the office, and while he was doing so intercepted him, presented the receipt, demanded that he sign it, and while he was doing so "under protest" shot him. In holding the express company liable under the circumstances this court said: "The plaintiff was there upon the invitation of defendant for a legitimate purpose. He and Joiner were in the midst of the very business which had called them together, at the time said shooting occurred. In addition thereto, the petition alleges that plaintiff was in the very act of signing the receipt when he was suddenly shot."

It also cited a number of authorities sustaining the principle clearly stated by Judge Cooley (*Cooley, Torts*, 3d ed. § 625) as follows: "The master is liable for the acts of his servant, not only when they are directed by him, but also when the scope of his employment or trust is such that he has been left at liberty to do, while pursuing or attempting to discharge it, the injurious act complained of. It is not merely for the wrongful acts he was directed to do, but the wrongful acts he was suffered to do, that the master must respond."

There is nothing in any of these authorities which applies the doctrine of respondeat superior, or the principles on which it rests, to the facts of this case as already stated, and we are not surprised that the diligent search indicated by the briefs of eminent counsel in this case has failed to disclose one. Had the messenger boy, charged as the direct perpetrator of the injury to plaintiff, been charged by the telegraph company with the duty of delivering a telegram to her and taking a receipt therefor, and he had presented it and demanded the receipt, and had a quarrel arisen between them as to the proper method

of executing it, in which he had lost his temper by reason of her protests, and thrown her upon the pavement or otherwise chastised her to her injury, the *Maniaci Case* would be a direct authority in favor of the master's liability. The same principle is supported more or less directly by the authorities which it cites. They all put the master's liability upon the ground that in the performance of those acts which can be done only by the use of its powers and under its direction, it is responsible for the conduct of the servant, even though, in the accomplishment of that object, he commits a wilful tort. There is nothing in any of them that implies the duty to regulate the gait of one who walks along the street for such purpose. Had economy indicated that the duty of delivering telegrams be united in the boy with the duty of delivering medicine for the drug store in which defendant's office was situated, a search of his pockets might disclose either telegrams or medicine, or both, but we do not think their presence would be of value to fix upon either druggist or telegraph company a liability for his want of circumspection in using the easement which was freely open to him for himself despite the objections of either, or both.

We have already referred to the paucity of authority upon the liability of the master for the use by his servant of the public street. The most of us frequently send our servants to the postoffice or the store, or, if we have no one regularly employed to do these errands, expend a nickel or a dime for a special messenger for such purposes. Traveling salesmen in the employ of commercial houses go from store to store and house to house in the pursuance of their calling. Boys engaged in this employment frequently encounter their juvenile enemies, and we, who employ them, do not think of worrying over our financial responsibility for the result. The youth who goes to the postoffice with our letter on a Fourth of July morning may carry a bundle of fire crackers and distribute them freely along the route, or the festive drummer on a holiday occasion may fall over a slight and quiet traveler, or the boy who carries a parcel may, at the same time, try to control his boon companion, the bull pup, with a string. Many of us have seen painful accidents resulting from such conditions, but have seen no legal authority for holding the master liable in damages growing out of the rollicking movements of his servants on the street, even though his own business may have taken them to the very place at that very time, unless he instigates the wrong which caused the injury. Nor are we prepared to hold that a corporation is, in this respect, sub-

ject to a more stringent rule of liability than a natural person.

The judgment of the Circuit Court for the City of St. Louis is therefore reversed.

Railey, C., not sitting.

Per Curiam:

The foregoing opinion of Brown, Commissioner, is adopted by the court in banc as the opinion of said court. All concur, except Woodson, J.

Woodson, J., dissenting:

I dissent from the majority opinion for the reason that the same rule of law applies to the facts of this case as if the in-

jury had been inflicted by an automobile instead of being caused by the messenger's body negligently coming in physical contact with the plaintiff. The messenger was performing the master's business at the time he injured the plaintiff, and had it not been for that fact he would not have been pursuing the journey which resulted in the injury, and the mere fact that he side-stepped a few feet to gratify some personal desire does not change the rule. In that case, as in this, he would have been about the master's business, and the negligence in the one is identical with that in the other; the authorities cited abundantly hold.

Petition for rehearing denied.

NORTH CAROLINA SUPREME COURT.

CITY OF CHARLOTTE, Appt.,

v.

JOHN B. ALEXANDER.

(— N. C. —, 92 S. E. 384.)

Evidence — parol — contract with municipality.

1. A contract with a municipal corporation may be established by parol in the absence of statute requiring it to be recorded. *For other cases, see Evidence, VI. a, in Dig. 1-52 N. S.*

Contract — to secure waivers — debt of another — Statute of Frauds.

2. An agreement by a taxpayer to secure waivers from other taxpayers of the statutory limit for street improvement assessments, and promises to pay the full cost of the improvement, is not within the provision of the Statute of Frauds requiring promises to pay the debt of another to be in writing.

For other cases, see Contracts, I. c, 2, in Dig. 1-52 N. S.

Same — waiving assessment limitation — public policy.

3. An agreement by a property owner to waive statutory limitation of assessments upon his property for street improvement is not void as against public policy.

For other cases, see Contracts, III. c, 1, in Dig. 1-52 N. S.

(May 16, 1917.)

Note. — The defendant in CHARLOTTE v. ALEXANDER did not promise to pay the debt of another, that is, the assessments of the property owners, but guaranteed to secure waivers of a statutory limitation as to assessments and an agreement on the part of the property owners to pay the assessments, if the improvement should be made. It is clear that the decision that this is an original promise and does not come within L.R.A.1917F.

A PPEAL by plaintiff from a judgment of the Superior Court for Mecklenburg County in defendant's favor in an action brought to compel performance of a contract to deliver waivers of limitation of liability for street improvements, and to recover damages for failure to make such delivery. Reversed.

The facts are stated in the opinion.

Messrs. J. W. Keerans, C. D. Talliaferro, and M. L. Ritch, for appellant:

Parol testimony as to what was done and said at the council meeting was competent, where it was omitted from the minutes.

2 Dill. Mun. Corp. 5th ed. § 557, pp. 883, 884; Bank of United States v. Dandridge, 12 Wheat. 64, 6 L. ed. 552; United States v. Fillebrown, 7 Pet. 28, 8 L. ed. 596; 8 Enc. Ev. 833, 834; Bigelow v. Perth Amboy, 25 N. J. L. 297; Belton v. Sterling, — Tex. Civ. App. —, 50 S. W. 1027; Long v. Battle Creek, 39 Mich. 323, 33 Am. Rep. 384; Decherd v. Drewry, 64 Ark. 599, 44 S. W. 351; Porter v. Dubuque, 20 Iowa, 440; Jay County v. Brewington, 74 Ind. 7; Weatherhead v. Cody, 27 Ky. L. Rep. 631, 85 S. W. 1099; Westerhaven v. Clive, 5 Ohio, 136; State ex rel. Columbus v. Hauser, 63 Ind. 155; Handley v. Stutz, 139 U. S. 417, 35 L. ed. 227, 11 Sup. Ct. Rep. 530; 2 Thomp. Corp. 2d ed. §§ 1842, 1847; Franklin County v. Layman, 145 Ill. 138, 33 N. E. 1094; McCabe v. Fountain County, 46 Ind. 380; Jordon v. Osceola County, 59 Iowa, 388, 13 N. W. 344; Chicago, K. & W. R. Co. v.

the Statute of Frauds, requiring a promise to pay the debt of another to be in writing, is correct. An extended search has not disclosed any other cases passing upon the question whether an agreement to procure from another a waiver of a legal right or defense is a contract to answer for the debt, default, or miscarriage of another within the Statute of Frauds.

Stafford County, 36 Kan. 121, 12 Pac. 593; Green v. Lancaster County, 61 Neb. 473, 85 N. W. 439; Hazelgreen v. McNabb, 23 Ky. L. Rep. 811, 64 S. W. 431; Ross v. Madison, 1 Ind. 281, 48 Am. Dec. 361; Brown v. Webster City, 115 Iowa, 511, 88 N. W. 1070; Troy v. Atchison & N. R. Co. 13 Kan. 70; Richardson v. Mehler, 111 Ky. 408, 63 S. W. 967; Bohan v. Avoca, 154 Pa. 404, 26 Atl. 604; Bridgford v. Tuscumbia, 4 Wood, 611, 16 Fed. 910.

Defendant would be liable upon his promise and guaranty to secure the waivers from the owners of property abutting on said streets, and deliver them to the city, as disclosed by the proposed evidence, even though the same was not reduced to writing.

Gainesville & A. Hospital Asso. v. Hobbs, 153 N. C. 188, 69 S. E. 79; Peele v. Powell, 156 N. C. 557, 73 S. E. 234; Gainesville & A. County Hospital Asso. v. Atlantic Coast Line R. Co. 157 N. C. 461, 73 S. E. 242; Whitehurst v. Padgett, 157 N. C. 424, 73 S. E. 240; Craig v. Stewart, 163 N. C. 536, 79 S. E. 1100; Kelly Handle Co. v. Crawford Plumbing & Mill Supply Co. 171 N. C. 503, 88 S. E. 514; Partin v. Prince, 159 N. C. 555, 73 S. E. 1080; Powell & Powell v. King Lumber Co. 168 N. C. 638, 84 S. E. 1032; Dale v. Gaither Lumber Co. 162 N. C. 653, 28 L.R.A.(N.S.) 407, 68 S. E. 134; Davis v. Patrick, 141 U. S. 479, 35 L. ed. 826, 12 Sup. Ct. Rep. 58.

The waivers taken and to be procured by the defendant, if delivered to the city, without restrictions or conditions, in accordance with his promise, are valid and enforceable.

Charlotte v. Brown, 165 N. C. 435, 81 S. E. 611; Harnwell v. White, 115 Ark. 88, 171 S. W. 108; Richcreek v. Moorman, 14 Ind. App. 370, 42 N. E. 943; Dunkirk Land Co. v. Zehner, 35 Ind. App. 694, 74 N. E. 1101; 40 Cyc. 254-267; State v. Mitchell, 119 N. C. 786, 25 S. E. 783, 1020; McKnight v. Pittsburgh, 91 Pa. 273; Thornton v. Cincinnati, 26 Ohio C. C. 33; Ebensburg v. Little, 28 Pa. Super. Ct. 469; Belfast v. Belfast Water Co. 115 Me. 234, L.R.A. 1917B, 908, P.U.R.1917A, 313, 98 Atl. 738.

If the public corporation has performed a contract on its side, the adversary party cannot retain the benefits and plead *ultra vires*.

Hendersonville v. Price, 96 N. C. 423, 2 S. E. 155; 1 Elliott, Contr. p. 479; 3 Thomp. Corp. 2d ed. § 2787; Hutchins v. Planters' Nat. Bank, 128 N. C. 73, 38 S. E. 252; McCracken v. Greensboro, N. & A. R. Co. 168 N. C. 66, 84 S. E. 30; Victor v. Louise Cotton Mills, 148 N. C. 111, 16 L.R.A.(N.S.) 1020, 61 S. E. 648, 16 Ann. Cas. 291; Charlotte Twp. v. Piedmont Realty Co. 134 N. C. 41, 46 S. E. 723; State ex rel. Columbus v. Mitchell, 31 Ohio St. 592; Harrisburg v. L.R.A.1917F.

Baptist, 156 Pa. 526, 27 Atl. 8; Floyd v. Atlanta Bkg. Co. 109 Ga. 778, 35 S. E. 172.

The waivers are not against public policy. De Ridder v. Lewis, 139 La. 903, 72 So. 447; Hamilton, Special Assessments, § 730. Messrs. Cansler & Cansler for appellee.

Brown, J., delivered the opinion of the court:

The plaintiff sues to compel defendant to deliver to it certain so-called waivers for street improvements in possession of defendant, and to recover \$7,504.83 for street paving assessments on account of the loss sustained by it, caused by the failure of the defendant, in violation of his promise, to procure and deliver to it agreements from all owners having property abutting on certain streets improved by the plaintiff, waiving the 20 per cent clause in the city charter and consenting to pay the actual cost incurred by the city in improving said streets; the judgment to be discharged upon the defendant procuring said agreements, without conditions or restrictions, duly executed, and delivery over to the plaintiff, or the payment of said assessments by the property owners.

It appears in the pleadings and evidence that the city of Charlotte had authority, upon petitions of citizens owning more than one half of the frontage abutting on certain streets, including those in controversy, to adopt a system of laying out streets, etc., for permanent improvement, and equalize the assessments on the real estate to pay the cost thereof, as might be just and proper, provided that such assessments should not exceed the amount of special benefits to, or enhancement in value of, said property by reason of said improvements, or 20 per cent of the assessed taxable value thereof; that certain citizens, including the defendant, owning the requisite frontage abutting on the four streets in controversy, presented petitions to the board of aldermen in March, 1912, asking that said streets be improved; that the defendant was especially interested therein, owning property abutting on three of same; that in April, 1912, the board passed an ordinance declaring said streets permanent improvement districts; that nothing whatever was done by the plaintiff towards improving said streets until after March 27, 1913; that on this date the defendant and other citizens, owning property abutting on said streets, appeared before the board of aldermen, the defendant acting as spokesman, for the purpose of inducing the board to pave said streets. The plaintiff offered evidence and proposed to prove that "at a meeting of the board of aldermen on March 27, 1913, the defendant and other citizens interested in said streets

appeared at a regular meeting of said board, and were informed by the latter that, on account of the cost to improve said streets exceeding 20 per cent of the assessed taxable value thereof, as provided by the city charter (Private Acts 1911, § 7, chap. 251), the streets could not be improved by the city unless agreements were obtained from all property owners abutting on said streets, waiving the 20 per cent clause and agreeing to pay the actual cost for the work; that upon such statement, the defendant, as spokesman for the petitioners, then and there at said meeting promised and agreed that, if the said streets were ordered to be paved and the work done by the city, he, personally, would guarantee to secure such agreements or waivers from all the property owners and deliver over to the city; that the plaintiff acted and relied upon said promise, and at said meeting passed a resolution or ordinance directing said streets to be paved, and they were so paved; that subsequently notice was given and assessments were made charging property owners with the actual cost of the work; that the contract was let and bonds issued; that defendant was especially interested in having said streets improved; that he was the owner of property abutting on three of said streets; that but for his promise and guaranty, said streets would not have been improved."

This evidence was excluded by the court, and plaintiff excepted. It appears that a waiver is a paper writing duly executed by the property owner, whereby he waives the limitation of 20 per cent in the city charter and approves and confirms the full assessment, being the cost of the improvement, and covenants and agrees to pay the same. It is admitted that the offer of defendant and the substance of what transpired between the aldermen and defendant were not taken down and entered on the minutes of the board. Plaintiff proposed to prove the transaction by the city clerk and others present at the meeting. So far as the record in this case discloses, there is nothing in the city charter requiring all such matters or transactions to be entered of record, and making the minutes the only evidence. We are of opinion that the court erred in excluding the evidence. It may turn out when the evidence is taken that the whole thing was mere declamation, and did not amount to a contract, but we must consider it as it is presented in the offer to prove.

1. It is competent to prove such a contract by parol evidence. Neither plaintiff nor defendant will be prejudiced by failure of the clerk to enter it upon the minutes of L.R.A.1917F.

the corporation. In 2 Dillon, Mun. Corp. 5th ed. § 557, it is said: "Parol evidence . . . [to show facts omitted to be stated upon the record] is receivable unless the law expressly and imperatively requires all matters to appear of record, and makes the record the only evidence. Thus, in a well-considered case in the Supreme Court of the United States, it was held that the acts of a corporation might be proved otherwise than by its records or some written document, even although it was its duty 'to keep a fair and regular record of its proceedings.'"

In Bank of United States v. Dandridge, 12 Wheat. 64, 6 L. ed. 552, Judge Story says: "Would the omission of the corporation to record its own doings have prejudiced the rights of the party relying upon the good faith of an actual vote of the corporation? If such omission would not be fatal to the plaintiff in suits against the corporation (as in our opinion, it would not be), it establishes the fact that acts of the corporation, not recorded, may be established by parol proofs, and, of course, by presumptive proofs. In reason and justice, there does not seem any solid ground why a corporation may not, in case of the omission of its officers to preserve a written record, give such proofs to support its rights as would be admissible in suits against it to support adverse rights. The true question in such case would seem to be, not which party was plaintiff or defendant, but whether the evidence was the best the nature of the case admitted of, and left nothing behind in the possession or control of the party higher than secondary evidence." "We do not admit, as a general proposition, that the acts of a corporation . . . are invalid merely from the omission to have them reduced to writing, unless the statute creating it makes such writing indispensable as evidence, or to give them an obligatory force."

The same rule is recognized in United States v. Fillebrown, 7 Pet. 28, 8 L. ed. 596. In 8 Enc. Ev. 833, it is said: "Where it is sought to prove a contract existing between a municipal corporation and a private person, the fact that the municipal authorities have failed to keep a proper record does not prevent proof of such contract by any competent evidence, notwithstanding the fact that the law requires them to keep a complete record of their official proceedings in a proper book."

The authorities seem to be in full accord to the effect that, in the absence of a statutory requirement that a record must be made

of a contract in order to render the same valid and binding, where a contract or agreement within their jurisdiction has been entered into by a municipal board and has been executed, the same may be established by parol testimony, although there may be no record in the minutes of the board.

2. The contract of defendant need not be in writing, as it is an original promise, and does not come within the Statute of Frauds, requiring a promise to pay the debt of another to be in writing. The statute does not apply to original promises or undertakings, though the benefit accrues to another than the promisor. *Gainesville & A. Hospital Asso. v. Hobbs*, 153 N. C. 188, 69 S. E. 79. In *Peele v. Powell*, 156 N. C. 557, 558, 73 S. E. 236, the court said: "The obligation is original if made at the time or before the debt is created and the credit is given solely to the promisor, . . . where the promise is for the benefit of the promisor, and he has a personal, immediate, and pecuniary benefit in the transactions," etc.

This rule is recognized and approved in *Gainesville & A. County Hospital Asso. v. Atlantic Coast Line R. Co.* 157 N. C. 461, 462, 73 S. E. 242; *Whitehurst v. Padgett*, 157 N. C. 424, 427, 73 S. E. 240; *Craig v. Stewart*, 163 N. C. 536, 79 S. E. 1100; *Kelly Handle Co. v. Crawford Plumbing & Mill Supply Co.* 171 N. C. 503, 88 S. E. 514.

The defendant in making such promise and guaranty was acting for himself as much as anyone else. His promise was an original obligation for value received by him from the city; to wit, the performing of the work on the streets in which he was vitally and personally interested. Therefore he is liable upon his promise to the city, even though there was no writing. The streets would not have been paved but for the promise and guaranty of defendant to secure waivers and deliver them to plaintiff, upon which promise plaintiff relied. Although plaintiff had the authority to pave the streets, it could not be compelled to do so, as the 20 per cent clause is the limit of assessments fixed by the charter beyond which the plaintiff could not go except by the consent of the property owners. *Charlotte v. Brown*, 165 N. C. 435, 81 S. E. 611.

3. The waivers, copies of which are set out in the record, are not nudum pactum, but are valid and enforceable by the plaintiff when duly executed and delivered. There is no valid reason why citizens who wish to have their property improved by street paving may not expressly waive the charter restriction, and contract with the city to pay L.R.A.1917F.

the actual cost. There is nothing against public policy in such agreement. On the contrary, it conduces to the general improvement of the municipality. When such contracts are entered into with full knowledge by the property owner, the law will not permit him to repudiate it after the work is done and he has received the benefits. This principle is approved by numerous authorities. The supreme court of Arkansas says (*Harnwell v. White*, 115 Ark. 88, 171 S. W. 108): "Where a property owner who was interested in the construction of a proposed improvement, the cost of which exceeded the statutory limit, executed an agreement obligating herself to pay the assessments, which were uncollectable because in excess of the statutory limit, in consideration of a bonding company buying the bonds for the improvement, she is estopped thereafter to set up the invalidity of the assessments or of the improvement districts levying them."

See also *Richcreek v. Moorman*, 14 Ind. App. 370, 42 N. E. 943; *Dunkirk Land Co. v. Zehner*, 35 Ind. App. 694, 74 N. E. 1099.

In *McKnight v. Pittsburgh*, 91 Pa. 273-276, the court said: "The appellant made no objection to the grade or the work as it progressed. The work was undertaken at her instance, among others, and for the benefit of her property, and her agents aided the contractor in hauling and furnishing material. Held, that she was estopped from controverting the acts of the city and its contractor, even though the contract under which the grading was done was void for want of power in the city to execute it. When abutting property owners signed a petition for an improvement, agreeing "to pay such assessment irrespective of the number of owners of property signing the petition," they "are estopped from setting up the constitutional limitation of special benefits." *Thornton v. Cincinnati*, 26 Ohio C. C. 33. *Belfast v. Belfast Water Co.* 115 Me. 234, L.R.A.1917B, 908, P.U.R.1917A, 313, 98 Atl. 738, is a recent case containing a well-considered opinion of the supreme court of Maine, where the authorities are collected and reviewed.

In our opinion it is both good morals and sound law to hold that when a person has accepted the benefits of a contract not contra bonos mores, he is estopped to question the validity of it.

The judgment of nonsuit is set aside.
Reversed.

Hoke, J., concurs in result.

TENNESSEE SUPREME COURT.

R. A. GRIFFIN & SON

v.

J. T. PARKER.

(129 Tenn. 446, 164 S. W. 1142.)

Master and servant — fall of scaffold — construction by foreman.

1. That a master has furnished suitable material for construction of a scaffold does not relieve him from liability for injury to a workman caused by insufficiency of the scaffold, if the structure is erected under the supervision of the master's foreman from materials selected by him.

For other cases, see Master and Servant, II. a, 4, a, in Dig. 1-52 N. S.

Same — act of workmen — fall of scaffold — knowledge of master.

2. A master cannot be held liable for injury to a workman through the fall of a scaffold which was sufficient when erected, but became unsafe because of the dislodging of bracing by negligent acts of the workmen, unless it is shown that he had notice of the defective condition, or that in the exercise of ordinary care he should have known of it.

For other cases, see Master and Servant, II. a, 4, a, in Dig. 1-52 N. S.

(April 2, 1914.)

Note. — That a master is bound under common-law rules to use reasonable care to furnish a reasonably safe place for his servant to work is not questioned by any competent authority, but there is an exception to that rule almost as universally accepted; namely, that where a master has provided an adequate and accessible stock of suitable appliances from which to make a selection, he cannot be held responsible for injuries from the selection of a defective appliance by a servant who knew or ought to have known of the defects. This exception is itself subject to another exception, and the doctrine enunciated in *GRIFFIN v. PARKER*, that when an employer takes upon himself, either personally or through an agent, the duty of selecting for use certain materials from a mass of such materials at hand, he is chargeable with any negligence in such selection, is sustained on high authority.

"All the courts in the United States seem to be unanimous as to the doctrine that, where it is a question of the condition of the instrumentalities, animate or inanimate, when they first become a part of the organism through which the master carries on his business, the master's liability is determined by the principle that he must answer for any negligence which may be committed by any servant to whom he delegates the duty of furnishing those instrumentalities." 4 Labatt, Mast. & S. 4461. This statement of the rule is supported by a long list of

CERTIORARI by both parties, to the Court of Civil Appeals to review a judgment reversing a judgment of the Circuit Court for Davidson County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Modified.

The facts are stated in the opinion.

Mr. J. B. Daniel for plaintiff.

Messrs. Larkin E. Crouch and Thomas H. Malone, for defendants:

The burden of proof was on the plaintiff to show not only a defect causing the accident, but actual or constructive knowledge of this defect on the part of the employer.

Acme Box Co. v. Gregory, 119 Tenn. 537, 105 S. W. 350; *Nashville, C. & St. L. R. Co. v. Hayes*, 117 Tenn. 680, 99 S. W. 362; *East Tennessee & W. C. N. R. Co. v. Lindamood*, 111 Tenn. 457, 78 S. W. 99.

There was no attempt to show actual knowledge on the part of the employer; and as the evidence fails to show when the braces were removed, the plaintiff has wholly failed to establish constructive knowledge.

Nashville, C. & St. L. R. Co. v. Hayes, 117 Tenn. 688, 99 S. W. 362.

If it is held that the evidence shows that the braces were removed on the morning of

authorities dealing with scaffolds, which will be found on page 4467.

The duty of the master to furnish safe appliances as affected by the fact that the appliances are prepared by fellow employees is discussed in a note to *Haskell v. Cape Ann Anchor Works*, 4 L.R.A.(N.S.) 220. At page 228, the statement is made: "Sometimes the master undertakes to furnish his servants a completed appliance which ordinarily he is not bound to do. If he does not leave such a detail of the servant's work to the servants themselves, he is responsible to an employee for any injury caused by the negligence of a coemployee in the construction of the appliance." This liability, of course, must be based upon the fact that the duty to furnish the completed appliance is a non-delegable duty, and any employee charged with the duty of furnishing such appliances must be considered as a vice principal of the employer.

And see the note attached to *Cheatham v. Hogan*, 22 L.R.A.(N.S.) 951, upon the subject, "Duty of master as to condition of scaffold constructed by employee, to an employee not a member of the gang for whose use the scaffold was primarily constructed." See also the case of *Hutchins v. Wolfe*, post, 500. For other notes on the liability of the master for defects in scaffolds, see Indexes to L.R.A. Notes, under the title, "Master and Servant," subtitle, "Safety as to place, appliances, and tools."

the accident, then the interval between 7 o'clock A. M. and 8:30 A. M. is not sufficient to fix the employer with knowledge.

Acme Box Co. v. Gregory, supra.

The existence of the small knot did not cause the accident; but in any event no attempt is made to show actual knowledge of this knot on the part of the employer, and it is not such a defect as would be discovered by reasonable inspection, nor would the employer's duty of inspection extend to such a defect.

Armour v. Brazeau, 191 Ill. 117, 60 N. E. 904.

The presumption is that the master discharged his duty.

Nashville, C. & St. L. R. Co. v. Hayes and *East Tennessee & W. C. N. R. Co. v. Lindamood*, supra.

Plaintiff, having left his position of safety and voluntarily exposed himself to danger, cannot recover.

Knox v. Pioneer Coal Co. 90 Tenn. 546, 18 S. W. 255; *Nashville & C. R. Co. v. McDaniel*, 12 Lea, 386.

The defect being as patent to him as it could be to the employer, he assumed the risk.

Baker v. Louisville & N. Terminal R. Co. 106 Tenn. 490, 53 L.R.A. 474, 61 S. W. 1029; *Brewer v. Tennessee Coal, Iron & R. Co.* 97 Tenn. 615, 37 S. W. 549.

The master, having furnished suitable material for scaffold purposes, and competent fellow servants to aid in its construction, is not liable for defects in the scaffold.

Olsen v. Nixon, 61 N. J. L. 671, 40 Atl. 604, 4 Am. Neg. Rep. 515; *Hogan v. Smith*, 125 N. Y. 774, 26 N. E. 742; *Ross v. Walker*, 139 Pa. 42, 23 Am. St. Rep. 160, 21 Atl. 157, 159; *Dewey v. Parke, D. & Co.* 76 Mich. 631, 43 N. W. 644; *Callan v. Bull*, 113 Cal. 593, 45 Pac. 1017; *Noyes v. Wood*, 102 Cal. 389, 36 Pac. 766; *Perigo v. Indianapolis Brewing Co.* 21 Ind. App. 338, 52 N. E. 462; *Kennedy v. Spring*, 160 Mass. 203, 35 N. E. 779; *Killea v. Faxon*, 125 Mass. 485; *Oelschlegel v. Chicago G. W. R. Co.* 73 Minn. 327, 76 N. W. 56, 409; *Fraser v. Red River Lumber Co.* 45 Minn. 235, 47 N. W. 785; *Lindvall v. Woods*, 41 Minn. 212, 4 L. L. 793, 42 N. W. 1020, 16 N. E. Neg. Cas. 200; *Judson v. Olean*, 116 N. Y. 655, 22 N. E. 555.

Williams, J., delivered the opinion of the court:

This suit was brought by Parker to recover damages for personal injuries incurred while in the service of the appellant firm of contractors as a carpenter. In the circuit court a judgment was recovered by Parker; but the court of civil appeals has reversed L.R.A.1917F.

this judgment and remanded the case for a new trial.

Neither party is content with the action of the last-named court, with result that two petitions for certiorari are before us asking for a review of the judgment. Parker's contention is that there was error in the remand of the cause; the contracting firm insists that its motion for peremptory instructions to the jury in the lower court should have been sustained.

Parker, a carpenter of thirty-five years' experience, while in the employ of petitioner firm, was injured by the falling of a scaffold on which he was standing doing work on the ceiling of a church under course of erection in Nashville. The scaffold was about 28 feet high, and was held up by boards of yellow pine about 28 feet in length, which projected as supporting beams or arms. One of these arms, 6 inches wide and 2 inches thick, carried a knot (about 1½ inches in size) about the center of its length. This arm was in the construction of the scaffold set edgewise, and if held to that position was capable of sustaining a greater weight than it would if set flat. It was held firmly by braces when first placed; but, after so remaining for about five weeks, these braces, or one of them, had been displaced by material carried up by workmen striking against same. With the brace removed, the arm or beam careened under the weight of the floor, men, and material above it, and when it turned flat from upright the arm broke at the center, where the knot was, causing the collapse and Parker's fall.

The court of civil appeals held that the proximate cause of the breaking was not the knot, but the displacement of the bracing and the consequent careening of the beam. Parker himself testified that immediately preceding the collapse he felt this beam careen and did not have time to protect himself.

The scaffold was built under the supervision of R. A. Griffin, Jr., who was not a member of the firm sued, but a general foreman employed by the firm, and who inspected the lumber that went into the scaffold. Parker was not engaged at this building when the scaffold was erected, but was a boss of the firm on another job in the city. He had come to the church construction work one day before the scaffold fell.

The court of civil appeals found the fact to be, on the uncontradicted evidence, that the firm furnished ample suitable material with which to erect the scaffold; that, so far as disclosed, no one noticed the knot in the beam until after the break and collapse.

It is not shown when the bracing of the arm was displaced. The only evidence on the point elicited was to the effect that it

might have occurred on the morning of the collapse. Work commenced at 7 A. M. and the fall of the scaffold occurred at 8:30 A. M.

The primary contention of the firm sued is that this scaffold was a temporary structure, intended only to be used by the carpentry crew in finishing the room where it was constructed; that it was but a part of the work in which the force (of which Parker claimed to be a member) was engaged; that they, as employers, furnished an ample quantity of suitable materials, employed a competent foreman, and did not themselves undertake to furnish the scaffold as a completed structure; and that therefore they are not answerable to Parker for his injury—citing *Killea v. Faxon*, 125 Mass. 485; *Kennedy v. Spring*, 160 Mass. 203, 35 N. E. 779; *Ross v. Walker*, 139 Pa. 42, 23 Am. St. Rep. 160, 21 Atl. 159; *Kimmer v. Weber*, 151 N. Y. 417, 56 Am. St. Rep. 630, 45 N. E. 880, 1 Am. Neg. Rep. 156; *Noyes v. Wood*, 102 Cal. 389, 36 Pac. 766; *Lindvall v. Woods*, 41 Minn. 212, 4 L.R.A. 793, 42 N. W. 1020, 16 Am. Neg. Cas. 200, and other cases in accord.

The general rule is that an employer is bound to use reasonable diligence to furnish the employee a safe place and safe instrumentalities for the work to be done; but an exception exists in case of a scaffold where the employer supplies ample material of good quality and competent labor for the construction of such appliance, which he is not required to furnish in a completed state, and which the employees, within the scope of their employment, are themselves required to construct. In such case the employer is not liable to one of the workmen for the negligence of a fellow servant in the construction of the scaffold. Authorities, *supra*; *Haakensen v. Burgess Sulphite Fibre Co.* Ann. Cas. 1913B, 1122, and note, 76 N. H. 443, 83 Atl. 804; *Haskell v. Cape Ann Anchor Works*, 4 L.R.A. (N.S.) 226-229, note.

A close question, touching which the authorities are not in accord, is whether an exception to the above-noted exception arises where the employer has engaged in the work of scaffold construction a foreman to whom is assigned the selection of the material from the mass or the designing of the structure, and where by reason of the negligence of the foreman in regard to such matter, injury to an employee occurs, and the doctrine of fellow servant is interposed as a defense by the employer.

In the case of *Ross v. Walker*, 139 Pa. 42, 23 Am. St. Rep. 160, 21 Atl. 159, it appeared that Walker, the employer, had in his employ as foreman one Duffey. The trial court instructed the jury that if Duffey was in the entire control of the work, de-

termining what and where materials were to be used for the scaffolding, he was to be deemed to be a vice principal, and his negligence would be that of defendant Walker. The supreme court of Pennsylvania, holding this to be error, said: "For an error in judgment, or for a neglect of duty on the part of any one of his employees, from the foreman down to the humblest unskilled laborer, he was not liable. It was not material to this inquiry to know whether 'Duffey had entire charge and control of the work' as a foreman or not; nor to know whether he selected from the mass furnished by the employer the materials to be used for any particular purpose, or not. . . .

The inquiry is, Was it the employer's duty, after having provided materials ample in quantity and quality, to supervise the selection of every stick out of the mass for every purpose? To state the question is to answer it. This was not his duty, and for this reason Duffey, if he did select the timber, . . . did not represent Walker as a vice principal in such selection." See also *Lambert v. Missisquoi Pulp Co.* 72 Vt. 278, 47 Atl. 1085; *Lindvall v. Woods*, 41 Minn. 212, 4 L.R.A. 793, 42 N. W. 1020, 16 Am. Neg. Cas. 200; *Sowles v. Norcross Bros. Co.* 115 C. C. A. 577, 195 Fed. 889; *Noyes v. Wood*, 102 Cal. 389, 36 Pac. 766; *Olsen v. Nixon*, 61 N. J. L. 671, 40 Atl. 694, 4 Am. Neg. Rep. 515.

We are of opinion, however, that the cases ruling to the contrary announce the better doctrine. When the employer through such a foreman undertakes, as we must infer to have been the fact from the evidence in this case, to make the selection of the materials for use in the scaffolding, the foreman is to be deemed a vice principal. The fact of selection by him defined for the common employer what was fit for use; opportunity for the exercise of discretion on the part of workmen in the selection from any mass was withheld. Without such discretion coming into play, it is difficult to see how any of the workmen can be convicted of negligence in that regard, as a basis for a denial of relief to Parker. *Woods v. Linvall*, 1 C. C. A. 37, 4 U. S. App. 49, 48 Fed. 62; *Blomquist v. Chicago, M. & St. P. R. Co.* 60 Minn. 426, 62 N. W. 818, 16 Am. Neg. Cas. 261; *Lee v. H. N. Leighton Co.* 113 Minn. 373, 129 N. W. 767; *Arkerson v. Dennison*, 117 Mass. 407; *Donahue v. Buck & Co.* 197 Mass. 550, 18 L.R.A. (N.S.) 476, 83 N. E. 1090; *Dunleavy v. Sullivan*, 200 Mass. 20, 85 N. E. 866; *Richards v. Hayes*, 17 App. Div. 422, 45 N. Y. Supp. 324, 3 Am. Neg. Rep. 267; *F. C. Austin Mfg. Co. v. Johnson*, 32 C. C. A. 309, 60 U. S. App. 661, 89 Fed. 677.

We hold, therefore, that when the fore-

man exercised the function of making such selection he acted as vice principal. It was the duty of the employer (1) to furnish the scaffold as an instrumentality complete for use; or (2) to leave the employee unembarrassed as to selection from a mass of the character above defined.

We also conceive that the facts found established that the scaffold when constructed was not a defective structure, and that the beam or arm as placed was sufficient to render the scaffolding superimposed secure. The efficient cause of the collapse was not due to any defect of construction, but to the negligent acts of the workmen thereafter in dislodging the bracing. Treating the scaffold as an instrumentality in reference to which the employer firm owed the workmen the duty to keep safe by the exercise of reasonable care, yet under another firmly established rule it was incumbent on Parker, as plaintiff below, to overcome the presumption of the exercise of due care on the part of the employer by proof of fault, in that

the latter had notice of this defective condition, or that in the exercise of ordinary care he should have known of it. *East Tennessee & W. N. C. R. Co. v. Lindamood*, 111 Tenn. 463, 78 S. W. 99; *Nashville, C. & St. L. R. Co. v. Hayes*, 117 Tenn. 680, 99 S. W. 362.

For aught that appears in the proof, the displacement of the bracing occurred within one and one half hours before the accident. In *Acme Box Co. v. Gregory*, 119 Tenn. 537, 542, 105 S. W. 350, it was held that no presumption of negligence could arise from the employer's failure to inspect during a period of four and one half hours, covering the period of the existence of the defect; and on that ground it was ruled that peremptory instructions should have been given on defendant's motion.

A like holding must here result. The judgment of the Court of Civil Appeals will, on grant of the writ of certiorari, be modified accordingly.

MINNESOTA SUPREME COURT.

THOMAS S. HUTCHINS, Reapt.,
v.

JOHN H. WOLFE, Appt.

(127 Minn. 337, 149 N. W. 543.)

Master and servant — scaffold — reliance on materials.

1. Where the master selects and furnishes material for scaffolding purposes, to be used for that purpose only, the servants may assume that in selecting the same the master exercised due care, and they are not required, before using it to determine whether it is suitable for the purpose.

For other cases, see Master and Servant, II. a, 4, a, in Dig. 1-52 N. S.

Evidence — material for scaffold — sufficiency.

2. Evidence held to justify the conclusion that the defendant selected certain material for the purposes stated; that he negligently included therein defective material, the use of which resulted in injury to plaintiff; and that plaintiff was not guilty of contributory negligence.

For other cases, see Evidence, XII. d, in Dig. 1-52 N. S.

(November 20, 1914.)

Headnotes by BROWN, Ch. J.

Note.—As to the master's liability for defective scaffolding, see *Griffin v. Parker*, ante, 497, and memorandum note appended thereto.

L.R.A.1917F.

APPEAL by defendant from a judgment of the District Court for Hennepin County in plaintiff's favor and from an order denying a motion for new trial in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. George E. Young, for appellant:

The negligence of a fellow servant is one of the risks incident to the employment assumed by the servant.

Buckalew v. Tennessee Coal, Iron & R. Co. 112 Ala. 146, 20 So. 606; *Yeomans v. Contra Costa Steam Nav. Co.* 44 Cal. 71, 9 Am. Neg. Cas. 78; *World's Columbian Exposition v. Bell*, 76 Ill. App. 591; *Boyer v. Eastern R. Co.* 87 Minn. 367, 92 N. W. 326, 12 Am. Neg. Rep. 496; *Foster v. Minnesota C. R. Co.* 14 Minn. 360, Gil. 277; *O'Neil v. Great Northern R. Co.* 80 Minn. 27, 51 L.R.A. 532, 82 N. W. 1086; *Farwell v. Boston & W. R. Corp.* 4 Met. 49, 38 Am. Dec. 339; *Burke v. Norwich & W. R. Co.* 34 Conn. 474, 13 Am. Neg. Cas. 662.

If it were true that the workmen were not fellow servants when the negligent act of selection occurred it would be immaterial, for the accident happened while the same parties were fellow servants and through the negligence of one who was a fellow servant, and not through any negligence of the master. It was the presence of the defective plank that caused the injury, and this was chargeable to the negligence of a fellow servant, who not only put it there, but left it there for the common use of all.

Butler v. Townsend, 126 N. Y. 105, 26 N. E. 1017; Cregan v. Marston, 126 N. Y. 568, 22 Am. St. Rep. 854, 27 N. E. 952; Wachowski v. Chicago Ornamental Iron Co. 167 Ill. App. 335; Hoar v. Merritt, 62 Mich. 386, 29 N. W. 15; Killea v. Faxon, 125 Mass. 485; Brady v. Norcross, 172 Mass. 331, 52 N. E. 528; Fraser v. Red River Lumber Co. 45 Minn. 235, 47 N. W. 785.

Messrs. John N. Berg and Adolph E. L. Johnson, for respondent:

Contributory negligence must be pleaded in order to be available as a defense.

Hill v. Minneapolis Street R. Co. 112 Minn. 503, 128 N. W. 831.

Assumption of risk must also be pleaded in order to be available as a defense.

Coulter v. Union Laundry Co. 34 Mont. 590, 87 Pac. 973; Nord v. Boston & M. Consol. Copper & S. Min. Co. 33 Mont. 464, 84 Pac. 1116, 89 Pac. 647; Longpre v. Big Blackfoot Mill. Co. 38 Mont. 99, 99 Pac. 131; 26 Cyc. 1402; Oregon Short Line & W. N. R. Co. v. Tracy, 14 C. C. A. 199, 29 U. S. App. 529, 66 Fed. 931; Nicholas v. Chicago, R. I. & P. R. Co. 90 Iowa, 85, 57 N. W. 694; Leary v. William G. Webber Co. 210 Mass. 73, 96 N. E. 136.

The negligence of a fellow servant is also an affirmative defense which must be pleaded in order to be available.

Longpre v. Big Blackfoot Mill. Co. 38 Mont. 99, 99 Pac. 131; Layng v. Mt. Shasta Mineral Spring Co. 135 Cal. 141, 67 Pac. 48; Duff v. Willamette Iron & Steel Works, 45 Or. 479, 78 Pac. 363, 668, 17 Am. Neg. Rep. 120; Conlin v. San Francisco & S. J. R. Co. 36 Cal. 404, 13 Am. Neg. Cas. 360; Higgins v. Missouri P. R. Co. 43 Mo. App. 547; Christy v. Fremont Lumber Co. 129 La. 175, 55 So. 754; Johnson v. Heath, 5 Neb. (Unof.) 369, 98 N. W. 832.

In order to relieve the master from liability by reason of the careless act of a fellow servant, the so-called fellow servant must be a fellow servant at the time the careless act was performed, and also at the time the injuries were received.

Smith v. Humphreyville, 47 Tex. Civ. App. 140, 104 S. W. 495; Mosher Mfg. Co. v. Boyles, 62 Tex. Civ. App. 636, 132 S. W. 492; 7 Thomp. Neg. § 4975; State use of Abell v. Western Maryland R. Co. 63 Md. 441; 1 Shearm. & Redf. Neg. § 234; Carroll v. Chicago, B. & N. R. Co. 99 Wis. 399, 67 Am. St. Rep. 872, 75 N. W. 176; Livingway v. Houghton County Street R. Co. 145 Mich. 86, 108 N. W. 662; Commerce Mill. & Grain Co. v. Gowan, — Tex. Civ. App. —, 104 S. W. 916; Baltimore & O. S. W. R. Co. v. Walker, 41 Ind. App. 588, 84 N. E. 730; Lore v. American Mfg. Co. 160 Mo. 608, 61 S. W. 678; Zellars v. Missouri Water & Light Co. 92 Mo. App. 107; Duggan v. L.R.A.1917F.

Phelps, 82 App. Div. 509, 81 N. Y. Supp. 916; Henry v. Kaw Boiler Works, 87 Kan. 671, 125 Pac. 67; Eastland v. Clarke, 165 N. Y. 428, 70 L.R.A. 751, 59 N. E. 202.

If the master himself sets aside certain material for scaffolding purposes he will be liable notwithstanding the fact that the fellow servant may take therefrom a defective plank.

Lee v. H. N. Leighton Co. 113 Minn. 373, 129 N. W. 767; Falkenberg v. Bazille & Partidge, 124 Minn. 19, 144 N. W. 431; Hove-land v. National Blower Works, 134 Wis. 342, 14 L.R.A. (N.S.) 1254, 114 N. W. 705; Donahue v. C. H. Buck & Co. 197 Mass. 550, 18 L.R.A. (N.S.) 476, 83 N. E. 1090; Farrell v. Eastern Machinery Co. 77 Conn. 484, 68 L.R.A. 239, 107 Am. St. Rep. 45, 59 Atl. 611, 17 Am. Neg. Rep. 460; Cushing v. G. W. & F. Smith Iron Co. 194 Mass. 310, 80 N. E. 596.

The doctrine of safe place governs this case and fellow servant rule has no applica-tion.

Johnson v. Lindahl, 106 Minn. 382, 118 N. W. 1009; Johnson v. St. Paul Foundry Co. 112 Minn. 352, 128 N. W. 293; Eingartner v. Illinois Steel Co. 94 Wis. 70, 34 L.R.A. 503, 59 Am. St. Rep. 859, 68 N. W. 664; Eastland v. Clarke, 165 N. Y. 428, 70 L.R.A. 751, 59 N. E. 202; Commerce Mill. & Grain Co. v. Gowan, — Tex. Civ. App. —, 104 S. W. 916; Duggan v. Phelps, 82 App. Div. 509, 81 N. Y. Supp. 916.

Brown, Ch. J., delivered the opinion of the court:

Action for personal injuries, in which plaintiff had a verdict, and defendant ap-pealed from an order denying his motion for judgment or a new trial.

The facts are as follows: Defendant is a contractor and builder, and at the time of the injury to plaintiff was engaged in the construction of a building on Garfield ave-nue, in the city of Minneapolis. The frame-work of the structure had been completed and a scaffold erected to enable the workmen to put up the cornice. This scaffold was constructed by the employees of defendant and from material furnished by defendant for the purpose. It was fully completed and in condition for use prior to the time plaintiff entered into defendant's employ, and plaintiff had no hand either in the se-lection of material therefor or in its con-struction. He was not a servant of defend-ant at that time. It was in the usual form of such structures. After entering defend-ant's service, plaintiff was first put to work inside the building, where he remained for three or four days. He was then directed by defendant to go upon this scaffold and assist another workman in laying the cor-

nice of the building. While engaged in this work, a plank upon the scaffold, and upon which he was required to stand in order to lay the cornice, suddenly broke, thereby precipitating plaintiff to the ground, a distance of some 15 feet, resulting in the injuries of which he here complains.

The complaint charged negligence in the failure of defendant to provide plaintiff a safe place in which to do his work; that the material furnished for the scaffold was defective and unsafe; and that the scaffold was improperly constructed. The defense, as disclosed by the answer, in addition to the general denial, was that plaintiff was guilty of contributory negligence in that, by suddenly changing from a standing to a sitting position, he subjected the plank to an unusual and violent strain, thus causing it to break and precipitate him to the ground.

By the verdict the jury found the facts in plaintiff's favor, and against the defense of contributory negligence. Our examination of the record leads to the conclusion that the verdict of the jury, finding that the plank was defective and improper for use in the scaffold, and that plaintiff was not guilty of contributory negligence, is sustained by the evidence. The evidence made both issues questions of fact, and we sustain the verdict. It is unnecessary to discuss the evidence. We have examined it, with the result stated.

Defendant took exception to the instructions of the trial court, and portions thereof are assigned as error. The court charged in substance and effect that since the scaffold was a completed structure before plaintiff entered defendant's employ, the servants who constructed it were not fellow servants of plaintiff, and he did not assume the risk of their negligence in the selection of the material therefor. And, further, that if defendant made the selection of the material for the scaffold, and failed to exercise due care in such selection, as a result of which the defective plank was made a part of the scaffold, he was liable for such negligence, without regard to the fact that his other servants put the scaffold in shape for use. We do not use the exact language of the instructions, but this statement thereof is in substance what the court said to the jury.

The particular objection to the instructions goes to that part wherein the court said to the jury that acts of negligence on the part of defendant's servants preceding the time when plaintiff entered the service are not chargeable to plaintiff under the fellow-servant doctrine, for he was not at the time of such negligence their fellow servant. We find it unnecessary to determine this question. The authorities are not L.R.A.1917F.

in harmony thereon, and as a further question disposes of the case, we pass it without comment. The question is referred to in 4 Labatt on Master & Servant, 1406, where the authorities upholding both views of the question are cited.

The case on its undisputed facts is controlled by *Lee v. H. N. Leighton Co.* 113 Minn. 373, 129 N. W. 767, and *Falkenburg v. Bazille & Partridge*, 124 Minn. 19, 144 N. W. 431. It appears from the evidence, and we discover no real controversy on the subject, that the scaffolding material for this building was all selected by defendant; it was purchased by him and delivered upon the premises to be used for that purpose. It is not a case where the master furnishes a mass of material from which the servants may select suitable pieces for purposes of this kind, but one, like the *H. N. Leighton Co. Case*, supra, where the master selects and furnishes material for the particular purpose. In such case the servant is not charged with the duty of examining the material so furnished to determine whether it is fit and suitable, but may rely upon the judgment of the master that it is all proper and safe, and that the master acted with due care in selecting the same. This is settled law in this state, as well as elsewhere. The testimony of defendant makes it clear that he purchased and delivered upon the premises the material, of which the plank in question formed part, expressly for scaffolding purposes, and that it was devoted to that purpose by his servants. The case comes, therefore, within those cited, and defendant is liable, irrespective of the question of the negligence of fellow servants.

All other assignments of error have been considered, with the result that no reversible error appears.

Petition for rehearing denied.

UNITED STATES SUPREME COURT.

F. DREW CAMINETTI

v.

UNITED STATES. (No. 139.)

MAURY I. DIGGS

v.

SAME. (No. 163.)

L. T. HAYS

v.

SAME. (No. 464.)

(242 U. S. 470, 61 L. ed. 442, 37 Sup. Ct. Rep. 192.)

Statutes — construction — name of act.

1. The name given to a congressional en-

actment by way of designation or description in the act or the report of the committee accompanying the introduction of the bill into the House of Representatives cannot change the plain implication of the words of the statute.

For other cases, see Statutes, II. a, in Dig. 1-52 N. S.

Prostitution — white slave traffic — nonmercenary transportation.

2. Transportation of a woman in interstate commerce in order that she may be debauched or become a mistress or concubine, although unaccompanied by the expectation of pecuniary gain, is condemned by the provisions of the White Slave Traffic Act of 1910, making it an offense knowingly to transport or cause to be transported in interstate commerce any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose to induce such woman or girl to become a prostitute, or to give herself up to debauchery, or engage in any other immoral practice.

For other cases, see Prostitution, in Dig. 1-52 N. S.

Commerce — power of Congress — white slave traffic.

3. Construing as applicable to transportation, unaccompanied by the expectation of pecuniary gain, the provisions of the White Slave Traffic Act of 1910, making criminal the transportation or the causing to be transported, or the obtaining, aiding, or assisting in the transportation in interstate commerce of women or girls for the purpose of prostitution, debauchery, or other immoral purposes, does not render the statute invalid as in excess of the constitutional power of Congress over interstate commerce.

For other cases, see Commerce, II. a, in Dig. 1-52 N. S.

Criminal law — accused as witness — comment on testimony — self-crimination.

4. An accused who takes the stand in his own behalf and voluntarily testifies for himself may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence in which he participated, and concerning which he is fully informed, without subjecting his silence to the inferences naturally to be drawn from it, and justifying comment by the court in his charge to the effect that the jury may take this omission into consideration in reaching a verdict.

For other cases, see Criminal Law, II. b; Trial, I. h, in Dig. 1-52 N. S.

Appeal — refusal to instruct — testimony of accomplices.

5. A conviction under the White Slave Traffic Act of 1910, making criminal the

transportation or the causing to be transported, or the obtaining, aiding, or assisting in the transportation in interstate commerce of women or girls for the purpose of prostitution, debauchery, or other immoral purposes, will not be reversed because of the refusal of the trial court to instruct the jury that the testimony of the women was that of accomplices, and was to be received with great caution, and to be believed only when corroborated by other testimony.

For other cases, see Appeal and Error, VII. m, 4, b, in Dig. 1-52 N. S.

(Mr. Chief Justice White, Mr. Justice Clarke, and Mr. Justice McKenna dissent.)

(January 15, 1917.)

PETITIONS for writs of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review judgments affirming judgments of the District Court of the United States for the Northern District of California convicting petitioners of violating the White Slave Traffic Act. Affirmed.

PETITION for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which affirmed a judgment of the District Court of the United States for the Western District of Oklahoma convicting petitioner of violating the White Slave Traffic Act. Affirmed.

The facts are stated in the opinion.

Messrs. Joseph W. Bailey, Marshall B. Woodworth, and Robert T. Devlin, for petitioners in Nos. 139 and 163:

It was error to permit comment on the failure of accused to testify.

Balliet v. United States, 64 C. C. A. 201, 129 Fed. 689; Myrick v. United States, 134 C. C. A. 619, 219 Fed. 1; Leonard v. Territory, 2 Wash. Terr. 381, 7 Pac. 872; Williams v. United States, 168 U. S. 382, 42 L. ed. 590, 18 Sup. Ct. Rep. 92; McKnight v. United States, 54 C. C. A. 358, 115 Fed. 972; Cooley, Const. Lim. p. 317.

The facts shown did not, as matter of law, prove the guilt. The presumption of innocence was evidence in favor of the accused.

Coffin v. United States, 156 U. S. 432, 39 L. ed. 481, 15 Sup. Ct. Rep. 394; Kirby v. United States, 174 U. S. 47, 43 L. ed. 890, 19 Sup. Ct. Rep. 574, 11 Am. Crim. Rep. 330.

The jury should not regard the evidence

Note.—The construction, applicability, and effect of the congressional White Slave Traffic Act are considered in the notes to Johnson v. United States, L.R.A.1915A, 862, and Van Pelt v. United States, L.R.A.1917E, 1135.

L.R.A.1917F.

As to the indictment of a woman transported in violation of the White Slave Traffic Act for conspiracy to violate the laws of the United States, see note to United States v. Holte, L.R.A.1915D, 281.

of an accomplice unless she is confirmed and corroborated in some material parts of her evidence.

United States v. Ybanez, 53 Fed. 536; 12 Cyc. 447, 453, 458, 459; *People v. Coffey*, 161 Cal. 433, 39 L.R.A. (N.S.) 704, 119 Pac. 901; *Bennett v. United States*, 227 U. S. 333, 57 L. ed. 531, 33 Sup. Ct. Rep. 288; *United States v. Holte*, 236 U. S. 140, 59 L. ed. 504, L.R.A. 1915D, 281, 35 Sup. Ct. Rep. 271; *Crawford v. United States*, 212 U. S. 183, 204, 53 L. ed. 465, 474, 29 Sup. Ct. Rep. 260, 15 Ann. Cas. 392; *United States v. Flemming*, 18 Fed. 907; *United States v. Harries*, 2 Bond, 311, Fed. Cas. No. 15,309; *United States v. Smith*, 2 Bond, 323, Fed. Cas. No. 16,322; *United States v. McKee*, 3 Dill. 546, Fed. Cas. No. 15,685; *United States v. Lancaster*, 2 McLean, 431, Fed. Cas. No. 15,556; *United States v. Reeves*, 38 Fed. 404; *United States v. Van Leuven*, 45 Fed. 78; *United States v. Sykes*, 58 Fed. 1004; *United States v. Kessler*, Baldw. 22, Fed. Cas. No. 15,528; *United States v. Sacia*, 2 Fed. 754; *People v. Bonney*, 98 Cal. 278, 33 Pac. 98; *United States v. Babcock*, 3 Dill. 581, Fed. Cas. No. 14,487; *United States v. Goldberg*, 7 Biss. 175, Fed. Cas. No. 15,223; *Blashfield Instructions to Jurors*, p. 485; *Solander v. People*, 2 Colo. 48; *Cheatham v. State*, 67 Miss. 335, 19 Am. St. Rep. 310, 7 So. 204; *People v. Sternberg*, 111 Cal. 11, 43 Pac. 201; *People v. Strybe*, 4 Cal. Unrep. 505, 36 Pac. 3; *United States v. Neverson*, 1 Mackey, 152; *United States v. Bicksler*, 1 Mackey, 341; *State v. Hyer*, 39 N. J. L. 598; *State v. Haney*, 19 N. C. (2 Dev. & B. L.) 390; *State v. Miller*, 97 N. C. 484, 2 S. E. 363; *Hanley v. United States*, 59 C. C. A. 153, 123 Fed. 849; *Martin v. State*, 36 Tex. Crim. Rep. 632, 36 S. W. 587, 38 S. W. 194.

The misconduct of counsel during their opening and closing arguments deprived the accused of a fair and impartial trial.

People v. Hail, 25 Cal. App. 342, 143 Pac. 803; *Wells v. State*, 65 Tex. Crim. Rep. 663, 145 S. W. 950; *Wilson v. State*, 87 Neb. 638, 128 N. W. 38; *People v. Crosby*, 17 Cal. App. 518, 120 Pac. 441; *Texas Baptist University v. Patton*, — Tex. Civ. App. —, 145 S. W. 1065; *Collins v. State*, 100 Miss. 435, 56 So. 527; *Parker v. State*, 11 Ga. App. 251, 75 S. E. 437; *Com. v. Nicely*, 130 Pa. 261, 18 Atl. 737; *Watson v. State*, 7 Okla. Crim. Rep. 590, 124 Pac. 1101; *Williams v. United States*, 168 U. S. 382, 398, 42 L. ed. 509, 515, 18 Sup. Ct. Rep. 92; *Hall v. United States*, 150 U. S. 76, 82, 37 L. ed. 1003, 1007, 14 Sup. Ct. Rep. 22; *Graves v. United States*, 150 U. S. 118, 37 L. ed. 1021, 14 Sup. Ct. Rep. 40; *People v. Warr*, 22 Cal. App. 663, 136 Pac. 304; *Brallaforde v. States*, 71 Tex. Crim. Rep. 113, 158 S. W. L.R.A. 1917F.

541; *Miller v. State*, 8 Ga. App. 540, 69 S. E. 922; *Territory v. Cordova*, 11 N. M. 367, 68 Pac. 919; *State v. Blackman*, 108 La. 121, 92 Am. St. Rep. 377, 32 So. 334, 14 Am. Crim. Rep. 37; *People v. Bissert*, 172 N. Y. 643, 65 N. E. 1120; *Ward v. State*, 77 Ark. 19, 90 S. W. 619; *Ivey v. State*, 113 Ga. 1062, 54 L.R.A. 459, 39 S. E. 423, 14 Am. Crim. Rep. 22; *State v. Proctor*, 86 Iowa, 699, 53 N. W. 424; *People v. Bowlers*, 79 Cal. 415, 21 Pac. 752; *People v. Ah Len*, 92 Cal. 282, 27 Am. St. Rep. 103, 28 Pac. 286; *Tucker v. Henniker*, 41 N. H. 319; *People v. Mull*, 167 N. Y. 247, 60 N. E. 629; *Cox v. Territory*, 2 Okla. Crim. Rep. 668, 104 Pac. 378; *People v. Becker*, 210 N. Y. 274, 104 N. E. 396, 12 Cyc. 571, 574; 1 Hayne, New Tr. & App. pp. 245, 250; 3 Wigmore, Ev. § 1808; *People v. Lee Chuck*, 78 Cal. 317, 20 Pac. 719, 8 Am. Crim. Rep. 434; *State v. Irwin*, 9 Idaho, 35, 60 L.R.A. 716, 71 Pac. 608, 13 Am. Crim. Rep. 620; *People v. Carr*, 64 Mich. 702, 31 N. W. 590; *People v. Dane*, 59 Mich. 550, 26 N. W. 781; *People v. Derbert*, 138 Cal. 467, 71 Pac. 564; *Newby v. People*, 28 Colo. 16, 62 Pac. 1035; *Flint v. Com.* 81 Ky. 186, 23 S. W. 346; *Leahy v. State*, 31 Neb. 566, 48 N. W. 390; *Randall v. State*, 132 Ind. 539, 32 N. E. 305; *Smith v. People*, 8 Colo. 457, 8 Pac. 920, 5 Am. Crim. Rep. 615; *State v. Hannett*, 54 Vt. 83, 4 Am. Crim. Rep. 38; *Garlitz v. State*, 71 Md. 293, 4 L.R.A. 601, 18 Atl. 39; *Martin v. State*, 63 Miss. 505, 56 Am. Rep. 813; *Perkins v. Guy*, 55 Miss. 153, 30 Am. Rep. 510; *Cavanah v. State*, 56 Miss. 299; *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582; *State v. Smith*, 75 N. C. 306, 1 Am. Crim. Rep. 306; *Ferguson v. State*, 49 Ind. 33, 1 Am. Crim. Rep. 582; *Newton v. State*, 21 Fla. 53; *State v. Underwood*, 77 N. C. 502; *Combs v. State*, 75 Ind. 221; *People v. Barker*, 10 N. Y. Crim. Rep. 112, 17 N. Y. Supp. 16; *Fuller v. State*, 30 Tex. App. 559, 17 S. W. 1108.

The White Slave Act is unconstitutional. Persons are not subjects of commerce.

New York v. Miln, 11 Pet. 102, 9 L. ed. 648; *License Cases*, 5 How. 504, 12 L. ed. 256; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 489, 31 L. ed. 708, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062.

The only power Congress has over any person is while such person is in transitu.

Lemmon v. People, 26 Barb. 270, affirmed in 20 N. Y. 562.

Commerce among the several states shall be "free and untrammelled."

Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; *Hall v. DeCuir*, 95 U. S. 485, 24 L. ed. 547; *Webber v. Virginia*, 103 U. S. 344, 26 L. ed. 565; *Passenger Cases*, 7 How. 283, 12 L. ed. 702; *King v. American Transp.*

Co. 1 Flipp. 1, Fed. Caa. No. 7,787; Boyce v. Anderson, 2 Pet. 150, 7 L. ed. 379.

The White Slave Traffic Act was intended by Congress to apply only to cases of commercialized vice or of "white slavery," and not to "des affaires de cœur" or escapades such as the facts disclose in the case at bar.

Sedgw. Stat. & Const. Law pp. 241, 242; Congressional Record, vol. 50, pp. 3368, 3370, 3371; Bishop, Statutory Crimes, 3d ed. § 70; 2 Lewis's Sutherland Stat. Constr. 2d ed. § 347; United States v. Bitty, 208 U. S. 393, 52 L. ed. 543, 28 Sup. Ct. Rep. 396; Standard Dict. "White Slave;" Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; Century Dict. "Slave," "Slave-Trade," "Trade," "Traffic;" United States v. Poland, 145 C. C. A. 630, 231 Fed. 817; Congressional Record, vol. 50, pp. 3354 et seq.; People v. Draper, 169 App. Div. 479, 154 N. Y. Supp. 1034.

The word "commerce," as employed by the framers of the Constitution, implies a means to a financial, pecuniary, or other like remunerative end,—traffic or trade for emolument or compensation.

Bl. Com. pp. 273 to 278, subd. 5; 1 Kent, Com. pp. 32–34, 431–439; United States v. Hoke, 187 Fed. 992; Keller v. United States, 213 U. S. 138, 53 L. ed. 737, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066; Black, Const. Law, 3d ed. 391, 392; Freund, Pol. Power, § 65; Bishop, Statutory Crimes, 3d ed. § 990; Tiedeman, Pol. Power, § 201.

"Prostitution," of course, refers to commercialized vice. The words following it, "debauchery, or for any other immoral practice (purpose)," under the rule of construction known as "ejusdem generis," where general words follow the enumeration of particular classes of persons or things, will be construed as applicable only to persons or things of the same general nature or class as those enumerated.

36 Cyc. 1119, 1122; State v. Erwin, 91 N. C. 545; Lane v. State, 39 Ohio St. 312; Ex parte Muckenfuss, 52 Tex. Crim. Rep. 467, 107 S. W. 1131; State v. Goodrich, 84 Wis. 359, 54 N. W. 577; Reg. v. Reid, 30 Ont. Rep. 732.

The White Slave Traffic Act is a highly penal statute and it should be strictly construed; and if there be any doubt or ambiguity in some of the verbiage of the act that doubt or ambiguity should be resolved against the government and in favor of the individual.

H. Hackfeld & Co. v. United States, 197 U. S. 442, 49 L. ed. 826, 25 Sup. Ct. Rep. 456.

Mr. Harry O. Glasser, for petitioner in No. 464:

"Prostitution" may be defined, generally, L.R.A.1917F.

as the practice of a female offering her body to an indiscriminate intercourse with men, as distinguished from sexual intercourse confined to one man.

People v. Demoussat, 71 Cal. 611, 12 Pac. 788, 7 Am. Crim. Rep. 1; State v. Goodwin, 38 Kan. 538, 6 Pac. 899, 5 Am. Crim. Rep. 1; Carpenter v. People, 8 Barb. 603; Van Dalsen v. Com. 28 Ky. L. Rep. 238, 89 S. W. 255; United States v. Smith, 35 Fed. 490.

It is sometimes defined as "common lewdness of a woman for gain," and the "act of permitting a common and indiscriminate sexual intercourse for hire."

Bunfill v. People, 154 Ill. 640, 39 N. E. 565; State v. Gibson, 111 Mo. 97, 19 S. W. 980; 2 Bouvier's Law Dict.

The "other immoral purpose" must be one of the same general class or kind as the particular purpose of prostitution.

United States v. Bitty, 208 U. S. 398, 52 L. ed. 544, 28 Sup. Ct. Rep. 396.

The words of the statute must fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished (Evans v. United States, 153 U. S. 584, 38 L. ed. 830, 14 Sup. Ct. Rep. 934, 9 Am. Crim. Rep. 668; United States v. Carl, 105 U. S. 611, 26 L. ed. 1135, 4 Am. Crim. Rep. 246; United States v. Marx, 122 Fed. 964), and must state all the material facts and circumstances embraced in the definition of the offense (United States v. Hess, 124 U. S. 483, 31 L. ed. 516, 8 Sup. Ct. Rep. 571).

Mr. William Wallace, Jr., Assistant Attorney General, for the United States:

The person furnishing the ticket or otherwise bearing the cost of transportation, whether accompanying the passenger or not, causes such passenger to be transported in interstate commerce, and this result is likewise not dependent upon the purpose of the person furnishing the ticket or otherwise causing the transportation.

Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 400, 57 L. ed. 1511, 1541, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18; New York v. Compagnie Générale Transatlantique, 107 U. S. 59, 27 L. ed. 383, 2 Sup. Ct. Rep. 87; Mobile County v. Kimball, 102 U. S. 691, 702, 26 L. ed. 238, 241; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 218, 38 L. ed. 962, 968, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Chicago, R. I. & P. R. Co. v. Wright, 239 U. S. 548, 550, 60 L. ed. 431, 434, 36 Sup. Ct. Rep. 185; Reid v. Colorado, 187 U. S. 137, 146, 150, 47 L. ed. 108, 113, 115, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; Hanley v. Kansas City

Southern R. Co. 187 U. S. 617, 619, 47 L. ed. 333, 335, 23 Sup. Ct. Rep. 214.

Illicit sexual intercourse is ejusdem generis with prostitution.

United States v. Bitty, 208 U. S. 393, 402, 52 L. ed. 543, 546, 28 Sup. Ct. Rep. 396.

Giving the language of the act its ordinary meaning, it would cover the acts charged against petitioners.

United States v. Bitty, 208 U. S. 393, 52 L. ed. 543, 28 Sup. Ct. Rep. 396; United States v. Holte, 236 U. S. 140, 145, 59 L. ed. 504, 506, L.R.A.1915D, 281, 35 Sup. Ct. Rep. 271; Wilson v. United States, 232 U. S. 563, 571, 58 L. ed. 728, 733, 34 Sup. Ct. Rep. 347; Johnson v. United States, L.R.A. 1915A, 862, 131 C. C. A. 613, 215 Fed. 679; United States v. Flaspoller, 205 Fed. 1006; Suslak v. United States, 130 C. C. A. 391, 213 Fed. 913; United States v. Warner, 188 Fed. 682; United States v. Vaughn, 209 Fed. 719; Athanasaw v. United States, 227 U. S. 326, 330, 331, 57 L. ed. 528, 530, 33 Sup. Ct. Rep. 285, Ann. Cas. 1913E, 911.

Mr. Justice Day delivered the opinion of the court:

These three cases were argued together, and may be disposed of in a single opinion. In each of the cases there was a conviction and sentence for violation of the so-called White Slave Traffic Act of June 25, 1910 (36 Stat. at L. 825, chap. 395, Comp. Stat. 1913, § 8812), the judgments were affirmed by the circuit courts of appeals, the writs of certiorari bring the cases here.

In the Caminetti Case, the petitioner was indicted in the United States district court for the northern district of California, upon the 6th day of May, 1913, for alleged violations of the act. The indictment was in four counts, the first of which charged him with transporting and causing to be transported, and aiding and assisting in obtaining transportation for a certain woman from Sacramento, California, to Reno, Nevada, in interstate commerce, for the purpose of debauchery, and for an immoral purpose, to wit, that the aforesaid woman should be and become his mistress and concubine. A verdict of not guilty was returned as to the other three counts of this indictment. As to the first count, defendant was found guilty and sentenced to imprisonment for eighteen months and to pay a fine of \$1,500. Upon writ of error to the United States circuit court of appeals for the ninth circuit, that judgment was affirmed. 136 C. C. A. 147, 220 Fed. 545.

Diggs was indicted at the same time as was Caminetti, upon six counts, with only four of which are we concerned, inasmuch as there was no verdict upon the last two. The first count charged the de-

fendant with transporting and causing to be transported, and aiding and assisting in obtaining transportation for, a certain woman from Sacramento, California, to Reno, Nevada, for the purpose of debauchery, and for an immoral purpose, to wit, that the aforesaid woman should be and become his concubine and mistress. The second count charged him with a like offense as to another woman (the companion of Caminetti) in transportation, etc., from Sacramento to Reno, that she might become the mistress and concubine of Caminetti. The third count charged him (Diggs) with procuring a ticket for the first-mentioned woman from Sacramento to Reno in interstate commerce, with the intent that she should become his concubine and mistress. The fourth count made a like charge as to the girl companion of Caminetti. Upon trial and verdict of guilty on these four counts, he was sentenced to imprisonment for two years and to pay a fine of \$2,000. As in the Caminetti case, that judgment was affirmed by the circuit court of appeals. 136 C. C. A. 147, 220 Fed. 545.

In the Hays Case, upon June 26th, 1914, an indictment was returned in the United States district court for the western district of Oklahoma against Hays and another, charging violations of the act. The first count charged the said defendants with having, on March 17th, 1914, persuaded, induced, enticed, and coerced a certain woman, unmarried and under the age of eighteen years, from Oklahoma City, Oklahoma, to the city of Wichita, Kansas, in interstate commerce and travel, for the purpose and with intent then and there to induce and coerce the said woman, and intending that she should be induced and coerced to engage in prostitution, debauchery, and other immoral practices, and did then and there, in furtherance of such purposes, procure and furnish a railway ticket entitling her to passage over the line of railway, to wit, the Atchison, Topeka, & Santa Fe Railway, and did then and there and thereby, knowingly entice and cause the said woman to go and to be carried and transported as a passenger in interstate commerce upon said line of railway. The second count charged that on the same date the defendants persuaded, induced, enticed, and coerced the same woman to be transported from Oklahoma City to Wichita, Kansas, with the purpose and intent to induce and coerce her to engage in prostitution, debauchery, and other immoral practices at and within the state of Kansas, and that they enticed her and caused her to go and be carried and transported as a passenger in interstate commerce from

Oklahoma City, Oklahoma, to Wichita, Kansas, upon a line and route of a common carrier, to wit: The Atchison, Topeka, & Santa Fe Railway. Defendants were found guilty by a jury upon both counts, and Hays was sentenced to imprisonment for eighteen months. Upon writ of error to the circuit court of appeals for the eighth circuit, judgment was affirmed (145 C. C. A. 294, 231 Fed. 106).

It is contended that the act of Congress is intended to reach only "commercialized vice," or the traffic in women for gain, and that the conduct for which the several petitioners were indicted and convicted, however reprehensible in morals, is not within the purview of the statute when properly construed in the light of its history and the purposes intended to be accomplished by its enactment. In none of the cases was it charged or proved that the transportation was for gain or for the purpose of furnishing women for prostitution for hire, and it is insisted that, such being the case, the acts charged and proved, upon which conviction was had, do not come within the statute.

It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms. *Lake County v. Rollins*, 130 U. S. 662, 670, 671, 32 L. ed. 1060, 1063, 1064, 9 Sup. Ct. Rep. 651; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 33, 39 L. ed. 601, 610, 15 Sup. Ct. Rep. 508; *United States v. Lexington Mill & Elevator Co.* 232 U. S. 399, 409, 58 L. ed. 658, 661, L.R.A.1915B, 774, 34 Sup. Ct. Rep. 337; *United States v. First Nat. Bank*, 234 U. S. 245, 258, 58 L. ed. 1298, 1303, 34 Sup. Ct. Rep. 846.

Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion. *Hamilton v. Rathbone*, 175 U. S. 414, 421, 44 L. ed. 219, 222, 20 Sup. Ct. Rep. 155. There is no ambiguity in the terms of this act. It is specifically made an offense to knowingly transport or cause to be transported, etc., in interstate commerce, any woman or girl for the purpose of prostitution or debauchery, or for "any other immoral purpose," or with the intent and purpose to induce any such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice.

Statutory words are uniformly presumed, unless the contrary appears, to be used in L.R.A.1917F.

their ordinary and usual sense, and with the meaning commonly attributed to them. To cause a woman or girl to be transported for the purposes of debauchery, and for an immoral purpose, to wit, becoming a concubine or mistress, for which Caminetti and Diggs were convicted; or to transport an unmarried woman, under eighteen years of age, with the intent to induce her to engage in prostitution, debauchery, and other immoral practices, for which Hays was convicted, would seem by the very statement of the facts to embrace transportation for purposes denounced by the act, and therefore fairly within its meaning.

While such immoral purpose would be more culpable in morals and attributed to baser motives if accompanied with the expectation of pecuniary gain, such considerations do not prevent the lesser offense against morals of furnishing transportation in order that a woman may be debauched, or become a mistress or a concubine, from being the execution of purposes, within the meaning of this law. To say the contrary would shock the common understanding of what constitutes an immoral purpose when those terms are applied, as here, to sexual relations.

In *United States v. Bitty*, 208 U. S. 393, 52 L. ed. 543, 28 Sup. Ct. Rep. 396, it was held that the act of Congress against the importation of alien women and girls for the purpose of prostitution "and any other immoral purpose" included the importation of an alien woman to live in concubinage with the person importing her. In that case this court said:

"All will admit that full effect must be given to the intention of Congress as gathered from the words of the statute. There can be no doubt as to what class was aimed at by the clause forbidding the importation of alien women for purposes of 'prostitution.' It refers to women who, for hire or without hire, offer their bodies to indiscriminate intercourse with men. The lives and example of such persons are in hostility to 'the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.' *Murphy v. Ramsey*, 114 U. S. 15, 45, 29 L. ed. 47, 57, 5 Sup. Ct. Rep. 747. . . . Now the addition in the last statute of the words, 'or for any other immoral purpose,' after the word 'prostitution,' must have been made for some practical object. Those added words show beyond question that Congress had in view

the protection of society against another class of alien women other than those who might be brought here merely for purposes of 'prostitution.' In forbidding the importation of alien women 'for any other immoral purpose,' Congress evidently thought that there were purposes in connection with the importations of alien women which, as in the case of importations for prostitution, were to be deemed immoral. It may be admitted that, in accordance with the familiar rule of ejusdem generis, the immoral purpose referred to by the words 'any other immoral purpose' must be one of the same general class or kind as the particular purpose of 'prostitution' specified in the same clause of the statute. 2 Lewis's Sutherland, Stat. Constr. § 423, and authorities cited. But that rule cannot avail the accused in this case; for the immoral purpose charged in the indictment is of the same general class or kind as the one that controls in the importation of an alien woman for the pur-

pose strictly of prostitution. The prostitute may, in the popular sense, be more degraded in character than the concubine, but the latter none the less must be held to lead an immoral life, if any regard whatever be had to the views that are almost universally held in this country as to the relations which may rightfully, from the standpoint of morality, exist between man and woman in the matter of sexual intercourse."

This definition of an immoral purpose was given prior to the enactment of the act now under consideration, and must be presumed to have been known to Congress when it enacted the law here involved. (See the sections of the act¹ set forth in the margin.)

But it is contended that though the words are so plain that they cannot be misapprehended when given their usual and ordinary interpretation, and although the sections in which they appear do not in terms limit the offense defined and punished

¹ Sections 2, 3, and 4 of the act are as follows:

"Sec. 2. That any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any territory or the District of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any territory or the District of Columbia, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

"Sec. 3. That any person who shall knowingly persuade, induce, entice, or coerce, or cause to be persuaded, induced, enticed, or coerced, or aid or assist in persuading, inducing, enticing, or coercing any woman or

girl to go from one place to another in interstate or foreign commerce, or in any territory or the District of Columbia, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and who shall thereby knowingly cause or aid or assist in causing such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or any territory or the District of Columbia, shall be deemed guilty of a felony and on conviction thereof shall be punished by a fine of not more than five thousand dollars, or by imprisonment for a term not exceeding five years, or by both such fine and imprisonment, in the discretion of the court.

"Sec. 4. That any person who shall knowingly persuade, induce, entice or coerce any woman or girl under the age of eighteen years, from any state or territory or the District of Columbia, to any other state or territory or the District of Columbia, with the purpose and intent to induce or coerce her, or that she shall be induced or coerced to engage in prostitution or debauchery, or any other immoral practice, and shall in furtherance of such purpose knowingly induce or cause her to go and to be carried or transported as a passenger in interstate commerce upon the line or route of any common carrier or carriers, shall be deemed guilty of a felony, and on conviction thereof shall be punished by a fine of not more than ten thousand dollars, or by imprisonment for a term not exceeding ten years, or by both such fine and imprisonment, in the discretion of the court."

to acts of "commercialized vice," or the furnishing or procuring of transportation of women for debauchery, prostitution, or immoral practices for hire, such limited purpose is to be attributed to Congress and engrafted upon the act in view of the language of § 8 and the report which accompanied the law upon its introduction into and subsequent passage by the House of Representatives.

In this connection, it may be observed that while the title of an act cannot overcome the meaning of plain and unambiguous words used in its body (*United States v. Fisher*, 2 Cranch, 358, 386, 2 L. ed. 304, 313; *Goodlett v. Louisville & N. R. Co.* 122 U. S. 391, 408, 30 L. ed. 1230, 1233, 7 Sup. Ct. Rep. 1254; *Patterson v. The Eudora*, 190 U. S. 169, 172, 47 L. ed. 1002, 1003, 23 Sup. Ct. Rep. 821; *Cornell v. Coyne*, 192 U. S. 418, 430, 48 L. ed. 504, 509, 24 Sup. Ct. Rep. 383; *Lapina v. Williams*, 232 U. S. 78, 92, 58 L. ed. 515, 520, 34 Sup. Ct. Rep. 196), the title of this act embraces the regulation of interstate commerce "by prohibiting the transportation therein for immoral purposes of women and girls, and for other purposes." It is true that § 8 of the act provides that it shall be known and referred to as the "White Slave Traffic Act," and the report accompanying the introduction of the same into the House of Representatives set forth the fact that a material portion of the legislation suggested was to meet conditions which had arisen in the past few years, and that the legislation was needed to put a stop to a villainous interstate and international traffic in women and girls. Still, the name given to an act by way of designation or description, or the report which accompanies it, cannot change the plain import of its words. If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning.

Reports to Congress accompanying the introduction of proposed laws may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation (*Blake v. National City Bank*, 23 Wall. 307, 319, 23 L. ed. 119, 120; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 42, 39 L. ed. 601, 613, 15 Sup. Ct. Rep. 508; *Chesapeake & P. Teleph. Co. v. Manning*, 186 U. S. 238, 246, 46 L. ed. 1144, 1147, 22 Sup. Ct. Rep. 881; *Binns v. United States*, 194 U. S. 486, 495, 48 L. ed. 1087, 1090, 24 Sup. Ct. Rep. 816). But, as we have already said, and it has been so often affirmed as to become a recognized rule, when words are free from doubt they must be taken as the final expression of the legis-

lative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent. See *Mackenzie v. Hare*, 239 U. S. 299, 308, 60 L. ed. 297, 300, 36 Sup. Ct. Rep. 106.

The fact, if it be so, that the act as it is written opens the door to blackmailing operations upon a large scale, is no reason why the courts should refuse to enforce it according to its terms, if within the constitutional authority of Congress. Such considerations are more appropriately addressed to the legislative branch of the government, which alone had authority to enact and may, if it sees fit, amend the law. *Lake County v. Rollins*, 130 U. S. 873, 32 L. ed. 1064, 9 Sup. Ct. Rep. 651.

It is further insisted that a different construction of the act than is to be gathered from reading it is necessary in order to save it from constitutional objections, fatal to its validity. The act has its constitutional sanction in the power of Congress over interstate commerce. The broad character of that authority was declared once for all in the judgment pronounced by this court, speaking by Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23, and has since been steadily adhered to and applied to a variety of new conditions as they have arisen.

It may be conceded, for the purpose of the argument, that Congress has no power to punish one who travels in interstate commerce merely because he has the intention of committing an illegal or immoral act at the conclusion of the journey. But this act is not concerned with such instances. It seeks to reach and punish the movement in interstate commerce of women and girls with a view to the accomplishment of the unlawful purposes prohibited.

The transportation of passengers in interstate commerce, it has long been settled, is within the regulatory power of Congress, under the commerce clause of the Constitution, and the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.

Moreover, this act has been sustained against objections affecting its constitutionality of the character now urged. *Hoke v. United States*, 227 U. S. 308, 57 L. ed. 523, 43 L.R.A.(N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913F, 905; *Athanasaw v. United States*, 227 U. S. 326, 57 L. ed.

528, 33 Sup. Ct. Rep. 285, Ann. Cas. 1913E, 911; *Wilson v. United States*, 232 U. S. 563, 58 L. ed. 728, 34 Sup. Ct. Rep. 347. In the *Hoke Case*, the constitutional objections were given consideration and denied upon grounds fully stated in the opinion (pages 308 et seq.). It is true that the particular case arose from a prosecution of one charged with transporting a woman for the purposes of prostitution in violation of the act. But, holding as we do, that the purposes and practices for which the transportation in these cases was procured are equally within the denunciation of the act, what was said in the *Hoke Case* as to the power of Congress over the subject is as applicable now as it was then.

After reviewing the *Lottery Case* (*Champion v. Ames*) 188 U. S. 321, 357, 47 L. ed. 492, 501, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561, and other cases in this court decided since the decision of that case, it was said in the *Hoke Case* (page 323):

"The principle established by the cases is the simple one, when rid of confusing and distracting considerations, that Congress has power over transportation 'among the several states;' that the power is complete in itself, and that Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 215, 29 L. ed. 158, 166, 1 Intera. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Cooley, Const. Lim.* 7th ed. 856. We have no hesitation, therefore, in pronouncing the act of June 25, 1910, a legal exercise of the power of Congress."

Notwithstanding this disposition of the questions concerning the construction and constitutionality of the act, certain of the questions made are of sufficient gravity to require further consideration.

In the *Diggs Case*, after referring to the fact that the defendant had taken the stand in his own behalf, and that his testimony differed somewhat from that of the girls who had testified in the case, and instructing the jury that it was their province to ascertain the truth of the matter, the court further said: "After testifying to the relations between himself and Caminetti and these girls down to the Sunday night on which the evidence of the government tends to show the trip to Reno was taken, he stops short and has given none of the details or incidents of that trip nor any direct statement of the intent or purpose with which that trip was taken, contenting himself by merely referring to it as having been taken, and by testifying to his state of mind for some days previous to L.R.A.1917F.

the taking of that trip. Now this was the defendant's privilege, and, being a defendant, he could not be required to say more of he did not desire to do so; nor could he be cross-examined as to matters not covered by his direct testimony. But in passing upon the evidence in the case for the purpose of finding the facts you have a right to take this omission of the defendant into consideration. A defendant is not required under the law to take the witness stand. He cannot be compelled to testify at all, and if he fails to do so, no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted in that case to comment unfavorably upon the defendant's silence; but where a defendant elects to go upon the witness stand and testify, he then subjects himself to the same rule as that applying to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury with all the other circumstances in reaching their conclusion as to his guilt or innocence; since it is a legitimate inference that could he have truthfully denied or explained the incriminating evidence against him, he would have done so."

This instruction, it is contended, was error in that it permitted the jury to draw inferences against the accused from failure to explain incriminating circumstances when it was within his power to do so, and thus operated to his prejudice and virtually made him a witness against himself, in derogation of rights secured by the 5th Amendment to the Federal Constitution.

There is a difference of opinion expressed in the cases upon this subject, the circuit court of appeals in the eighth circuit holding a contrary view, as also did the circuit court of appeals in the first circuit. See *Balliet v. United States*, 64 C. C. A. 201, 129 Fed. 689; *Myrick v. United States*, 134 C. C. A. 619, 219 Fed. 1. We think the better reasoning supports the view sustained in the court of appeals in this case, which is that where the accused takes the stand in his own behalf and voluntarily testifies for himself (Act of March 16, 1878, 20 Stat. at L. 30, chap. 37, Comp. Stat. 1913, § 1465), he may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence, in which he participated and concerning which he is fully informed, without subjecting his silence to the inferences to be naturally drawn from it.

The accused, of all persons, had it with-

in his power to meet, by his own account of the facts, the incriminating testimony of the girls. When he took the witness stand in his own behalf he voluntarily relinquished his privilege of silence, and ought not to be heard to speak alone of those things deemed to be for his interest, and be silent where he or his counsel regarded it for his interest to remain so, without the fair inference which would naturally spring from his speaking only of those things which would exculpate him and refraining to speak upon matters within his knowledge which might incriminate him. The instruction to the jury concerning the failure of the accused to explain acts of an incriminating nature which the evidence for the prosecution tended to establish against him, and the inference to be drawn from his silence, must be read in connection with the statement made in this part of the charge which clearly shows that the court was speaking with reference to the defendant's silence as to the trip to Reno with the girls named in the indictment, and as to the facts, circumstances, and intent with which that trip was taken; and the jury was told that it had a right to take into consideration that omission.

The court did not put upon the defendant the burden of explaining every inculpatory fact shown or claimed to be established by the prosecution. The inference was to be drawn from the failure of the accused to meet evidence as to these matters within his own knowledge and as to events in which he was an active participant and fully able to speak when he voluntarily took the stand in his own behalf. We agree with the circuit court of appeals that it was the privilege of the trial court to call the attention of the jury in such manner as it did to this omission of the accused when he took the stand in his own behalf.

See, in this connection, *Brown v. Walker*, 161 U. S. 591, 597, 40 L. ed. 819, 821, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644; *Sawyer v. United States*, 202 U. S. 150, 165, 50 L. ed. 972, 979, 26 Sup. Ct. Rep. 575, 6 Ann. Cas. 269; *Powers v. United States*, 223 U. S. 303, 314, 56 L. ed. 448, 452, 32 Sup. Ct. Rep. 281.

It is urged as a further ground of reversal of the judgments below that the trial court did not instruct the jury that the testimony of the two girls was that of accomplices, and to be received with great caution and believed only when corroborated by other testimony adduced in the case. We agree with the circuit court of appeals that the requests in the form made should not have been given. In *Holmgren v. United States*, 217 U. S. 509, 54 L. ed. 861, 30 Sup. Ct. Rep. 588, 19 Ann. Cas. 778, L.R.A.1917F.

this court refused to reverse a judgment for failure to give an instruction of this general character, while saying that it was the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to such evidence. While this is so, there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them. 1 Bishop, *Crim. Proc.* 2d ed. § 1081, and cases cited in the note.

Much is said about the character of the testimony adduced and as to certain facts tending to establish the guilt or innocence of the accused. This court does not weigh the evidence in a proceeding of this character, and it is enough to say that there was substantial testimony tending to support the verdicts rendered in the trial courts. Other objections are urged upon our attention, but we find in none of them a sufficient reason for reversing the judgments of the Circuit Courts of Appeals in these cases.

The judgment in each of the cases is affirmed.

Mr. Justice McReynolds took no part in the consideration or decision of these cases.

Mr. Justice McKenna, dissenting:

Undoubtedly, in the investigation of the meaning of a statute we resort first to its words, and, when clear, they are decisive. The principle has attractive and seemingly disposing simplicity, but that it is not easy of application, or, at least, encounters other principles, many cases demonstrate. The words of a statute may be uncertain in their signification or in their application. If the words be ambiguous, the problem they present is to be resolved by their definition; the subject matter and the lexicons become our guides. But here, even, we are not exempt from putting ourselves in the place of the legislators. If the words be clear in meaning, but the objects to which they are addressed be uncertain, the problem then is to determine the uncertainty. And for this a realization of conditions that provoked the statute must inform our judgment. Let us apply these observations to the present case.

The transportation which is made unlawful is of a woman or girl "to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice." Our present concern is with the words "any other immoral practice," which, it is asserted, have a special office. The words are clear enough as general descriptions; they fail in particular designation;

they are class words, not specifications. Are they controlled by those which precede them? If not, they are broader in generalization and include those that precede them, making them unnecessary and confusing. To what conclusion would this lead us? "Immoral" is a very comprehensive word. It means a dereliction of morals. In such sense it covers every form of vice, every form of conduct that is contrary to good order. It will hardly be contended that in this sweeping sense it is used in the statute. But, if not used in such sense, to what is it limited and by what limited? If it be admitted that it is limited at all, that ends the imperative effect assigned to it in the opinion of the court. But not insisting quite on that, we ask again, By what is it limited? By its context, necessarily, and the purpose of the statute.

For the context I must refer to the statute; of the purpose of the statute Congress itself has given us illumination. It devotes a section to the declaration that the "act shall be known and referred to as the 'White Slave Traffic Act.'" And its prominence gives it prevalence in the construction of the statute. It cannot be pushed aside or subordinated by indefinite words in other sentences, limited even there by the context. It is a peremptory rule of construction that all parts of a statute must be taken into account in ascertaining its meaning, and it cannot be said that § 8 has no object. Even if it gives only a title to the act, it has especial weight. *United States v. Union P. R. Co.* 91 U. S. 72, 82, 23 L. ed. 224, 229. But it gives more than a title; it makes distinctive the purpose of the statute. The designation "white slave traffic" has the sufficiency of an axiom. If apprehended, there is no uncertainty as to the conduct it describes. It is commercialized vice, immoralities having a mercenary purpose, and this is confirmed by other circumstances.

The author of the bill was Mr. Mann, and in reporting it from the House committee on interstate and foreign commerce he declared for the committee that it was not the purpose of the bill to interfere with or usurp in any way the police power of the states, and further, that it was not the intention of the bill to regulate prostitution or the places where prostitution or immorality was practised, which were said to be matters wholly within the power of the states, and over which the Federal government had no jurisdiction. And further explaining the bill, it was said that the sections of the act had been "so drawn that they are limited to the cases in which there is an act of transportation in inter-

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state commerce of women for the purposes of prostitution." And again:

"The White Slave Trade.—A material portion of the legislation suggested and proposed is necessary to meet conditions which have arisen within the past few years. The legislation is needed to put a stop to a villainous interstate and international traffic in women and girls. The legislation is not needed or intended as an aid to the states in the exercise of their police powers in the suppression or regulation of immorality in general. It does not attempt to regulate the practice of voluntary prostitution, but aims solely to prevent panders and procurers from compelling thousands of women and girls against their will and desire to enter and continue in a life of prostitution." Cong. Rec. vol. 50, pp. 3368, 3370.

In other words, it is vice as a business at which the law is directed, using interstate commerce as a facility to procure or distribute its victims.

In 1912 the sense of the Department of Justice was taken of the act in a case where a woman of twenty-four years went from Illinois, where she lived, to Minnesota, at the solicitation and expense of a man. She was there met by him and engaged with him in immoral practices like those for which petitioners were convicted. The assistant district attorney forwarded her statement to the Attorney General, with the comment that the element of traffic was absent from the transaction and that therefore, in his opinion, it was not "within the spirit and intent of the Mann Act."² Replying, the Attorney General expressed his concurrence in the view of his subordinate.³

² "Careful consideration of the facts and circumstances as related by Miss Fox fails to convince me that her case came within the spirit and intent of the Mann act. The element of traffic is entirely absent from this transaction. It is not a case of prostitution or debauchery and the general words 'or other immoral practice' should be qualified by the particular preceding words and be read in the light of the rule of ejusdem generis. This view of the statute is the more reasonable when considered in connection with § 8, where Congress employs the terms 'slave' and 'traffic' as indicative of its purpose to suppress certain forms of abominable practice connected with the degradation of women for gain."

³ "I agree with your conclusion that the facts and circumstances set forth in your letter and its inclosure do not bring the matter within the true intent of the White Slave Traffic Act, and that no prosecution against Edwards should be instituted in the Federal courts unless other and different facts are presented to you."

Of course, neither the declarations of the report of the committee on interstate commerce of the House nor the opinion of the Attorney General are conclusive of the meaning of the law, but they are highly persuasive. The opinion was by one skilled in the rules and methods employed in the interpretation or construction of laws, and informed, besides, of the conditions to which the act was addressed. The report was by the committee charged with the duty of investigating the necessity of the act, and to inform the House of the results of that investigation, both of evil and remedy. The report of the committee has, therefore, a higher quality than debates on the floor of the House. The representations of the latter may indeed be ascribed to the exaggerations of advocacy or opposition. The report of a committee is the execution of a duty and has the sanction of duty. There is a presumption, therefore, that the measure it recommends has the purpose it declares and will accomplish it as declared.

This being the purpose, the words of the statute should be construed to execute it, and they may be so construed even if their literal meaning be otherwise. In *church of the Holy Trinity v. United States*, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511, there came to this court for construction an act of Congress which made it unlawful for anyone in any of the United States "to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States . . . under contract or agreement . . . to perform labor or *service of any kind* [italics mine] in the United States, its territories or the District of Columbia." The Trinity Church made a contract with one E. W. Warren, a resident of England, to remove to the city of New York and enter its service as rector and pastor. The church was proceeded against under the act and the circuit court held that it applied, and rendered judgment accordingly. 36 Fed. 303.

It will be observed that the language of the statute is very comprehensive,—fully as much so as the language of the act under review,—having no limitation whatever from the context; and the circuit court, in submission to what the court considered its imperative quality, rendered judgment against the church. This court reversed the judgment, and, in an elaborate opinion by Mr. Justice Brewer, declared that "it is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers." And the learned justice further said: L.R.A.1917F.

"This has been often asserted, and the reports are full of cases illustrating its application."

It is hardly necessary to say that the application of the rule does not depend upon the objects of the legislation, to be applied or not applied as it may exclude or include good things or bad things. Its principle is the simple one that the words of a statute will be extended or restricted to execute its purpose.

Another pertinent illustration of the rule is *Reiche v. Smythe*, 13 Wall. 162, 20 L. ed. 566, in which the court declared that if at times it was its duty to regard the words of a statute, at times it was also its duty to disregard them, limit or extend them, in order to execute the purpose of the statute. And applying the principle, it decided that in a tariff act the provision that a duty should be imposed on horses, etc., and other *live animals* imported from foreign countries should not include canary birds, ignoring the classification of nature. And so again in *Silver v. Ladd*, 7 Wall. 219, 19 L. ed. 138, where the benefit of the Oregon Donation Act was extended by making the words "single man" used in the statute mean an unmarried woman, disregarding a difference of genders clearly expressed in the law.

The rule that these cases illustrate is a valuable one and in varying degrees has daily practice. It not only rescues legislation from absurdity (so far the opinion of the court admits its application), but it often rescues it from invalidity,—a useful result in our dual form of governments and conflicting jurisdictions. It is the dictate of common sense. Language, even when most masterfully used, may miss sufficiency and give room for dispute. Is it a wonder, therefore, that when used in the haste of legislation, in view of conditions perhaps only partly seen or not seen at all, the consequences, it may be, beyond present foresight, it often becomes necessary to apply the rule? And it is a rule of prudence and highest sense. It rescues from crudities, excesses, and deficiencies, making legislation adequate to its special purpose, rendering unnecessary repeated qualifications, and leaving the simple and best exposition of a law the mischief it was intended to redress. Nor is this judicial legislation. It is seeking and enforcing the true sense of a law notwithstanding its imperfection or generality of expression.

There is much in the present case to tempt to a violation of the rule. Any measure that protects the purity of women from assault or enticement to degradation finds an instant advocate in our best emotions; but the judicial function cannot yield to

emotion—it must, with poise of mind, consider and decide. It should not shut its eyes to the facts of the world and assume not to know what everybody else knows. And everybody knows that there is a difference between the occasional immoralities of men and women and that systematized and mercenary immorality epitomized in the statute's graphic phrase "white slave traffic." And it was such immorality that was in the legislative mind, and not the other. The other is occasional, not habitual,—inconspicuous,—does not offensively obtrude upon public notice. Interstate commerce is not its instrument as it is of the other, nor is prostitution its object or its end. It may, indeed, in instances, find a convenience in crossing state lines, but this is its accident, not its aid.

There is danger in extending a statute beyond its purpose, even if justified by a strict adherence to its words. The purpose is studied, all effects measured, not left at random,—one evil practice prevented, opportunity given to another. The present case warns against ascribing such improvidence to the statute under review. Blackmailers of both sexes have arisen, using the terrors of the construction now sanctioned by this court as a help—indeed, the means—for their brigandage. The result is grave and should give us pause. It certainly will not be denied that legal authority justifies the rejection of a construc-

tion which leads to mischievous consequences, if the statute be susceptible of another construction.

United States v. Bitty, 208 U. S. 393, 52 L. ed. 543, 28 Sup. Ct. Rep. 396, is not in opposition. The statute passed upon was a prohibition against the importation of alien women or girls,—a statute, therefore, of broader purpose than the one under review. Besides, the statute finally passed upon was an amendment to a prior statute, and the words construed were an addition to the prior statute, and necessarily, therefore, had an added effect. The first statute prohibited the importation of any alien woman or girl into the United States *for the purpose of prostitution* [italics mine]. The second statute repeated the words and added "*or for any other immoral purpose.*" Necessarily there was an enlargement of purpose, and besides, the act was directed against the importation of foreign corruption, and was construed accordingly. The case, therefore, does not contradict the rule; it is an example of it.

For these reasons I dissent from the opinion and judgment of the court, expressing no opinion of the other propositions in the cases.

I am authorized to say that the CHIEF JUSTICE and Mr. Justice Clarke concur in this dissent.

UNITED STATES SUPREME COURT.

HARRY T. HALL, Superintendent of Banks and Banking of the State of Ohio, Appt.,
v.

GEIGER-JONES COMPANY. (No. 438.)

SAME, Appt.,
v.

DON C. COULTRAP. (No. 439.)

SAME, Appt.,
v.

WILLIAM R. ROSE et al. (No. 440.)

(242 U. S. 539, 61 L. ed. 480, 37 Sup. Ct. Rep. 217.)

License — for dealing in stocks.

1. Dealing in corporate or quasi corporate securities without first securing a license from a specified state official, obtainable only upon an application setting out certain information respecting the applicant's business, with references establishing good repute, may be forbidden by a state, in the exercise of its police power, notwithstanding

ing the declarations of U. S. Const. 14th Amendment, that no person shall be deprived of his life, liberty, or property without due process of law, or denied the equal protection of the laws.

For other cases, see Constitutional Law, II, c. 4, in Dig. 1-52 N. S.

Legislature — delegation of power — validity.

2. Arbitrary power is not unconstitutionally conferred upon the state superintendent of banks and banking by a statute which requires that official, as a condition of granting the license that such statute makes a condition precedent to dealing in corporate or quasi corporate securities, to be satisfied in the good repute in business of the applicant and its selling agents, and empowers him to revoke the license or to refuse to renew it upon ascertaining that the licensee "is of bad business repute, has violated any provision of the act, or has engaged, or is about to engage, under favor of such license, in illegitimate business or fraudulent transactions," since there is a presumption against wanton action on his part, and the statute also affords judicial review of his action in cases where there may be a dispute of fact.

For other cases, see Constitutional Law, I, d, 4, in Dig. 1-52 N. S.

Note.—As to constitutionality of Blue Sky Laws, see annotation following this case, post, 524.
L.R.A.1917F.

Statute — who may question constitutionality.

3. Dealers in corporate securities cannot successfully urge against the validity of a statute making a license a condition precedent to dealing in corporate or quasi corporate securities, that, while the statute in form prohibits sales, it at the same time necessarily prevents purchases, and thereby shields contemplating purchasers from the loss of property by the exercise of their own defective judgment, and puts them, as well as the sellers, under guardianship. *For other cases, see Statutes, l. c. 1, in Dig. 1-52 N. S.*

Constitutional law — license to deal in bonds — discrimination.

4. The equal protection of the laws is not denied by a statute forbidding dealing in corporate or quasi corporate securities without a license, by reason of the fact that the statute discriminates between cases where more or less than 50 per cent of an issue of bonds is included in a sale to one person; between securities which have and those which have not been authorized by the State Public Service Commission; between securities issued by certain corporations organized under the state laws and those which are not; between an owner who sells his securities in a single transaction and one who disposes of them in successive transactions; between a bank or trust company that sells at a commission of not more than 2 per cent and one which sells at a higher commission; between securities which have and those which have not been published in regular market reports; between single sales of \$5,000 or more and smaller transactions; between securities upon which there has and has not been a default as to principal or interest; between cases where the information required is or is not contained in a standard approved manual; between cases in which the vendor proposes to sell securities for which he has and those for which he has not paid 90 per cent of his selling price; and discriminates against securities when any part of the proceeds is to be applied in payment for patents, services, good will, or for property outside of the state; against securities issued by taxing subdivisions of other states; against securities which have not from time to time for six months been published in the regular market reports, or the news columns of a daily newspaper of general circulation in the state; and discriminates where the securities are or are not of manufacturing or transportation companies in the hands of bona fide purchasers on a specified date if such companies were on that date and at the time of sale going concerns; where the disposal is or is not made for a commission of less than 1 per cent by a licensee who is a member of a stock exchange and who is conducting an established and lawful business in the state, regularly open for public patronage; where the securities are or are not those of a common carrier, or of a company organized under the state laws and engaged principally in the business of manu-

facturing, transportation, etc., and the whole or a part of the property upon which securities are based is located within the state; and provides for such delays in the issue of a license and in the subsequent conduct of business thereunder as to hinder substantially, and in many cases to prevent, sales.

For other cases, see Constitutional Law, II. a, 5, a, in Dig. 1-52 N. S.

Commerce — Interstate — power of state.

5. Congressional inaction leaves the state free to impose such an indirect or incidental burden upon interstate commerce as may result from the provisions of a statute forbidding dealers from disposing or offering to dispose of corporate or quasi corporate securities "within the state" without first having obtained a license from a specified state official.

For other cases, see Commerce, IV. a, in Dig. 1-52 N. S.

(McReynolds, J., dissents.)

(January 22, 1917.)

A PPEALS by the superintendent of banks from decrees of the District Court of the United States for the Southern District of Ohio enjoining the enforcement of the so-called Blue Sky Law of that state. Reversed.

Statement by Mr. Justice McKenna:

These cases were heard together in the district court and there disposed of in one opinion. They were argued and submitted together here. The bills of complaint attacked from different angles the so-called Blue Sky Law of the state of Ohio, which provides:

"Sec. 6373-1. Except as otherwise provided in this act, no dealer shall, within this state, dispose or offer to dispose of any stock, stock certificates, bonds, debentures, collateral trust certificates or other similar instruments (all hereinafter termed 'securities') evidencing title to or interest in property, issued or executed by any private or quasi public corporation, copartnership or association (except corporations not for profit), or by any taxing subdivision of any other state, territory, province or foreign government, without first being licensed so to do as hereinafter provided."

"Sec. 6373-2. . . . The term 'dealer,' as used in this act shall be deemed to include any person or company, except national banks, disposing or offering to dispose, of any such security, through agents or otherwise, and any company engaged in the marketing or flotation of its own securities either directly or through agents or underwriters or any stock promotion scheme whatsoever, except:

"(a) An owner, not the issuer of the security, who disposes of his own property, for his own account; when such disposal is not made in the course of repeated and successive transactions of a similar character by such owner; or a natural person, other than the underwriter of the security, who is a bona fide owner of the security and disposes of his own property for his own account; . . .

"As used in this act, the term 'company' shall include any corporation, copartnership or association, incorporated or unincorporated, and whenever and wherever organized; . . ." [Laws 1914, p. 110.]

The Geiger-Jones Company is an Ohio corporation, licensed to do the business of buying and selling investment securities, and of buying and selling the stocks and bonds of industrial corporations. It has a regularly established clientage, it alleges, of about eleven thousand persons residing in the state of Ohio and other states, and has sold, and there are now outstanding in the hands of persons to whom it has sold, securities of about twenty to twenty-five million dollars, par value, and has stockholders in Ohio and other states. That the securities above referred to consist of securities of over twenty corporations of Ohio and other states and foreign countries. That it is still selling such securities, and is and has been engaged in intrastate, interstate, and foreign commerce.

The appellee, Don C. Coultrap, in No. 439, repeats the allegations made by Geiger-Jones Company, with enumeration of some of the companies in whose stocks and securities that corporation is engaged in dealing and alleges that he is the owner and holder of its stocks and of the stocks of other companies, and is engaged in buying and selling and offering to sell such stocks in the state of Ohio and in the state of Pennsylvania, and in the course of such transactions travels back and forth between those states and conducts a correspondence from Pennsylvania to Ohio, and receives certificates evidencing the ownership of stock from the state of Ohio, and sends them from Pennsylvania to Ohio.

William R. Rose, one of the appellees in No. 440, alleges himself to be a citizen of Ohio and engaged in that state in the business of buying and selling investment securities, and particularly the stocks and bonds of industrial corporations, and that he has built up and maintained a large and profitable business and an enviable reputation.

The Richard Auto Manufacturing Company, the other appellee, is a corporation of West Virginia, but has its principal place of business in Cleveland, Ohio, and has a

contract to manufacture and is ready to manufacture automobiles under certain patents obtained by François Richard as soon as and not until the stock of the company can be put upon the market and a sufficient amount realized therefrom for such purposes.

That on September 25, 1914, and prior thereto, Rose was actively engaged in buying and selling stocks and bonds of industrial corporations and investment securities in general, and particularly the stock of the Richard Auto Manufacturing Company, of which company he was the secretary, and for which business he had unusual aptitude and was able to prosecute more successfully "than any other man whose services were available to said corporation."

That on September 25th he was arrested upon an affidavit filed by one H. R. Young, a subordinate and deputy of the state superintendent of banks and banking for the state of Ohio, under whose immediate direction and control he was then acting. Rose, upon being taken before a magistrate, waived examination and was "bound over to the grand jury" of Cuyahoga county, which jury subsequently returned an indictment against him for violation of the law.

The grievance alleged in Nos. 438 and 439 is that, under the laws of the state, the attorney general is threatening to give an opinion to Hall, the superintendent of banks and banking, that the law is valid, and that it is the duty of Hall to cancel appellees' license, and that this will result in irreparable injury to appellees and to their security holders from the publicity they will obtain. And it is apprehended that Hall will act on such advice, believing that he is bound by the opinion of the attorney general.

The statute is attached to the bills, and is asserted to be unconstitutional, invalid, and void, and the particulars are enumerated to be that it will deprive appellees of their property without due process of law, deny them the equal protection of the laws, impose burdens on interstate commerce, confer executive powers, delegate such powers and legislative powers, in violation of the Constitution of Ohio. Appellees consider themselves remediless except in equity, and pray injunctions interlocutory and permanent.

The complaint of Rose and the auto company is that Hall, superintendent of banks and banking, is actively engaged in the prosecution of the proceedings against Rose, and has, together with the prosecuting attorney, interfered with, interrupted, and completely prevented Rose from carrying on his business in the state of Ohio, and especially in attempting upon his part to

dispose of and sell the stock of the auto company, and that the prosecuting attorney and the sheriff of Cuyahoga county, unless restrained, will assist and actively cooperate with Hall, to the great and irreparable injury of both Rose and the auto company.

The charge is amplified by details which it is unnecessary to give, and the law is charged to be unconstitutional in the same particulars as those enumerated by the Geiger-Jones Company.

Injunctions temporary and perpetual are prayed.

The district court in the Geiger-Jones Case considered that it was without power to enjoin the attorney general, but decided that it could and should, under the charges of the bill, restrain Hall from further action under the law, the restraint to continue until the hearing and determination of the applications of the respective complainants for interlocutory injunctions.

The applications subsequently came to be heard before three judges, and Hall and all of his employees and subordinates were enjoined from attempting to enforce the provisions of the law. There was an exception in No. 440, as follows: ". . . except such proceedings as may be deemed proper in any criminal action pending against said complainants or either of them when the complaint in this cause was filed." The injunctions in all the cases were to continue until final decision or further order of the court. The court declared the law to be obnoxious to all of the charges made by the respective complainants against it. 230 Fed. 233.

Mr. Edward O. Turner, Attorney General of Ohio, for appellant:

A foreign corporation which has not complied or attempted to comply with the laws of Ohio regulating its admission to do business cannot question the validity of a law regulating the conduct of a particular business.

Brodnax v. Missouri, 219 U. S. 285-293, 55 L. ed. 219-224, 31 Sup. Ct. Rep. 238; *District of Columbia v. Brooke*, 214 U. S. 138-152, 53 L. ed. 941-946, 29 Sup. Ct. Rep. 560; *National Mercantile Co. v. Watson*, 215 Fed. 929; *New York ex rel. Hatch v. Reardon*, 204 U. S. 152-160, 51 L. ed. 415-422, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; *Standard Stock Food Co. v. Wright*, 225 U. S. 540-550, 56 L. ed. 1197-1201, 32 Sup. Ct. Rep. 784.

The Geiger-Jones Company was not engaged in interstate commerce.

New York ex rel. Hatch v. Reardon, 204 U. S. 152-161, 51 L. ed. 415-422, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; *New York L.R.A.1917F.*

L. Ins. Co. v. Deer Lodge County, 231 U. S. 495, 509, 59 L. ed. 332, 338, 34 Sup. Ct. Rep. 167.

One who would strike down a statute as violative of the Federal Constitution must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional.

Standard Stock Food Co. v. Wright, 225 U. S. 540-550, 56 L. ed. 1197-1201, 32 Sup. Ct. Rep. 784; *District of Columbia v. Brooke*, 214 U. S. 138-152, 53 L. ed. 941-946, 29 Sup. Ct. Rep. 560; *New York ex rel. Hatch v. Reardon*, 204 U. S. 152-160, 51 L. ed. 415-422, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736.

Blue Sky Laws are valid.

Mechanics Bldg. & L. Asso. v. Coffman, 110 Ark. 269, 162 S. W. 1090; *Ex parte Taylor*, 68 Fla. 61, 66 So. 292; *State v. Agey*, 171 N. C. 831, 88 S. E. 726; *Standard Home Co. v. Davis*, 217 Fed. 904.

The legislature has power to regulate sale of corporate stocks.

Bacon v. Walker, 204 U. S. 311-317, 51 L. ed. 499-503, 27 Sup. Ct. Rep. 289; *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 547, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 58 L. ed. 1011, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612; *Lottery Case (Champion v. Ames)* 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; *Noble State Bank v. Haskell*, 219 U. S. 104, 110, 111, 55 L. ed. 112-116, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; *Otis v. Parker*, 187 U. S. 606-609, 47 L. ed. 323-327, 23 Sup. Ct. Rep. 168; *Rast v. Van Deman & L. Co.* 240 U. S. 342, 60 L. ed. 679, L.R.A.1917A, 421, 36 Sup. Ct. Rep. 370; *Schmidinger v. Chicago*, 226 U. S. 578-587, 57 L. ed. 364-367, 33 Sup. Ct. Rep. 182, Ann. Cas. 1914B, 284.

The Blue Sky Law is an intrastate regulation only.

Alabama & N. O. Transp. Co. v. Doyle, 210 Fed. 181; *Buck Stove & Range Co. v. Vickers*, 226 U. S. 205, 57 L. ed. 189, 33 Sup. Ct. Rep. 41; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; *District of Columbia v. Brooke*, 214 U. S. 138, 152, 53 L. ed. 941, 946, 29 Sup. Ct. Rep. 560; *Emert v. Missouri*, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367; *International Textbook Co. v. Pigg*, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A. (N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; *New York ex rel. Hatch v. Reardon*, 204 U. S. 152-161, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; *Standard Stock Food Co. v. Wright*, 225 U. S. 540, 550, 56 L. ed. 1197, 1201, 32 Sup. Ct. Rep. 784; *Metropolis Theatre Co. v. Chicago*, 228 U. S. 61-69, 57

L. ed. 730-733, 33 Sup. Ct. Rep. 441; *Lemieux v. Young*, 211 U. S. 489-493, 53 L. ed. 295-299, 29 Sup. Ct. Rep. 174.

The enactment of the Ohio Blue Sky Law is a reasonable exercise of police power.

Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; *Crossman v. Lurman*, 192 U. S. 189, 48 L. ed. 401, 24 Sup. Ct. Rep. 234; 7 Cyc. 444; *Emert v. Missouri*, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367; *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389-409, 58 L. ed. 1011-1020, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612; *Gibbons v. Ogden*, 9 Wheat. 1, 203, 6 L. ed. 23, 71; *Henderson v. New York (Henderson v. Wickham)* 92 U. S. 259, 268, 23 L. ed. 543, 547; *Lindsley v. Natural Carbonic Gas Co.* 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; *McLean v. Arkansas*, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; *Howe Mach. Co. v. Gage*, 100 U. S. 676-679, 25 L. ed. 754, 755; *Minnesota v. Barber*, 136 U. S. 313-319, 34 L. ed. 455-457, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Neilson v. Garza*, 2 Woods, 289, Fed. Cas. No. 10,091; *Otis v. Parker*, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115; *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; *Patapasco Guano Co. v. Board of Agriculture*, 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. Rep. 862; *Rast v. Van Deman & L. Co.* 240 U. S. 342-364, 60 L. ed. 679-689, L.R.A.1917A, 421, 36 Sup. Ct. Rep. 370; *Robbins v. Taxing Dist.* 120 U. S. 489-493, 30 L. ed. 694-696, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Sligh v. Kirkwood*, 237 U. S. 52-58, 59 L. ed. 835-837, 35 Sup. Ct. Rep. 501; *Standard Stock Food Co. v. Wright*, 225 U. S. 540, 56 L. ed. 1197, 32 Sup. Ct. Rep. 784; *New Mexico ex rel. McLean v. Denver & R. G. R. Co.* 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. Rep. 1; *Turner v. Maryland*, 107 U. S. 38, 27 L. ed. 370, 2 Sup. Ct. Rep. 44; *Welton v. Missouri*, 91 U. S. 275, 278, 23 L. ed. 347, 348; *Woodruff v. Parham*, 8 Wall, 123-139, 19 L. ed. 382-387.

It operates only on persons within the state.

New York ex rel. Hatch v. Reardon, 204 U. S. 152-159, 51 L. ed. 415-421, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; *Rast v. Van Deman & L. Co.* 240 U. S. 342, 60 L. ed. 679, L.R.A.1917A, 421, 36 Sup. Ct. Rep. 370; *Tanner v. Little*, 240 U. S. 369, 60 L. ed. 691, 36 Sup. Ct. Rep. 379.

Even assuming that the Blue Sky Law is a regulation of interstate commerce, it does not conflict with the commerce clause.

Cooley v. Port Wardens, 12 How. 299, 13 L.R.A.1917F.

L. ed. 996; *Field v. Barber Asphalt Paving Co.* 194 U. S. 618-623, 48 L. ed. 1142-1154, 24 Sup. Ct. Rep. 784; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196-204, 29 L. ed. 158-162, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Hall v. DeCuir*, 95 U. S. 485, 487, 24 L. ed. 547, 548; *Minnesota Rate Cases (Simpson v. Shepard)* 230 U. S. 352-399, 57 L. ed. 1511-1541, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18.

Messrs. John A. Shauck, Timothy S. Hogan, A. M. McCarty, E. N. Huggins, M. B. Johnson, H. H. Johnson, and Francis R. Marvin, for appellees:

The act attempts to confer upon the commissioner arbitrary power, or authority to exercise legislative power.

Harmon v. State, 66 Ohio St. 249, 58 L.R.A. 618, 64 N. E. 117; *Richmond v. Dudley*, 129 Ind. 112, 13 L.R.A. 587, 28 Am. St. Rep. 180, 28 N. E. 312; *Bills v. Goshen*, 117 Ind. 221, 3 L.R.A. 261, 20 N. E. 115; *Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239; *State v. Tenant*, 110 N. C. 609, 15 L.R.A. 423, 28 Am. St. Rep. 715, 14 S. E. 387; *State ex rel. Garrabad v. Dering*, 84 Wis. 585, 19 L.R.A. 858, 36 Am. St. Rep. 948, 54 N. W. 1104; *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 42 L.R.A. 696, 68 Am. St. Rep. 153, 51 N. E. 788; *Noel v. People*, 187 Ill. 587, 52 L.R.A. 287, 79 Am. St. Rep. 238, 58 N. E. 616; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *People ex rel. Moskowitz v. Jenkins*, 202 N. Y. 53, 35 L.R.A.(N.S.) 1079, 94 N. E. 1065; *Bessonies v. Indianapolis*, 71 Ind. 189.

The exercise of the police power must always be in subordination to the provisions of the 14th Amendment.

Atchison, T. & S. F. R. Co. v. Vosburg, 239 U. S. 56, 59 L. ed. 1199, L.R.A.1915E, 953, 35 Sup. Ct. Rep. 675; *Hannibal & St. J. R. Co. v. Husem*, 95 U. S. 465, 24 L. ed. 527; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347.

The Blue Sky Law of Ohio contravenes the commerce clause of the Federal Constitution.

International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; *Buck Stove & Range Co. v. Vickers*, 226 U. S. 205, 213, 216, 57 L. ed. 189, 191, 192, 33 Sup. Ct. Rep. 41; *Lottery Case (Champion v. Ames)* 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; *Butler Bros. Shoe Co. v. United States Rubber Co.* 84 C. C. A. 167, 156 Fed.

1; *Lyng v. Michigan*, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; Story, Const. § 1072.

Whatever subjects of commerce are in their nature national, or admit of one uniform system or plain of regulation, are to be regarded as under the exclusive control of Congress; other subjects, which are to be regarded in view of local circumstances and facts, and which can usually be best regulated by the state, are subject to such regulation so far as it does not interfere with any action of Congress.

Crandall v. Nevada, 6 Wall. 42, 18 L. ed. 746; *Southern S. S. Co. v. Portwardens*, 6 Wall. 31, 18 L. ed. 749; *Ex parte McNeil*, 13 Wall. 236, 20 L. ed. 624; *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; *Haskell v. Cowham*, 109 C. C. A. 235, 187 Fed. 403; *Henderson v. New York (Henderson v. Wickham)* 92 U. S. 259, 271, 272, 23 L. ed. 543, 548, 549; *Hannibal & St. J. R. Co. v. Huse*, 95 U. S. 465, 471, 473, 24 L. ed. 527, 530, 531; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 474, 475, 479-481, 31 L. ed. 700, 703-705, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Mugler v. Kansas*, 123 U. S. 623, 624, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Pullman Co. v. Kansas*, 216 U. S. 56, 65, 54 L. ed. 378, 385, 30 Sup. Ct. Rep. 232; *Robbins v. Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *I. M. Darnell & Son Co. v. Memphis*, 208 U. S. 113, 120-124, 52 L. ed. 413, 417-419, 28 Sup. Ct. Rep. 247; *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Brimmer v. Rebman*, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; *Voight v. Wright*, 141 U. S. 62, 35 L. ed. 638, 11 Sup. Ct. Rep. 855; *Welton v. Missouri*, 91 U. S. 275-282, 23 L. ed. 347-350; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; *Walling v. Michigan*, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454; *State Freight Tax Cases*, 15 Wall. 232, 21 L. ed. 146; *Butler Bros. Shoe Co. v. United States Rubber Co.* 84 C. C. A. 167, 156 Fed. 1.

Corporate stocks and bonds constitute articles of interstate commerce.

Alabama & N. O. Transp. Co. v. Doyle, 210 Fed. 173; *William R. Compton Co. v. Allen*, 216 Fed. 537; *Bracey v. Darst*, 218 Fed. 482.

The business of selling stocks and bonds is not one affected with a public interest.

Alabama & N. O. Transp. Co. v. Doyle, 210 Fed. 179.

The requiring of a license as a condition precedent to the carrying on of the lawful L.R.A.1917F.

business of dealing in articles of interstate commerce is a direct burden on such commerce.

International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; *Buck Stove & Range Co. v. Vickers*, 226 U. S. 205, 57 L. ed. 189, 33 Sup. Ct. Rep. 41.

The law deprives of property without due process.

Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 763, 28 L. ed. 585, 589, 4 Sup. Ct. Rep. 652; *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 41 L. ed. 832, 836, 17 Sup. Ct. Rep. 427; *Yick Wo v. Hopkins*, 118 U. S. 356, 370, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064.

Mr. George Cosson, Attorney General of Iowa, and *Mr. Walter C. Owen*, Attorney General of Wisconsin, filed a brief as amici curiæ.

Messrs. Robert R. Reed, *George W. Wickersham*, and *Charles K. Allen* also filed a brief as amici curiæ.

Mr. Justice McKenna delivered the opinion of the court:

It will be observed that these cases bring here for judgment an asserted conflict between national power and state power, and bring, besides, power of the state as limited or forbidden by the national Constitution.

The assertion of such conflict and limitation is an ever-recurring one; and yet it is approached as if it were a new thing under the sun. The primary postulate of the state is that the law under review is an exercise of the police power of the state, and that power, we have said, is the least limitable of the exercises of government. *Sligh v. Kirkwood*, 237 U. S. 52, 59 L. ed. 835, 35 Sup. Ct. Rep. 501. We get no accurate idea of its limitations by opposing to it the declarations of the 14th Amendment that no person shall be deprived of his life, liberty, or property without due process of law, or denied the equal protection of the laws. *Noble State Bank v. Haskell*, 219 U. S. 104, 110, 55 L. ed. 112, 116, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487. A stricter inquiry is necessary, and we must consider what it is of life, liberty, and property that the Constitution protects.

What life is and what may or may not affect it, we have quite accurate tests; and what liberty is in its outside sense, and, in like sense, what property is. We know that it is of the essence of liberty—indeed, we may say, of life—that there shall be freedom of conduct, and yet there may be limitations upon such freedom. We know

that, in the concept of property, there are the rights of its acquisition, disposition, and enjoyment,—in a word, dominion over it. Yet all of these rights may be regulated. Such are the declarations of the cases, become platitudes by frequent repetition and many instances of application.

The question, then, is, Is the statute of Ohio within the principles declared? The statute is a restraint upon the disposition of certain property, and requires dealers in securities evidencing title to or interest in such property to obtain a license,—a requirement simple enough in itself, and yet of itself asserted to be an illegal control of a private business, made especially so by the conditions which are imposed. These conditions, summarized, are as follows:

To obtain the license there must be filed with the superintendent of banks and banking (termed in the act "commissioner") application for such license, together with information in such form as the commissioner shall determine, setting forth:

"(a) The names and addresses of the directors and officers if such applicant be a corporation or association, and of all partners if it be a partnership, and of the person if the applicant be an individual, together with names and addresses of all agents of such applicant assisting in the disposal of such securities;

"(b) Location of the applicant's principal office and of his principal office in the state, if any;

"(c) The general plan and character of the business of said applicant, together with references which the 'commissioner' shall confirm by such investigation as he may deem necessary, establishing the good repute in business of such applicant, directors, officers, partners, and agents.

"If the applicant be a corporation organized under the laws of any other state, territory, or government, or have its principal place of business therein, it shall also file a copy of its articles of incorporation, certified by the proper officer of such state, territory, or government, and of its regulations and by-laws; and if it be an unincorporated association, a certified copy of its articles of association, or deed of settlement."

The applicant is also required to file a written instrument irrevocably consenting to be sued in a particular county, and, if personal service there cannot be had, consenting to service upon the sheriff of the county.

It is also provided that all of the applications shall be published in a daily newspaper, and if the commissioner be satisfied that the applicant is of good repute, he shall, upon payment of certain fees, register the applicant as a licensed dealer in secur-

ities. Pending disposition of the application, temporary permission to transact business may be given. Yearly renewals of the licenses are provided for.

The commissioner may revoke a license upon ascertaining that the licensee: (a) Is of bad repute; (b) has violated any provision of the act; or (c) has engaged, or is about to engage, under favor of such license, in illegitimate business or fraudulent transactions.

It will be observed, therefore, that the law is a regulation of business, constrains conduct only to that end, the purpose being to protect the public against the imposition of unsubstantial schemes and the securities based upon them. Whatever prohibition there is, is a means to the same purpose, made necessary, it may be supposed, by the persistence of evil and its insidious forms and the experience of the inadequacy of penalties or other repressive measures. The name that is given to the law indicates the evil at which it is aimed; that is, to use the language of a cited case, "speculative schemes which have no more basis than so many feet of 'blue sky';" or, as stated by counsel in another case, "to stop the sale of stock in fly-by-night concerns, visionary oil wells, distant gold mines, and other like fraudulent exploitations." Even if the descriptions be regarded as rhetorical, the existence of evil is indicated, and a belief of its detriment; and we shall not pause to do more than state that the prevention of deception is within the competency of government, and that the appreciation of the consequences of it is not open for our review. *Trading Stamp Cases*, *Rast v. Van Deman & L. Co.* 240 U. S. 342, 60 L. ed. 679, L.R.A.1917A, 421, 36 Sup. Ct. Rep. 370; *Tanner v. Little*, 240 U. S. 369, 60 L. ed. 691, 36 Sup. Ct. Rep. 379; *Pitney v. Washington*, 240 U. S. 337, 391, 60 L. ed. 703, 706, 36 Sup. Ct. Rep. 385. Therefore, the purpose being legal, the question only remains whether the manner in which it is accomplished is illegal. This is contended, and the provisions which render the law void are found, it is stated, in: (1). Power conferred upon the commissioner to grant or refuse licenses; (2) the authority given the commissioner to place forbidden restrictions and burdens on the conduct of the business of one who has obtained a license.

The basis of these contentions is that the law confers arbitrary power upon the commissioner. In considering the contentions we must keep in mind that the law is addressed to a complex situation. Its purpose is, as we have seen, to give a basis for judgment of the securities offered the purchasing public; assure credit where it

is deserved and confidence to investment and trading; prevent deception and save credulity and ignorance from imposition, as far as this can be done by the approved reputation of the seller of the securities and authoritative information.

It may, however, be said that character establishes itself, and neither needs nor can be compelled to accept the stamp of government; and it is asserted that the "normal investment business of the country" and its "individual transactions" are not subject to "executive control,"—the broad contention being made that, as such business cannot be prohibited, it cannot be regulated. This, indeed, is the basic principle of the opposition to the statute. It is expressed in many ways, and the various provisions of the statute—those that are explicit in direction to the commissioner and those that commit discretion to him—are said to so burden and complicate "normal business as to make it difficult, if not impossible, to carry it on in a normal way, if at all."

As broadly made, we cannot assent to these propositions. The reason and extent of the law we have indicated and the control to which individual transactions are subjected, and we think both are within the competency of the state. It is to be remembered that the value of securities consists in what they represent, and to determine such value is a complex problem even to the most skilful and informed.

We have very lately decided a case upon the principle of the power of the state to prevent frauds and impositions. *Hutchinson Ice Cream Co. v. Iowa*, 242 U. S. 153, 61 L. ed. 28, 37 Sup. Ct. Rep. 28. The principle applies as well to securities as to material products, the provisions of the law necessarily varying with the objects. As to material products the purpose may be accomplished by a requirement of inherent purity. The intangibility of securities, they being representatives or purporting to be representatives of something else, of property, it may be, in distant states and countries, schemes of plausible pretensions, requires a difference of provision, and the integrity of the securities can only be assured by the probity of the dealers in them and the information which may be given of them. This assurance the state has deemed necessary for its welfare to require; and the requirement is not unreasonable or inappropriate. It extends to the general market something of the safeguards that are given to trading upon the exchanges and stock boards of the country,—safeguards that experience has adopted as advantageous. In convenience may be caused and supervision and surveillance, but this must yield to the

public welfare; and against counsel's alarm of consequences, we set the judgment of the state.

We turn back, therefore, to consider the more specific objections to the law. The basis of them is, as we have seen, the power conferred upon the commissioner, which is asserted to be arbitrary. The objection is somewhat difficult to handle. It centers in the provision that requires the commissioner, as a condition of a license, "to be satisfied of the good repute in business of such applicant and named agents," and in the power given him to revoke the license or refuse to renew it upon ascertaining that the licensee "is of bad business repute, has violated any provision of the act, or has engaged or is about to engage, under favor of such license, in illegitimate business or fraudulent transactions." It is especially objected that, as to these requirements, no standard is given to guide or determine the decision of the commissioner. Therefore, it is contended that the discretion thus vested in the commissioner leaves "room for the play and action of purely personal and arbitrary power."

We are a little surprised that it should be implied that there is anything recondite in a business reputation or its existence as a fact which should require much investigation. If in special cases there may be controversy, those cases the statute takes care of; an adverse judgment by the commissioner is reviewable by the courts. § 6373-8. So also as to the other judgments.

Besides, it is certainly apparent that, if the conditions are within the power of the state to impose, they can only be ascertained by an executive officer. Reputation and character are quite tangible attributes, but there can be no legislative definition of them that can automatically attach to or identify individuals possessing them, and necessarily the aid of some executive agency must be invoked. The contention of appellees would take from government one of its most essential instrumentalities, of which the various national and state commissions are instances. But the contention may be answered by authority. In *Gundling v. Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633, an ordinance of the city of Chicago was passed on which required a license of dealers in cigarettes, and, as a condition of the license, that the applicant, if a single individual, all of the members of the firm, if a copartnership, and any person or persons in charge of the business, if a corporation, should be of good character and reputation, and the duty was delegated to the mayor of the city to determine the existence of the conditions. The ordinance was sustained. To this case may

be added Red "C" Oil Mfg. Co. v. Board of Agriculture, 222 U. S. 380, 394, 56 L. ed. 240, 245, 32 Sup. Ct. Rep. 152, and cases cited; Mutual Film Corp. v. Industrial Commission, 236 U. S. 230, 59 L. ed. 552, 35 Sup. Ct. Rep. 387, Ann. Cas. 1916C, 296; Brazee v. Michigan, 241 U. S. 340, 341, 60 L. ed. 1034, 1035, 36 Sup. Ct. Rep. 561. See also Reetz v. Michigan, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 50 L. ed. 305, 26 Sup. Ct. Rep. 144.

The discretion of the commissioner is qualified by his duty, and besides, as we have seen, the statute gives judicial review of his action. Pending such review, we must accord to the commissioner a proper sense of duty and the presumption that the functions intrusted to him will be executed in the public interest, not wantonly or arbitrarily to deny a license to or take one away from a reputable dealer (Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 545, 58 L. ed. 713, 719, 34 Sup. Ct. Rep. 359); and, as we have said, in cases where there can be a dispute of fact, the statute provides for judicial review, and we see no legal objection to the designation of a particular court for such review.

We are not disposed to give serious attention to the contention that while the statute in form prohibits sales, "it at the same time necessarily prevents purchases, and thereby shields contemplated purchasers from loss of property by the exercise of their own defective judgment," and puts them as well as the sellers under guardianship. If we may suppose that such purchasers would assert a liberty to form a "defective judgment," and resent means of information as a limitation of their freedom, we must wait until they themselves appear to do so. Besides, there are examples in legislation of unsolicited protection, and there is much in the business we are considering which urges to an imitation of the examples. It is not wise to put out of view the tendencies of the business, and that it tempts to and facilitates speculative judgments, if the purpose be trading, improvident judgments, if the purpose be investment. Whatever detriment may come from such judgments the law may be powerless to prevent; but against counterfeits of value the law can give protection, and such is the purpose of the statute under review. It must be judged of upon that consideration, not upon the assertion of an absolute liberty of conduct which does not exist.

Discriminations are asserted against the statute which extend, it is contended, to denying appellees the equal protection of the laws. Counsel enumerates them as follows:

"Prominent among such discriminations L.R.A.1917F.

are between the cases where more or less than 50 per cent of an issue of bonds is included in the sale to one person; between securities which have and which have not been authorized by the Public Service Commission of this state; between the securities issued by a bank, trust company, a building and loan association organized under the laws of this state and those which are not; between an owner who sells his securities in a single transaction and one who disposes of them in successive transactions; between a bank or trust company who sells at a commission of not more than 2 per cent and one which sells at a higher commission; against securities when any part of the proceeds to be derived from the sale are to be applied in payment for patents, services, good will, or for property not located in this state; in providing for such delays in the issuance of a license and in the subsequent conduct of business thereunder as to substantially hinder, and in many cases naturally arising to utterly prevent sales; in discriminating between securities which have and which have not been published in regular market reports; between sales where, in a single transaction, the sale is for \$5,000 or more; in discriminations against securities issued by taxing subdivisions of other states; between securities upon which there has and has not been a default as to principal or interest; against securities which have not from time to time for six months been published in the regular market reports or the news columns of a daily newspaper of general circulation in the state; where the securities are or are not of manufacturing or transportation companies in the hands of bona fide purchasers prior to March 1st, 1914, where such companies were on that date, and shall be at the time of the proposed sale, going concerns; between cases where the information contemplated is or is not contained in a standard manual of information approved by the commissioner; where the disposal is or is not made for a commission of less than 1 per cent of the par value thereof by a licensee who is a member of a regularly organized and recognized stock exchange and who has an established and lawfully conducted business in this state, regularly open for public patronage as such; between cases in which the vendor proposes to sell securities for which he has and those for which he has not paid 90 per cent of the price at which they are to be sold by him; where the securities are or are not those of a common carrier or of a company organized under the laws of this state and engaged principally in the business of manufacturing, transportation, etc., and the whole or a part of the property upon which

such securities are predicated are located within this state."

We cannot give separate attention to the asserted discriminations. It is enough to say that they are within the power of classification which a state has. A state "may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed. . . . If a class is deemed to present a conspicuous example of what the legislature seeks to prevent, the 14th Amendment allows it to be dealt with although otherwise and merely logically not distinguishable from others not embraced in the law." *Central Lumber Co. v. South Dakota*, 226 U. S. 157, 160, 57 L. ed. 164, 169, 33 Sup. Ct. Rep. 66. The cases were cited from which those propositions were deduced. To the same effect is *Armour & Co. v. North Dakota*, 240 U. S. 517, 60 L. ed. 776, 36 Sup. Ct. Rep. 440, Ann. Cas. 1916D, 548.

The next contention of appellees is that the law under review is a burden on interstate commerce, and therefore contravenes the commerce clause of the Constitution of the United States. There is no doubt of the supremacy of the national power over interstate commerce. Its inaction, it is true, may imply prohibition of state legislation, but it may imply permission of such legislation. In other words, the burden of the legislation, if it be a burden, may be indirect and valid in the absence of the assertion of the national power. So much is a truism; there can only be controversy about its application. The language of the statute is: "Except as otherwise provided in this act, no dealer shall, *within this state*, dispose" of certain securities "issued or executed by any private or quasi public corporation, copartnership or association (except corporations not for profit) . . . without first being licensed so to do as hereinafter provided."

The provisions of the law, it will be observed, apply to dispositions of securities *within* the state, and while information of those issued in other states and foreign countries is required to be filed (§ 6373-9), they are only affected by the requirement of a license of one who deals in them *within* the state. Upon their transportation into the state there is no impediment,—no regulation of them or interference with them after they get there. There is the exaction only that he who disposes of them there shall be licensed to do so, and this only that they may not appear in false character and impose an appearance of a value which they may not possess,—and this certainly

is only an indirect burden upon them as objects of interstate commerce, if they may be regarded as such. It is a police regulation strictly, not affecting them until there is an attempt to make disposition of them within the state. To give them more immunity than this is to give them more immunity than more tangible articles are given, they having no exemption from regulations the purpose of which is to prevent fraud or deception. Such regulations affect interstate commerce in them only incidentally. *New York ex rel. Hatch v. Reardon*, 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; *Ware & Leland v. Mobile County*, 209 U. S. 405, 52 L. ed. 855, 28 Sup. Ct. Rep. 526, 14 Ann. Cas. 1031; *Engel v. O'Malley*, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. Rep. 190; *Brodnax v. Missouri*, 219 U. S. 285, 55 L. ed. 219, 31 Sup. Ct. Rep. 238; *Banker Bros. Co. v. Pennsylvania*, 222 U. S. 210, 56 L. ed. 168, 32 Sup. Ct. Rep. 38; *Savage v. Jones*, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715; *Standard Stock Food Co. v. Wright*, 225 U. S. 540, 56 L. ed. 1197, 32 Sup. Ct. Rep. 784; *Trading Stamp Cases*, *supra*. With these cases *International Textbook Co. v. Pigg*, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A. (N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; *Buck Stove & Range Co. v. Vickers*, 226 U. S. 205, 57 L. ed. 189, 33 Sup. Ct. Rep. 41, and the *Lottery Case* (*Champion v. Ames*) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561, are not in discordance.

We might, indeed, ask, When do the designated securities cease migration in interstate commerce and settle to the jurisdiction of the state? Material things, choses in possession, pass out of interstate commerce when they emerge from the original package. Do choses in action have a longer immunity? It is to be remembered that though they may differ in manner of transfer, they are in the same form in the hands of the purchaser as they are in the hands of the seller, and in the hands of both as they are brought into the state. We ask again, Do they never pass out of interstate commerce? Have they always the freedom of the state? Is there no point of time at which the state can expose the evil that they may mask? Is anything more necessary for the supremacy of the national power than that they be kept free when in actual transportation, subjected to the jurisdiction of the state only when they are attempted to be sold to the individual purchaser? The questions are pertinent, the answer to them one way or the other, of consequence; but we may pass them, for, regarding the securities as still in inter-

state commerce after their transportation to the state is ended and they have reached the hands of dealers in them, their interstate character is only incidentally affected by the statute.

Decree reversed and the cause remanded for further proceedings in conformity with this opinion.

Mr. Justice McReynolds dissents.

Annotation—Constitutionality of Blue Sky Laws.

The power and duty of public authorities to control the issuance of securities of public service corporations are discussed in the notes to *People ex rel. New York Edison Co. v. Willcox*, 45 L.R.A. (N.S.) 629, and *Laird v. Baltimore & O. R. Co.* 47 L.R.A. (N.S.) 1167.

The present note does not include cases like *Otis v. Parker* (1903) 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168, dealing with the constitutionality of statutes regulating or prohibiting sales of stock on margin, or *Brodnax v. Missouri* (1911) 219 U. S. 285, 55 L. ed. 219, 31 Sup. Ct. Rep. 238, involving a statute against purchases and sales of stocks or grain for future delivery. It does not purport to deal with the question of the validity of statutes designed to regulate building and loan associations, loan companies or individuals engaged in the loan business, banks, etc.; and must necessarily, although the limitation is somewhat vague, be confined in the main to consideration of those statutes commonly termed "Blue Sky" Laws, which will be found to have certain similarities and to constitute a somewhat distinct class.

In recent years, the sale of stocks, bonds, and other securities has been the subject of regulation in many states. Laws enacted to regulate the sale of such securities have been popularly known as "Blue Sky" Laws. Their general purpose is, as is stated in *Alabama & N. O. Transp. Co. v. Doyle* (1914) 210 Fed. 173, "to stop the sale of stock in fly-by-night concerns, visionary oil wells, distant gold mines, and other like fraudulent exploitations." It is said in the opinion of the Federal Supreme Court in *Merrick v. N. W. Halsey & Co.* (1917) 242 U. S. 568, 61 L. ed. 498, 37 Sup. Ct. Rep. 227, that twenty-six states now have legislation of the nature herein considered. And if the present note appears to set out a somewhat unnecessary amount of detail in reciting the provisions of the various statutes and the differences between them, it is because of the importance and newness of the subject, and the fact that, while the power of the state to regulate or prohibit the sale of securities palpably of a fraudulent nature may be conceded, the vital question is whether in attempting to exercise this L.R.A.1917F.

power the state in the particular case has transgressed constitutional limits.

Generally the validity of the so-called Blue Sky Laws has been assailed by those dealing in corporate or quasi corporate securities, such as stocks, bonds, etc. But in one case, as will be observed later, the question was raised by a real estate corporation selling small tracts of land in another state, the corporation being held to be within the terms of the statute.

It seems advisable at the outset, in order to obtain a bird's-eye view of the situation, to state the conclusions reached in the various cases. The constitutionality of the Blue Sky Laws of Ohio, South Dakota, and Michigan has been sustained by the Federal Supreme Court,—the first in *HALL v. GEIGER-JONES Co.* ante, 514, the second in *Caldwell v. Sioux Falls Stock Yards Co.* (1917) 242 U. S. 559, 61 L. ed. 493, 37 Sup. Ct. Rep. 224, and the last in *Merrick v. N. W. Halsey & Co.* (1917) 242 U. S. 568, 61 L. ed. 498, 37 Sup. Ct. Rep. 227, reversing (1915) 228 Fed. 805. The constitutionality of the Arkansas Blue Sky Law was sustained in *Standard Home Co. v. Davis* (1914) 217 Fed. 904, and *Mechanics Bldg. & L. Asso. v. Coffman* (1913) 110 Ark. 269, 162 S. W. 1090. The validity of the North Carolina Blue Sky Law was upheld in *State v. Agey* (1915) 171 N. C. 831, 88 S. E. 726. The Florida Blue Sky Law was held constitutional in *Ex parte Taylor* (1914) 68 Fla. 61, 66 So. 292, Ann. Cas. 1916A, 701. A statute of Louisiana regulating sales of bonds by itinerant agents was held constitutional in *State v. Schofield* (1915) 136 La. 702, 67 So. 557.

On the other hand, the earlier form of the Michigan Blue Sky Law of 1913 was held unconstitutional in *Alabama & N. O. Transp. Co. v. Doyle* (1914) 210 Fed. 173, the law which was held constitutional by the Federal Supreme Court in *Merrick v. N. W. Halsey & Co.* (U. S.) supra, being the Michigan statute as amended in 1915. The West Virginia Blue Sky Law was held unconstitutional in *Bracey v. Darst* (1914) 218 Fed. 482. And the Iowa Blue Sky Law was held unconstitutional in *William R. Compton Co. v. Allen* (1914) 216 Fed. 537.

The question of the constitutionality of the Blue Sky Laws of Montana and Oregon has been raised also, but the courts under the circumstances involved found a decision of the question unnecessary.

It may be stated generally that these statutes require as a condition precedent to dealing in stocks, bonds, and other securities the filing of certain information with a designated state officer and the procuring from him of a permit or license to do business, and invest the officer in question with considerable power and discretion as to the advisability of granting the license. Nevertheless, the statutes differ considerably in their application and details. The Florida statute, for example, contrary to that of most of the other states, applies only to corporations. The statutes differ also to a considerable extent in their requirements of the persons or corporations regulated, and in the extent of the discretionary powers conferred upon the state officer designated to grant the license or permit.

In the case of *Caldwell v. Sioux Falls Stock Yards Co.* (U. S.) supra, the court stated that the statute of South Dakota differed in some details from the statute of Ohio, upheld in *HALL v. GEIGER-JONES Co.* ante, 514, but in its purpose and general provisions was the same; and rested its decision that the statute did not violate the 14th Amendment or the commerce clause of the Federal Constitution on the more extended opinions in the *HALL CASE* and in the case of *Merrick v. N. W. Halsey & Co.* (U. S.) supra. The South Dakota statute makes it unlawful for a dealer or investment company (which includes persons, corporations, copartnerships, or associations, incorporated or unincorporated) to sell or offer for sale securities, with certain exceptions, other than those approved by the State Securities Commission, or to transact business on any other plan than that set forth in the statements and papers filed with the Commission; it provides for such approval and the issuance of a certificate by the Commission if the Commission finds, from the data which the statute requires investment companies to file with it, and from the investigations conducted by it, that the securities or investment contracts offered for sale are not of a character to work a fraud upon the purchaser; the term "dealer," it is provided, shall not include an owner or issuer of securities when the sale of them is not made in the course of continued and successive

transactions of a similar nature, nor one who, in a trust capacity created by law, lawfully sells securities impressed with such trust; a dealer is required to obtain a license from the Commission; and the Commission may revoke licenses granted by it if from an examination it appears that the further sale of the securities in question would work a fraud upon the purchaser; investment companies are required to pay a filing fee of from \$10 to \$100 on application to the Commission for a certificate.

While, as above shown, the constitutionality of the statute was upheld in the *Caldwell Case* (U. S.) supra, it was held in that case that the jurisdiction of a Federal court to enjoin the threatened enforcement by state officials through civil or criminal proceedings of the provisions of the statute could not be successfully challenged on the grounds that the complainants had a plain, speedy, and adequate remedy at law; that the suit was one against the state; or the plea of the unconstitutionality of the statute was made in certain pending criminal actions,—where six informations for violations of the statute had already been filed against the complainants, and as many more might be brought as there were violations, and a conviction of each might bear a fine of \$1,000 or imprisonment, or both, and where the decree did not enjoin criminal actions begun before the filing of the bill.

In *Merrick v. N. W. Halsey & Co.* (1917) 242 U. S. 568, 61 L. ed. 498, 37 Sup. Ct. Rep. 227, the court stated that the Blue Sky Law of Michigan under consideration was almost identical with that of South Dakota, which was the subject of the decision in the *Caldwell Case*. And the court held that the Michigan statute was justified by the police power of the state, notwithstanding the limitations of the 14th Amendment of the Federal Constitution; further, that it did not deny the equal protection of the law in the exemption of securities listed in any standard manual of information approved by the State Securities Commission, nor in empowering the Commission to call for additional information other than that contained in the manual, and, pending the filing of such information, to suspend the sale of such securities, and to suspend, either temporarily or permanently, the sale of any securities listed in such manuals after a hearing upon notice, if the Commission should find that the sale of such securities would work a fraud upon purchasers. It was held

also that the pursuit of a lawful business was not made the subject of arbitrary executive discretion by the statute, contrary to the 14th Amendment, in that it forbade the sale of corporate or quasi corporate securities that had not first received the approval of the State Securities Commission, and required dealers in such securities to obtain a license from the Commission, and forbade them to transact business on any other plan than that set forth in the statements and papers filed with the Commission, since there was a presumption against wanton action by the Commission, and if there should be such disregard of duty a remedy in the courts was expressly given, and if not given would necessarily be implied.

The title of the Michigan Blue Sky Law,—"An act to prevent fraud in the sale and disposition of stocks, bonds, or other securities sold or offered for sale," etc.,—was held in *Merrick v. N. W. Halsey & Co. (U. S.) supra*, to indicate sufficiently the contents of the statute. See also as to title of the Florida Blue Sky Law, *Ex parte Taylor (1914) 68 Fla. 61, 66 So. 292, infra*.

The contention that the Blue Sky Laws of South Dakota and Michigan violated the commerce clause of the Federal Constitution was overruled in the cases of *Caldwell v. Sioux Falls Stock Yards Co. (1917) 242 U. S. 559, 61 L. ed. 493, 37 Sup. Ct. Rep. 224*, and *Merrick v. N. W. Halsey & Co. (U. S.) supra*, on the opinion in *HALL v. GEIGER-JONES Co. ante, 514*.

As to the right of the state to regulate the sale of securities, the Federal Supreme Court by Mr. Justice McKenna, in *Merrick v. N. W. Halsey & Co. (U. S.) supra*, said: "Counsel, indeed, frankly concedes the evil of 'get-rich-quick' schemes, and quotes the banking commissioner of the state of Kansas for the statement that the Blue Sky Law of that state has saved the people of that state \$6,000,000 since its enactment, and that between 1,400 and 1,500 companies had been investigated by the department, and less than 400 of the number granted permits to sell securities in the state. Counsel also quotes the confidence of the commissioner in the efficacy of the law, and that it will 'eventually result in the regulation and supervision of all kinds of companies in the same manner as banks are now regulated and supervised.' Against this statement, however, counsel cites the view expressed by the British Board of Trade of the inexpediency of an official investigation 'into the soundness, good faith, and prospects' of com-

panies. Upon this difference in views we are not called upon to express an opinion, for, as we have said, the judgment is for the state to make, and in the belief of evils and the necessity for their remedy and the manner of their remedy the state has determined that the business of dealing in securities shall have administrative supervision, and twenty-six states have expressed like judgments. Much may be said against these judgments, as much has been said, and decisions of the courts have been cited against them. We are not insensible to the strength of both, but we cannot stay the hands of government upon a consideration of the impolicy of its legislation. Every new regulation of business or conduct meets challenge, and, of course, must sustain itself against challenge and the limitations that the Constitution imposes. But it is to be borne in mind that the policy of a state and its expression in laws must vary with circumstances. And this capacity for growth and adaptation we said, through Mr. Justice Matthews, in *Hurtado v. California (1884) 110 U. S. 516, 530, 28 L. ed. 232, 237, 4 Sup. Ct. Rep. 111, 292*, is the 'peculiar boast and excellence of the common law.' It may be that constitutional law must have a more fixed quality than customary law, or, as was said by Mr. Justice Brewer, in *Muller v. Oregon (1908) 208 U. S. 412, 420, 52 L. ed. 551, 555, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957*, that 'it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action.' This, however, does not mean that the form is so rigid as to make government inadequate to the changing conditions of life, preventing its exertion except by amendments to the organic law. We may feel the difficulties of the new applications which are invoked, the strength of the contentions and the arguments which support or oppose them, but our surest recourse is in what has been done, and in the pending case we have analogies, if not exact examples, to guide us. So guided and so informed, we think the statute under review is within the power of the state. It burdens honest business, it is true, but burdens it only that, under its forms, dishonest business may not be done. This manifestly cannot be accomplished by mere declaration; there must be conditions imposed and provision made for their performance. Expense may thereby be caused, and inconvenience, but to arrest the power of the state by such considerations would make it impotent

to discharge its function. It costs something to be governed."

And, in this connection, the observations seem pertinent of Wood, Circuit Judge, who in dissenting from the majority opinion in *Bracey v. Darst* (1914) 218 Fed. 482, that the West Virginia Blue Sky Law was unconstitutional, said: "The statute here involved was intended to prevent, or at least check, one of the most generally recognized and harmful evils of economic life. With increasing facilities and communication all sorts of fraudulent and visionary schemes are imposed on the public by selling stocks, bonds, and other papers, in form of securities, calling for returns on the investment. Nothing seems plainer than the right of the legislature under the police power to provide by statute a reasonable method of having these schemes examined into by some public authority and requiring those who would sell to the public securities based on them to make a showing of good faith, solvency, and a reasonable chance of return on the investment."

The constitutionality of the Arkansas Blue Sky Law was, as before stated, sustained in *Standard Home Co. v. Davis* (1914) 217 Fed. 904. This law is similar in its main provisions and phraseology to that held unconstitutional in *Bracey v. Darst* (1914) 218 Fed. 482, discussed *infra*. It contains the additional provision, however, that after any investment company is admitted under the act to do business its license may be revoked by the insurance commissioner (whose duties, it is provided, devolve on the bank commissioner on the creation of the latter office) if he finds that the company is attempting in any manner to defraud the public, and provides for a suit by an investment company whose right to do business in the state is refused or revoked, in the chancery court in any county in the state where its principal office is maintained or its principal agent resides, asking that the refusal or revocation be annulled. The Arkansas law also requires any individual, copartnership, corporation, or association which sells any building or investment contracts, or like securities, on which payments are required to be made by the purchaser from time to time, before being admitted to do business in the state, to give a bond in the sum of \$20,000 for the faithful performance of its contracts. The court found that the plaintiff, an investment company, which sought to enjoin enforcement of the statute, was not engaged in interstate com-

merce, as it offered nothing for sale, and conducted a business in the nature of loans, receiving monthly instalments from parties who purchased contracts; so that it could not raise the objection that the statute offended against the commerce clause of the Federal Constitution. And it was held that the plaintiff was not in a position to question the constitutionality of the statute on the ground that it denied the equal protection of the laws, in that it applied to state banks and trust companies but not to national banks, the plaintiff not being engaged in the banking business (in this connection, see note to *Pugh v. Pugh*, 32 L.R.A.(N.S.) 954, on the general question as to who may raise the objection that a statute contains an unconstitutional discrimination); or on the ground that it deprived the plaintiff of property without due process of law and denied to it freedom of contract, in violation of the Federal Constitution, in that it prohibited the sale of stocks, bonds, or other securities unless the company issuing them was solvent, since the plaintiff specifically alleged that it was a solvent corporation. The constitutionality of the statute was upheld as against objections also that it denied the equal protection of the law in violation of the 14th Amendment to the Federal Constitution, in that it applied to stocks, bonds, and other securities, and not to bonds of the United States or municipal bonds of the state of Arkansas; that it applied to mortgage securities upon real estate situated without the state, but did not apply to mortgages on real property situated within the state; and that it did not apply to notes secured by mortgage upon real property situated within the state, but was applicable to mortgages on property within the state if said mortgages secured bonds. Other objections to the constitutionality of the statute which were held untenable were that it unlawfully authorized the bank commissioner and his assistants to examine the business of any investment company and required it to divulge any facts in connection with said business, whether or not the same related in any way to securities proposed to be sold in Arkansas; that it unlawfully infringed charter and contract rights, in that before its enactment the plaintiff had obtained a license to do business in the state and had entered into a large number of contracts therein (there being, however, at that time a constitutional provision that the general assembly should have the power to alter, revoke,

or annul any charter); that it delegated legislative powers and duties upon the bank commissioner, and vested him with arbitrary power; that its enforcement would amount to a deprivation of the right of freedom of contract; and that it violated constitutional provisions of the United States and of the state of Arkansas prohibiting excessive fines and cruel and unusual punishments, the penalty for each offense being a fine of not less than \$100 nor more than \$5,000, or imprisonment in the county jail for not more than ninety days, or both fine and imprisonment.

And the court held also in *Standard Home Co. v. Davis* (1914) 217 Fed. 904, that it was immaterial, so far as concerned the plaintiff's right to question the constitutionality of the statute, that it denied to persons the right to purchase stocks, bonds, or other securities of an investment company when in the opinion of the bank commissioner such purchase would result in a loss to purchasers, as the plaintiff did not engage in the purchase of stocks or bonds, or claim to be authorized to do so by its charter.

The court, however, held that the statute did not authorize the requirement by the bank commissioner of a true and complete list of the holders of all the securities of an investment company. *Ibid.*

As to the reasons for the enactment of the so-called Blue Sky Law, and for sustaining its validity, the court in *Standard Home Co. v. Davis* (Fed.) supra, said: "Experience has demonstrated the fact that some of the grossest frauds have been perpetrated on the public by investment companies by extravagant expenditures for salaries, agents' commissions, and other apparently legitimate purposes through officers who had practically nothing invested in the association, and whose character and reputation stamped them as adventurers and cheats. Such regulations are proper and wholesome. The dockets of the national courts have been crowded for the last few years with criminal prosecutions of persons charged with the use of the mails of the United States in carrying out fraudulent schemes by so-called investment companies and persons offering allurements to get rich quick. But those courts are only clothed with jurisdiction to prosecute those who, in carrying out their fraudulent schemes, make use of the mails, and then only after the commission of the offense. This necessarily affects only a small portion of those engaged in such schemes, L.R.A.1917F.

and can in no wise act as a preventative. The states alone can provide for the prevention and punishment of all who commit frauds, although the mails are not used for their accomplishment, and enact laws to prevent the commission of these crimes. Legislation to prevent crime is of greater benefit to society than the punishment of the offender after the crime has been committed and innocent persons have been made to suffer. Statutes enacted for such purposes ought not to be declared invalid by the courts upon slight grounds, even if extreme cases can be imagined where they may work an injustice. The granting of the privilege to do business of that nature in the state by a high official is, to a certain extent, an assurance to the public that the corporation is properly managed. It is not only his privilege, but his duty, to exercise great caution to satisfy himself that not only the scheme, but the men administering the affairs of the company, are of such character and standing, and have such a financial interest in the success of the scheme, as to give reasonable assurance to investors that their money will not be dishonestly dissipated or misappropriated. Nor can there be a reasonable objection to the provision of the statute that this information should be accessible to those who are inclined to invest their money in the securities of that association. There can be no better means of information than the sworn statements of the officers showing the condition of their corporation. National, as well as state, banks and insurance companies are required to publish similar information in the public press, and fully as much in their reports to the officials charged with their supervision. The validity of these requirements has never been questioned. The claim that the provisions of the act are not within the police power of the state as they are not necessary to protect the health, safety, morals, and welfare of its people cannot be sustained."

The validity of the Arkansas statute was sustained also in *Mechanics Bldg. & L. Asso. v. Coffman* (1913) 110 Ark. 269, 162 S. W. 1090, as against objections by a building and loan association that the act was not passed in accordance with constitutional requirements, that it conferred judicial power on the insurance commissioner, and made an arbitrary and unreasonable classification.

The Florida statute, which was held

constitutional in *Ex parte Taylor* (1914) 68 Fla. 61, 66 So. 292, Ann. Cas. 1916A, 701, is, in general provisions and phraseology, substantially similar to that held unconstitutional in *Bracey v. Darst* (1914) 218 Fed. 482, cited *infra*, except that it defines as a domestic investment company "every corporation, . . . [with certain exceptions] which are now organized or which may be organized in this state, which shall offer for sale within the state of Florida, and outside of the county where such corporation has its principal office or place of business through any agency whatsoever, any of its stocks, bonds, debentures, certificates, policies or other securities of any kind or character;" and defines a foreign investment company as any such corporation organized under the laws of any other state. It will thus be observed that the statute applies only to corporations. It requires investment companies, before selling or offering to sell any stocks or securities, to file certain papers with the state comptroller, who may, together with the attorney general, make a further examination of the investment company and its affairs, at the company's expense, and if they find that the company is solvent and that its articles of incorporation and association, its constitution and by-laws, its proposed plan of business, and its contracts contain a "fair, just, and equitable plan for the transaction of business," they shall issue it a permit to do business in the state, the provision of the West Virginia statute considered in the *Bracey* Case, as to the finding that the plan in question promises a fair return in the judgment of the examining officer, being omitted in the Florida statute. See also the quotation from the *Bracey* Case, *infra*, in which the court distinguishes the West Virginia and Florida statutes.

It was held in *Ex parte Taylor* (Fla.) *supra*, that the title of the statute, reciting that it was "an act to define domestic and foreign investment companies; to provide for the regulation and supervision of same; to provide conditions and terms under which corporations, foreign and domestic, can sell to persons in Florida stock and other securities; to place such investment companies under the jurisdiction of the comptroller and attorney general, and to prescribe for the comptroller and attorney general certain duties and powers; to provide for the service of process thereon; to provide

for the registration of agents selling securities of such investment companies, and to provide penalties for the violations of the terms of this act, and for other purposes,"—was not so defective or misleading as to render the act violative of a constitutional provision that "each law enacted in the legislature shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title." See also as to title of Michigan Blue Sky Law, *Merrick v. N. W. Halsey & Co.* (1917) 242 U. S. 568, 61 L. ed. 498, 37 Sup. Ct. Rep. 227.

It was held also that no question of interstate commerce was involved, as the offense charged was an attempt by an agent, in violation of the statute, to sell in a county in the state outside of the county where the corporation had its principal office or place of business, shares of the capital stock of a domestic corporation. *Ibid.*

As to whether the statute involved a taking of property without due process of law or denied the equal protection of the laws, in violation of constitutional provision, the court in *Ex parte Taylor* (Fla.) *supra*, said: "Certainly it is within the power, as it is clearly the duty, of the state to limit and regulate the powers and operations of corporations which it brings into existence. This limitation and regulation may, in the legislative discretion, be accomplished by administrative action within the ultimate and reasonable bounds definitely fixed by the statute; every such administrative action being subject to judicial review. . . . It is manifestly competent for the lawmaking power to authorize an administrative finding whether the 'proposed place of business and the contracts' of a domestic corporation 'contain a fair, just, and equitable plan for the transaction of business,' which finding will warrant administrative action duly taken under a statutory police regulation in the interest of the public welfare, unless restrained or controlled by appropriate judicial action. There is no ground whatever in this case to support a contention of taking property without due process of law. Even if the state has not provided along similar lines adequate protection of the public against firms and individuals, the petitioner here cannot complain of it if this statutory regulation is lawfully applied in this case. The statute contemplates an adequate hearing as to all rights in-

volved. The petitioner is not denied the equal protection of the laws, since this statutory regulation has relation to the public welfare and is applicable alike to all corporations similarly conditioned with the domestic corporation concerned here, of which the petitioner acted as agent in violating the statute. Such regulations as those prescribed are peculiarly appropriate to corporations as classified in the statute. No arbitrary discrimination appears."

A real estate company selling small tracts of land in another state was held in *State v. Agey* (1916) 171 N. C. 831, 88 S. E. 726, to be within the North Carolina Blue Sky Law, the validity of which the court sustained. The statute in this state provides that before certain kinds of companies, including bond and "investment" companies, or any individual, corporation, or copartnership who offers for sale the stocks, bonds, or obligations of any foreign corporation through agents, shall be authorized to do business in the state it must be licensed by the insurance commissioner, who is authorized to grant the license when he is satisfied that the corporation is "safe and solvent," and has complied with the laws of the state applicable to fidelity companies; an amendment enacted in 1913 made subject to the act every corporation, copartnership, or association organized without the state, whether incorporated or not, which within the state sold or negotiated for sale any "stocks, bonds, or other evidences of property, or interest in itself or any other company," where any part of the proceeds of sale were to be used in the payment of commissions, or organization or promotion expenses. In this case a Tennessee corporation, authorized to buy and sell real estate, bought and subdivided large tracts of land in Georgia, it being its purpose to sell the subdivisions for fig orchards, payments being made by instalments, and the company agreeing to care for the orchards for five years and to deed the land sold on completion of payments. It was held, as before stated, that the corporation was within the statute and that its agent was subject to indictment thereunder for soliciting and selling its contracts in North Carolina, when the corporation had not complied with the statute. It was said: "This transaction took place entirely within the state of North Carolina, and is subject to the police power of this state. There can be no interstate commerce, unless as a part of the transac-

tion there is in contemplation some act of transportation between two or more states. In this case the defendant was selling to a citizen of this state an obligation to make title to real estate in Georgia, and, upon compliance with the terms therein stated, to make title to a certain small lot of land in Georgia. There is nothing to be transported either from this state to Georgia or from Georgia to this state. There is no element of interstate commerce involved. . . . The intent of this statute is to protect our people, under the police power, from fraud and imposition by irresponsible nonresident parties. These instances have been so frequent that the United States Post-office Department has estimated that the people of this country have been losing annually more than \$100,000,000 by speculative schemes which have no more substantial basis than so many feet of 'blue sky.' To prevent such impositions on its people is an essential duty of government. If there is fraud and imposition in a case of this kind the parties imposed on can rarely go to Georgia and hunt up the guilty party, even if to be found there, and undergo the expense incident thereto. Even if this could be done, there would rarely be any assets which could be applied to the demands of the plaintiff. This state has sought to protect its people, not by forbidding such transactions, but by the very reasonable requirements that when parties, whether incorporated or not, acting under the authority, actual or merely asserted, of another state, propose to do such business in our borders, they must submit their statement of assets and the nature of their business to the insurance commissioner of this state, who will issue his license to do business here when he is satisfied that the company or corporation is safe and solvent, and has complied with the law of this state applicable to fidelity companies and governing their admission and supervision by the insurance department, and making it indictable to transact such business in this state until such license has been obtained. This is a reasonable requirement under the police power of this state."

In *State v. Schofield* (1915) 136 La. 702, 67 So. 557, the court sustained the constitutionality of a statute, construed as an exercise of the taxing power, requiring every itinerant or traveling agent engaged in the sale of stocks or bonds of any corporation organized in

that or any other state to procure from the secretary of state, at a cost of \$1, a certificate of permission, which would entitle him to procure from the sheriff of the parish in which he proposed to engage in such sales a license to do so, the license costing \$5 per annum; to give bond in a sum of not less than \$15,000, conditioned that he would make no false statement or misrepresentation of facts in making sales; and to give a separate bond and procure a separate certificate of permission and license for each separate company or stocks and bonds represented. The particular objections to the constitutionality of the statute were that it deprived itinerant venders of stocks and bonds of liberty and property in violation of the Federal Constitution; that the license imposed by the statute was not graduated, as required by the state Constitution of taxation licenses (the court saying that the graduation consisted in the agent being required to take out a separate license for each company or stock or bond he represented and for each parish in which he did business); that the statute contained two objects, viz., the levying of a tax and the regulation of the business in question, in violation of a constitutional provision requiring statutes to have but one object; that it was broader than the title, in violation of a provision of the Constitution requiring the object of acts to be stated in their titles; that it unlawfully discriminated between itinerant sellers and sellers with fixed places of business, and was therefore class legislation obnoxious to the provisions of the Federal Constitution; that it unlawfully discriminated between purchasers by affording the protection of a bond to purchasers from itinerant agents, and not extending the same protection to purchasers from agents with fixed places of business; and that it violated the commerce clause of the Federal Constitution. As to the last point, the court, however, stated that, under the doctrine that a statute would not be so interpreted as to render it unconstitutional if without doing violence to its language a saving interpretation is possible, the stocks and bonds of foreign corporations to which the statute had reference would have to be held to be those only already incorporated into the mass of the property of the state.

In view of the decisions of the Federal Supreme Court considered above, sustaining the constitutionality of the Blue Sky Laws of Ohio, South Dakota, L.R.A.1917F.

and Michigan, there may be considerable doubt as to the correctness of the prior decisions of the lower Federal courts that the Blue Sky Laws of West Virginia and Iowa, and the Michigan statute of 1913, are violative of the Federal Constitution. But, although the general import of the Blue Sky Laws held unconstitutional appears to be the same as that of those held constitutional by the Federal Supreme Court, there seems to be some ground for distinguishing between them, because of substantial differences in the statutes. This is true particularly, it seems, in that the statutes held unconstitutional apparently go farther than those whose constitutionality has been sustained by the Federal Supreme Court in attempting to guard investors against possible financial loss and not merely against fraud, and in failing to exempt from their provisions a sale by a bona fide owner of securities not made in the course of continued or successive transactions of a similar nature, or, as in the case of the Iowa statute, limiting such exemption to owners who are residents of the state.

The Michigan statute upheld by the Federal Supreme Court in *Merrick v. N. W. Halsey & Co.* (1917) 242 U. S. 568, 61 L. ed. 498, 37 Sup. Ct. Rep. 227, was an amendment, enacted in 1915, of the Michigan Blue Sky Law of 1913, which had been declared unconstitutional in *Alabama & N. O. Transp. Co. v. Doyle* (1914) 210 Fed. 173. When the *Merrick* Case came before the same court which had declared the 1913 law unconstitutional, it decided ((1915) 228 Fed. 805) that no substantial change in the law had been made by the amendment of 1915, and that the law as amended was unconstitutional as being especially in violation of the interstate commerce clause of the Federal Constitution. While the latter decision has been overruled by the Federal Supreme Court, a quotation from the opinion of the district court in that case is here given because it indicates the nature of the 1913 act which the same court held unconstitutional in the *Doyle* Case (Fed.) supra, and also the nature of the 1915 statute which the Federal Supreme Court sustained. It was said: "The only question now open is whether the differences between the laws of 1913 and 1915 justify any different result as to the latter. We think not, because we find no substantial changes in those respects which were held to be fatal. Some minor details have been corrected,

but the new law, like the old, impresses upon interstate commerce a burden which is direct and which is beyond the limits of the police power. The 1913 law suspended all deals for thirty days, and then, lacking actual objection, automatically withdrew legal objection. The new law forbids all dealings until after affirmative approval by the Commission. This approval would not, normally, be obtainable for several days, and it may be indefinitely withheld, without objection made or reason given, but at the mere convenience of the Commission. The change in the law has not diminished this burden, in directness or in weight. Under the 1913 act sales were to be forbidden if the Commission finds that the plan of business is unfair, or that the securities (a) are fraudulent, (b) will, in all probability, work a fraud upon the purchaser, or (c) will, in all probability, result in loss to the purchaser. The 1915 act in terms seems to eliminate the tests of unfairness and of probable loss, but in fact provides for disapproval, if the Commission finds 'that the proposed plan of business of said investment company, or that its proposed contracts, stocks, bonds, or other securities are fraudulent, or are of such a nature that the sale of such contracts, stocks, bonds, or other securities, would, in the opinion of said Commission, work a fraud upon the purchaser.' § 9. Has there been any substantial change, or has the omission of the words 'unfair' and 'loss' left the statute unchanged in true intent and meaning? Obviously the statute is not content to rest the Commission's condemnation alone on the fraudulent character of plan or securities. They must also meet the additional test whether 'in the opinion of the Commission' the sale of the securities would 'work a fraud upon the purchaser.' To 'work a fraud upon the purchaser' must be something different from being 'fraudulent'; and the clause would seem to be difficult of interpretation, save for the aid given by the history of the statute, and by an additional section which first appears in the new law. This is § 8, copied in the margin. It provides in substance that the Commission may, by its own experts and physical examination, determine the value of the property involved, and may prohibit the sale, unless all securities in excess of the value so determined are surrendered to the Commission,—all of which plainly means that the Commission is, directly or indirectly, to fix the price

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at which securities may be sold. When this provision is read in connection with the general rule of prohibition in § 9, it is clear enough that 'in the opinion of said Commission work a fraud upon the purchaser' means 'in the opinion of said Commission will in all probability result in loss to the purchaser,' and no real change in the meaning has been accomplished."

The West Virginia Blue Sky Law was held in *Bracey v. Darst* (1914) 218 Fed. 482 (Woods, Circuit Judge, dissenting) in conflict with the Federal Constitution, in that it denied the right of citizens of the United States to buy and sell property in the state, deprived them of their property without due process of law, denied them the equal protection of the laws, and imposed an unlawful restraint and burden on interstate commerce. The principal question considered was whether the statute should be construed as limited in its application to corporations, the court saying that it was substantially admitted that if the intent of the statute was to prevent a citizen from selling his own notes or other obligations, as bonds, securities, etc., which he may have acquired in the course of business, without a certificate from the auditor of solvency and "sound business capacity," it was clearly subversive of his inalienable right to acquire and sell property. And the majority of the court reached the conclusion that the statute should not be limited, as above indicated, to apply only to corporations. The statute provides that "every corporation, every copartnership, every company, every individual, and every association, . . . [with certain exceptions] organized or which shall be organized in this state, whether incorporated or unincorporated, which sell or negotiate for the sale of any stocks, bonds, debentures, or other securities of any kind or character," except those named, shall be known as a domestic investment company, and that every such investment company organized in any other state shall be known as a foreign investment company. It is provided that every investment company, before offering or attempting to sell any stocks, bonds, debentures, or other securities of any kind, other than those specifically exempted, shall file certain data with the state auditor, who shall examine the papers filed, and may make a detailed examination of the company's affairs at its expense; and if he finds that the company is solvent, that its articles of incor-

poration, etc., its proposed plan of business, and proposed contract or securities provide for a "fair, just, and equitable plan for the transaction of business, and in his judgment promises a fair return on the stocks, bonds, debentures, and other securities by it offered for sale," he shall issue to the company a statement reciting that it has complied with the provisions of the act; but if he finds otherwise, it is made unlawful for the company to transact any further business until it has changed its constitution, etc., its proposed plan of business and proposed contracts, and its general financial condition, in such manner as to satisfy the auditor that it is solvent, and that its articles of incorporation, etc., its proposed plan of business, and proposed contract "are bona fide, and provide for a fair, just, and equitable plan for the transaction of business, and does in his judgment promise a fair return on the stocks, bonds, and other securities by it offered for sale." It is unlawful for any investment company either as principal or agent to transact any business until it has filed the papers in question and received from the auditor the statement provided for. The statute also makes provision for receivership proceedings whenever it appears to the auditor that the assets of any investment company are impaired to the extent that they do not equal the liabilities, or that the company is conducting its business in an unsafe, inequitable, or unauthorized manner, or is jeopardizing the interests of its stockholders or investors.

In *Bracey v. Darst* (Fed.) *supra*, the court distinguished the case of *Ex parte Taylor* (1914) 68 Fla. 61, 66 So. 292, Ann. Cas. 1916A, 701, discussed above, from that before it, as follows: "The Florida act is confined exclusively to corporations, while the West Virginia act includes individuals, copartnerships, and associations of individuals. The Florida act restricts the corporation from selling in that state (other than in the county wherein is its principal office or place of business) only its own stocks, bonds, debentures, certificates, policies, or other securities of any kind or character, while the West Virginia act prohibits sale or attempt to sell any stocks, bonds, debentures, or other securities of any kind or character (except those specially mentioned) by any individual, copartnership, corporation, or association. The Florida act expressly excludes from the effect of its provisions the sale by any bona fide owner of stock, etc., purchased in good faith; the West Virginia act

makes no such exception. The Florida act expressly permits its domestic company to sell its stock, etc., in the county in the state wherein it has its principal office or place of business; the West Virginia act permits no such exception. In short, while the provisions of both acts to some extent obscure and fail to define clearly their true intent and meaning as to what kind of business operations are sought to be regulated, one might well reach the conclusion that the Florida act had for its purpose the defining of terms and conditions under which corporations can do business in that state and sell its stock and bonds for the purpose of doing such business, a perfectly legitimate thing for the state to do, for its domestic corporations are simply the offspring of its own creation, while it has long since been determined that as to foreign corporations a state exercising its sovereign power may exclude them from doing business within its territorial limits altogether. But, on the other hand, the West Virginia act must by its terms be construed to regulate individuals, copartnerships, corporations, or associations seeking to engage in the business of buying and selling stocks, bonds, and securities of any kind or character, other than those expressly exempted. In other words, to prevent any such person, corporation, etc., from selling in the state any obligation of any corporation, whether doing business in the state or not, which had not the auditor's permission to do business therein. The sweeping effect of such provision is at once apparent, as it would substantially limit the brokerage business in the state and the purchase by its citizens of standard foreign securities which would have to be sold by them outside the state. The decision of the supreme court of Florida in *Ex parte Taylor* (Fla.) *supra*, is expressly based upon the fact that the power is clear in the legislature "to limit and regulate the powers and operations of corporations which it brings into existence."

In *William R. Compton Co. v. Allen* (1914) 216 Fed. 537, the court granted a motion for a preliminary injunction to restrain enforcement of the Iowa Blue Sky Law, on the ground that it was unconstitutional, in that it unlawfully imposed a direct burden on interstate commerce, and imposed burdens upon and denied privileges to citizens of other states which were not imposed upon and which were granted to citizens of the state. The court said: "Coming now to a consideration of the act for the pur-

pose of determining whether it does in express terms and undoubted meaning and intent contravene any provision of the organic law of the nation or this state, it is seen to undoubtedly prohibit any person or citizen, natural or corporate, of any foreign state, from selling or offering for sale, in person or through another, in any manner or way whatever, any stocks, bonds, or other securities or obligations, of every kind and nature, to any person within this state, unless the provisions of the act are first complied with, under heavy penalties. That is to say, by its express terms the act prohibits a citizen of a sister state of this country, owning and having stocks, bonds, certificates, or securities, although the same are listed on the exchanges of the country and have a well-established actual and salable value, from either bringing or sending the same into this state for sale unless he first meets the exactions of this law, or by so doing subjects himself to its penalties. Nor may he enter upon and conduct negotiations looking to or consummating a sale of his property by correspondence through the mails of the country, either personally or through his agent, without compliance with the provisions of the act, or abiding its penalties. . . . That the act in question, in prescribing the only terms and conditions on which complainants and interveners, citizens of foreign states, may transact the business of disposing of their property within the borders of this state, does impose a burden on interstate commerce needs no comment further than a reading of the act itself, for by the law it is placed within the power of officers of the state to absolutely prohibit such business transactions."

The Iowa statute held unconstitutional in *William R. Compton Co. v. Allen* (Fed.) supra, provides in substance that it shall be unlawful for any investment company or stockbroker, or any representative thereof, to sell or offer for sale any stocks, bonds, or other securities of any kind, with certain exceptions, without a permit from the secretary of state; that before any investment company shall secure such permit it shall file certain data with the secretary of state, who, if he finds that the company is solvent, that its articles of incorporation, etc., its proposed plan of business, and proposed contracts provide for a "fair, just, and equitable plan for the transaction of business," shall issue to it the permit; that whenever it shall appear to the secretary of state that the assets of

any investment company are impaired to the extent that they do not equal its liabilities, or that it is conducting its business in an unsafe, unfair, inequitable, or unauthorized manner, or is jeopardizing the interests of its stockholders or investors, he shall cancel such permit; and any stockbroker, agent, or other person who attempts to sell the securities of any investment company which has not complied with the statute is subject to a fine and imprisonment. The statute requires brokers and agents before doing business for any investment company to register with the secretary of state and receive from him a certificate showing that the company has complied with the provisions of the act. It also provides that the secretary of state may issue to any stockbroker resident of the state during the last preceding six months an annual permit, entitling him to handle such securities as "are known to be standard, or are well known to be safe and legitimate investments, or such as are found by investigation of the secretary of state to be safe and legitimate stocks, bonds, or other securities;" that the secretary of state may cancel the broker's permit at any time he decides that the broker is not handling such securities as he deems safe and legitimate investments; also that the broker shall pay an annual fee of \$50 for permits from the secretary of state, and give bond in the sum of \$5,000, conditioned upon a strict compliance with the statute. It is also provided that nothing therein should be "so construed as to prohibit the bona fide owner of any stocks, bonds, or other securities, who is at the time a resident of this state, from selling, exchanging, or otherwise disposing of the same when not made in the course of continuing or repeated transactions of a similar nature, or when the said securities . . . have been issued or given for goods . . . purchased or dealt in by the issuer in the ordinary course of his business," nor when sold or otherwise disposed of in good faith to a bank, trust or insurance company, building and loan association, or stockbroker authorized to do business in the state. The statute defines the term "investment company" as including every corporation or concern, however constituted, "now or hereafter organized, which shall sell or cause to be sold or offered for sale, take subscriptions for, or negotiate for the sale of any stocks, bonds, or other securities of any kind or character to any person or persons in the state of Iowa," with certain ex-

ceptions as to banks, loan and trust companies, etc.; and the term "stockbroker" is defined as including every person, association, copartnership, or corporation which offers for sale or deals in any of the securities covered by the statute.

In *National Mercantile Co. v. Watson* (1914) 215 Fed. 929, the validity of the Oregon Blue Sky Law was challenged by a British Columbia corporation, but a plea in abatement was sustained, on the ground that a copy of the charter or articles of incorporation of the complainant had not been properly certified, so as to entitle it to do business in the state and to maintain the suit.

And it was held in *McKinney v. Watson* (1915) 74 Or. 220, 145 Pac. 266, that a taxpayer not engaged in any business subject to the statute could not enjoin payment of salaries incurred under the Oregon Blue Sky Law, which was enacted to protect purchasers of stocks and bonds and to prevent fraud in the sale thereof, and created a corporation commission to administer the law, on the ground that it was unconstitutional, since it did not appear that the expenditures authorized by the statute would exceed the revenues derived thereunder in the way of fees and other contributions from corporations, so as to increase the plaintiff's burden of taxation. (Generally as to the right of citizen or taxpayer to enjoin waste or unlawful expenditure of state funds, see note to *Sutton v. Buie*, L.R.A. 1915D, 178.

In *National Mercantile Co. v. Keating*

(1914) 218 Fed. 477, the question of the constitutionality of the Montana Blue Sky Law was raised, but was not decided, as it was held that a court of equity would not enjoin enforcement of the law at the instance of a corporation whose methods and business clearly showed that they embodied a scheme to defraud. It was said: "That this corporation is designed to profit its owners at the expense of victims enticed by pseudo promises and deceptive prospects seems clear. Therein, a court of equity—of conscience—will give no aid. Those appealing to equity to restrain the trespasses of others must themselves be free from imputation. If the right they assert is to do iniquity, they cannot have equity. . . . In this view of the case, it is unnecessary to consider the attack upon the constitutionality of the state's Blue Sky Law, for in no event is plaintiff entitled to the relief sought."

The Vermont statute relating to loan and investment companies and imposing a penalty on agents transacting business within the state for foreign partnerships which had not complied with conditions not required of local partnerships was held in *State v. Cadigan* (1901) 73 Vt. 245, 57 L.R.A. 666, 87 Am. St. Rep. 414, 50 Atl. 1079, to discriminate against such agents in favor of those of local firms so as to be void under the Federal Constitution and those provisions of a state Constitution protecting equal rights and privileges.

R. E. H.

ARKANSAS SUPREME COURT.

J. W. McCLENDON, Appt.,
v.
CITY OF HOT SPRINGS et al.

(— Ark. —, 195 S. W. 686.)

Mandamus — to compel execution of contract — control of official discretion.

1. The mayor of a city cannot defeat a mandamus proceeding to compel him to execute a contract provided for by an ordinance passed over his veto, on the theory that it is an attempt to control his discretion.

For other cases, see *Mandamus*, I. d, 1, in Dig. 1-52 N. S.

Municipal corporation — validity of ordinance — residence of alderman.

2. An ordinance is not subject to collateral

attack because certain aldermen whose votes were necessary to its passage did not reside in the wards which they purported to represent, as required by the charter.

For other cases, see *Municipal Corporations*, II. c, 2, in Dig. 1-52 N. S.

Same — authority to compromise suit.

3. The absence of a formal transfer of a street by the improvement district to the city does not deprive the city of the power to compromise a suit brought in the joint names of itself and the commissioners of the district to compel repair of the streets, where the street has in fact been under control of the city sufficiently long to become badly worn.

For other cases, see *Highways*, I. a, in Dig. 1-52 N. S.

Same — authority over contracts.

4. The city council has power to enforce a bond for the maintenance of a street improvement where, by statute, it is required to care for the streets and cause them to be kept open and in repair.

For other cases, see *Municipal Corporations*, II. a, in Dig. 1-52 N. S.

Note. — For mandamus to compel a public officer to execute a contract, see annotation following this case, post, 538. L.R.A.1917F.

Same — authority to compromise suit.

5. The common council of a city, having authority to enforce a bond for the maintenance of a street improvement, has authority to compromise a suit brought for that purpose.

For other cases, see Municipal Corporations, II. a, in Dig. 1-52 N: S.

(May 28, 1917.)

APPEAL by the Mayor of Hot Springs from an order of the Circuit Court for Garland County awarding a writ of mandamus to compel him to execute a contract provided for by an ordinance which was passed over his veto. Affirmed.

The facts are stated in the opinion.

Messrs. Murphy & McHaney for appellant.

Messrs. James S. McConnell, Martin, Wootton, & Martin, and Morris M. Townley, for appellees:

The discretion of the mayor was exhausted when, by veto, he sought to prevent the ordinance from becoming a law. His present duty is purely ministerial, and mandamus is the proper remedy.

People ex rel. Schanck v. Green, 64 N. Y. 499; People ex rel. Lynch v. Lennon, 147 App. Div. 537, 132 N. Y. Supp. 620; State ex rel. McCormick v. Fisher, 5 Penn. (Del.) 273, 64 Atl. 68; Milburn v. Glynn County, 112 Ga. 160, 37 S. E. 178; Jones v. Bank of Cumming, 131 Ga. 614, 63 S. E. 36; Com. ex rel. Keller v. George, 148 Pa. 463, 24 Atl. 59, 61; Home Constr. Co. v. Duncan, 24 Ky. L. Rep. 94, 68 S. W. 15; 26 Cyc. 280, 291, 358; 19 Am. & Eng. Enc. Law, 2d ed. 821.

The ordinance was lawfully passed.

Eureka Fire Hose Co. v. Furry, 126 Ark. 231, 190 S. W. 427; St. Louis County Ct. v. Sparks, 10 Mo. 117, 45 Am. Dec. 355; Oliver v. Jersey City, 63 N. J. L. 634, 48 L.R.A. 412, 76 Am. St. Rep. 228, 44 Atl. 709; Lempasas v. Talcott, 36 C. C. A. 318, 94 Fed. 457; Murphy v. Shepard, 52 Ark. 356, 12 S. W. 707; Re Collins, 75 App. Div. 87, 77 N. Y. Supp. 702; State ex rel. Newman v. Jacobs, 17 Ohio, 143; Ross v. Long Branch, 73 N. J. L. 292, 63 Atl. 609; Roche v. Jones, 87 Va. 484, 12 S. E. 965; Lockhart v. Troy, 48 Ala. 579; Hooper v. Goodwin, 48 Me. 79; Farrier v. Dugan, 48 N. J. L. 613, 7 Atl. 381; Patterson v. Miller, 2 Met. (Ky.) 493; Hinton v. Lindsay, 20 Ga. 746; Reuter v. Meacham Contracting Co. 143 Ky. 557, 136 S. W. 1028, Ann. Cas. 1912D, 265; Sheehan's Case, 122 Mass. 445, 23 Am. Rep. 374; Lexington & H. Turnp. Road Co. v. McMurry, 6 B. Mon. 214; Case v. State, 69 Ind. 46; Com. v. Taber, 123 Mass. 253; Prescott v. Hayes, 42 N. H. 56.

All municipalities and public bodies pos-
L.R.A.1917F.

sessing the power to sue and be sued have, incident to such power, the authority to compromise pending or prospective litigation.

Warren v. St. Paul, 5 Dill. 498, Fed. Cas. No. 17,199; Farnham v. Lincoln, 75 Neb. 502, 106 N. W. 666; San Antonio v. San Antonio Street R. Co. 22 Tex. Civ. App. 148, 54 S. W. 281; O'Brien v. New York, 40 App. Div. 331, 57 N. Y. Supp. 1039, affirmed in 160 N. Y. 691, 55 N. E. 1098; Petersburg v. Mappia, 14 Ill. 193, 56 Am. Dec. 501; Agnew v. Brall, 124 Ill. 312, 16 N. E. 230; Board of Liquidation v. Louisville & N. R. Co. 109 U. S. 221, 27 L. ed. 916, 3 Sup. Ct. Rep. 144; Prout v. Pittsfield Fire Dist. 154 Mass. 450, 28 N. E. 679; State ex rel. Fuller v. Martin, 27 Neb. 441, 43 N. W. 244; Troy v. Atchison & N. R. Co. 11 Kan. 519; 1 Dill. Mun. Corp. 4th ed. § 477; 20 Am. & Eng. Enc. Law, 2d ed. 1146; 28 Cyc. 641; People ex rel. Central P. R. Co. v. San Francisco, 27 Cal. 655; Washburn County v. Thompson, 99 Wis. 585, 75 N. W. 309; Shawneetown v. Baker, 85 Ill. 563; Mills County v. Burlington & M. River R. Co. 47 Iowa, 66; Grimes v. Hamilton County, 37 Iowa, 290; Baileyville v. Lowell, 20 Me. 178; Augusta v. Leadbetter, 16 Me. 45; Hall v. Baker, 74 Wis. 118, 42 N. W. 104; Orleans County v. Bowen, 4 Lans. 24; Onslow County v. Tollman, 76 C. C. A. 317, 145 Fed. 753.

Smith, J., delivered the opinion of the court:

In 1905 an improvement district was formed for the purpose of paving Central avenue and other streets in the city of Hot Springs. On April 2, 1906, a contract was entered into between the improvement district and the Barber Asphalt Paving Company to pave said streets with asphalt. The paving contract contained a clause whereby the paving company agreed to make certain repairs for a period of ten years after the completion of its contract. The streets were paved, and after a few years' use became out of repair, and the paving company was called upon to make the necessary repairs, which it declined to do upon the ground that it was under no duty to make the repairs which had become necessary.

This controversy was settled by an agreement on the part of the paving company to pay the sum of \$7,500 in cash, in consideration of which payment a release was to be executed by both the city and the improvement district; but a controversy arose between the city officials and the commissioners of the improvement district over the disposition of this money, and the required release was never executed and the money was never paid to either, the city or the improvement district. Failing to adjust the

matter, a suit was brought by the city against the paving company and the surety on its bond, in which judgment was asked for \$30,000. An agreement was reached for the settlement of this litigation, pursuant to which an ordinance was passed which recited the agreement of the paving company to do certain resurfacing and other repair work in consideration of a sum of money to be paid by the city. This ordinance was passed to effectuate the settlement of the differences between the paving company and the city, and authorized and directed the mayor, in the name of the city, to sign the contract agreed upon. This ordinance was vetoed by the mayor, and afterwards passed by a vote of eight in favor of the ordinance to two against it, two members of the council not being present at the time.

After the passage of the ordinance over the veto of the mayor, that officer was called upon to execute the contract of settlement there authorized; but he declined so to do. Whereupon a proper petition for mandamus was filed against him, praying that he be required to do so. The relief prayed was resisted upon the following grounds: (1) That the signing of said contract on the part of the mayor involves the exercise of discretion. (2) That appellees have another remedy. (3) That the ordinance providing the terms of the contract was not legally passed, and is therefore not a valid and binding ordinance of the city council of said city. (4) That the streets were in the hands of the commissioners of the improvement district, and that the city council had no authority to pass the ordinance providing for this contract or to require the mayor to sign it. Appellant argues, and appellees concede, that mandamus will not lie to control the discretion of an officer where the performance of an official duty involves an exercise of discretion. And the concession is likewise made that mandamus will not lie where the party applying therefor has another and an adequate remedy.

Appellant says that it is now sought, in effect, to compel him to approve an ordinance which, in the exercise of his discretion, he saw proper to veto. We think, however, that such is not the case, for after the passage of the ordinance the discretion of the mayor ceased. Once a valid ordinance is passed, it becomes binding upon all persons alike, and if it imposes upon the mayor, or other officers of the city, any duty which the council has the authority to impose, then the obligation to perform that duty becomes binding. The mayor had a discretion in the approval of the ordinance, and this discretion he exercised; but upon its passage notwithstanding his veto the mayor became charged with the performance of a mere min-

isterial duty, and no officer has a discretion to obey, or to refuse to obey, a law requiring the performance of a mere ministerial duty.

It is insisted by learned counsel for appellant that "the contract itself being a part of the ordinance which the mayor vetoed, he cannot now be compelled, nor can they ask aid of the court to compel him, to do that which he has already exercised his discretion in refusing to do. In vetoing the ordinance, the mayor vetoed the contract as well, and now to require him to sign and approve the contract is an indirect way of compelling him to approve the ordinance providing for the contract."

It is further insisted that if the council had authority to pass this ordinance over the mayor's veto, it had the power to approve the contract without the necessity of the mayor's signature, and that appellees are seeking to compel appellant to do a thing which the city could have done, and can yet do, itself.

We have seen, however, that this proceeding is not intended to control the discretion of the mayor, but is intended to compel the performance of a duty imposed by an ordinance which was passed over his veto. The mayor would have no more discretion, and does not have any more discretion, in obeying an ordinance passed over his veto, than he has in obeying one which was passed with his approval. It may be true the ordinance could have been so drafted as not to require the signature of the mayor to the contract; but, as passed, it did require his signature, and this cannot be said to be an inappropriate manner of executing such contracts. On the contrary, it is usual and customary for the mayor, as the chief executive officer of a city, to act for and in the name of the city in the execution of any contract which the city may lawfully make; and if the city had the authority to pass the ordinance in question, it cannot be material that it might have passed a different ordinance on the subject and one which would not have required appellant to perform any duty in its enforcement.

It is argued that the evidence conclusively shows that two of the aldermen, without whose vote the ordinance could not have been passed over the mayor's veto, did not then reside in the wards for which they claimed, respectively, to be sitting as aldermen. The court found, however, that the aldermen were de facto officers, and held that their qualifications to serve as such could not be inquired into in a collateral proceeding. The court was correct in so holding, and many cases are cited in the brief in support of that position, and, among others, the following Arkansas cases: *Eureka Fire Hose Co. v. Furry*, 126 Ark. 231,

190 S. W. 427; *Barton v. Lattourette*, 55 Ark. 81, 17 S. W. 588; *Murphy v. Shepard*, 52 Ark. 356, 12 S. W. 707; *Moore v. Turner*, 43 Ark. 243.

The real question in the case is that of the authority of the council to pass the ordinance. It does not appear that any formal transfer of the street had been made from the commissioners of the improvement district to the city. But no formal delivery is required for this purpose. Evidently, the transfer had been made, and the street was under the control of the city, and had been for a sufficient length of time for the street to be so badly worn as to require the repairs which form the subject-matter of this controversy. The original contract provided that if the paving company failed to make repairs, either the improvement district or the city might sue the paving company for a breach of contract, and under this contract the city had sued that company, making the commissioners of the district parties to the suit. This suit was defended upon the ground that the paving company was under no duty to make the repairs. The compromise agreement, which the ordinance in question approved, was executed in the name of both the city and the improvement district. In the case of *English v. Shelby*, 116 Ark. 212, 172 S. W. 817, we upheld the right of the commissioners of an improvement district to sue on the bond of a contractor given to maintain a street for a specified number of years. No question was there involved about the right of the improvement district, rather than the city, to sue. In the case of *Peay v. Kinsworthy*, 126 Ark. 323, 190 S. W. 565, we held that the commissioners of a sewer improvement district which was still in the hands and under the control of the commissioners had the right to maintain, in their name as commissioners, a suit to protect the interests of their district. There is no conflict of authority here between the city and the commissioners of the improvement district. The bond was executed for the benefit of both. The suit against the paving company was brought by both the city and the commissioners of the improvement district, and the compromise agreement, settling this litigation, which the ordinance directs the mayor to sign, runs

in the name of both the city and the improvement district.

It is argued by learned counsel for appellant that the control of this litigation, and the right to enforce the provisions of the maintenance bond and to supervise the repair of the streets, inhere in the board of public affairs, and not in the city council. But we do not agree with counsel in this contention. Section 5607 of Kirby's Digest provides that "the city council shall possess all the legislative powers granted by this act, and other corporate powers of the city not herein prohibited, or by some ordinance of the city council made in pursuance of the provisions of this act and conferred on some officer of the city; they shall have the management and control of finances, and of all the property, real and personal, belonging to the corporation. . . ."

Section 5530 of Kirby's Digest provides that "the city council shall have the care, supervision, and control of all the public highways, bridges, streets, alleys, public squares, and commons within the city; and shall cause the same to be kept open and in repair and free from nuisance."

The maintenance bond was executed by the paving company for the benefit of the city and of the improvement district, and, as an incident to the right to sue thereon, the right to settle that litigation arose. Litigants are not to be denied the right to settle their litigation. The policy of the law encourages the earliest settlement of litigation. The ordinance in question authorizes and directs this action with reference to this litigation, and, as the authority exists to pass this ordinance, the matter was concluded when the ordinance was passed. We cannot consider the question of expediency involved in the enactment of this ordinance, and have not done so. We rest our decision upon the determination of the power of the council to pass the ordinance.

It follows, therefore, that in effect this is a suit to compel the mayor of Hot Springs to discharge a ministerial duty pursuant to a valid ordinance, under which no discretion vests in him. His duty being to obey this ordinance, the writ of mandamus was properly awarded to compel him to do so, and the order of the court below to that effect is therefore affirmed.

Annotation—Mandamus to compel public officer to execute a contract.

The cases in which the right to mandamus to compel the execution of a contract have turned simply on the right or remedy of the lowest bidder to have the contract awarded to him are excluded from the present note as they are in-
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cluded in the note to *Molloy v. New Rochelle*, 30 L.R.A.(N.S.) 126, on "Remedy of lowest bidder for refusal of authorities to award contract to him." As to the right to mandamus to compel the issuance of a municipal warrant to pay

an indebtedness, see note appended to *George S. Chatfield Co. v. Reeves, L.R.A. 1916D, 324.*

Ordinarily, mandamus will lie against a public officer to enforce only a ministerial duty, as contradistinguished from a duty which is discretionary. There must be also a duty existing at the time the application for mandamus is made, and this duty must be both peremptory and clearly defined,—a duty which the law not only authorizes, but requires, to be performed. *United States ex rel. International Contracting Co. v. Lamont (1894) 155 U. S. 303, 39 L. ed. 160, 15 Sup. Ct. Rep. 97.*

Mandamus will not issue to compel a mayor to execute a contract in accordance with a resolution of the common council, after this body has revoked the resolution (*Paddock v. State (1916) — Ind. —, 114 N. E. 217*); or to compel a Secretary of War to sign a contract in accordance with a proposal and acceptance, where the relator has voluntarily entered into another contract involving the same subject-matter for a substantially less sum (*United States ex rel. International Contracting Co. v. Lamont (U. S.) supra*); or to compel a street superintendent to enter into a contract to improve a street, awarded by the city council, where the law requires him to contract with abutting owners to improve the street abutting their premises, if satisfied that a certain per cent of them desire to make such improvements, and he, after satisfying himself in this regard, actually enters into contracts with such abutting owners (*Fairchild v. Wall (1892) 93 Cal. 401, 29 Pac. 60*).

As pointed out in the foregoing statement of the rule applicable to the right to mandamus to compel a public officer to execute a contract, mandamus will not issue where the duty to execute the contract is discretionary as distinguished from ministerial.

Thus, mandamus will not issue to compel a board of public improvements of a city to make a contract authorized by an invalid ordinance, especially where the contract requires the exercise of discretion on the part of the board as to some of its terms and provisions. *State ex rel. Belt v. St. Louis (1901) 161 Mo. 371, 61 S. W. 658.* And see *Day v. Ryan (1914) 245 Pa. 154, 91 Atl. 633*, holding that, where it is the duty of a city solicitor to prepare contracts authorized by the city council, and to indorse upon them his approval as to form before the contracts shall take effect, mandamus will not issue in favor of a contractor *L.R.A.1917F.*

to whom a contract has been awarded, to compel a city solicitor to prepare a contract for execution by the mayor.

Even where the execution of a contract is ministerial, if there exist valid reasons against its execution at the time, mandamus will not issue to compel its execution, for mandamus is not a writ of right, but its issue lies in the discretion of the court. Thus, conceding that mandamus may issue to require a mayor to execute a contract authorized by the common council, nevertheless the court, in issuing the mandamus, may exercise its discretion where application is made for a mandamus to compel the mayor to execute a contract provided for by the common council over the mayor's veto. Mandamus will be denied if it appears that the contract is for the purchase of property for a concededly higher price than the actual value of the property, even though the difference is not sufficient to show actual fraud. *People ex rel. Lighton v. McGuire (1900) 31 Misc. 324, 65 N. Y. Supp. 463.* And in New York it has been held that, where a bid has been accepted and the board having the matter in charge refuses to execute a contract with the bidder, mandamus will not lie to compel the execution of the contract. *People ex rel. Lunney v. Campbell (1878) 72 N. Y. 496; Beckwith v. New York (1907) 121 App. Div. 462, 106 N. Y. Supp. 175 (rule stated).* And it has also been held that, where a board has the power to award a contract and the contract is to be executed by the mayor, mandamus will not lie to compel the execution of a contract based upon an award by the board, which they subsequently revoked, although they were also made parties to the mandamus proceeding. *People ex rel. Ryan v. Aldridge (1894) 83 Hun, 279, 31 N. Y. Supp. 920.* These decisions are based upon the ground that the bidder has an adequate remedy at law by an action for damages for failure to carry out the contract, the award of the contract apparently being regarded as constituting a contract.

Nor will mandamus issue to compel the governor of a state to execute a contract authorized by the legislature, where no provision has been made to raise the money necessary to meet the obligation incurred thereby. *State ex rel. Martin v. Humphrey (1892) 47 Kan. 561, 28 Pac. 722.*

Subject to the exception just noted, where a municipal officer has no discretion in the matter, and his affixing his signature to a contract is a formal matter, his duty in this regard being purely

ministerial, mandamus will issue to compel him to execute a contract authorized by the authorities having power in that regard.

For example, where the power is vested exclusively in a city council to decide and award a contract, and the functions of the mayor in signing it and affixing thereto the seal of the city are merely ministerial, mandamus will issue to compel him to sign and affix the city seal to a contract duly awarded by the council. *State ex rel. McCormick v. Fisher* (1903) 5 Penn. (Del.) 273, 64 Atl. 68.

In accordance with this doctrine, *McCLENDON v. HOT SPRINGS*, ante, 535, holds that, since the act of the mayor in signing a contract is purely ministerial, mandamus will issue to compel him to execute a contract for street improvement in accordance with the terms of an ordinance, although this ordinance was passed over the mayor's veto. And mandamus will issue to compel a mayor and city solicitor to execute a contract in accordance with an ordinance, the validity of which has been sustained by a court of competent jurisdiction. *Home Constr. Co. v. Duncan* (1902) 24 Ky. L. Rep. 94, 68 S. W. 15.

So it was held in *State ex rel. Independent Asphalt Paving Co. v. Gill* (1915) 87 Wash. 201, 151 Pac. 498, that mandamus will issue to compel the mayor to approve a bond given by a contractor to secure performance of a contract for street improvement, according to a certain ordinance, where the only ground for objection by the mayor is the unfounded claim that the ordinance is invalid.

And see on this point, although not strictly within the scope of the note, *Milburn v. Glynn County* (1900) 112 Ga. 160, 37 S. E. 178, holding that mandamus will issue to compel a board of county commissioners to enter a contract on their minutes after entering into it, where such entry is necessary to make the contract complete and legal.

See also *State ex rel. Cobbey v. Junkin* (1908) 81 Neb. 118, 115 N. W. 546, holding that, where the legislature provides for the printing of the Annotated Statutes and for their delivery to the secretary of the state, mandamus will issue to require the secretary of the state to receive and accept the statutes after they have been published in accordance with the provision. A. G. S.

FLORIDA SUPREME COURT.

PHOENIX ASSURANCE COMPANY, LIMITED, OF LONDON, Plff. in Err.,
v.

JENNIE EPPSTEIN et al.

(— Fla. —, 75 So. 537.)

Insurance — automobile — theft — joy ride.

1. Where a policy of insurance indemnifies the owner of an automobile against loss or damage occasioned by theft, robbery, or pilferage, the owner cannot, under this clause of the policy, recover for damage to a machine which had been taken by another and used without the consent of the owner, but without any intent to steal.

For other cases, see Insurance, IX. in Dig. 1-52 N. S.

Larceny — theft — intent.

2. "Theft" is synonymous with "larceny," and the intent to steal is a necessary ingredient of the offense.

For other cases, see Larceny, in Dig. 1-52 N. S.

Headnotes by SHACKLEFORD, J.

Note. — As to automobile insurance against theft, robbery, and pilferage, see annotation following this case, post, 543. L.R.A.1917F.

Evidence — sufficiency — theft.

3. In action upon a policy of insurance which indemnifies the owner of an automobile against loss or damage occasioned by theft, robbery, or pilferage by any person or persons other than those in the employment, service, or household of the insured, it is incumbent upon the plaintiff to prove his case by a preponderance of the evidence. It is essential to a recovery that the evidence adduced establishes that the damage to the automobile was occasioned by the taking of the same by some person not in the employment, service, or household of the insured, without the consent of the owner, and with the intent to permanently deprive the owner of his property.

For other cases, see Evidence, XII. k, in Dig. 1-52 N. S.

Appeal — verdict contrary to evidence.

4. Where the verdict rendered by a jury is manifestly contrary to the charge of the court, to the law, and to the evidence, the judgment must be reversed and a new trial awarded.

For other cases, see Appeal and Error, VII. l, 2, in Dig. 1-52 N. S.

(May 5, 1917.)

ERROR to the Circuit Court for Duval County to review a judgment in plaintiffs' favor in an action brought to recover

the amount alleged to be due on an automobile insurance policy. Reversed.

The facts are stated in the opinion.

Messrs. Cockrell & Cockrell, for plaintiff in error:

The owner cannot, under this clause of the policy, recover for damages to a machine which has been taken by another and used without the consent of the owner, but without any intent to steal.

Hartford F. Ins. Co. v. Wimbish, 12 Ga. App. 712, 78 S. E. 265; Long v. State, 44 Fla. 134, 32 So. 870, 14 Am. Crim. Rep. 453.

Mr. D. M. Gornato for defendants in error.

Shackelford, J., delivered the opinion of the court:

This is an action on a policy of insurance issued by the defendant assurance company to Mrs. Jennie Eppstein, by the terms of which the defendant insured such plaintiff in the sum of \$1,500 against loss or damage by fire on a certain described automobile owned by such plaintiff, which policy also contained a provision of insurance "against loss or damage by theft, robbery, or pilferage in excess of \$25 (each accident being deemed a separate claim and said sum being deducted from the amount of each claim when determined), by any person or persons other than those in the employment, service, or household of the insured."

The declaration contains the following allegation: "On the 19th day of May, A. D. 1914, the said automobile so assured and in the said policy described was stolen from the garage in which it was kept by the said Mrs. Jennie Eppstein, and was injured and damaged by such theft, robbery, and pilferage so committed, as the plaintiffs' allege, by some person or persons other than any person or persons in the employment, service, or household of the assured, and damage and loss was thereby occasioned to the said Mrs. Jennie Eppstein in the amount of \$1,475, in such circumstances as to come within the promise and undertaking of the said policy of insurance so issued as aforesaid."

A copy of the insurance policy is attached to the declaration. The defendant filed the following pleas:

"Comes now the defendant, by its attorneys, Cockrell & Cockrell, and for its plea to the declaration in the above-entitled cause denies that the said automobile, described in the policy attached to the declaration, was stolen by some person or persons other than any person or persons in the employment, service, or household of said Mrs. Jennie Eppstein from the garage in which said automobile was kept by Mrs. Jennie Eppstein.

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"(2) And for a second plea defendant denies that the automobile described in the policy of insurance attached to the declaration, was stolen from Mrs. Jennie Eppstein.

"(3) And for a third plea defendant says that at the time the automobile described in the policy of insurance attached to the declaration is alleged to have been injured it was in the control and custody of a person in the employment of said Mrs. Jennie Eppstein.

"(4) And for a fourth plea defendant says that at the time when the automobile described in the policy of insurance attached to the declaration is alleged to have been injured it was then and there in the custody of and being driven by one Johnnie Johnson, a negro chauffeur, and said Johnnie Johnson was then and there the regularly employed chauffeur of said Mrs. Jennie Eppstein."

The plaintiffs joined issue upon these pleas, and a trial was had before a jury, which resulted in a verdict in favor of the plaintiffs for the sum of \$900, with interest at 8 per cent per annum from the 11th of August, 1914, upon which verdict a judgment was duly rendered and entered, which judgment has been brought here for review.

Several errors are assigned, but we shall confine ourselves to the consideration of the assignment based upon the overruling of the motion for a new trial, the first three grounds of which are that the verdict is contrary to the charge of the court, contrary to law, and contrary to the evidence. The construction of the clause of the insurance policy relating to the loss of or damage to the automobile "by theft, robbery, or pilferage" is presented to this court for the first time, though the courts in several other jurisdictions have had occasion to deal with it. It was held in Hartford F. Ins. Co. v. Wimbish, 12 Ga. App. 712, 78 S. E. 265:

"Words used in a policy of insurance are to be given their ordinary and usual signification unless the context requires a different construction.

"Where a policy of insurance indemnifies an owner of an automobile against loss or damage occasioned by theft, robbery, or pilferage, the owner cannot, under this clause of the policy, recover for damage to a machine which had been taken by another and used without the consent of the owner, but without any intent to steal.

"At common law, and under the statutes of this state, 'theft' is synonymous with 'larceny.' The word 'robbery,' as used in the contract sued on, should be given the meaning set forth in the Penal Code of this state. 'Pilferage' is petty larceny. The intent to steal is a necessary ingredient in all three offenses."

Also see *Michigan Commercial Ins. Co. v. Wills*, 57 Ind. App. 256, 106 N. E. 725; *Stuht v. Maryland Motor Car Ins. Co.* 90 Wash. 576, 156 Pac. 557; *Rush v. Boston Ins. Co.* 88 Misc. 48, 150 N. Y. Supp. 457; *Valley Mercantile Co. v. St. Paul F. & M. Ins. Co.* 49 Mont. 430, L.R.A.1915B, 327, 143 Pac. 559, Ann. Cas. 1916A, 1126; *Kansas City Regal Auto Co. v. Old Colony Ins. Co.* 187 Mo. App. 514, 174 S. W. 153.

In addition to its general charge, the court gave the following instructions at the request of the defendant:

"(1) The burden is on the plaintiffs to prove by a preponderance of the evidence that the alleged automobile was stolen by some person or persons other than those in the employment, service, or household of the insured. If that burden has not been sustained by the preponderance of the evidence, the jury must find for the defendant.

"(2) The jury cannot find a verdict for the plaintiffs unless the plaintiffs have proven: First, a theft of the automobile as alleged; and, second, that theft was not by John Johnson or by any other person or persons in the employment, service, or household of the insured.

"(3) If you find that there was a theft of the automobile, and that it was committed by someone in the employment, service, or household of the insured, then you must find for the defendant.

"The fourth charge requested by the defendant is refused, and the following substituted in its stead by the court:

"(4) If you find that one John Johnson took and was driving this automobile at the time when it was damaged, as alleged, and that he was the same John Johnson who was in the service of the plaintiff at the time, then you must find for the defendant.

"(5) If you find that the person who took this automobile, whether Johnson or someone else, took it merely for a joy ride, or for any purpose other than permanently depriving the owner of it, you must find for the defendant.

"(7) Before you can find for the plaintiff you must find that some person took this automobile with the intent to steal it, and that such person was not in the service, employment, or household of the plaintiff."

In response to the question from one of the jurors, "What is stealing?" the court further instructed the jury as follows: "Gentlemen, larceny or stealing is the wrongful taking and carrying away of the property of another with intent to permanently deprive the owner of the use thereof. It is alleged in the declaration and denied in one of the pleas that this car was stolen. Therefore one of the issues before you, gentlemen, is whether or not that car was actually stolen."

temen, is whether or not that car was actually stolen."

We do not consider it necessary to set forth the charge given by the court of its own motion or the instructions requested by the defendant which were refused and upon which errors are assigned. Neither do we consider it necessary to attempt an analysis of the testimony. As was said in *Hartford F. Ins. Co. v. Wimbish*, supra: "One cannot be convicted of either theft, robbery, or pilferage unless he had the intent to steal. And we know of no authority for giving any different meaning to these words in a contract of insurance wherein it is stipulated that the company will be liable for loss or damage to an automobile, resulting from 'theft, robbery, or pilferage.' Under this contract, if the thief carries away a machine with intent to steal it, and it is never recovered and loss occurs, the owner may recover the full value of the automobile. If the thief be apprehended and the machine recovered, then the owner is entitled to recover for whatever damage has been done to the machine, if it exceeds \$25. But in both cases it must appear that the person taking the machine intended to steal it. If he had the *animo revertendi*, he is not guilty of theft or robbery or pilferage, even though he took the machine without the owner's consent."

This language was quoted and approved in *Michigan Commercial Ins. Co. v. Wills*, supra, and also in *Stuht v. Maryland Motor Car Ins. Co.* 90 Wash. 576, 156 Pac. 557. In *Valley Mercantile Co. v. St. Paul F. & M. Ins. Co.* 49 Mont. 430, L.R.A.1915B, 327, 143 Pac. 559, Ann. Cas. 1916A, 1126, it was held: "To constitute the crime of larceny, the intent which accompanies the act of taking must be the criminal intent to permanently deprive the owner of his property, and without which the taking would be a bare trespass or civil injury."

We have several times held that in larceny it is essential to a conviction that the property was taken "*animo furandi*." See *Long v. State*, 11 Fla. 295; *Bird v. State*, 48 Fla. 3, 37 So. 525; *Jarvis v. State*, — Fla. —, 74 So. 796. As was said in *Valley Mercantile Co. v. St. Paul F. & M. Ins. Co.* supra: "Since this is a civil action, plaintiffs were required to prove their case only by a preponderance of the evidence; but, to recover at all they had the burden of proving every element of the crime of larceny."

See our holding in *Abraham v. Baldwin*, 52 Fla. 151, 10 L.R.A.(N.S.) 1051, 42 So. 591, 10 Ann. Cas. 1148.

We are of the opinion that the evidence adduced in this case does not measure up to this requirement. It may also be questioned as to whether the evidence establishes

that the automobile was taken or stolen by some person "other than any person or persons in the employment, service, or household of the assured." Be that as it may, we think that the contention of the defendant that the verdict rendered is contrary to the charge of the court, to the law, and to the evidence, has been sustained. It necessarily follows that the court erred in overruling

the motion for a new trial. See our discussion as to the province and power of the trial court to grant a new trial in *Carney v. Stringfellow*, — Fla. —, 74 So. 866.

The judgment is reversed.

Browne, Ch. J., and Taylor, Whitfield, and Ellis, JJ., concur.

Annotation—Automobile insurance against theft, robbery, and pilferage.

The earlier cases on this question are covered in the annotation in 44 L.R.A. (N.S.) 75; 51 L.R.A. (N.S.) 584; and L.R.A.1915E, 579.

Meaning of terms "theft," etc.

The conclusion reached in *PHOENIX ASSUR. CO. v. EPPSTEIN*, ante, 540, that no recovery for damage to the insured automobile could be had under a policy insuring against loss or damage occasioned by theft, robbery, or pilferage where there was no intent to steal it by the one who took it, is in accord with the decision in *Hartford F. Ins. Co. v. Wimbish* (1913) 12 Ga. App. 712, 78 S. E. 265 (set out in the note in 44 L.R.A. (N.S.) 75).

The decision in *Hartford F. Ins. Co. v. Wimbish*, just referred to, was relied upon in *Stuht v. Maryland Motor Car Ins. Co.* (1916) 90 Wash. 576, 156 Pac. 557, where the same form of policy was involved and it was held that the words "theft," "robbery," and "pilferage" were well understood, and were used in their common and ordinary meaning, and that there could be no recovery under the policy for damage to a car where an employee of a garage undertook to return it to the owner, but went out of his way for his own pleasure. The court observed that it was not claimed that the garage employee was wrongfully in possession of the car.

It has been held that the term "theft," as used in a policy insuring an automobile owner against direct loss or damage by theft, does not include all forms of larceny recognized by law, and does not include larceny of the car, perpetrated under the form of a business transaction, by which the insured delivered his car under an agreement that it should be sold, and the ones to whom it was delivered stole the car, and converted it to their own use. *Delafield v. London & L. F. Ins. Co.* (1917) 177 App. Div. 477, 164 N. Y. Supp. 221.

See also the following cases which are set out in earlier notes: *Bigus v. Pacific Coast Casualty Co.* (1910) 145 Mo. App. L.R.A.1917F.

170, 129 S. W. 982, in note in 51 L.R.A. (N. S.) p. 584; *Michigan Commercial Ins. Co. v. Wills* (1914) 57 Ind. App. 256, 106 N. E. 725; *Valley Mercantile Co. v. St. Paul F. & M. Ins. Co.* (1914) 49 Mont. 430, L.R.A.1915B, 327, 143 Pac. 559, Ann. Cas. 1916A, 1126; *Rush v. Boston Ins. Co.* (1914) 88 Misc. 48, 150 N. Y. Supp. 457; and *Siegel v. Union Assur. Soc.* (1915) 90 Misc. 550, 153 N. Y. Supp. 662, set out in note in L.R.A. 1915E, pp. 579, 580.

Persons whose acts are insured against.

In *Callahan v. London & L. F. Ins. Co.* (1917) 98 Misc. 589, 163 N. Y. Supp. 322, the owner of an automobile insured against theft by any person or persons other than those in the employment, service, or household of the insured was held entitled to recover where his machine was taken from the garage of a company of which he was president and treasurer, without his permission or authority, by certain persons, one of whom was the caretaker of the building, there being no evidence that such person had anything to do with the insured's automobile except as caretaker for the entire building, and it appearing that another employee of the garage company acted as the insured's chauffeur.

And in *Neal, C. & N. Co. v. Liverpool & L. & G. Ins. Co.* (1917) — App. Div. —, 165 N. Y. Supp. 204, a conditional vendor of a motorcycle who held a policy insuring his interest separately against loss by theft, by any person or persons other than those in his employ, service, or household, was held entitled to recover from the insurer the unpaid purchase price, although the machine was stolen by the conditional vendee.

In *Delafield v. London & L. F. Ins. Co.* (N. Y.) supra, where the complaint alleged that the plaintiff delivered his automobile to certain persons for sale, and that they converted his car and stole it, an answer which contained no denials, but stated that the insured employed certain persons to sell his machine, and

that, when they sold it, they were in the employment of the insured, was held to set out a sufficient defense, where the policy insured against loss by theft by persons other than those in the insured's employ or service.

See also *Schmid v. Heath*, 173 Ill. App. 649, in note in 51 L.R.A.(N.S.) p. 584, and *Kansas City Regal Auto Co. v. Colony Ins. Co.* (1915) 187 Mo. App. 514, 174 S. W. 153, in note in L.R.A. 1915E, p. 579.

Evidence of loss or damages.

In *Chepakoff v. National Ben Franklin F. Ins. Co.* (1916) 97 Misc. 330, 161 N. Y. Supp. 283, a prima facie case of theft in an action on a policy insuring an automobile against loss by theft was held to be made where there was testimony that the plaintiff drove his automobile aboard a ferryboat, placed it close to the front, put on the emergency brake and stopped the engine; that he went into the cabin before the boat started and some minutes later, when it was out in the stream, came out and found that his car was gone, and the chain at the rear of the boat was lying loose on the deck and the gate was half-way open.

The evidence in *Neal, C. & N. Co. v. Liverpool & L. & G. Ins. Co.* (N. Y.) supra, where the policy insured the interest of the conditional vendor of a motorcycle against loss by theft, was held to establish the theft of the machine by the conditional vendee.

See also *Kansas City Regal Auto Co. v. Colony Ins. Co.* (1915) 187 Mo. App. 514, 174 S. W. 153, in note in L.R.A. 1915E, 579.

Amount of loss on recovery.

It has been held that a policy insuring the owner of an automobile against loss by theft is a contract of indemnity, and that the insurer is only required to make the insured whole in case of loss, and is not bound to pay the face of the policy, and that it may discharge its liability, where it has recovered the stolen car, by returning it to the insured, and paying the damages caused by reason of its theft. *Kansas City Regal Auto Co. v. Old Colony Ins. Co.* (1917) — Mo. App. —, 195 S. W. 579.

The insurer in the case just cited was held not to have discharged its obligation by notifying the insured that his automobile was in a garage at a certain place in another state, and offering to turn it over to the plaintiff there, and to pay all damages by reason of its theft, since the insured had no L.R.A.1917F.

way of knowing what damage the car had sustained or what liens had been created against it since its theft, and no certain information as to what it would cost to return the machine to the city from which it was stolen. The court stated that the insurer need not have returned the machine to the exact spot from which it was stolen, but that it should have brought it to a place in the city from which it was stolen, where the insured could conveniently receive it. And the testimony in this case was held not sufficient, as a matter of law, to show a waiver of the insured's right to have the car returned to the city from which it was stolen, where there was evidence that the insured's attorney stated that he did not want the car, but wanted the money, but there was also testimony showing that he did not refuse to accept the car in case the insurer refused to pay the money.

The adjuster of an insurance company which issued a policy against loss or damage due to the theft of an automobile may be assumed to have authority to bind the company in the ascertainment of what that damage was and in adjusting the cost of repairing it, but he has no power to bind the company by an agreement to pay for putting the car in as good condition as new. *Chisholm v. Royal Ins. Co.* (1917) 225 Mass. 428, 114 N. E. 715.

A provision of a policy insuring an automobile against theft, that, in case of a difference as to the value of the property, no action should be brought until after an appraisal, has been held to be waived where the insured went several times to the insurer's office in an endeavor to adjust the loss, and was told by its representatives that they would not do a thing, and such statement was also held a waiver of another clause in the policy providing that suit should not be commenced before the expiration of sixty days after service of notice of loss. *Callahan v. London & L. F. Ins. Co.* (1917) 98 Misc. 589, 163 N. Y. Supp. 322.

Character of damages.

The policy in *Callahan v. London & L. F. Ins. Co.* (N. Y.) supra, which insured the automobile against damages directly resulting from theft, robbery, or pilferage, was held to cover all damage which, in the contemplation of the parties, might result from theft, and this was held to include damages caused by reckless driving or handling; and where the car was totally destroyed by

a collision while in the possession of the thief, the insurer was held liable for the value of the car.

Interests covered.

It has been held that a policy which in effect insures separately the interest of the conditional vendor of a motorcycle and the conditional vendee against loss by theft by any person or persons other than those in the employment, service, or household of the insured, covers the interest of the conditional vendor, and that he may recover on the policy where the machine was stolen by the conditional vendee. *Neal, C. & N. Co. v. Liverpool*

& L. & G. Ins. Co. (1917) — App. Div. —, 165 N. Y. Supp. 204.

Representations and warranties.

It has been held that an automobile is new within the meaning of a question in an application for a policy of theft insurance as to whether it is new or secondhand, where it was brought by the insured's employer with the agreement that the title should remain in the latter until the insured had earned enough to pay for the car, and it was so paid for within three months, and before the application was made for the policy. *Rabinowitz v. Vulcan Ins. Co. (1917) — N. J. —, 100 Atl. 175.* J. T. W.

MINNESOTA SUPREME COURT.

F. T. BYRNE, Appt.,

v.

CITY OF ST. PAUL, Resp't.

(— Minn. —, 163 N. W. 162.)

Officer — compulsory resignation — validity.

1. Plaintiff was in the employ of the city of St. Paul, as an inspector in the department of public health. Upon a reorganization of the department he was required to file with the department a formal written resignation, to be accepted whenever the department deemed for the best interests of the service. Plaintiff filed such resignation, it was later accepted, and he thereupon relinquished his position and obtained other employment. There was no fraud or coercion or purpose to set at naught the civil service requirements of the city charter.

It is held that by the resignation and subsequent conduct plaintiff voluntarily relinquished the position held by him, and the method by which that result came about was not a violation of the civil service policy of the city.

For other cases, see *Officers, I. e., in Dig.* 1-52 N. S.

Same — form — sufficiency.

2. The resignation was effectual though not addressed to the city commissioner, whose jurisdiction extended over the health department. It was addressed to the active official having in charge the details of the department; and, whether the acceptance was by the commissioner or not, he was advised thereof and acquiesced therein.

For other cases, see *Officers, I. e., in Dig.* 1-52 N. S.

(June 18, 1917.)

Headnotes by BROWN, Ch. J.

Note. — As to right to repudiate or withdraw resignation, see annotation following this case, post, 547.
L.R.A.1917F.

APPEAL by plaintiff from a judgment of the District Court for Ramsey County dismissing an action brought to recover a year's salary which he would have earned had he been allowed to retain his position as inspector in the department of public health. Affirmed.

The facts are stated in the opinion.

Messrs. Keller & Loomis, for appellant:

Plaintiff, having been holding a position at the time the new charter became effective, was entitled to retain same until removed in compliance therewith.

State ex rel. Furlong v. McColl, 127 Minn. 155, 149 N. W. 11; *Sclawr v. St. Paul*, 132 Minn. 238, 156 N. W. 283.

If illegally removed, plaintiff is entitled to his salary during the period of removal; at least, until some other fact cuts off such right.

Larsen v. St. Paul, 83 Minn. 473, 86 N. W. 459; *Sclawr v. St. Paul*, supra.

Messrs. O. H. O'Neill and W. J. Gibson, for respondent:

Plaintiff handed in a written resignation with full knowledge of its purport. There was nothing in the law which required that it be in writing, and, therefore, in the absence of any requirement that it be in writing, a resignation by parol was good; hence the fact that it was misdirected is immaterial.

Van Orsdall v. Hazard, 3 Hill, 243; *People v. Hanifan*, 6 Ill. App. 158; *Edwards v. United States*, 103 U. S. 471, 26 L. ed. 314.

The fact that he had resigned appears from the evidence to have been communicated to the commissioner of public safety, who filled the position by the appointment of another. This, in the absence of any law to the contrary, was sufficient acceptance.

People ex rel. Dennison v. Spencer, 101 Ill. App. 61; *State ex rel. Williams v. Fitts*, 49 Ala. 402; *People v. Porter*, 6 Cal.

27; *Bath v. Reed*, 78 Me. 276, 4 Atl. 638; *State ex rel. Roberts v. Lincoln*, 4 Neb. 260; *State ex rel. Ryan v. Murphy*, 30 Nev. 409, 18 L.R.A. (N.S.) 1210, 97 Pac. 391, 720; *State ex rel. Kleinstauber v. Kotecki*, 155 Wis. 66, 144 N. W. 200.

The salary attached to the position having been paid to a de facto officer who had taken his place, plaintiff could not collect in this sort of an action until the rights of all parties to the position had been determined by a separate proceeding.

Collier, Civil Service, pp. 124-126; *Ternhune v. New York*, 88 N. Y. 248, 42 Am. Rep. 248; *Wood v. New York*, 23 Jones & S. 230; *Van Valkenburgh v. New York*, 49 App. Div. 210, 63 N. Y. Supp. 6; *Nichols v. MacLean*, 101 N. Y. 526, 54 Am. Rep. 730, 5 N. E. 347; *McVeany v. New York*, 80 N. Y. 190, 36 Am. Rep. 600; *Dolan v. New York*, 68 N. Y. 274, 23 Am. Rep. 168; *Fitzsimmons v. Brooklyn*, 102 N. Y. 536, 55 Am. Rep. 835, 7 N. E. 787; *Gorley v. Louisville*, 104 Ky. 372, 47 S. W. 263; *Selby v. Portland*, 14 Or. 243, 12 Pac. 377.

Handing in his resignation, with failure to perform the duties of the position, and without a showing of coercion or fraud, makes out a prima facie case of resignation.

State ex rel. Young v. Ladeen, 104 Minn. 252, 16 L.R.A. (N.S.) 1058, 116 N. W. 486; 1 Dill. Mun. Corp. p. 724; *Gilbert v. Luce*, 11 Barb. 91.

He at least must be held to have abandoned the position.

Byrnes v. St. Paul, 78 Minn. 205, 79 Am. St. Rep. 384, 80 N. W. 959.

And is barred at this time of any relief by reason of laches in seeking relief.

People ex rel. Vanderhoff v. Palmer, 3 App. Div. 389, 38 N. Y. Supp. 651; *People ex rel. Young v. Collis*, 6 App. Div. 467, 39 N. Y. Supp. 698; *Re McDonald*, 34 App. Div. 512, 54 N. Y. Supp. 525; *People ex rel. Taylor v. Welde*, 28 Misc. 582, 59 N. Y. Supp. 1030; *People ex rel. Miller v. Justices of Court of General Sessions*, 78 Hun, 334, 29 N. Y. Supp. 157; *Re Gaffney*, 84 Hun, 503, 32 N. Y. Supp. 303; *People ex rel. Shea v. Bryant*, 28 App. Div. 480, 51 N. Y. Supp. 119; *Barrett v. New Orleans*, 32 La. Ann. 101.

Brown, Ch. J., delivered the opinion of the court:

Prior to June, 1914, plaintiff had for a year or more been in the employ of the city of St. Paul as an inspector in the department of public health, working under the direction of the head of that department. A reorganization of the department took place at about the time stated, being rendered necessary by a change to the com-

mission form of the city government which then became effective under the new city charter. Under the new charter this branch of the public service was within the department of public safety, presided over by one of the city commissioners, though the details of the work were committed to and were under the direction of a health officer. As a part of the reorganization proceedings each employee in the department was required to sign and deposit in the office of the health officer a formal resignation of the position held by him, to be accepted when the best interests of the service, in the judgment of the department, rendered it necessary. In compliance with this requirement plaintiff prepared a formal resignation in writing, addressed to the health officer, and filed the same in his office. The resignation bears date June 5, 1914. It was accepted on July 15, 1914, but by what officer does not clearly appear. But acting thereon, and treating it as ending his connection with the employment, plaintiff ceased to perform any of the duties thereof, subsequently obtained employment elsewhere, and another was appointed to the position so held by him, who thereafter performed all the duties of the position and was paid therefor by the city. Plaintiff made no claim that the acceptance of his resignation was ineffectual, or that his removal from the service was in violation of any rights possessed by him under the civil service provisions of the new city charter or otherwise, but he did make several efforts for a reinstatement to his former position, but without success. After the lapse of a year from the date of acceptance of his resignation plaintiff brought this action to recover the compensation allotted to the position, and which he would have earned had he been permitted to retain the same. The court below, at the conclusion of the trial, upon defendant's motion ordered the action dismissed, and plaintiff appealed from a judgment entered thereon.

It is the contention of plaintiff that the method by which he was taken out of or removed from the employment of the city was illegal and void because in violation of the civil service provisions of the city charter, which provide that no removals from certain branches of the public service shall be made except for cause, and in the manner therein provided, and, because the removal was illegal, that plaintiff remained the de jure officer, and was entitled to the compensation prescribed by law. We do not sustain this claim, but concur in the conclusion of the learned trial court, to the effect that by his resignation and subsequent conduct plaintiff voluntarily took himself out of the service, and is now in no position to insist that

his rights under the charter were in any way violated. There is no suggestion that the resignation was the result of coercion, that any fraud was practised upon plaintiff, or that it was exacted or required as a scheme on the part of the department to avoid or circumvent the civil service policy of the city. On the contrary, the act of plaintiff was wholly voluntary, he understood the effect of the resignation, and that the department could accept it and thus retire him from his position at any time it was deemed best for the service. While plaintiff claims that there was no reason for his removal, the cause thereof as determined and acted upon by the department does not appear, and we are bound to assume that the officers so accepting the resignation were acting within, and not in violation of, the law. 1 Dunnell's Dig. 3435.

It is not important that the resignation was not addressed to the commissioner of public safety, the officer having charge of the particular department. It was addressed to the active head of the department, the health officer, was filed with that officer, and later accepted, in which the commissioner, if he did not authorize the acceptance, fully acquiesced. It was effectual as a voluntary surrender of the position upon acceptance. And since there was no fraud or purpose to set at naught the civil service provisions of the charter, it is conclusive against the present claim of plaintiff. *State ex rel. Furlong v. McColl*, 127 Minn. 155, 149 N. W. 11, and *Sclawr v. St. Paul*, 132 Minn. 238, 156 N. W. 283, are not in point.

Judgment affirmed.

Annotation—Right to repudiate or withdraw resignation.

The right to repudiate or withdraw a resignation is discussed in the note to *State ex rel. Young v. Ladeen*, 16 L.R.A. (N.S.) 1058. Only the cases decided since the date of that note are discussed herein.

As stated in the earlier note, there is a conflict among the decisions as to the necessity of an acceptance of a resignation to complete it. That question is discussed in the note to *Reiter v. State*, 23 L.R.A. 681, and *State ex rel. Royce v. Superior Ct.* 12 L.R.A. (N.S.) 1010.

The resignation involved in *BYRNE v. ST. PAUL*, ante, 545, was a formal one, signed by the plaintiff upon a reorganization of the department in which he was employed when the city adopted the commission form of government. Such a resignation was required of each employee of the department, and was to be accepted when the best interest of the service rendered it necessary. The resignation of the plaintiff was thereafter accepted, whereupon he ceased his connection with the department. About a year thereafter the action was brought for reinstatement, the claim of the plaintiff being that the civil service provisions of the city charter had been violated. The court, in denying this contention, states that the resignation was voluntary, that no fraud or coercion was shown, nor was the resignation exacted or required as a scheme to avoid or circumvent the civil service policy of the city.

The rule stated in the earlier note, that where the resignation has become complete, either by transmission or acceptance, it cannot then be withdrawn, L.R.A.1917F.

even with the consent of the power authorized to accept it, was applied in *Elswick v. Ratliff* (1915) 166 Ky. 149, 179 S. W. 11, by a nominee, the court holding that after one had declined a nomination for office, and directed that his name be not printed on the official ballot, and this declination had been accepted by the party authorities and another candidate nominated, the first candidate could not withdraw his declination and continue to be the nominee. While the declination in this case is treated as a resignation, it can hardly be accurately designated as such, and no attempt has been made to include cases of this character in the note.

As stated in the earlier note, it is generally held that a conditional or prospective resignation may be withdrawn at any time before acceptance. After the resignation has been accepted it cannot be withdrawn, even though it is conditional, or by its terms to take effect in the future. Some authority to the contrary appeared in the earlier note. Since the date of that note it has been held that a conditional resignation, accepted to take effect at a date in the future, may be withdrawn before the arrival of that date. *State ex rel. Almon v. Fowler* (1909) 160 Ala. 186, 135 Am. St. Rep. 91, 48 So. 985, holding that the resignation of a clerk of court, addressed to a judge of that court, and asking that the same be accepted by the judge, the acceptance to take effect at such time as the judge may fix or determine, which is accepted by the judge, and a date in the future fixed on which it is to take

effect, may be withdrawn by the clerk before the date fixed. The court states that "the resignation was, by its terms, to take effect only upon the acceptance by the judge, and, the judge having made the acceptance effective upon a future day, the respondent had the right to withdraw said resignation before the arrival of the date fixed by the judge." The court distinguished from *Murray v. State* (1905) 115 Tenn. 303, 89 S. W. 101, 5 Ann. Cas. 687, discussed in the earlier note, by stating that there the officer requested that the resignation be acted upon at once, and the court seems to have stressed the fact that "the acceptance of the resignation ipso facto vacated the office." Continuing, the court states that "here we have no unconditional acceptance, but one which, by its own terms, was not to become effective until a subsequent day."

Mandamus to compel the reinstatement of a driver in a city fire department was refused in *Jacobsen v. Chicago* (1915) 191 Ill. App. 511, where the driver, having been informed that a leave of absence could not be granted for longer than thirty days, but that it would be extended from time to time, applied for and was granted a leave for thirty days and subsequently had the leave extended. No record having been kept of the extension, other officers, who were not informed thereof, demanded of the driver the city property which he had in his possession, and the same was returned, and over a year elapsed before the driver asked for reinstatement. The court treats this as a resignation, one of the officials having written and signed a resignation for the driver. W. A. E.

OKLAHOMA SUPREME COURT.

A. NUNNERY, Plff. in Err.,
v.

J. W. BAILEY et al.

(— Okla. —, 166 Pac. 82.)

Libel — statement as to charges made.

1. Publishing the fact that charges against a minister of the gospel (with no intimation of their import) were read and by unanimous vote sustained at a church conference, and that such church had withdrawn fellowship from him, is not libelous per se.

For other cases, see *Libel and Slander*, II. in Dig. 1-52 N. S.

Pleading — libel — allegation of damages.

2. In an action in damages for libel the publication declared on is not libelous per se. A petition failing to allege special damage is fatally defective.

For other cases, see *Pleading*, II. f, in Dig. 1-52 N. S.

(Thacker, J., dissents.)

(June 12, 1917.)

ERROR to the District Court for Greer county to review a judgment in defendants' favor in an action brought to recover damages for an alleged libel. Affirmed.

The facts are stated in the Commissioner's opinion.

Headnotes by BLEAKMORE, C.

Note. — As to what words uttered concerning clergymen are actionable per se, see annotation following this case post, 551. L.R.A.1917F.

Messrs. S. B. Garrett and Wilkins B. Garrett, for plaintiff in error:

The publication by defendants was libelous and plaintiff is entitled to damages.

Smith v. Gillis, — Okla. —, 151 Pac. 869; *Immaculate Conception v. Murphy*, 89 Neb. 524, 35 L.R.A.(N.S.) 926, 131 N. E. 946; 6 Am. & Eng. Enc. Law, 877; *Mattison v. Lake Shore & M. S. R. Co.* 3 Ohio Dec. 526; *Wildee v. McKee*, 111 Pa. 335, 56 Am. Rep. 271, 2 Atl. 108; *Smith v. Nippert*, 76 Wis. 86, 20 Am. St. Rep. 26, 44 N. W. 846; *Hendryx v. People's United Church*, 42 Wash. 336, 4 L.R.A.(N.S.) 1154, 84 Pac. 1123, 7 Ann. Cas. 764; *Nance v. Busby*, 91 Tenn. 303, 15 L.R.A. 801, 18 S. W. 874; *Cranfill v. Hayden*, — Tex. Civ. App. —, 75 S. W. 573; *State ex rel. Kerr v. Hicks*, 154 N. C. 265, 33 L.R.A.(N.S.) 529, 70 S. E. 468.

Messrs. B. L. Tisinger and B. F. Van Dyke, for defendants in error:

The language which is made the ground of the charge against defendants in error is not libelous per se.

Hubbard v. Cowling, 36 Okla. 603, 129 Pac. 714; *Spencer v. Minnick*, 41 Okla. 613, 139 Pac. 130; *McKenney v. Carpenter*, 42 Okla. 410, 141 Pac. 779; *Smith v. Gillis*, — Okla. —, 151 Pac. 869; *Chicago, R. I. P. R. Co. v. Medley*, — Okla. —, L.R.A. 1916D, 587, 155 Pac. 211; *Townshend, Slander & Libel*, 4th ed. § 147; *Newell, Slander & Libel*, 3d ed. §§ 174, 175.

Any injury to plaintiff's reputation, in order to be actionable, must result in some actual special damage to him.

Starkie, Libel & Slander, p. 424; *Newell, Slander & Libel*, § 49; *McKenney v.*

Carpenter, 48 Okla. 410, 141 Pac. 779; N. S. Sherman Mach. Co. v. Dun, 28 Okla. 447, 114 Pac. 617; Hundley v. Louisville & N. R. Co. 105 Ky. 162, 63 L.R.A. 289, 88 Am. St. Rep. 298, 48 S. W. 429; Kimball v. Harman, 34 Md. 407, 6 Am. Rep. 340; Beechley v. Mulville, 102 Iowa, 602, 63 Am. St. Rep. 479, 70 N. W. 107, 71 N. W. 428; Robertson v. Parks, 76 Md. 118, 24 Atl. 411; Delz v. Winfree, 80 Tex. 400, 26 Am. St. Rep. 755, 16 S. W. 111; Stevens v. Rowe, 59 N. H. 578, 47 Am. Rep. 231; Dorsey Mach. Co. v. McCaffrey, 139 Ind. 549, 47 Am. St. Rep. 290, 38 N. E. 208; Doremus v. Hennessy, 62 Ill. App. 391; Wildee v. McKee, 111 Pa. 335, 56 Am. Rep. 271, 2 Atl. 108.

The civil courts will not assume jurisdiction in an action for libel brought by one who has been expelled from church.

Landis v. Campbell, 79 Mo. 433, 49 Am. Rep. 239; Nance v. Busby, 91 Tenn. 303, 15 L.R.A. 801, 18 S. W. 874; Brundage v. Deardorf, 34 C. C. A. 304, 92 Fed. 230; Travers v. Abbey, 104 Tenn. 668, 51 L.R.A. 261, 58 S. W. 247; Pounder v. Ashe, 44 Neb. 682, 63 N. W. 48; Ramsey v. Hicks, 174 Ind. 428, 30 L.R.A. (N.S.) 673, 91 N. E. 344, 92 N. E. 164; Hendryx v. People's United Church, 42 Wash. 336, 4 L.R.A. (N.S.) 1154, 84 Pac. 1123, 7 Ann. Cas. 764; State ex rel. Hatfield v. Cummins, 171 Ind. 112, 36 L.R.A. (N.S.) 945, 85 N. E. 359; St. Vincent's Parish v. Murphy, 83 Neb. 630, 35 L.R.A. (N.S.) 919, 120 N. W. 187.

Bleakmore, C., filed the following opinion:

The parties appear here as in the trial court. Plaintiff sought recovery of damages for libel based on the publication of the minutes of a conference of the Granite Baptist Church alleged to have been made pursuant to a conspiracy on the part of defendants to injure him. After portions thereof were stricken on motion of defendants, demurrer to his petition was sustained, and plaintiff has appealed.

While plaintiff assigns as error the act of the court in striking certain allegations from the petition, he does not urge same in his brief as a ground for reversal, and therefore such assignment may properly be disregarded.

By the petition it is alleged, in substance, that plaintiff, an ordained minister of the Baptist church, had resided in Greer county for eight years, during which time he was actively engaged in the work of his calling; the defendants were members of the Granite Baptist church, a society founded and organized according to the customs and practices of denominations of the same belief; that such church had no

written rule or precedent for its regulation recognized by it or any ecclesiastical body over it, but was a sovereign religious organization; that plaintiff was pastor of the Lake Creek Baptist church in Greer county and of the Baptist church at the town of Duke, in Jackson county, and was editor of a certain Baptist publication; that he was and had been holding protracted meetings and performing marriage ceremonies, for all of which services he received sums aggregating an annual income of \$2,000; that on October 7, 1914, plaintiff, then also a member of said Granite Baptist church, in fellowship with its members and in harmony with its doctrine, was by vote of the membership thereof assembled into conference granted a letter of dismission, thus severing his connection with said church and conferring upon him the right to unite with and be received as a member of any other Baptist church of like faith, which letter, according to established usage, after adjournment of the conference, should have been issued, signed by the clerk and moderator, and forwarded to plaintiff or to the church of which he might later become a member; that by virtue of the act of such conference said Granite Baptist church lost all jurisdiction over him and his membership and relation to the Baptist church, and exclusive jurisdiction thereof was lodged in the church later receiving him into fellowship; that the letter of dismission so granted by said conference was not issued, signed, and forwarded in accordance with the church rule, but that on October 21, 1914, pursuant to the recognized custom of Baptist churches and in reliance upon the action of said conference, plaintiff joined and was received into full membership by the Lake Creek Baptist church, of which he was the pastor; that defendants, with full knowledge of the facts, actuated by a malicious design to injure plaintiff, conspired to call a conference of the Granite Baptist church, and in such conference pass or cause to be passed a fraudulent, slanderous, and libelous order, as the order and act of the said Granite Baptist church, and write and cause to be written on the minutes of said Granite church a false, fraudulent, slanderous, and libelous writing, and publish and cause to be published the same, the said fraudulent, slanderous, and libelous writing to be of the purport and import that plaintiff had been guilty of conduct unbecoming a minister, and that he had been regularly charged with the same before said Granite Baptist church and found guilty thereof, and turned out of said church, and deprived of membership therein, and the fellowship of said church with-

drawn from him, and that in furtherance of said conspiracy, and in furtherance of the malicious intent of defendants to wrong, injure, and damage the plaintiff, the defendants caused a conference, or what purported to be a conference, of the said Granite Baptist church, to be opened on the 4th day of November, 1914, with the defendant J. W. Bailey purporting to act as moderator, and the defendant Hettie Williams purporting to act as clerk; that there were other members of said Granite Baptist church who were not into said conspiracy entered into by the defendants and were ignorant of the same, and the said conspirators kept the said conspiracy and the objects and purposes thereof a secret, and concealed from the said other members of said Granite church who were not parties thereto; and that on said last-named date the said conspirators, the said defendants herein, caused the following false, fraudulent, slanderous, and libelous statement in writing to be made and entered and published as minutes of said Granite Baptist false, fraudulent, slanderous, and libelous church, the same, plaintiff alleges as being as to plaintiff, and as the same refers to and was intended by defendants to affect the plaintiff, to wit:

November 4, 1914. Devotional exercises. Minutes October 7 read. A motion carried to rescind the act of this meeting. Brother Burnett read charges against Brother Nunnery. A motion to sustain charges as read voted unanimous. Motion and second that Brother Nunnery. Vote was unanimous. the church withdraw fellowship from The clerk tendered her resignation as she was going away. Motion and second that Sister Georgia Austin act as clerk pro tem until the clerk returned. A motion for the same committee to see the sisters. A motion and second also for the committee to see Brother George W. Anderson. A motion and second for the church to call a pastor to-night. Brother J. E. Kirk was unanimously elected. The church invited Brother Bailey to make a Sunday school talk instead of having church next Sunday. No further business, conference adjourned.

Brother J. W. Bailey, Moderator.
Hettie Williams, Clerk.

Where the language employed in an alleged defamatory publication is plain and unambiguous, it is the duty of the court to determine whether same is libelous per se. Chicago, R. I. & P. R. Co. v. Medley, — Okla. —, L.R.A.1916D, 587, 155 Pac. 211; McKenney v. Carpenter, 42 Okla. 410, 141 Pac. 779; Spencer v. Minnick, 41 Okla. L.R.A.1917F.

613, 139 Pac. 130; Bodine v. Times-Journal Pub. Co. 26 Okla. 135, 31 L.R.A.(N.S.) 147, 110 Pac. 1096.

The trial court decided that the words used in the instant publication were not in themselves libelous; and plaintiff's challenge of this holding presents for review the principal question in the case.

Plaintiff alleges that he has been actually damaged by the foregoing wrongful acts of the defendants in his good name, good fame, reputation, and professional standing as a minister. "in a large sum of money;" that he has been actually damaged thereby in the loss of his good reputation, and thereby his ability to secure calls to large church congregations as pastor, and consequently the loss of salaries for preaching as pastor and in holding protracted meetings, in the sum of \$10,000; that his influence as an editor has been impaired, and he has thereby been damaged in the sum of \$5,000; that by reason of the malice of the defendants against the plaintiff in the formation and the carrying out of said conspiracy, the plaintiff is entitled to recover of the defendants the sum of \$20,000 as exemplary damages.

Publishing the fact that charges against plaintiff (with no intimation of their import) were read, and by unanimous vote sustained, at a church conference, and that such church, regardless of the fact of his membership therein, had for no given cause withdrawn fellowship from him, did not, in our opinion, touch him in his profession, or necessarily tend to impair confidence in his integrity, character, or professional ability, and we cannot legally conclude that the natural or probable consequences of the publication of the words used, when given their popular and obvious meaning, would be to deprive him of public confidence as a man, minister, or editor, or to injure him in his occupation. Therefore, if actionable at all, such publication is not libelous per se.

In Newell on Slander and Libel, 3d ed. § 197, it is stated: "Words touching a clergyman in his profession are actionable per se. Words are often actionable when spoken of a clergyman which would not be so if spoken of others. But it does not follow that all words which tend to bring a clergyman into disrepute or which merely impute that he has done something wrong are actionable without proof of special damage. The reason always assigned for this distinction between clergymen and others is that the charge, if true, would be ground of degradation or deprivation. The imputation therefore must be such as, if true,

would tend to prove him unfit to continue his calling, and therefore tend more or less directly to proceedings by the proper authorities to silence him."

Plaintiff failed to allege special damage, an essential averment in all cases where in the publication declared on is not libelous per se; and in this respect the petition is fatally defective. *N. S. Sherman Mach. Co. v. Dun*, 28 Okla. 447, 114 Pac. 617; *McKenney v. Carpenter*, 42 Okla. 410, 141

Pac. 779; *Hall v. Taylor*, — Okla. —, 158 Pac. 373.

The judgment of the trial court should be affirmed.

Per Curiam:

Adopted in whole.

Thacker, J., dissents.

Petition for rehearing denied.

Annotation—What words uttered concerning clergymen are actionable per se.

The earlier cases on this question are discussed in the note to *Cole v. Mills-paugh*, 28 L.R.A. (N.S.) 152.

To falsely charge that a minister of the gospel had been caught in bed with another man's wife, and that the husband had blacked his eye and he had gone west, was held slanderous per se in *Haynes v. Robertson* (1915) 190 Mo. App. 156, 175 S. W. 291. A statute in this jurisdiction made it actionable slander to publish falsely and maliciously in any manner that a person has been guilty of fornication or adultery. The court held the language spoken in this case to charge adultery.

The publication of an article concerning the pastor of a church stating that he was charged with the juggling of money taken on the collection plate, and that charges were to be brought against him therefor, was held libelous in *Curtis v. Argus Co.* (1915) 171 App. Div. 105, 156 N. Y. Supp. 813. The court said: "The charge clearly is injurious to his character and his standing in his profession, and holds him up to contempt and ridicule. It is urged that the word 'juggled' in itself has no very bad mean-

ing. But when a pastor is accused of juggling with plate collections, and is to be tried therefor, the words must be given the meaning in which the public ordinarily would understand them, and the expression is not capable of any reasonable understanding which does not bring disgrace and odium upon the pastor and injure his good name and affect his standing in his profession."

A conviction of criminal libel was sustained in *State v. Pardo* (1916) — Mo. —, 190 S. W. 264, for the publication in a newspaper of a charge of wastefulness and extravagance in managing the affairs of a certain parish, stating that, if anything was written which was not to the taste of the priest, then, for the money "which you countrymen give for holy masses, he buys warrants against the editor." The court said that from the connection in which such words were used, they constitute a plain averment that the priest secured such warrants by bribery. The fact that the priest was not mentioned by name and that the defendant may not have known who the priest was does not render the language nonlibelous.

W. A. E.

VERMONT SUPREME COURT.

LA FOUNTAIN & WOOLSON COMPANY
v.

WALTER W. BROWN.

(— Vt. —, 101 Atl. 36.)

Corporation — dividend — transfer of stock — who entitled.

A dividend declared by a corporation after the making of a contract by a stockholder for the transfer of his stock, but before the

Note. — As to right to dividend declared between making of contract for sale of stock and delivery of stock, see annotation following this case, post, 553.
L.R.A.1917F.

time fixed for its delivery, belongs to the purchaser if the sale is consummated, although performance could not have been enforced because the contract was within the Statute of Frauds.

For other cases, see *Corporations, V. c. 4*, in *Dig. 1-52 N. S.*

(May 1, 1917.)

EXCEPTIONS by defendant to rulings of the Windsor County Court, made during the trial of an action brought to recover the amount of a dividend on stock purchased from defendant by plaintiff, which resulted in a judgment in its favor. Affirmed.

The facts are stated in the opinion.

Messrs. Blanchard & Tupper, for defendant:

Whoever owns stock in a corporation at the time a dividend is declared owns the dividend also.

Bright v. Lord, 51 Ind. 272, 19 Am. Rep. 732; *Goodwin v. Hardy*, 57 Me. 143, 99 Am. Dec. 758; *March v. Eastern R. Co.* 43 N. H. 515.

The profits and surplus fund of the corporation, whensoever they may accrue, are, until separated from the capital by the declaration of a dividend, a part of the stock itself, and will pass with the stock in a transfer.

Phelps v. Farmers & M. Bank, 26 Conn. 269; *Jermain v. Lake Shore & M. S. R. Co.* 91 N. Y. 483.

A dividend does not pass with a subsequent transfer of the shares unless the contract of transfer expressly so provides.

Hopper v. Sage, 112 N. Y. 530, 8 Am. St. Rep. 771, 20 N. E. 350; *Jones v. Terre Haute & R. R. Co.* 29 Barb. 353.

A custom of brokers by which dividends declared, but not paid, belong to the purchaser of shares, is not admissible to alter the legal rights of such a transaction.

Spear v. Hart, 3 Rob. 420; *Hopper v. Sage*, *supra*.

The agreement of March 24th was invalid and void by reason of the Statute of Frauds, relating to the sale of goods of the price of \$40 or more, and no rights can accrue under it.

McDonald v. Place, 88 Vt. 80, 90 Atl. 948; *Crosby v. Bouchard*, 82 Vt. 66, 71 Atl. 835; *Strong v. Dodds*, 47 Vt. 348.

The sale of corporate stock is within the 2d section of the Statute of Frauds.

Fay v. Wheeler, 44 Vt. 292; *Tisdale v. Harris*, 20 Pick. 13; *North v. Forest*, 15 Conn. 400.

The intention of the parties, as manifested by the agreed statement of facts and the way in which the contract was consummated, was to make the delivery and payment concurrent. The sale was therefore a cash sale, and title did not pass until payment and delivery.

Allen Lumber Co. v. Higuera, 86 Vt. 453, 85 Atl. 979; *Turner v. Moore*, 58 Vt. 455, 3 Atl. 467; *Drake v. Scott*, 136 Ala. 261, 96 Am. St. Rep. 25, 33 So. 873; *Benjamin, Sales*, 7th ed. 270, 271, 298, 299.

Messrs. Stickney, Sargent, & Skeels for plaintiff.

Taylor, J., delivered the opinion of the court:

The action is contract for money had and received. The plaintiff seeks to recover the amount of a dividend on stock purchased by it from the defendant. The case was tried L.R.A.1917F.

by the court on an agreed statement of facts, and the plaintiff had judgment.

The defendant was the owner of the major part of the capital stock of the Brown Hotel Company, a corporation, operating a hotel at Springfield, Vermont, and one of the three directors of the corporation. On March 24, 1916, he had negotiations with plaintiff's representative regarding the sale of the capital stock of the hotel company. Later the same day the defendant's agent called plaintiff's representative by telephone and told him that the defendant would sell his stock to the plaintiff at a certain price per share. Plaintiff's representative replied that the plaintiff would take the stock at the price named and pay for it the following morning, to which defendant's agent assented. No part of the stock was then delivered nor any part of the purchase money paid; neither was any written memorandum of the bargain made. On the following morning the defendant and plaintiff's representative met and the transaction was completed by delivery of the certificate of stock and payment of the purchase price. During the negotiations nothing was said about cash in the treasury of the hotel company.

On March 24, 1916, after the above telephone conversation, the defendant called a meeting of the directors of the hotel company, and a dividend of \$1.50 per share was declared, which was immediately paid by the treasurer of the corporation. The defendant received as the dividend on the stock bargained to the plaintiff \$499.50. The plaintiff first learned of the dividend when the books of the hotel company were turned over after the delivery of the stock. Thereupon it made demand upon the defendant; and, payment being refused, this suit was brought.

To maintain this action the plaintiff must establish that it was entitled to the dividend as the purchaser of the defendant's stock; and its right to receive the dividend depends upon its relation to the stock at the time the dividend was declared. It is held that in case of options and sales of stock for future delivery the right to dividends depends upon the question at what time, with reference to the declaration of the dividend, the title passes. 7 R. C. L. 293. This transaction was not an option. It culminated in an unconditional agreement for the sale and purchase of the stock before the dividend was declared. All that remained to be done was the delivery of the certificate and the payment therefor at the time fixed in the agreement.

The defendant contends that the agreement of March 24th was invalid because within the Statute of Frauds, so that no

rights could accrue under it, conceding that, while the agreement remained wholly executory, it was not enforceable because of the statute, and the subsequent delivery and payment took the transaction out of the statute, leaving the rights of the parties to be determined independently of it. *Patterson v. Sargent*, 83 Vt. 516, 138 Am. St. Rep. 1102, 77 Atl. 338; *Strong v. Dodds*, 47 Vt. 348; *Fay v. Wheeler*, 44 Vt. 292, 2 Cook, Corp. 1045.

The defendant claims further that title to the stock did not pass until payment and delivery; and so, as the stock belonged to him at the time the dividend was declared, the dividend was payable to him. There is no disagreement as to the general rule that a dividend belongs to the one who was the owner of the stock when the dividend was actually declared. See *King v. Follett*, 3 Vt. 385. It is also well settled that the surplus of a corporation is a part of the stock itself until separated from the capital by the declaration of a dividend. See *Re Heaton*, 89 Vt. 550, L.R.A.1916D, 201, 96 Atl. 21. Such undivided surplus will pass with the stock under that name in a transfer thereof. The purchaser takes the stock with all its incidents, one of which is the right to receive its proportionate share of undivided profits. *Harris v. Stevens*, 7 N. H. 454; *March v. Eastern R. Co.* 43 N. H. 520; 7 R. C. L. 292; 10 Cyc. 556.

The defendant recognizes this fact and bases his right to the dividend upon the claim of legal title to the stock at the time it was declared. But the question does not depend alone upon legal title. The principle of equitable assignments applies. The purchaser of shares of corporate stock is held to acquire an equitable interest in the

stock before the transfer is completed, if the agreement of purchase and sale is binding between the parties. As between them such interest will be enforced and protected as a trust. 1 Morawetz, Priv. Corp. § 174.

In construing an agreement for the sale of shares of stock, it will be taken to be the intention of the parties, nothing to the contrary appearing, that the shares are to be transferred in their condition at the time of the bargain. 1 Morawetz, Priv. Corp. § 175. Thus the law imputes to the seller an intention to deal fairly with the purchaser, and in doing so requires him to deliver only what entered into the value and price at which the stock was sold. While it permits him to retain the "fallen fruit," it does not accord to him the additional privilege of "shaking the tree" after the bargain is closed.

It follows from what we have said that if, after a valid contract for the sale of shares of stock is made, but before the time for delivery and payment arrives, a dividend is declared, the purchaser is entitled to the dividend on complying with the contract. *Phinizy v. Murray*, 83 Ga. 747, 6 L.R.A. 426, 20 Am. St. Rep. 342, 10 S. E. 358; *Currie v. White*, 45 N. Y. 822; *Harris v. Stevens*, 7 N. H. 454; *Conant v. Reed*, 1 Ohio St. 298; *Black v. Homersham*, L. R. 4 Exch. Div. 24, 39 L. T. N. S. 671, 48 L. J. Exch. N. S. 79, 27 Week. Rep. 171; 7 R. C. L. 293; 2 Addison, Contr. § 661; *Cook, Stocks & Stockholders*, § 543; 2 Cook, Corp. § 539; 1 Morawetz, Priv. Corp. §§ 174-178.

The result is that, under the agreement in the case, the dividend belongs to the plaintiff.

Judgment affirmed.

Annotation—Right to dividend declared between making of contract for sale of stock and delivery of stock.

This note lies in narrow compass. The general subject of the right to dividends on transfer of stock is treated in the notes to *Rose v. Barclay*, 45 L.R.A. 392, and to *Wallin v. Johnson City Lumber & Mfg. Co.* L.R.A.1917B, 326; and these notes cover, inter alia, the cases as to options and contracts for future delivery.

In *LA FOUNTAIN & W. Co. v. BROWN*, ante, 551, the court wisely remarks that while the law permits the seller "to retain the 'fallen fruit,' it does not accord to him the additional privilege of 'shaking the tree' after the bargain is closed."

Where both parties expected a dividend to be made on the 22d of September and it was declared between 12 and L.R.A.1917F.

1 P. M., of the 23d, it was held that the seller was entitled to the dividend under the following contract: "I hereby assign, transfer, and set over all my interest in the within share of stock to H. B. Lathrop, and authorize the transfer to him, with all the dividends made after the morning of the 23d of September." *Brewster v. Lathrop* (1860) 15 Cal. 21, 2 Mor. Min. Rep. 552. The court said: "It would be sacrificing the spirit of this contract to its letter to hold that this delay of the trustees for this brief space defeated the plaintiff's rights, even if there was no reason to believe, as there is, that the defendant's own interfering produced or contributed to this result."

Where sales of stock at auction, made

at various dates in August up to the 21st, were to be completed on August 29th, but were silent as to dividends, and a dividend was declared on the 28th, out of profits earned prior to the sale, the dividends were held to belong to the purchaser. *Black v. Homersham* (1878) L. R. 4 Exch. Div. (Eng.) 24. In that case one of the judges says it would be strange if the matter were otherwise determined, "for we know that the value of such property falls immediately a dividend is paid. The purchaser bought at the value before dividend, and if he does not receive it, he will be paying so much more for his shares than he bargained for."

In *Union Screw Co. v. American Screw Co.* (1877) 11 B. I. 569, on rehearing (1882) 13 R. I. 673, a corporation agreed to buy a certain portion of the plaintiff's property, and to pay therefor in cash or stock as the plaintiff elected, the price of sale and the value of such stock to be fixed by arbitrators, the award to be made in six months and payment to be made within ten days thereafter, the value of the stock to be its value at the date of the contract. It was held that the corporation had the right to declare dividends after the date of the contract, and to make its payment in new shares of stock, but that plaintiff was entitled to share in a dividend declared more than ten days after the award, though before the actual transfer of the stock.

After a contract for the sale of certain shares in the stock of a corporation, but before the time appointed for receiving payment and making delivery, a dividend was declared, as to which there was no express stipulation in the contract. It was held that though, according to authorities on the subject, the purchaser,

if he had accepted the stock and paid for it, would have been entitled to the dividend, yet he had no right to decline acceptance and making payment because the seller claimed the dividend as his own, and refused to give an order for its payment to him, the purchaser. The latter, having failed, without just cause, to comply with his contract, lost his hold both upon the stock and the dividend. *Phinizy v. Murray* (1889) 83 Ga. 747, 6 L.R.A. 426, 20 Am. St. Rep. 342, 10 S. E. 358.

Where a corporation attempts to pay a dividend of a certain amount on the day of the date when it is declared, and another of like amount at the option of the corporate agent from earnings of the last year, owners of stock at the time are entitled to the latter dividend, although it is not declared by the agent until after they have parted with their stock. *Hill v. Newichawanick Co.* (1876) 8 Hun (N. Y.) 459.

The following cases, while beyond the scope of this note, may be here referred to:

In order to be relieved from the penalty of a bond to transfer stock on or before a certain day, the obligor must transfer the stock and account for dividends since the time it ought to have been transferred. *Gardener v. Pullen* (1700) 2 Vern. 394, 23 Eng. Reprint, 853.

In *Harris v. Stevens* (1835) 7 N. H. 454 (cited in the principal case), where, on the 6th of the month, a proposition was made to the plaintiff that, if security was furnished for the price of stock by the 24th instant, "then I quitclaim all my right and title to him," it was held that the purchaser was entitled to dividends declared after the proposition was made. B. B. B.

NEW YORK COURT OF APPEALS.

JAMES SULLIVAN, Resp't.,
v.
WILHELM KNAUTH et al., Appts.

(220 N. Y. 216, 115 N. E. 460.)

Travelers' checks — forgery — liability for payment.

One issuing travelers' checks under the agreement to pay them when countersigned by the signature placed on their face is lia-

Note. — As to who must bear loss of payments on forgery of travelers' checks, see annotation following this case, post, 558. L.R.A.1917F.

ble to the purchaser for checks paid on a forged signature.

For other cases, see *Banks*, IV. a, 3, 8, (1), in *Dig.* 1-52 N. S.

(February 27, 1917.)

APPEAL by defendants from an order of the Appellate Division of the Supreme Court, First Department, reversing an order of the Appellate Term, First District, and reinstating a judgment of the Municipal Court of New York in plaintiff's favor in an action brought to recover the amount of certain travelers' checks paid by defendants on a forged signature. Affirmed. The facts are stated in the opinion.

Messrs. Davies, Auerbach, & Cornell, with **Mr. George T. Hogg,** for appellants: Plaintiff is not within the defendants' promise to "pay against this check;" or within their promise to refund the amount of lost checks against the execution of a suitable bond of indemnity; or even within the erroneously assumed agreement to repay a deposit on his order, evidenced by his countersignature on the notes or checks in question. He has not presented and does not hold said instruments and they are not lost, but held adversely, and he disclaims the countersignatures thereon. The defendants are not in default, and the plaintiff's remedy is a suit in equity against all parties to said instruments.

Delaware Trust Co. v. Calm, 195 N. Y. 231, 88 N. E. 53; **Vandegrift v. Cowles Engineering Co.** 161 N. Y. 435, 48 L.R.A. 685, 55 N. E. 941; **Downes v. Phoenix Bank,** 6 Hill, 297; **Read v. Marine Bank,** 136 N. Y. 454, 32 Am. St. Rep. 758, 32 N. E. 1083; **Cottle v. Marine Bank,** 166 N. Y. 53, 59 N. E. 736, reargument denied in 167 N. Y. 595, 60 N. E. 1109; **Frank v. Wessels,** 64 N. Y. 155; **Crandall v. Schroepfel,** 1 Hun, 567; **Hathaway v. Delaware County,** 185 N. Y. 368, 13 L.R.A.(N.S.) 273, 113 Am. St. Rep. 909, 78 N. E. 153; **Embiricos v. Anglo-Austrian Bank** [1905] 1 K. B. 677, 2 B. R. C. 294, 74 L. J. K. B. N. S. 326, 53 Week. Rep. 306, 92 L. T. N. S. 305, 21 Times L. R. 268, 10 Com. Cas. 99, 2 Ann. Cas. 703; **Casper v. Kuhne,** 150 App. Div. 389, 144 N. Y. Supp. 502; **Samberg v. American Exp. Co.** 136 Mich. 630, 99 N. W. 879.

Messrs. Mornay Williams and Stephen L. Vanderveer, with **Mr. Harold G. Aron,** for respondent:

The breach of defendants' contracts to the plaintiff's damage, in paying checks which were not countersigned, and their express agreement that "any checks unused will be redeemed at their face value," made them liable to plaintiff.

Hartford v. Greenwich Bank, 157 App. Div. 448, 142 N. Y. Supp. 387; 2 Dan. Neg. Inst. § 1611a; **Ætna Nat. Bank v. Fourth Nat. Bank,** 46 N. Y. 82, 7 Am. Rep. 314; **Albany County Bank v. People's Co-op. Ice Co.** 92 App. Div. 47, 86 N. Y. Supp. 773; **Cassidy v. Uhlmann,** 170 N. Y. 505, 63 N. E. 554; **Shipman v. Bank of State,** 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371; **Frank v. Chemical Nat. Bank,** 84 N. Y. 209, 38 Am. Rep. 501; **Critten v. Chemical Nat. Bank,** 171 N. Y. 219, 57 L.R.A. 529, 63 N. E. 969; **White v. Continental Nat. Bank,** 64 N. Y. 316, 21 Am. Rep. 612; **Bank of British N. A. v. Merchants' Nat. Bank,** 91 N. Y. 106.

The check was not countersigned by L.R.A.1917F.

plaintiff, and payment under a forgery to a third person is no defense as against the plaintiff, seeking to recover the balance of his money, which defendants admittedly received.

Morgan v. Bank of State, 11 N. Y. 404; **Robinson v. Chemical Nat. Bank,** 86 N. Y. 404; **Welsh v. German American Bank,** 73 N. Y. 424, 29 Am. Rep. 175; **Bank of British N. A. v. Merchants' Nat. Bank,** 91 N. Y. 106; **Citizens' Nat. Bank v. Importers & T. Bank,** 119 N. Y. 195, 23 N. E. 540; **Weisser v. Denison,** 10 N. Y. 68, 61 Am. Dec. 731.

Hogan, J., delivered the opinion of the court:

The plaintiff, by occupation a miner, in the fall of 1911 contemplated a trip to San Francisco and Lima, Peru. He called at the Lyon County National Bank at Yerington, Nevada, and asked for Wells Fargo travelers' checks. An officer of the bank recommended to him travelers' checks issued by defendants, and he thereupon purchased seven checks, four for \$100 each, three for \$50 each, and paid therefor \$550. Three of the checks, two for \$100 each and one for \$50, are involved in the present action. The following is a copy of one of the checks:

K. N. & K. Traveler's Check Nos.

S. 4,021-01, \$100.

Sold by Lyon County Bank,

New York (Date) Yerington, Nevada.

Holder's Signature.

Good within one year from date when countersigned below with the opposite signature:

James Sullivan.

Knauth, Nachod, & Kuhne, New York, through their correspondents, will pay against this check out of their balance to the order of **T. P. Bingham & Hijos** one hundred dollars or equivalent as follows:

In U. S. and Canada, \$100; England, Ireland, Scotland, £20-8-2; France, Belgium, Switz., Fcs., 521.50; Germany, M. 416.60; Italy, Lir. 512.50; Sweden, Norway, Demm., Kronor 366.98; Holland, Florins 245.10; Austria, Kronen 490.20; Russia, Rubles 192.30; other countries at current rates.

Knauth, Nachod, & Kuhne.

Countersign here:

James Sullivan.

This signature must correspond with above.

At the end:

Knauth, Nachod, & Kuhne, New York.

Checks negotiated in Europe will be paid only through European correspondents. (Then followed a list of such correspondents.) And all other correspondents as per official list.

The foregoing check was indorsed by T. P. Bingham & Hijos to the order of Cortes Commercial & Banking Company, Limited, then by the latter to the order of G. Amsinck & Company, and by Amsinck & Company to the Bank of New York, N. B. A., or order. Immediately following appears: "Received payment Nov. 14, 1911. The Bank of New York National Banking Association, Charles Olney, Cashier."

The two remaining checks, one for \$100, one for \$50, were in like form, save that the payee in each check was Castellon & Lacayo, Ltd'a, were each indorsed by the payee and others, and were finally paid through the Bank of New York and indorsed by the latter in the same manner as the first check. Four of the seven checks purchased by plaintiff had been cashed by him. The three checks above referred to were produced by the defendants upon the trial.

At the time plaintiff purchased the seven checks at the bank in Yerington he signed his name "James Sullivan" on each one of the checks under the words "Holder's Signature" engraved thereon, in the presence of an officer of the bank. The checks which he personally had cashed were countersigned by him where indicated by the words "Countersign here." The three remaining checks hereinbefore specifically referred to were not countersigned by him. His name appearing thereon was a forgery, and such issue was not controverted by defendants upon the trial.

The evidence of plaintiff tended to show that he took passage on the steamship San Juan at San Francisco for Ancon, Panama. On October 15, 1911, when near Corinto, Nicaragua, he discovered that the three checks which had not been countersigned by him had been lost or stolen while he was on the boat. He endeavored to find the checks, and offered a reward for the return of the same. By reason of a quarantine at Corinto because of yellow fever he was not permitted to go ashore at that port. Upon his arrival at Panama he gave notice of the loss of the checks to a man who conducted a small bank and general store, upon which place of business was a sign inscribed "Knauth, Nachod, & Kuhne," and was told by that man that he would stop payment of the checks. He also gave notice to three banks at Panama to stop payment of the checks. He testified that he did not know the numbers of the lost or stolen checks or the address of defendants, as the same

was lost or stolen with the checks; that he did not send direct notice to New York, and the first opportunity afforded him to give any notice was upon his arrival at Panama.

From Panama plaintiff went to Peru, and later, and about December 21, 1911, returned upon a sailing vessel to the United States. Since his return he has resided at Portland, Oregon. December 29, 1911, the Lyon County Bank at Yerington, Nevada, addressed a letter to defendants and inclosed therewith a letter received by it from the plaintiff. In the letter written by the bank appeared the following: (The letter inclosed) "is self-explanatory. We have written him to take the matter up with you. You will please stop payment on the checks as per his request. . . ."

The receipt of that letter was acknowledged by defendants January 3, 1912.

On behalf of defendants evidence was offered to the effect that the letter received by them from the bank at Yerington was the first notice they had that the checks, which had been paid about one month previous thereto, were not presented by a holder in due course; that defendants did not have an agent at Panama, though they had some 3,000 correspondents in their business of travelers' checks. Plaintiff having testified that, at the time of the purchase of the checks, a book with a red cover was delivered to him which he described as a "European directory of that firm, I believe," upon cross-examination he testified: "Upon the cover of the book given me was printed: 'We refund the amount of lost checks against execution of a suitable bond of indemnity. Particulars of such checks should, however, be promptly reported.'"

Evidence offered by defendants tended to show that defendants issued two books, one a red-covered book for foreign use, the second one a brown-covered book for domestic use, also a folder. Counsel were permitted on the trial to read in evidence from the books and folder as follows:

"If you have already traveled extensively, you probably know the difficulties which, at times, arise in regard to arrangements for carrying money. Then, you will appreciate the safety, economy, and convenience of our letters of credit and travelers' checks. If this is your first long trip, we can assure you that the various facilities which we offer will prove equal if not superior to those provided by any other system."

"In case of loss, the amount of checks will be refunded, or a new supply furnished in their stead, upon execution of a satisfactory bond of indemnity. The numbers of the checks lost and the circumstances attending the loss should, however, be at once

communicated to Messrs. Knauth, Nachod, & Kuhne, Leipzig, Germany, if lost abroad, or to Knauth, Nachod, & Kuhne, New York, if lost in America, so as to enable them to do whatever is possible under the circumstances."

"We sell travelers' checks for a commission of one-half of 1 per cent, and guarantee payment of the face amount, less stamp tax, if any. . . .

"In order to insure himself against loss, the traveler is required at the time of purchase to sign his name to the checks in the space reserved for 'holder's signature.' Our travelers' checks cannot be cashed unless they are countersigned, and then only if 'holder's signature' and 'countersignature' correspond. Wrongful holders would find it difficult to commit forgery, as the countersignature is to be affixed to the checks in the presence of our correspondents."

"We wish to call attention to the fact that the countersignature should be affixed to the checks only in the presence of the person to whom they are presented for payment. Checks already countersigned can only be cashed with difficulty and, in case of loss, they are open to misuse."

The Lyon County National Bank had in its possession engraved checks signed by the defendants. The amount payable on each check was engraved thereon. The bank was authorized to fill in the date on the checks, write or stamp thereon the name of the bank as the seller thereof, to receive the cash therefor, and, after the purchaser had signed his name to each check in the presence of an officer of the bank, in the space upon the checks reserved for "holder's signature," to deliver the checks. The defendants had delivered to the bank literature issued by them from which quotations have been made, to be distributed to purchasers of checks. The Yerington bank in the transaction at bar followed the procedure dictated by defendants, presumably the same course adopted with their numerous correspondents and at their home office in the city of New York. Clearly the Lyon County National Bank at Yerington, Nevada, was the agent of defendants. As such agent it received from the plaintiff \$550 for defendants, not as a deposit or for safekeeping, but upon a contract wherein defendants undertook that they would, within one year from the date of the checks, when countersigned below (where the words "Countersign here" appeared) with the opposite signature (i. e., the original signature of plaintiff, subscribed in the presence of defendant's agent under the heading "Holder's signature"), pay the amount stated in the check to the order of the payee therein named. The contract of defendants was L.R.A.1917F.

prepared by them. In their literature they referred to the safety, economy, and convenience of their traveler's checks; that they sold such checks for a commission of one half of 1 per cent and guaranteed payment of the face amount of same; they required the purchaser to place his signature in the space reserved for that purpose. Upon the face of the check they provided a means of protection to themselves and their correspondents; for thereupon was the holder's handwriting for comparison with the countersignature, which was to be affixed in the presence of the person to whom the check was presented for payment. While the requirement of a countersignature on the check was some protection to the purchaser of the same, it was a primary protection to defendants, as their promise to pay arose when the check was countersigned "below with the opposite (genuine) signature, which must correspond with the above signature," not the above name. The checks countersigned by the plaintiff in his handwriting before he left San Francisco were paid by defendants. They had his genuine countersignature in their possession for some time before the checks in question were paid; consequently they had additional means of identification of signatures. They paid the three checks in question upon a forged simulation of plaintiff's signature, rather than when the checks were countersigned with the "opposite signature," the genuine signature of the purchaser inscribed on the same, and thereupon breached their agreement.

Defendants were not entitled to defend the action on the ground that plaintiff had failed to give them a bond of indemnity. The checks are not lost; they are in the possession of defendants, and were produced by them upon the trial of the action. While defendants asserted that the checks had been paid, they did not undertake to question the evidence offered by plaintiff that his name appearing thereon as a countersignature was a forgery. After full consideration of all propositions argued by counsel for appellants, we conclude that the order of the Appellate Division was right, and should be affirmed with costs.

McLaughlin, J., concurring:

I concur in the conclusion reached by Judge Hogan on the ground that when the defendants paid the checks here in question, without the same having been countersigned by the plaintiff, it was a breach of contract which entitled him to recover the amount thus paid. The defendants expressly agreed that they would not cash such checks unless they were thus countersigned. They never were countersigned by the plain-

tiff, and when the defendants paid them the plaintiff had an immediate cause of action to recover the damages sustained, which were the amount of the checks, together with interest from the time the demand was made by him upon the defendants for

payment. *Samberg v. American Exp. Co.* 136 Mich. 639, 99 N. W. 879.

Hiscock, Ch. J., and Collin, Cardozo, Pound, and Crane, JJ., concur with both Hogan and McLaughlin, JJ.

Annotation—Who must bear loss of payments on forgery of travelers' checks.

Travelers' checks as here understood are drawn on the issuing bank. It seems, however, that the same expression is used as to checks drawn on another bank. See *Anchor Realty Co. v. Bankers' Trust Co.* (1915) 93 Misc. 64, 156 N. Y. Supp. 631.

SULLIVAN v. KNAUTH, ante, 554, seems to be a case of first impression. In this case the plaintiff had judgment in the municipal court; this was reversed (1913) 81 Misc. 148, 142 N. Y. Supp. 307, on the ground that the provision in the contract for prompt notice of loss had not been complied with by the plaintiff; this decision was in turn reversed in (1914) 161 App. Div. 148, 146 N. Y. Supp. 583, where the writer of the opinion said, inter alia: "In my opinion a relation cognate to that of depositor and banker should be considered to have been established between the plaintiff and these defendants. If that is not the effect of the transaction the traveler obtains little advantage from these so-called traveler's checks and might as well carry bills or gold. The basis of his purchase is protection by reason of the double signature. Safety is the thing impressed upon him. The paper is not effective as a draft or check or order for the payment of money until the purchaser, who, in the presence of the agent of the defendant, has signed his signature in the space 'holder's signature,' has countersigned it. The promise is to pay 'when countersigned below with the opposite signature,' not the opposite name, and below 'countersign here' is engraved, 'this signature must correspond with above,' not this name, and in this booklet defendants call attention to the difficulty of successful forgery when the countersignature is made in the presence of the person who, as the agent of the defendant, pays the check. It seems to me, therefore, it must be held that it is the second signature which gives the paper final currency. It is in the precise situation of a check payable to the order of a designated payee, undorsed by said payee. That being so, the countersigned signature must be treated as the ordi-

nary indorsement of a payee upon an ordinary check, that is, the bank is responsible if it pays on a forgery. Treating it in this way those defendants have their remedy over against prior indorsers as in an ordinary case of forgery of payee's signature on any other negotiable instrument. Unless it be so held the whole scheme seems likely to fail." This decision is now affirmed in the principal case.

It will be observed that the opinion in the court below takes the view that the rule to be applied is the ordinary rule as to payment of paper on a forged indorsement. See also *Samberg v. American Exp. Co.* (Mich.) *infra*. It has been suggested that one feature of travelers' checks is that the traveler in a place where he is unknown can obtain money on them at once, without other identification than his signature; and that, as the payor of the check is without any other means of identifying the payee, his principal, the maker, ought not to be holden for more than due diligence. This theory, if adopted, might exonerate the maker if the forgery was very like the true signature.

In *Samberg v. American Exp. Co.* (1904) 136 Mich. 639, 99 N. W. 879, cited in the opinion of McLaughlin, J., in *SULLIVAN v. KNAUTH*, the plaintiff sued the maker on a traveler's check it had issued to a third party whose countersignature appeared on the check with a line drawn through it. It was held that the plaintiff could not recover, as the check was not countersigned, no testimony being given as to why the line had been drawn through the signature. The court said: "Checks of a like character to this one have come into very general use, especially by travelers. They are an ingenious, safe, and convenient method by which the traveler may supply himself with funds in almost all parts of the civilized world, without the hazard of carrying the money on his person. The company has the right to refuse to pay when the check does not bear the countersign agreed upon. The owner of the check also has the right to insist

it shall not be paid when it is not countersigned as agreed. This check was not so countersigned, and for that reason defendant was entitled to a judgment in its favor."

Under these decisions the situation is somewhat similar to that which would arise in case a bank paid a cashier's check on itself, where the indorsement of the payee was a forgery.

Certificates of deposit, while somewhat different in character, may be referred to in this connection.

It is held that a bank paying a certificate of deposit on a forged indorsement is liable to the true payee, in the absence of negligence on his part. *Honig v. Pa-*

cific Bank (1887) 73 Cal. 464, 15 Pac. 58; *First Nat. Bank v. Bremer* (1893) 7 Ind. App. 685, 52 Am. St. Rep. 461, 34 N. E. 1012; *Gueydon Bros. v. Quintanilla* (1885) 2 Tex. App. Civ. Cas. (Willson) 541.

The same rule is assumed in *State Nat. Bank v. Freedman's Sav. & T. Co.* (1871) 2 Dill. 11, Fed. Cas. No. 13,324; *Merchants Bank v. Marine Bank* (1845) 3 Gill. 96, 43 Am. Dec. 300; *Stout v. Benoist* (1866) 39 Mo. 277, 90 Am. Dec. 466.

For payment under forged indorsements generally, see L.R.A. Indexes, under Banks. B. B. B.

NEW YORK COURT OF APPEALS.

CHARLES E. MILLER, Appt.,

v.

GEORGE HARVEY, Respnt.

(221 N. Y. 54, 116 N. E. 781.)

Sales — delivery to carrier — failure to protect buyer's interest — effect.

The loss of goods in transit must fall on seller and not on buyer where the seller, in delivering the goods to the carrier, contracts for a liability of only 50 per cent of their value, when he might have secured full liability at small additional expense, and the statute provides that the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, failure to do which enables the buyer to decline to treat delivery to the carrier as delivery to himself.

For other cases, see *Sale, I. b*, in *Dig. 1-52 N. S.*

(May 22, 1917.)

APPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, First Department, affirming the determination of the Appellate Term reversing a judgment of the Municipal Court of the City of New York in his favor in an action brought to recover the agreed price of two automobile tires sold and delivered by plaintiff to defendant. Affirmed.

The facts are stated in the opinion.

Mr. William F. Goldbeck, with Mr. Herman Goldman, for appellant:

When a buyer requests the seller to ship

goods and does not instruct him as to the means and terms of shipment, he thereby authorizes the seller to ship under a limited liability contract.

Nelson v. Hudson River R. Co. 48 N. Y. 498; *Shelton v. Merchants' Dispatch Transp. Co.* 59 N. Y. 258; *Root v. New York & N. E. R. Co.* 76 Hun, 23, 27 N. Y. Supp. 611; *Waldron v. Fargo*, 170 N. Y. 130, 62 N. E. 1077; *Jones v. New York, L. E. & W. R. Co.* 3 App. Div. 341, 38 N. Y. Supp. 284; *Isaacson v. New York C. & H. R. R. Co.* 94 N. Y. 278, 46 Am. Rep. 142; 31 Cyc. 1402, 1403; 24 Am. & Eng. Enc. Law, 1072, note 2; *McElvain v. St. Louis & S. F. R. Co.* 151 Mo. App. 126, 131 S. W. 736; *Cothay v. Tute*, 3 Campb. 129.

Plaintiff was under no contract duty or obligation to ship the goods. The shipping was separate and distinct from the sale transaction. The statute therefore does not apply to the plaintiff.

Terry v. Wheeler, 25 N. Y. 520.

The shipping contract made by plaintiff was, under the circumstances of the case, reasonable.

Zimmer v. New York C. & H. R. R. Co. 137 N. Y. 460, 133 N. E. 642; *Boyle v. Bush Terminal R. Co.* 210 N. Y. 389, 104 N. E. 933.

Mr. Alexander S. Andrews, with Mr. John Larkin, for respondent:

An express company's receipt is the contract of shipment, and is binding upon consignor and consignee; and its provisions limiting the carrier's liability to \$50 unless a greater value is given, are valid and limit the carrier's liability to \$50.

Mills v. Weir, 82 App. Div. 396, 81 N. Y. Supp. 801; *Bernstein v. Weir*, 40 Misc. 635, 83 N. Y. Supp. 48; *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 57 L. ed. 314, 44

Note.—As to whether seller or buyer must bear loss from failure to contract with carrier for full liability, see annotation following this case, post, 561. L.R.A.1917F.

L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; *George N. Pierce Co. v. Wells, F. & Co.* 236 U. S. 278, 59 L. ed. 576, 35 Sup. Ct. Rep. 351.

Where, for transmission to the buyer, a seller delivers goods worth over \$50 to a carrier whose contract of carriage limits recovery to \$50, and the seller fails to put a valuation on the goods, which thereafter never come to the buyer, such omission is a violation of the seller's duty, there is no delivery, and the seller cannot recover the purchase price from the buyer; or if they have, as here, already been paid for, the buyer can recover the price.

Personal Property Law, § 127, subd. 2; 2 *Mechem, Sales*, § 1183; *Burdick, Sales*, 1897, pp. 158, 159; *Benjamin, Sales*, § 694; *Reid v. Fargo*, 241 U. S. 544, 60 L. ed. 1156, 36 Sup. Ct. Rep. 712; *Clarke v. Hutchins*, 14 East, 475, 104 Eng. Reprint, 683; *Buckman v. Levi*, 3 Campb. 414; *Cothay v. Tute*, 3 Campb. 129; *Stafford v. Walter*, 67 Ill. 83; *Ward v. Taylor*, 56 Ill. 494; *Gordon v. Ward*, 16 Mich. 360; *Butterworth v. Cathcart*, 168 Ala. 262, 52 So. 896; *Lewis v. Imhof*, 138 Mo. App. 370, 122 S. W. 329.

Cardozo, J., delivered the opinion of the court:

The plaintiff sold to the defendant in the city of New York automobile tires which were to be sent by express to Allenhurst, New Jersey. The price, \$95.43, was paid by the defendant in advance. The seller entrusted the tires to an express company without declaring their value. The waybill states that the value was asked and not given. By the contract of carriage the liability of the carrier was limited to \$50, unless a greater value was "declared and paid for or agreed to be paid for at the time of shipment." The tires were lost in transit. The defendant notified the plaintiff of the loss and requested a duplicate shipment, which was made. The question to be determined is whether payment must be made again.

The general rule is that delivery to a carrier is delivery to the buyer. *Sales of Goods Act*, § 127, subd. 1; *Personal Property Law*, as amended by Laws 1911, chap. 571, *Consol. Laws*, chap. 41. But the rule has its exception. *Sales of Goods Act*, § 100, subd. 5; § 127, subds. 2 and 3. Only one of them will be considered. By § 127, subd. 2, of the *Sales of Goods Act*, it is provided: "Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be rea-

sonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages."

The statute is declaratory of the rule at common law. The seller must not sacrifice the buyer's right to claim indemnity from the carrier. That rule was declared more than a century ago in *Clarke v. Hutchins*, 14 East, 475, 104 Eng. Reprint, 683. In that case the carrier gave notice that it would not be answerable for any packages above £5 without special entry of value. The seller omitted the entry and was held to have assumed the risk. A more modern instance is a recent decision of the Supreme Court of the United States. *Reid v. Fargo*, 241 U. S. 544, 60 L. ed. 1156, 36 Sup. Ct. Rep. 712. An agent delivered an automobile to a carrier and accepted a bill of lading by which liability was limited to \$100. The acceptance of such a limitation was held to be a breach of duty. There are other cases of like tenor. *Buckman v. Levi*, 3 Campb. 414; *Stafford v. Walter*, 67 Ill. 83; *Lewis v. Imhof*, 138 Mo. App. 370, 122 S. W. 329; *Gordon v. Ward*, 16 Mich. 360. To the same effect are the leading textbooks. *Williston, Sales*, §§ 278, 595; *Benjamin, Sales*, 5th ed. p. 739; 2 *Mechem, Sales*, 1183; *Burdick, Sales*, § 694.

Tested by these principles, the plaintiff's case must fail. He limited the carrier's liability to \$50. He sacrificed the defendant's right of indemnity to the extent of almost one half of the value of the shipment. He did this when full indemnity could have been procured by an additional payment of ten cents. That was not a reasonable protection of the interests of his principal. The plaintiff's argument, if sound, would require us to hold that the acceptance of a like limitation would be reasonable if the value had been \$1,000. Precedent and reason forbid that conclusion. The seller who puts the buyer at the mercy of the carrier must procure the buyer's approval, or assume the risk himself.

Cases such as *Nelson v. Hudson River R. Co.* 48 N. Y. 498; *Shelton v. Merchants' Dispatch Transp. Co.* 59 N. Y. 258, and *Waldron v. Fargo*, 170 N. Y. 130, 62 N. E. 1077, cited by the plaintiff, are beside the mark. They deal with controversies between the owner and the carrier. They hold that the principal is not at liberty to repudiate as against the carrier the terms accepted by the agent. They have no bearing upon the measure of diligence owing from the agent

to the principal. *Reid v. Fargo*, supra. It is significant that whenever the plaintiff made shipments C. O. D. he declared the value to the carrier. His duty was to safeguard the defendant's interests as sedulously as his own.

The judgment should be affirmed, with costs.

Hiscock, Ch. J., and Chase, Collin, Cuddeback, and Hogan, JJ., concur. McLaughlin, J., not sitting.

Annotation—Must seller or buyer bear loss from failure to contract with carrier for full liability.

The few reported cases which have considered the question under annotation are in accord with the rule followed in *MILLER v. HARVEY*, ante, 559, that delivery to a carrier is incomplete so as to charge vendee with responsibility for loss or damage unless the vendor in so delivering exercises due care and diligence to provide vendee with a remedy over against the carrier.

Thus, such was the rule announced in the early English case of *Clarke v. Hutchins* (1811) 14 East, 475, 104 Eng. Reprint, 683, where, in denying vendor recovery for purchase price of goods shipped by carrier because of failure to enter the value as above £5, to which the carrier's liability was notoriously limited the court said: "The plaintiff cannot be said to have deposited the goods in the usual and ordinary way for the purpose of forwarding them to the defendant unless he took the usual and ordinary precaution which the notoriety of the carriers' general undertaking required with respect to goods of this value to insure them a safe conveyance; that is, by making a special entry of them. He had an implied authority, and it was his duty to do whatever was necessary to secure the responsibility of the carriers for the safe delivery of the goods and to put them into such a course of conveyance as that in case of a loss the defendant might have his indemnity against the carriers."

So also, in *Lewis v. Imhof* (1909) 138 Mo. App. 370, 122 S. W. 329, an action for the purchase price of goods lost in forwarding, in denying recovery because of vendor's failure to contract with carrier for full liability, the court stated that "in the absence of proof to the contrary, we must begin with the presumption that the usual and ordinary way requires the vendor in the performance of his duties as agent of the vendee to ship the goods under a contract that will afford the vendee a remedy against the carrier for their full value if they be negligently lost by the carrier. This was the rule of the common law, and we perceive no reason in the changed condi-

tions of modern commerce and the means of transportation for departing from it." The court added that the burden was on the vendor to show either expressed or implied authority to ship the goods in the manner he did, and that such authority should not be implied from the mere direction of a new customer to ship "by express."

In *Gordon v. Ward* (1868) 16 Mich. 360, allowing recovery by vendor of the purchase price of tobacco which was destroyed by fire while in the possession of the railroad, although he had accepted a restrictive bill of lading, the decision was based on the fact that the vendee had specially requested that the tobacco be sent by rail and not by water as the railroad companies would be liable for loss, and it was shown that the goods could not have been sent by rail except on such restricted liability, thus distinguishing this case from *MILLER v. HARVEY*.

So, too, *Stafford v. Walter* (1873) 67 Ill. 83, action for purchase price of apples shipped by rail which were lost, is distinguishable from *MILLER v. HARVEY*, as the decision allowing recovery was based on the fact that the vendee had ordered the apples shipped by rail immediately and the railroad company refused to accept them without a release of liability. The court stated that if the railway company would not receive the apples for transportation except upon the condition of executing such a release, then the giving of the same was but a necessary and proper act to be done in order to send the apples by the railroad, and there would be an implied authority to do such act, resulting from the direction to send the property in that way.

In *Reid v. Fargo* (1915) 241 U. S. 544, 60 L. ed. 1156, 36 Sup. Ct. Rep. 712, although not an action between seller and buyer, the same principle was followed in holding that an express company which accepted in London an automobile to be shipped to New York and, having boxed the same, shipped it by an ocean carrier without declaring its value, tak-

ing from the steamship company a bill of lading limiting liability to \$100 unless a greater value is declared and extra freight paid, was secondarily liable to the owner where the car was seriously damaged through the negligence of a

stevedore employed by the steamship company to discharge the cargo, even though the express company was regarded as a mere forwarding agent.

J. H. B.

OKLAHOMA SUPREME COURT.

JENNIE SHARP, Plff. in Err.,

v.

LANDIS SHARP.

(— Okla. —, 166 Pac. 175.)

Judgment — foreign — effect on lands.

A decree of the circuit court of the state of Oregon, in a suit for divorce in which both parties appeared, which attempts to settle the defendant's equitable rights to lands in Oklahoma, in so far as such decree relates to the lands in Oklahoma, is coram non iudice and void, and as such is not res judicata of the same claim in an action in Oklahoma between the same parties and involving the same land.

For other cases, see Judgment, IV. b, 1, in Dig. 1-52 N. S.

(June 27, 1916.)

ERROR to the Superior Court for Oklahoma County to review a judgment in plaintiff's favor in an action brought to recover possession of certain real estate. Reversed.

The facts are stated in the Commissioner's opinion.

Messrs. Twyford & Smith, for plaintiff in error:

The Oregon court had no jurisdiction to adjudicate title to the Oklahoma land, and its judgment, in so far as the same relates to the Oklahoma land, is void.

Headnote by BURFORD, C.

Note.—It will be observed that the question in SHARP v. SHARP was not as to the effect upon real property in one state of a decree of divorce rendered in another, which merely purported to affect the marital status of the parties, but as to the effect of a decree purporting directly to adjudicate the rights of the parties in respect of land in another state. The case therefore falls within the scope of the notes to Proctor v. Proctor, 69 L.R.A. 673; Fall v. Eastin, 23 L.R.A.(N.S.) 924 (which, like the SHARP CASE, involved a decree of divorce); and Burton-Lingo Co. v. Patton, 27 L.R.A.(N.S.) 420, on "Jurisdiction of equity over suits affecting real property in another state or country."

One phase of the question as to the effect upon rights as to real property in one state of a decree of divorce rendered in another, which merely purports to dissolve the mari-

Gooch v. Gooch, 38 Okla. 300, 47 L.R.A.(N.S.) 480, 133 Pac. 242; Columbia Nat. Sand Dredging Co. v. Morton, 28 App. D. C. 288, 7 L.R.A.(N.S.) 114, 8 Ann. Cas. 511; Proctor v. Proctor, 215 Ill. 275, 69 L.R.A. 673, 106 Am. St. Rep. 168, 74 N. E. 145, 2 Ann. Cas. 819; Rodgers v. Rodgers, 56 Kan. 483, 43 Pac. 779; Pennoyer v. Neff, 95 U. S. 727, 24 L. ed. 570; Carpenter v. Strange, 141 U. S. 87, 35 L. ed. 640, 11 Sup. Ct. Rep. 960; Fall v. Eastin, 215 U. S. 15, 54 L. ed. 72, 23 L.R.A.(N.S.) 924, 30 Sup. Ct. Rep. 3, 17 Ann. Cas. 853; Fire Asso. v. Patton (Burton-Lingo Co. v. Patton) 15 N. M. 304, 27 L.R.A.(N.S.) 420, 107 Pac. 679.

The Oregon judgment is subject to impeachment in this case on the ground of fraud on the defendant, this action being between the same parties.

Steele v. Kelley, 32 Okla. 547, 122 Pac. 934; Brown v. Trent, 36 Okla. 239, 128 Pac. 895; Levin v. Gladstein, 142 N. C. 482, 32 L.R.A.(N.S.) 905, 115 Am. St. Rep. 747, 55 S. E. 371; Mottu v. Davis, 151 N. C. 237, 65 S. E. 969; McNitt v. Turner, 16 Wall. 366, 21 L. ed. 348; Cole v. Cunningham, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269; Gray v. Richmond Bicycle Co. 167 N. Y. 348, 82 Am. St. Rep. 720, 60 N. E. 663; Abercrombie v. Abercrombie, 64 Kan. 29, 67 Pac. 539; United States v. Throckmorton, 98 U. S. 61, 25 L. ed. 93; Dobson v. Pearce, 12 N. Y. 156, 62 Am. Dec. 152; Davis v. Smith, 5 Ga. 274, 48 Am. Dec. 279; Doughty v. Doughty, 27 N. J. Eq.

tal relation, is treated in the notes to Benton's Succession, 59 L.R.A. 135, 181, and Van Blaricum v. Larson, 41 L.R.A.(N.S.) 219, on "Effect of foreign divorce upon dower;" and see later case, Gooch v. Gooch, 47 L.R.A.(N.S.) 480. The question considered in those notes presupposes that the decree of divorce rendered in the other state will be recognized so far as its effect upon the status of the parties is concerned.

The extraterritorial effect upon the marital status of a decree of divorce as affected by the domicile of the parties or the mode of service is discussed in the note to Benton's Succession, 59 L.R.A. 135, which has been supplemented, so far as concerns divorces rendered upon constructive service of process, in the notes to Joyner v. Joyner, 18 L.R.A.(N.S.) 647, and Perkins v. Perkins, L.R.A.1917B, 1032.

315, 38 N. J. Eq. 581; Keeler v. Elston, 22 Neb. 310, 34 N. W. 891.

Messrs. Harris, Nowlin, & Singleton, for defendant in error:

The Oregon court acquired jurisdiction over the person of the defendant, and, in addition to its powers and jurisdiction under publication service, all personal property, rights, and interests of the litigants, wherever the situs, were brought within the jurisdiction of the court in so far as they were involved in the controversy, and the court was given full power to enter a decree binding in personam upon both plaintiff and defendant.

Alfrey v. Colbert, 44 Okla. 246, 144 Pac. 179; *Pioneer Teleph. & Teleg. Co. v. State*, 40 Okla. 417, 138 Pac. 1053; *Prince v. Gosnell*, — Okla. —, 149 Pac. 1162; *Gibbs v. Gibbs*, 26 Utah, 382, 73 Pac. 641; *Carpenter v. Strange*, 141 U. S. 87, 35 L. ed. 640, 11 Sup. Ct. Rep. 960; *Dull v. Blackman*, 169 U. S. 243, 42 L. ed. 733, 18 Sup. Ct. Rep. 333; *Massie v. Watts*, 6 Cranch, 148-160, 3 L. ed. 181-185; *Dunlap v. Byers*, 110 Mich. 109, 67 N. W. 1067.

Burford, C., filed the following opinion:

This was an action in ejectment, instituted in the superior court of Oklahoma county, to recover the possession of lot 25, block 5, Orchard park addition to Oklahoma City.

The pleadings underwent various changes and amendments, but the essential facts relied upon are as follows: Plaintiff claimed title to the lot in question through a deed from one John Clardy, executed December 13, 1913, and duly recorded. He also claimed that the circuit court of Umatilla county, Oregon, in an action of divorce in which Landis Sharp was plaintiff and Jennie Sharp was defendant, in which action Jennie Sharp had appeared and filed her answer alleging that the property in question, as well as the other property, had been bought with their joint earnings, and that in equity the Oklahoma property belonged to her, had decreed that the property here involved was the sole property of the plaintiff, Landis Sharp. The defendant, upon the other hand, claimed that the decree of the Oregon court was not binding; that it was made without jurisdiction of the subject-matter, in so far as it related to the lots in question; that the property involved had been purchased by Landis Sharp with the money of the defendant, and that she was the owner of the equitable title thereto and entitled to have Landis Sharp declared a trustee of such property for her benefit. Upon the trial the plaintiff introduced his deed from John Clardy in evidence, and also introduced the record L.R.A.1917F.

of the Oregon proceeding. It appears that in the case there the defendant, Jennie Sharp, appeared and set up somewhat similar facts in relation to the advancement of the money for the purchase of the Oklahoma property to those pleaded in the instant case. Landis Sharp, the plaintiff in that suit, replied, denying the facts set up in defendant's answer, and sought to have the court determine that he was "vested with the exclusive title, legal and equitable, of said property, and that the defendant has not and shall not have, in law or in equity, any right, title, or interest, or estate therein; and that all right, title, interest, or estate by her claimed therein be by the decree of this court forever terminated and canceled."

The decree of the Oregon court is in part as follows: "That plaintiff, Landis Sharp, is the owner of all the real property in the pleadings in this suit filed particularly described, to wit [description of land in Oregon], and all of lot numbered 26, in block numbered 5 in Orchard park addition to Oklahoma City in the state of Oklahoma, free from all right, title, interest, estate, and claim forever of defendant, Jennie Sharp; that the defendant, Jennie Sharp, is not entitled to and shall not have any claim, right, title, interest or estate in or to any property, real or personal, owned by the plaintiff, and whatever property, real or personal, he owns is hereby declared and decreed to be his absolutely and free from any claim, interest, or estate of the defendant."

After introducing these records the plaintiff rested, whereupon the defendant sought to prove that the land in question was bought with money belonging to her. This proof was by the trial court refused. She then sought to prove that the decree of the Oregon court was obtained by fraud, which proof was likewise refused.

The principal questions arise upon the contentions that the circuit court of Umatilla county, Oregon, was without jurisdiction, even upon personal appearance, to render any decree which would affect the title to lands in Oklahoma; that the decree rendered did so attempt to affect the title to land in this state, and that it was therefore void, and not within the protection of the full faith and credit clauses of the Constitution of the United States. No question is here made of the propriety of the Oregon court considering the answer and cross petition of the defendant, in an action for divorce, or of the reply of the plaintiff, in which he sought to have the land in Oklahoma vested in him. The sole question is made, upon the one hand, that the Oregon court had no jurisdiction to render the de-

crees which it did, and, upon the other hand, that the decree rendered operated purely in personam; that the Oregon court, having jurisdiction of both parties, was competent to make such a decree, and that it is therefore res judicata of the same question in the instant case.

In examining the various contentions here made we may primarily rest our decision upon certain well-established principles:

First. The judgment of a court, rendered without jurisdiction, is void. That is elementary in all courts. The effect of such a judgment was but recently declared by this court in *Jefferson v. Gallagher*, — Okla. —, 150 Pac. 1071.

Second. The jurisdiction which is the fundamental requisite to a valid judgment is of three sorts: (1) Jurisdiction of the parties; (2) jurisdiction of the general subject-matter; (3) jurisdiction of the particular matter which the judgment professes to decide. *Jefferson v. Gallagher*, supra.

Third. The jurisdiction of any court exercising authority over any subject may be inquired into in every other court when the proceedings of the former are relied on and brought before the latter by a party claiming the benefit of such proceedings. This right of examination into jurisdiction is not confined alone to domestic judgments, but extends as well to the judgments of the courts of sister states. This doctrine was recognized in the Supreme Court of the United States in *Elliott v. Peirsol*, 1 Pet. 329, 7 L. ed. 165, and has been followed in many cases, among them *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897; *Haddock v. Haddock*, 201 U. S. 562, 50 L. ed. 867, 26 Sup. Ct. Rep. 525, 5 Ann. Cas. 1; *Hart v. Sansom*, 110 U. S. 151, 28 L. ed. 101, 3 Sup. Ct. Rep. 586; *Carpenter v. Strange*, 141 U. S. 87, 35 L. ed. 640, 11 Sup. Ct. Rep. 960; and *Fall v. Eastin*, 215 U. S. 1, 54 L. ed. 65, 23 L.R.A.(N.S.) 924, 30 Sup. Ct. Rep. 3, 17 Ann. Cas. 853. It was announced by this court in *Southern Pine Lumber Co. v. Ward*, 16 Okla. 131, 85 Pac. 459; *Earl v. Earl*, — Okla. —, 149 Pac. 1179, and *Re Moore*, — Okla. —, 152 Pac. 378.

Fourth Jurisdiction to render a judgment in rem inheres only in the courts of the state which is the situs of the res. *Watkins v. Holman*, 16 Pet. 25, 10 L. ed. 873; *Harrison v. Harrison*, L. R. 8 Ch. 342, 42 L. J. Ch. N. S. 495, 28 L. T. N. S. 545, 21 Week. Rep. 164, 490; *Davis v. Headley*, 22 N. J. Eq. 115; *Clopton v. Booker*, 27 Ark. 482; *Williams v. Nichol*, 47 Ark. 254, 1 S. W. 243; *Winn v. Strickland*, 34 Fla. 610, 16 So. 606; *Poindexter v. Burwell*, 82 Va. 507; *Cooper v. Ives*, 62 Kan. 395, 63 L.R.A.1917F.

Pac. 434; *Smith v. Smith*, 174 Ill. 52, 43 L.R.A. 403, 50 N. E. 1093.

Fifth. A court of chancery acting in personam may by its decree adjudicate the rights of the parties before it, even though such rights relate to lands in another state; but it may only make such decree effective by requiring, through process for contempt or otherwise, a conveyance by the party of the lands in question, thus indirectly affecting the title to the land in the foreign state; but it has no power, by mere force of its decree, to establish the title to such lands, or, in the absence of a conveyance by the party, to direct its master commissioner to execute a deed in his stead. See the voluminous notes to *Proctor v. Proctor*, 69 L.R.A. 673; *Fall v. Eastin*, supra, as reported in 23 L.R.A.(N.S.) 924, and *Burton-Lingo Co. v. Patton*, 27 L.R.A.(N.S.) 420; *Hart v. Sansom*, 110 U. S. 151, 28 L. ed. 101, 3 Sup. Ct. Rep. 586, and *Carpenter v. Strange*, 141 U. S. 87, 35 L. ed. 640, 11 Sup. Ct. Rep. 960. This doctrine is succinctly stated in *Fall v. Eastin*, 215 U. S. 1, 54 L. ed. 65, 23 L.R.A.(N.S.) 924, 30 Sup. Ct. Rep. 3, 17 Ann. Cas. 853, supra, as follows: "But this legislation does not affect the doctrine which we have expressed, which rests, as we have said, on the well-recognized principle that, when the subject-matter of a suit in a court of equity is within another state or country, but the parties within the jurisdiction of the court, the suit may be maintained and remedies granted which may directly affect and operate upon the person of the defendant, and not upon the subject-matter, although the subject-matter is referred to in the decree, and the defendant is ordered to do or refrain from certain acts toward it, and it is thus ultimately but indirectly affected by the relief granted. In such case the decree is not of itself legal title, nor does it transfer the legal title. It must be executed by the party, and obedience is compelled by proceedings in the nature of contempt, attachment, or sequestration. On the other hand, where the suit is strictly local, the subject-matter is specific property, and the relief, when granted, is such that it must act directly upon the subject-matter, and not upon the person of the defendant, the jurisdiction must be exercised in the state where the subject-matter is situated. 3 Pom. & Eq. Jur. §§ 1317, 1318, and notes."

Examining the decree of the Oregon court in the light of these principles, we come to the contentions of the defendant in error: First, that the decree does not attempt to vest any title to lands in Oklahoma, but inasmuch as the plaintiff (defendant in error here) was already the holder of the legal title, that title is not

varied, changed, or affected, but only the alleged personal rights of the defendant are denied; second, that even if the decree be taken as affecting the title to lands in Oklahoma, only that much of the decree is invalid, and the determination of the rights of the parties upon the principle of res judicata should preclude the determination of the same rights here, leaving the enforcement of such rights to the local courts.

Upon the first contention similar facts to those of the instant case appear not to have been passed upon in any decision which we have examined, in that the cases cited uniformly considered judgments where some change in the legal title to real property was involved, while here, the legal title, being already in the plaintiff, was but confirmed. The primary essential question for determination seems to be whether or not the decree of the Oregon court affects the title to real estate in Oklahoma. The Oregon court found that plaintiff was entitled to a judgment "decreeing and declaring that this plaintiff is the owner of all of said real property in Umatilla county, Oregon, and in Orchard park addition to Oklahoma City in the state of Oklahoma, and the defendant has and shall have no right, title, interest, or estate in and to any of said real property hereafter;" and decreed that "plaintiff, Landis Sharp, is the owner of . . . all of lot numbered 26, in block numbered 5, in Orchard park addition to Oklahoma City in the state of Oklahoma, free from all rights, title, interest, estate, and claim forever of defendant, Jennie Sharp. . . ."

It thus appears that the Oregon court did not attempt to render a judgment in personam, in so far as the real estate was concerned, but in form, at least, rendered a judgment in rem. But it is said that, having found, as it did, that Jennie Sharp was not entitled to any interest in the real estate, it would have been a useless thing to decree that she should execute a deed or release of her interest when she had no interest to convey. This argument has some force, but nevertheless it seems that the decree of the Oregon court does in fact, not through any act required of the person, Jennie Sharp, but through the force of the decree itself, determine the validity of the asserted rights of Jennie Sharp in and to the real estate, and thus, not indirectly but directly, affects the title or status of lands in Oklahoma. Otherwise of what force is the decree when introduced in the instant case? Jennie Sharp is asserting an equitable title to the Orchard Park property. To meet this assertion Landis Sharp introduces the record of the Oregon decree, L.R.A.1917F.

claiming that it bars Jennie Sharp's asserted rights. Its effect, so taken, is to establish Landis Sharp's title, yet this is the very thing which the Supreme Court of the United States in *Hart v. Saneom*, 110 U. S. 151, 28 L. ed. 101, 3 Sup. Ct. Rep. 586, said a court of equity could not do. "But in such a case, as in the ordinary exercise of its jurisdiction, a court of equity acts in personam, by compelling a deed to be executed or canceled by or in behalf of the party. It has no inherent power, by the mere force of its decree, to annul a deed, or to establish a title."

We conclude, therefore, that the effect of the Oregon decree, in so far as it related to the real estate, was to establish the title to lands in Oklahoma, and thus far it was beyond the jurisdiction of that court, *coram non judice*, and void.

The second contention above referred to appears to be concluded against the defendant in error by the discussion of the case of *Dull v. Blackman*, 169 U. S. 243, 42 L. ed. 733, 18 Sup. Ct. Rep. 333 (cited by defendant in error), and *Burnley v. Stevenson*, 24 Ohio St. 474, 15 Am. Rep. 621, contained in *Fall v. Eastin*, 215 U. S. 1, 54 L. ed. 65, 23 L.R.A.(N.S.) 924, 30 Sup. Ct. Rep. 3, 17 Am. Cas. 853, *supra*. In *Burnley v. Stevenson*, *supra*, the defendant had received a conveyance made by a master commissioner under order of the Kentucky court in a suit for specific performance of contract. The conveyance was of lands in Ohio. The defendant, in the Ohio court, asserted title under this deed. It was held that the Kentucky court had no power by its decree to affect the title to lands in Ohio, and that if the court could not so affect the lands by its decree, it could not do so by deed of its commissioner, but that the decree bound the consciences of the parties and was a record of the equities which preceded it, and that the validity of the decree, in so far as it determined the equitable rights of the parties, should be upheld and enforced in the Ohio court. But the Supreme Court of the United States, apparently with reluctance, felt itself bound by force of its prior decisions to deny the doctrine of *Burnley v. Stevenson*, and with the same reluctance we follow the decision of the Supreme Court.

Upon the whole case, aside from the decision in *Fall v. Eastin*, *supra*, to which we have referred, *Carpenter v. Strange*, 141 U. S. 87, 35 L. ed. 640, 11 Sup. Ct. Rep. 900, and *Fire Asso. v. Patton* (*Burton-Lingo Co. v. Patton*), 15 N. M. 304, 27 L.R.A.(N.S.) 420, 107 Pac. 679, are not inapplicable. In *Carpenter v. Strange*, a court of New York, having jurisdiction of

all the parties, had declared void a deed to lands in Tennessee, and that the defendant took no title under it. The Tennessee court refused recognition of the judgment. On appeal the Supreme Court of the United States said: "A judgment in a state court against an executrix, declaring a deed from the testator to her of land in another state void as to a debt due from the testator to the plaintiff, but not directing a conveyance of the land, does not annul the title to the land, and is not binding upon the courts of the other state so far as to compel them to surrender jurisdiction over the land, which is exclusively subject to the laws and jurisdiction of the courts of the latter state."

And, again: "To declare the deed to Mrs. Strange null and void, in virtue alone of the decree in New York, would be to attribute to that decree the force and effect of a judgment in rem by a court having no jurisdiction over the res."

In *Burton-Lingo Co. v. Patton*, supra, a Texas court in a suit in which all parties were before it, had declared void a release of a mechanic's lien covering lands in New Mexico. Later, in a suit in New Mexico between the same parties, it was sought to foreclose the lien, and the decree declaring the release void was pleaded as *res judicata* of that question, but the supreme court of New Mexico, reviewing the decisions of the Supreme Court of the United States, held that, inasmuch as the Texas court acted by force of its decree alone, and not through any compulsion of the parties, the decree was not conclusive in New Mexico.

In each of the above cases it will be seen that the former legal title was established

as against a subsequent conveyance or release of such title. Here the legal title is established against an asserted equitable title. We do not conceive, however, that the principles are at all different.

So we have concluded, also reluctantly, that, being not compelled by force of the constitutional provisions to give full faith and credit to the Oregon decree, we are concluded from affording it that effect through comity. In this state judgments void for lack of jurisdiction may be attacked or set aside in proper proceedings, by any party in interest at any time. The defendant had this right under our statutes. To concede, through comity, full faith and credit to the Oregon decree, would be to deny defendant's rights and to confer upon that court, by judicial fiat, a jurisdiction which it does not have. However desirable it may be to have an end of litigation, and however strongly we may feel that in the instant case the plaintiff in error in good conscience ought to be bound by the Oregon decree, it seems that considerations of this nature should be referred rather to the legislature than the courts.

For errors in holding the Oregon decree conclusive and refusing plaintiff in error opportunity to establish her asserted equitable right, the decree of the Supreme Court of Oklahoma County is reversed for further proceedings not inconsistent with this opinion.

Per Curiam:

Adopted in whole.

Petition for rehearing denied February 20, 1917.

WEST VIRGINIA SUPREME COURT OF APPEALS.

EFFIE LYNCH et al., Appts.,

v.

LOLA M. DAVIS et al.

(— W. Va. —, 92 S. E. 427.)

Mines — joint oil lease — division of royalty.

Where the several owners of adjoining tracts of land unite in a single lease thereof to a third party for oil and gas purposes,

Headnote by RUTZ, J.

Note. — The question as to the construction of oil and gas leases which cover different tracts of land owned in severalty by different persons is the subject of a note appended to *Nabors v. Producers' Oil Co.* L.R.A.1917D, 1115. L.R.A.1917F.

in which such lands are described as a single tract, and provision is made for the delivery of one eighth of the oil produced to the lessors, all of the royalty oil so delivered must be divided among the lessors in the proportion that the area of the tract of land owned by each of them bears to the total area of the tract covered by the lease, regardless of the ownership of the tract, or tracts, of land upon which the well, or wells, may be drilled from which such oil is produced.

For other cases, see *Mines*, II. b, 4, a, in Dig. 1-52 N. S.

(January 23, 1917.)

APPEAL by plaintiffs from a decree of the Circuit Court for Harrison County in favor of defendant Davis in a suit for the partitioning of royalty oil among the respective interests of the parties. Reversed. The facts are stated in the opinion.

Messrs. Millard F. Snider, Charles W. Louchery, and George M. Hoffheimer, for appellants:

A lease of two or more tracts of land owned in severalty, but leased in a single lease, wherein they are described as a single tract, is a joint lease, and in the absence of an agreement as to the division of the royalty it is to be divided in proportion to the areas of the several tracts, though the well is drilled on but one of them.

Harness v. Eastern Oil Co. 49 W. Va. 232, 38 S. E. 662; South Penn Oil Co. v. Snodgrass, 71 W. Va. 449, 43 L.R.A. (N.S.) 848, 76 S. E. 961; Rymer v. South Penn Oil Co. 54 W. Va. 530, 46 S. E. 559; Wetengel v. Gormley, 160 Pa. 559, 40 Am. St. Rep. 733, 28 Atl. 934, 18 Mor. Min. Rep. 93, 184 Pa. 854, 39 Atl. 57, 19 Mor. Min. Rep. 213; Higgins v. California Petroleum & Asphalt Co. 109 Cal. 304, 41 Pac. 1087; Northwestern Ohio Natural Gas Co. v. Ulery, 68 Ohio St. 259, 67 N. E. 494, 22 Mor. Min. Rep. 647.

The intention of the owners of several parcels of land who join in an oil and gas lease, that the royalty shall be divided proportionately, irrespective of the ownership of the parcel on which the oil or gas is produced, is manifested by the peculiar attributes of the subject-matter of the lease.

Uhl v. Ohio River R. Co. 51 W. Va. 106, 41 S. E. 340; Carnegie Natural Gas Co. v. South Penn Oil Co. 56 W. Va. 402, 49 S. E. 548; Raleigh Lumber Co. v. Wilson, 69 W. Va. 598, 72 S. E. 651; Bettman v. Harness, 42 W. Va. 433, 36 L.R.A. 566, 26 S. E. 271, 18 Mor. Min. Rep. 500; South Penn Oil Co. v. Knox, 68 W. Va. 362, 69 S. E. 1020; Prichard v. Freeland Oil Co. 75 W. Va. 450, L.R.A.1915D, 1186, 84 S. E. 945; Locke v. Russell, 75 W. Va. 602, 84 S. E. 948; Jennings v. Southern Carbon Co. 73 W. Va. 215, 80 S. E. 368; Huggins v. Daley, 48 L.R.A. 320, 40 C. C. A. 12, 99 Fed. 606, 20 Mor. Min. Rep. 377; Brewster v. Lanyon Zinc Co. 72 C. C. A. 213, 140 Fed. 801; Brown v. Spilman, 155 U. S. 665, 39 L. ed. 304, 15 Sup. Ct. Rep. 245; Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 720, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466; Ohio Oil Co. v. State, 150 Ind. 698, 50 N. E. 1125; Manufacturers' Gas & Oil Co. v. Indiana Natural Gas & Oil Co. 155 Ind. 461, 50 L.R.A. 768, 57 N. E. 912, 20 Mor. Min. Rep. 672; Louisville Gas Co. v. Kentucky Heating Co. 117 Ky. 71, 70 L.R.A. 558, 111 Am. St. Rep. 225, 77 S. W. 368, 4 Ann. Cas. 353; Grass v. Big Creek Development Co. 75 W. Va. 719, L.R.A.1915E, 1057, 84 S. E. 750; McGraw Oil & Gas Co. v. Kennedy, 65 W. Va. 595, 28 L.R.A. (N.S.) 959, 64 S. E. 1027; Core v. New York Petroleum Co. 52 W. Va. 276, 43 S. E. 128; L.R.A.1917F.

Ammons v. South Penn Oil Co. 47 W. Va. 610, 35 S. E. 1004; Gain v. South Penn Oil Co. 76 W. Va. 769, L.R.A.1916B, 1002, 86 S. E. 883; Barnard v. Monongahela Natural Gas Co. 216 Pa. 362, 65 Atl. 801; Kelley v. Ohio Oil Co. 57 Ohio St. 317, 39 L.R.A. 765, 63 Am. St. Rep. 721, 49 N. E. 399; Parish Fork Oil Co. v. Bridgewater Gas Co. 51 W. Va. 583, 59 L.R.A. 566, 42 S. E. 655, 22 Mor. Min. Rep. 145; Gadbury v. Ohio & I. Consol. Natural & Illuminating Gas Co. 162 Ind. 9, 62 L.R.A. 895, 67 N. E. 259, 22 Mor. Min. Rep. 680; Crawford v. Ritchey, 43 W. Va. 252, 27 S. E. 220; Steelsmith v. Gartlan, 45 W. Va. 27, 44 L.R.A. 107, 29 S. E. 978, 19 Mor. Min. Rep. 315; Jennings v. Southern Carbon Co. 73 W. Va. 215, 80 S. E. 368; Chandler v. French, 73 W. Va. 658, L.R.A.1915B, 561, 81 S. E. 825; Carper v. United Fuel Gas Co. — W. Va. —, L.R.A. 1917A, 171, 89 S. E. 12; Flat Top Grocery Co. v. Bailey, 62 W. Va. 84, 57 S. E. 302; Reed v. Bachman, 61 W. Va. 452, 123 Am. St. Rep. 906, 57 S. E. 769; Parker v. Brast, 45 W. Va. 399, 32 S. E. 269; Sommers v. Bennett, 68 W. Va. 157, 69 S. E. 690; 20 Cyc. 492; Forrer v. Forrer, 29 Gratt. 134; Mitchell v. Reed, 61 N. Y. 123, 19 Am. Rep. 252; McKinley v. Lynch, 58 W. Va. 44, 51 S. E. 4; Krebs v. Blankenship, 73 W. Va. 539, 80 S. E. 948; Kyle v. Griffin, 76 W. Va. 214, 85 S. E. 559; 23 Cyc. 455; Bond v. Taylor, 68 W. Va. 317, 69 S. E. 1000.

The intention of the lessors that the royalty should be divided proportionally, irrespective of the parcel on which oil or gas was produced, is evidenced by their situation and relationship.

Hall v. Vernon, 47 W. Va. 295, 49 L.R.A. 464, 81 Am. St. Rep. 791, 34 S. E. 764; Robertson Consol. Land Co. v. Paull, 63 W. Va. 249, 59 S. E. 1085, 15 Ann. Cas. 775; Dangerfield v. Caldwell, 81 C. C. A. 400, 151 Fed. 554; Preston v. White, 57 W. Va. 278, 50 S. E. 236; Huggins v. Daley, 48 L.R.A. 320, 40 C. C. A. 12, 99 Fed. 606, 20 Mor. Min. Rep. 377.

The terms of the lease are such as to show an intention of the lessors to divide the royalty proportionally, irrespective of the parcel on which the oil or gas was produced.

Carnegie Natural Gas Co. v. South Penn Oil Co. 56 W. Va. 402, 49 S. E. 548; Uhl v. Ohio River R. Co. 51 W. Va. 106, 41 S. E. 340; Parish Fork Oil Co. v. Bridgewater Gas Co. 51 W. Va. 583, 59 L.R.A. 566, 42 S. E. 655, 22 Mor. Min. Rep. 145; Waldron v. Pigeon Coal Co. 61 W. Va. 280, 56 S. E. 492; Taylor v. Buffalo Collieries Co. 72 W. Va. 353, 78 S. E. 27; Weekley v. Weekley, 75 W. Va. 280, 83 S. E. 1005; Culpeper Nat. Bank v. Wrenn, 115 Va. 55, 78 S. E. 620;

South Penn Oil Co. v. Knox, 68 W. Va. 362, 69 S. E. 1020; Ashland Coal & Coke Co. v. Hull Coal & Coke Corp. 67 W. Va. 503, 68 S. E. 124; Smith v. Ramsey, 116 Va. 538, L.R.A. —, —, 82 S. E. 189; Carper v. United Fuel Gas Co. — W. Va. —, L.R.A. 1917A, 171, 89 S. E. 12; Conklyn v. Shenandoah Mill. Co. 68 W. Va. 567, 70 S. E. 274; Rymer v. South Penn Oil Co. 54 W. Va. 530, 46 S. E. 559; Jarrett v. Johnson, 11 Gratt. 327; Irvin v. Stover, 67 W. Va. 356, 67 S. E. 1119; Smith v. Alderson, 116 Va. 986, 83 S. E. 873.

It was proved by a preponderance of the evidence that the fractions were present in the lease at the time of its execution. The burden was on Lola M. Davis, who alleged it, to prove that the lease was altered by insertion of the fractions after its execution.

Ramsey v. McCue, 21 Gratt. 349; United States v. Linn, 1 How. 104, 11 L. ed. 64; Hanrick v. Patrick, 119 U. S. 156, 30 L. ed. 396, 7 Sup. Ct. Rep. 147; Newman v. King, 54 Ohio St. 273, 35 L.R.A. 471, 56 Am. St. Rep. 705, 43 N. E. 688; Wicker v. Jones, 159 N. C. 102, 40 L.R.A. (N.S.) 69, 74 S. E. 801, Ann. Cas. 1914B, 1083; Rankin v. Tygard, 119 C. C. A. 591, 198 Fed. 795; 3 Jones, Ev. §§ 563, 564; 2 Am. & Eng. Enc. Law, 2d ed. 272.

Mr. Taney Harrison, for appellee:

Petroleum oil and natural gas are minerals, and while in the earth are a part of the realty. Oil and gas taken from a well on a particular tract of land belong to the owner of that tract even though the contract under which the well was drilled included other tracts of land.

Williamson v. Jones, 39 W. Va. 231, 25 L.R.A. 222, 19 S. E. 436; Rymer v. South Penn Oil Co. 54 W. Va. 530, 46 S. E. 559; Wilson v. Youst (Wilson v. Hughes) 43 W. Va. 826, 39 L.R.A. 292, 28 S. E. 781; Haskell v. Sutton, 53 W. Va. 206, 44 S. E. 533; Lawson v. Kirchner, 50 W. Va. 344, 40 S. E. 344, 21 Mor. Min. Rep. 683; Carter v. Tyler County Ct. 45 W. Va. 806, 43 L.R.A. 725, 32 S. E. 216; Jamison Coal & Coke Co. v. Carnegie Natural Gas Co. — W. Va. —, 87 S. E. 453; Reynolds v. Whitescarver, 66 W. Va. 388, 66 S. E. 518; Bettman v. Harness, 42 W. Va. 433, 36 L.R.A. 566, 26 S. E. 271, 18 Mor. Min. Rep. 500; Ohio Fuel Co. v. Burdett, 72 W. Va. 803, 79 S. E. 667, Ann. Cas. 1915D, 1033; Kelley v. Ohio Oil Co. 63 Am. St. Rep. 721, and note, 57 Ohio St. 317, 39 L.R.A. 765, 49 N. E. 399; Northwestern Ohio Natural Gas Co. v. Ullery, 68 Ohio St. 258, 67 N. E. 494, 22 Mor. Min. Rep. 647; Archer, Oil & Gas, p. 893; Thornton, Oil & Gas, §§ 19, 20.

A lease including separate tracts is joint L.R.A.1917F.

as between lessors and lessee, and the lessors may divide the royalty.

South Penn Oil Co. v. Snodgrass, 71 W. Va. 438, 43 L.R.A. (N.S.) 848, 76 S. E. 961; Harness v. Eastern Oil Co. 49 W. Va. 232, 38 S. E. 662; Archer, Oil & Gas, p. 882.

Oil and gas being real estate, a conveyance of them in their natural state in the earth requires all the formalities of a conveyance of any other interest in the same real estate.

Thornton, Oil & Gas, §§ 19, 20; Floyd v. Duffy, 68 W. Va. 339, 33 L.R.A. (N.S.) 883, 69 S. E. 993; Pifer v. Brown, 43 W. Va. 412, 49 L.R.A. 497, 27 S. E. 399; Comley v. Ford, 65 W. Va. 429, 64 S. E. 447; South Penn Oil Co. v. McIntire, 44 W. Va. 296, 28 S. E. 922; Slaven v. Riley, 78 W. Va. 76, 79 S. E. 1024; Weekley v. Wagner, 76 W. Va. 236, 85 S. E. 248; Wiseman v. Crislip, 72 W. Va. 340, 78 S. E. 107; Central Land Co. v. Laidley, 32 W. Va. 134, 3 L.R.A. 826, 25 Am. St. Rep. 797, 9 S. E. 61; Titchenell v. Titchenell, 74 W. Va. 237, 81 S. E. 978; Rosenour v. Rosenour, 47 W. Va. 554, 35 S. E. 918; Simpson v. Belcher, 61 W. Va. 167, 56 S. E. 211; Amick v. Ellis, 53 W. Va. 421, 44 S. E. 257; Waldron v. Harvey, 54 W. Va. 608, 102 Am. St. Rep. 959, 46 S. E. 603; McNeeley v. South Penn Oil Co. 52 W. Va. 616, 62 L.R.A. 562, 44 S. E. 508.

Ritz, J., delivered the opinion of the court:

In the year 1898, by the death of their mother, Effie Lynch, Ida B. Davis, Anna L. Spindle, Ella Meek, Rufus H. Randolph, and Lola M. Davis became the owners of 54 acres of land situate in the county of Harrison. Subsequently Rufus H. Randolph conveyed his one-sixth interest in this tract of land to his sister Effie Lynch. In the year 1895 the owners of the land decided to partition the same in kind among themselves, and to this end they secured the services of a surveyor, who went upon the land and divided it into six equal parcels. The parties then assigned one of these parcels to each of the owners, except that to Effie Lynch there were assigned two of said parcels because of her said purchase of the interest of her brother. At the same time deeds were made between the parties, conveying to them, respectively, the interests thus assigned, and these deeds were signed by all of the interested parties and acknowledged as to all of them, with the exception that the deed conveying the part thus assigned to Lola M. Davis was not acknowledged, or at any rate the notary public did not sign the certificate of acknowledgment. However, subsequent to this time the par-

ties treated the several parcels of land as owned by them in severalty. They sold parcels from it. The share of each was charged on the land books to the proper owner and the taxes paid, and ever since this partition was made the several parcels have been treated as being owned by the parties in severalty. In the year 1913 the five sisters executed to their brother, Rufus H. Randolph, an oil and gas lease covering the whole of the property. The lease is by its terms the joint lease of all of the parties, covering the whole tract of land, and describing it as a single parcel, and no indication is made in the lease of any holding of any part of it in severalty. The lease provides that the lessee shall have the right to explore the tract of land for oil, and to take the oil therefrom should oil be discovered, and deliver to the lessors one eighth of any oil produced from said leased premises. In all respects this lease treats the tract of land as if it were owned by the five sisters jointly and had never been partitioned by them. This lease was transferred by the lessee therein named to others, and a well which produced oil was drilled upon the parcel which had theretofore been assigned to Lola M. Davis. Upon the completion of this well the parties signed an order called a "division order," directing the pipe line company to deliver seven eighths of the oil to the operator and one eighth of it to Effie Lynch and others, naming the other parties interested with Effie Lynch. At the same time they executed a power of attorney to a bank, authorizing the bank to act for them in the sale of the one eighth of the oil so to be delivered to them, and in the receipt thereof. At this time there was a question raised by Lola M. Davis as to the interest of the several parties in this oil, she then making the contention that she was entitled to receive all of the oil, inasmuch as the well from which it was produced was upon her land, and the other parties claiming that it should be divided among them in the proportions in which each of them was interested in the whole tract. It was at this time determined that the rights of the parties in this regard were fixed by the lease, and in this conclusion they were correct. On account of this dispute between the parties the bank to whom the power of attorney was executed refused to act under it, and this suit was then instituted in the circuit court of Harrison county for the purpose of partitioning the oil among the five interests above referred to. The defendant Lola M. Davis answered the bill, and claimed that she was entitled to all of this oil, inasmuch as it was produced from a well drilled upon the land which had been assigned to her.

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The first contention made by the plaintiffs who are seeking to have the oil divided among the interested parties in accordance with the interest held by each in the whole tract of land is that the attempt to partition the land in 1905 was ineffective in so far as the defendant Lola M. Davis was concerned, because the deed from themselves, attempting to convey the interest to her in severalty, was not acknowledged before an officer authorized to take acknowledgments of deeds, or, at any rate, that the acknowledgment thereto was never signed by such officer. It is admitted that ever since said time the parties have held the tracts of land assigned to them in severalty. None of them have in any way interfered with the possession, control, use, or ownership of the parcels assigned to the others. Under this state of facts there is no merit in the contention of the appellants that the partition was ineffective to vest the title to the tract assigned to the defendant Lola M. Davis in her in severalty. Possession of the premises assigned to them, respectively, was given to each of the parties. They exercised uninterrupted ownership and control over such premises from the time of such partition, and still continue to so treat the said land, and in view of this no deed or deeds were necessary to make this partition effective between the parties. *Frederick v. Frederick*, 31 W. Va. 566, 8 S. E. 295.

This brings us to a consideration of the only other question involved in this case, and that is, where several parties own several distinct parcels of land and join in a lease for gas and oil covering all of the several parcels so owned by them, and lease the same as one boundary, and make no provision for the payment of royalty to them separately, are each of such owners entitled to the oil produced from a well drilled on the tract so owned by him, or do all of the parties participate in the royalty derived from the oil produced from a well, no matter upon which parcel of said land the same may be drilled? This seems to be a question of first impression in this state. We have cases which hold that, where a lease like this is made, the drilling of a well by the lessee upon any one of the tracts, and the production of oil therefrom, will vest in him the right to produce oil from all of the tracts so covered by such lease.

In the case of *Harness v. Eastern Oil Co.* 49 W. Va. 232, 38 S. E. 662, two tracts of land, containing 152 acres and 35½ acres, were owned by Harness and his wife, respectively. They joined in a lease of the two tracts, describing them as one tract of land, containing 187½ acres, more or less. A well was drilled on the tract of 152 acres owned by Harness, and it was held that the drill-

ing and production of oil from this well was sufficient to maintain the lease in force as to the 35½-acre tract belonging to Mrs. Harness.

In the case of *South Penn Oil Co. v. Snodgrass*, 71 W. Va. 438, 43 L.R.A. (N.S.) 848, 76 S. E. 961, three persons owned, respectively, three contiguous tracts of 329 acres, 143 acres, and 217½ acres. They executed a single lease covering all of them, and described the premises as a single tract of 600 acres, more or less. Later, two of the lessors conveyed parts of their land to two other persons. A well was drilled on one of the three tracts, but none on the other two. The owners of the two tracts upon which no wells were drilled attempted to lease to other parties, and upon a bill filed by the original lessee to cancel these subsequent leases it was held that the drilling of a well on one of the tracts of land was a sufficient compliance with the requirements of the lease to preserve the rights of the lessee as to all of said tracts, and that as to this requirement, to wit, that oil would be produced within a certain number of years, the lease was a joint lease. From these cases, as well as from some others in which the question arose, it is settled that as between the lessors and the lessee in a case like the one at bar the lease will be treated as a joint contract, and not a contract requiring the lessee to perform its covenants with each of the lessors, or in relation to the estate of each of the lessors.

For the purpose of construing this lease we must assume that when the parties made it they did so with knowledge of the construction placed upon such contracts by this court in the cases above cited, and we must further assume that they knew of the vagrant character of oil in place. We are not aided here by any acts of the parties done under the lease, nor by any construction given the lease by the parties themselves, but must construe the paper upon its face.

If we give this lease the construction contended for by the defendant *Lola M. Davis*, that is, that she is entitled to all of the oil produced from the well drilled upon her land, we say that the drilling of such a well is sufficient performance upon the part of the lessee to keep alive his rights under the lease as to the lands of all of the lessors, and that, because of the vagrant character of this substance, the whole thereof may be extracted through a well or wells so located, and the lands of the other parties entirely devastated of the oil and gas underlying the same, without any compensation to them whatever. It is contended that a more reasonable construction of this paper is that the parties, knowing the rights of the lessee

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under the lease, as laid down in the decisions above referred to, and being acquainted with the fugitive and vagrant character of oil and gas in place, for convenience leased their several tracts of land as one tract, contemplating that whatever oil was produced from the whole tract of land should be paid for to them jointly. In fact, this is the language of the lease. It provides for the payment to the lessors of the one eighth of the oil produced from the land. It is not likely that these parties would have made this lease in the form that they did had they believed that one of them might receive all of the compensation to be derived from the production of oil. The several tracts of land were small, and it could easily be seen that the oil underlying the combined area could be produced more cheaply by treating it as one tract of land than it could if each of the tracts was leased separately. Under this lease the production of oil from a well on one of the tracts has vested in the lessee the right to extract the oil from all of the tracts, and we know that from its character the oil and gas in place under one of the tracts may be extracted from a well drilled on one of the other tracts; and, should we hold that each of the parties is entitled to receive the royalty oil produced from a well or wells drilled on a tract owned by such party, then we in effect say that one of the parties to this contract may be permitted to appropriate the oil and gas of the others without any compensation being paid therefor. We do not think this is a fair construction of the contract. We are of opinion that the contract gave to the lessee the right to explore for oil upon any or all of these tracts of land, and that by the production of oil upon one of said tracts there was vested in said lessee the right to remove the oil from all of said tracts, whether by means of a well, or wells, drilled upon one of them, or more than one of them, and that after the oil was so produced, that the part thereof provided by the contract to be paid to the lessors should be divided among them in the proportion that the parcel of land held by each of them bears to the total area of the tract. This view is supported by the case of *Wettengel v. Gormley*, 160 Pa. 559, 40 Am. St. Rep. 733, 28 Atl. 934, 18 Mor. Min. Rep. 93. In that case the exact question presented here was presented to the supreme court of Pennsylvania, and that court held that the royalty produced should be divided among the parties interested in the proportion that the area of their several tracts bore to the total area involved in the lease. We think the reasoning of the court in that case is sound, and that its judgment was justified by the reasoning given.

In the case of *Higgins v. California Petroleum & Asphalt Co.* 109 Cal. 304, 41 Pac. 1087, there was a lease involved which provided for the mining of liquid asphalt. The lease covered two tracts of land, describing them as a single tract in the lease. The lessee subsequently became the owner of one of these tracts, and then contended that for the liquid asphalt produced from this tract of which it had become the owner it should not be compelled to account to the owner of the other tract. The court held, in construing that lease, that the rental to be paid for the asphalt produced from either of the tracts of land must be divided between the parties in the proportion that the area of their respective tracts bore to the area of the whole tract covered by the lease. It is contended by the appellee that to place this construction upon the contract involved in this case would in effect convey a part of the real estate of Loh M. Davis to her sisters, when there is in the lease no words which would effect such a conveyance. This argument is not well founded. The interpretation we give the contract, instead of having the effect declared, has the effect of preventing one of the parties from securing a part of the estate of the others without procuring a conveyance or paying compensation therefor. If we give this lease the construction contended for by the appellee, because of the fugitive and vagrant character of oil in place, it would permit the lessee by operations upon the land of one of the parties to transfer the oil under the lands of the others, and divert it to the exclusive use of the one upon whose land a well was drilled. It is impossible, of course,

to ascertain from what tract of land the oil actually produced came. We do know, however, that when a well is drilled upon one of these tracts of land the oil produced from it comes, not only from the tract upon which the well is produced, but from the other tracts as well. We know that when these wells are pumped for the oil that the power of suction employed will not stop at the boundary lines. Because of the fact that these parties leased their lands jointly and as one tract, we are justified in the assumption that there is an equal amount of oil under each acre of land so leased. We are further justified in the assumption that the lessee will produce this oil and market it, whether from one well on one tract of land, or a number of wells on different parcels, and that when the royalty oil is divided among the interested parties in the manner above indicated each of the parties will receive what he is entitled to, and what the contract contemplated should be received by each of them.

It follows from what has been said that the decree of the Circuit Court of Harrison County must be reversed, and a decree entered here, partitioning this oil among the parties interested in the proportions indicated in the pleadings, and the cause remanded to the Circuit Court of Harrison County for the purpose of executing such decree as to the funds now in the hands of its special receiver.

Lynch, P., absent.

Petition for rehearing denied May 22, 1917.

KANSAS SUPREME COURT.

GEORGE RAINS et al.

v.

HERMAN WEILER, Impleaded, etc., Appt.

(— Kan. —, 106 Pac. 235.)

Contract — implied — effect.

1. Parties may be as firmly bound by implied contracts as by those expressed in words, oral or written; they may arrive at agreements by acts and conduct which evince a mutual intention to contract, and from which the law implies a contract.

For other cases, see *Contracts*, I. b, in *Dig.* 1-52 N. S.

Headnotes by JOHNSTON, Ch. J.

Note. — The question of the right of a partner to compensation for services rendered to the partnership is treated in the annotation following this case, post, 575. L.R.A.1917F.

Partnership — compensation for services.

2. The general rule is that, in the absence of an agreement, one partner is not entitled to compensation for his services while employed in the partnership business, but where one partner is intrusted with the management of the partnership business, and at the instance of his copartners devotes his whole time and attention to it, while the copartners are attending to their individual business, the case is taken out of the general rule, and from the acts and conduct of the parties the law implies an agreement to pay the active managing partner compensation for his exceptional services.

For other cases, see *Partnership*, V. in *Dig.* 1-52 N. S.

Pleading — custom.

3. Ordinarily, where a party relies upon a custom or usage, it should be specially pleaded, but in an action for a partnership accounting embracing many items, where the defendants answered with a general denial and did not challenge any item because

of the absence of authority or an agreement to charge the firm with the item, the admission of evidence of a uniform, reasonable, and well-settled custom with respect to the item was not error.

For other cases, see Evidence, XIII. a, in Dig. 1-52 N. S.

Trial — order of proof — discretion.

4. The order in which proof is received is largely within the discretion of the trial court, and is not a matter of much consequence where the case is tried by the court without a jury.

For other cases, see Trial, I. c, in Dig. 1-52 N. S.

Partnership — right to borrow money.

5. A manager of a partnership business acting in good faith may borrow money necessary for the conduct of the business instead of making an assessment upon the partners to obtain the necessary money.

For other cases, see Partnership, II. in Dig. 1-52 N. S.

Same — extending business.

6. Likewise such partner in carrying on a mining enterprise may extend the operations of the firm to land in proximity to that previously mined, and the partnership will be bound by the operation if there is an absence of fraud or bad faith.

For other cases, see Partnership, II. in Dig. 1-52 N. S.

(July 7, 1917.)

APPEAL by defendant Weiler from a judgment of the District Court for Cherokee County in plaintiff's favor in a proceeding to obtain an accounting of the affairs of a partnership. Affirmed.

The facts are stated in the opinion.

Messrs. Edward E. Sapp and S. C. Westcott, for appellant:

A partner is not entitled to draw compensation of any kind or character for services rendered the firm, unless there is an agreement to that effect.

30 Cyc. 448, § 17; *Insley v. Shire*, 54 Kan. 793, 45 Am. St. Rep. 308, 39 Pac. 713; *Painter v. Hines*, 86 Kan. 832, 122 Pac. 1036; *Valentin v. Sarrett*, 25 Idaho, 517, 138 Pac. 834; *Williams v. Pedersen*, 47 Wash. 472, 17 L.R.A.(N.S.) 384, 92 Pac. 287; *Peck v. Alexander*, 40 Colo. 392, 91 Pac. 38; *Gaston v. Kellogg*, 91 Mo. 104, 3 S. W. 589; *Galligher v. Lockhart*, 11 Mont. 109, 27 Pac. 446.

A special custom has to be pleaded.

Lewis v. Metcalf, 53 Kan. 219, 36 Pac. 346; *The Governor v. Withers*, 5 Gratt. 24, 50 Am. Dec. 95; *Caldwell v. Dawson*, 4 Met. (Ky.) 121; *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417; *Nonotuck Silk Co. v. Fair*, 112 Mass. 354; *Fowler v. Pickering*, 119 Mass. 33; *Isaksson v. Williams*, 26 Fed. 642; *Pullan v. Cochran*, 6 Ohio Dec. Reprint, 1070; *Gano v. Palo Pinto Co.* 71 Tex. L.R.A.1917F.

99, 8 S. W. 634; *McSherry v. Blanchfield*, 68 Kan. 310, 75 Pac. 121; *Smythe v. Parsons*, 37 Kan. 79, 14 Pac. 444.

There was no right to borrow money without first asking the partners for an assessment.

Bates, Parta. § 329; *Skillman v. Lachman*, 23 Cal. 199, 83 Am. Dec. 96, 11 Mor. Min. Rep. 381; *Jones v. Clark*, 42 Cal. 180, 11 Mor. Min. Rep. 473; *Decker v. Howell*, 42 Cal. 636, 11 Mor. Min. Rep. 492; *Charles v. Eschleman*, 5 Colo. 107, 2 Mor. Min. Rep. 66; *Manville v. Parks*, 7 Colo. 128, 2 Pac. 212, 15 Mor. Min. Rep. 565; *Higgins v. Armstrong*, 9 Colo. 38, 10 Pac. 282; *Judge v. Brasswell*, 13 Bush, 67, 26 Am. Rep. 185, 11 Mor. Min. Rep. 508; *Shaw v. McGregory*, 105 Mass. 96; *Pooley v. Whitmore*, 10 Heisk. 629, 27 Am. Rep. 733.

Messrs. E. B. Morgan and Don H. Elleman, for appellees:

Where one partner devotes his time to the management, control, and prosecution of the business, and another partner devotes no time and gives no attention to the business, the partner so devoting his time and attention is entitled to compensation.

Cramer v. Bachmann, 68 Mo. 310; *Emerson v. Durand*, 64 Wis. 111, 54 Am. Rep. 593, 24 N. W. 129; *Bradford v. Kimberly*, 3 Johns. Ch. 431; *Caldwell v. Leiber*, 7 Paige, 483; *Levi v. Karrick*, 13 Iowa, 344; *Godfrey v. White*, 43 Mich. 171, 5 N. W. 243, 11 Mor. Min. Rep. 562; *Hoag v. Alderman*, 184 Mass. 217, 68 N. E. 199.

Where it is shown that a general uniform usage is established in a trade or line of business, it will be presumed that such usage is a part of any contract or transaction with reference to such trade or business.

3 Cyc. 953; *Seymour v. Armstrong*, 62 Kan. 720, 64 Pac. 612; *Fraser v. Ross*, 1 Penn. (Del.) 348, 41 Atl. 204.

Johnston, Ch. J., delivered the opinion of the court:

This was an action by George Rains, Charles Moore, and Don H. Elleman, as administrators of the estate of Charles Rains, deceased, against Herman Weiler, Charles Sheets, and Fred Gerster, to obtain a partnership accounting. Findings of fact and conclusions of law were made by a referee upon whose report the court rendered judgment against the defendants in favor of plaintiff George Rains. Weiler appeals.

The partnership was known as Rains, Moore, & Company, and for a little over a year and a half operated a mine called the Red Lion mine in Joplin, Missouri. George and Charles Rains each had a three-twentieths interest in the partnership, Moore four tenths, and the defendants each one

tenth. The Red Lion mill was destroyed by fire, and thereafter no mining operations were carried on by the firm. At the end of the partnership business there was a deficit, of which each of the plaintiffs paid his share in proportion to his interest, leaving a balance which was met by George Rains, and the recovery of which is sought from the defendants. There is a dispute as to the amount due from the defendants on the ground that some of the items for which Rains claims credit were not properly chargeable against the partnership. The management of the enterprise was left to George Rains, Moore kept the books of the company, and Sheets worked as a laborer in the mine. The business was financed by Rains and Moore, who also borrowed money at the bank upon their own notes when the partnership was in need of further funds. The other members contributed neither time nor money for the benefit of the partnership, but did accept profits arising from the conduct of the enterprise. During the continuance of the business dividends in the sum of \$6,500 were paid to the partners.

Among the items disputed by the defendants were the sum of \$2,125 paid out as salary to Rains as manager, \$510 paid to Moore as bookkeeper, and \$1,521 paid to Sheets in wages for ordinary labor. While there was testimony that Rains told Weiler that he would charge the firm \$25 per week for his services as manager, the referee found that what was said did not amount to an express agreement, but that the evidence did show an implied agreement to pay him the reasonable value of his services. Testimony was introduced over the objection of the defendants to the effect that there was a custom among miners in that district that, where some of the partners in a project of this character devote their time and effort to the conduct of the business, while others take no part in it, the ones performing the services are to be paid therefor.

Another item complained of was the expenditure of \$135.40 by Rains in prospecting the Ward mine, which was located near the Red Lion. After the Red Lion mill was burned and was not rebuilt, the chance to work the Ward mine was offered to Rains. Thinking that he might thereby make a profit for the partnership, Rains undertook to operate this mine, but after testing it for a few days he abandoned the scheme, seeing that it would not pay. Out of this venture \$46.54 was realized, making a net loss of \$88.86.

The items mentioned were all held by the court to be properly chargeable to the partnership.

The principal controversy on this appeal arises over the allowance of compensation L.R.A.1917F.

to the partners Rains, Moore, and Sheets for their services rendered in the partnership business. Defendant contends that these partners were not entitled to compensation from other members of the firm, because there was no special agreement to that effect. The general rule is that, in the absence of an agreement, a partner is not entitled to compensation for his services while employed in the partnership business. If there is no agreement to the contrary, it is the duty of each partner to contribute his time, skill, and ability so far as the same is reasonably necessary to the conduct of the business, without other compensation than a share of the profits. *Insley v. Shire*, 54 Kan. 793, 45 Am. St. Rep. 308, 39 Pac. 713; *Painter v. Hines*, 86 Kan. 832, 122 Pac. 1036. This rule was recognized by the referee and the trial court; but it was held that the acts and the conduct of the partners and the circumstances surrounding them implied an agreement that compensation was to be paid. In his well-reasoned opinion the referee states that such a contract may be express or it may be implied from the conduct of the parties and the circumstances of the particular partnership, and he found that "the evidence conclusively shows that it was the understanding between all the partners that Mr. Rains was to be the manager of the Red Lion Mining Company; . . . that he was to be the responsible partner, and there was no expectation that the other partners would devote their time to the business."

Apart from this consideration, it was found from the evidence that there was a custom or usage in that mining district to pay for the services of the managing partner, and it follows that such usage entered into and became a part of the partnership agreement. Defendant appears to contend that a partner is not entitled to compensation for services rendered unless there is an express agreement to that effect, and there are authorities that go to that extent. Note in 17 L.R.A.(N.S.) 384. Parties may be as firmly bound by implied contracts as by those expressed in formal language. In some cases parties arrive at agreements by words, either oral or written; and in other cases they arrive at an agreement by acts and conduct showing a mutual intention to contract, and from which the law implies a contract. 6 R. C. L. 587.

In 1 *Addison on Contracts*, 8th ed. p. 54, it is said: "The intention of the parties to any particular transaction may, however, be gathered from their acts and deeds, in connection with the surrounding circumstances, as well as from their words; and the law therefore implies, from the silent language of men's conduct and actions, con-

tracts and promises as forcible and binding as those that are made by express words or through the medium of written memorials."

A case closely in point with this one is *Emerson v. Durand*, 64 Wis. 111, 54 Am. Rep. 593, 24 N. W. 129. There two persons engaged in the business of manufacturing linseed oil, but they made no express agreement relating to the management and control of the business. From the beginning Emerson had the control and management of the business in every detail. He superintended the construction of the mill and the purchasing of machinery, and also superintended the making of additions and improvements. During the ten years that the business was conducted Emerson gave his entire time and attention to the business, while Durand occasionally visited the mill and made some suggestions as to the work, but was occupying a responsible position in another city where he spent most of his time. The labor and care of operating the mill were performed by Emerson. He hired men and paid them, bought flaxseed, and looked after the sale of the products of the mill as well as the finances of the business. The rule that one partner cannot ordinarily charge another partner for his services rendered in the partnership business unless there is an agreement to that effect was duly recognized, but the court stated that "it has its exceptions, founded in wisdom and experience. Where it can be fairly and justly implied from the course of dealing between the partners, or from circumstances of equivalent force, that one partner is to be compensated for his services, his claim will be sustained." 64 Wis. 118.

Applying that doctrine to the facts of the case, the court remarked: "When these facts, and others of a like tendency, are considered, they afford, to our minds, sufficient ground for implying a contract to compensate the plaintiff for his services in the management of the business. It is unreasonable to suppose the parties intended or understood that the plaintiff would give his entire time, attention, skill, and ability to the promotion of the common enterprise, while Mr. Durand, working for an insurance company on a large salary, should really contribute neither time nor attention nor labor, and that both should stand upon the same ground as to profits, and the plaintiff be paid nothing for his services. But, without dwelling longer upon the evidence bearing upon this point, we conclude by saying that a contract to pay for services rendered may be as fairly and incontrovertibly established by the acts and conduct of the parties, in connection with surrounding circumstances, as by words. Such a con-

tract, we think, may reasonably be implied in this case." 64 Wis. 120, 121.

So, here, the plaintiff was an active partner who organized the business and advanced money to start it. He was made general manager and gave his entire time to the management of the business. During the continuance of the business the plaintiff performed this unusual service, while the defendant was engaged in another line of business and gave no time to the partnership business. There was testimony of statements by defendant that he had left the management of the business to the plaintiff and that whatever plaintiff did was satisfactory to him. A case where an active and managing partner devotes his whole time and attention to a partnership business at the instance of other partners who are attending to their individual business and giving no time or attention to the business of the firm presents unusual conditions which take the case out of the general rule as to compensation, and warrants the implication of an agreement to pay compensation. *Lewis v. Moffett*, 11 Ill. 392; *Levi v. Karrick*, 13 Iowa, 344; *Morris v. Griffin*, 83 Iowa, 327, 49 N. W. 846; *Hoag v. Alderman*, 184 Mass. 217, 68 N. E. 199; *Cramer v. Bachmann*, 68 Mo. 310; *Bradford v. Kimberly*, 3 Johns. Ch. 431; *Caldwell v. Leiber*, 7 Paige, 483; *Mann v. Flanagan*, 9 Or. 425; *Hooker v. Williamson*, 60 Tex. 524; *Sheridan v. Healy*, 15 Chicago Leg. News, 104; note, subhead, "Implied Contract," in 17 L.R.A. (N.S.) 412. The same is true as to Moore, who was employed by the manager to keep the books of the firm, and certainly there can be no doubt of the right of Sheets to payment for common labor performed by him in and about the mine under an agreement with the manager.

Complaint is made of the introduction of evidence that a custom or usage existed in the mining district to the effect that partners who devote their time to managing a mine where other partners do not give the business any time or attention are given compensation for their services. The objections to its admission were that it was not pleaded and was not rebuttal, and further that it was not shown that the defendant had knowledge of the same. In the matter of pleading the plaintiffs asked for an accounting of the partnership, and the answer of the defendant was in effect a general denial in which no particular item of the account was challenged. If defendant had answered that there was no liability for services because of the absence of an agreement, the plaintiffs could have set up the prevailing custom which entered into the partnership arrangement. As the pleadings stood, the plaintiffs were entitled to

show the existence of a custom. The custom must, of course, be general and uniform, and cannot be received in evidence if it is contrary to law or to reason. *Smythe v. Parsons*, 37 Kan. 79, 14 Pac. 444; *Clark v. Allaman*, 71 Kan. 206, 70 L.R.A. 971, 80 Pac. 571. Nor is it admissible where it appears that the parties did not contract with reference to the custom. *Lewis v. Metcalf*, 53 Kan. 219, 36 Pac. 346. Here the custom or usage appears to have been general, uniform, and well known in the district in which all the parties resided. As said in *Smythe v. Parsons*, supra: "Parties are always presumed to contract with reference to a uniform and well-settled custom or usage pertaining to the matters concerning which they make the contract, where such custom or usage is not in opposition to well-settled principles of law, nor unreasonable." 37 Kan. 82.

The custom being general and well settled, the defendant is presumed to have known of it and to have contracted with reference to it. It is not opposed to law, and it cannot be said to be unreasonable. It appears to accord with other testimony in the case; that is, the facts and circumstances were such as to show a mutual intention to pay for the exceptional services of the plaintiffs. The result must have been the same without proof of the custom, as an agreement to pay for the services would be implied by law from the acts and conduct of the parties. The usage appears to accord with the common understanding.

Nor is there anything substantial in the objection that it was not proper rebuttal evidence. The order in which proof is re-

ceived is largely within the discretion of the trial court, and it is not regarded as a matter of much consequence, especially where, as here, the case was tried without a jury. *McBride v. Steinweden*, 72 Kan. 508, 83 Pac. 822; *State Bank v. Brecheisen*, 98 Kan. 193, 157 Pac. 259.

Complaint is made of the action of the manager in borrowing money instead of making assessments on the partners, and this question was raised by an objection to the evidence. Where the managing partner acts in good faith, he has the right to borrow money reasonably necessary to carry on the business of the firm instead of resorting to an assessment on the partners. Nothing appears to show bad faith in the action that was taken.

Objection is also made to the allowance of the item of \$88.86, the loss resulting from the operation of the Ward property for a few days. This was likewise within the scope of the powers intrusted to the manager. After the Red Lion mill was burned and the proprietor would not rebuild it, attention was turned to the Ward property, on which there was a mill, but a test of a few days demonstrated that it could not be profitably operated, and the business was suspended. The good faith of the transaction can hardly be questioned.

There was evidence to sustain the special findings of the referee, and no material error is found in the record.

Judgment affirmed.

All the Justices concur.

Petition for rehearing denied.

Annotation—Right of partner to compensation for services rendered to the partnership.

Earlier cases considering the question under annotation will be found in the note to *Williams v. Pederson*, 17 L.R.A. (N.S.) 385.

The general rule, shown in the earlier note, that in the absence of a contract express or implied a partner is not entitled to compensation for services rendered by him to the copartnership, has been adhered to in the following later cases, and other cases subsequently cited in the note: *Peek v. Alexander* (1907) 40 Colo. 392, 91 Pac. 38; *Bishop v. Pendley* (1912) 138 Ga. 738, 76 S. E. 69; *Talbert v. Hamlin* (1910) 86 S. O. 523, 68 S. E. 764; *Gay v. Householder* (1912) 71 W. Va. 277, 76 S. E. 450, Ann. Cas. 1914C, 297; *Kyle v. Griffin* (1915) 76 W. Va. 214, 85 S. E. 559. L.R.A.1917F.

Unequal services—in general.

Supplementing note in 17 L.R.A. (N.S.) p. 391.

The mere fact that one member of a law firm does more of the partnership work than the other, or that his labors are of a more valuable or profitable character, is not a sufficient ground upon which to base a demand for extra compensation. *Roth v. Boies* (1908) 139 Iowa, 253, 115 N. W. 930. See further as to law partnerships, subsequent headings in this note and the earlier note, "Law partnerships."

That a member of a firm rendered exceptional services in selling coal does not entitle him to compensation in the absence of an agreement therefor. *Boothe v. Summit Coal Min. Co.* (1913) 72

Wash. 679, 131 *Pac.* 252, repeating with approval the statement in 22 *Am. & Eng. Enc. Law*, 121, that a partner is not entitled to compensation because he is more active in the business or performs greater or more valuable services than his copartner.

Nor, in the absence of agreement, may a partner recover extra compensation for marketing the products of the firm. *Sandberg v. Scougale* (1913) 75 *Wash.* 313, 134 *Pac.* 1051 (logging enterprise). And in *Blair v. Fraley* (1916) 172 *Ky.* 570, 189 *S. W.* 886, it was held that, as the evidence of an alleged agreement that one partner in land transactions should have extra compensation for his services was not very satisfactory, extra compensation should not have been allowed, although it did appear that he rendered more services in connection with the land than the other partner. The court adhered to the rule that a partner is not entitled to anything extra for any inequality of services rendered by him as compared with those rendered by his copartner, in the absence of clear and convincing evidence of a contract.

— **managing or active partner.**

Supplementing note in 17 *L.R.A.* (N.S.) 394.

See also *infra*, "Contractual right to compensation."

A managing partner is not, in the absence of any agreement, entitled to extra compensation for his services. *Merriam v. Kenderdine Realty Co.* (1915) — *Ont.* —, 25 *D. L. R.* 369.

Compensation because of partner's misconduct.

Supplementing note in 17 *L.R.A.* (N.S.) 395.

Where the partnership contract provides that each partner shall put in his entire time and energy in running and handling the same, and one of the parties fails and neglects to comply with his contract, he should be charged with the services of the other partner during the time he so neglects the business. *Valentin v. Sarrett* (1913) 25 *Idaho*, 517, 138 *Pac.* 834.

Liquidating partner's right to compensation.

Supplementing note in 17 *L.R.A.* (N.S.) 396.

A member of a partnership dissolved by a decree of court, who held real estate in trust for the firm, is not entitled to compensation out of the firm's assets, for managing, controlling, and selling it *L.R.A.* 1917F.

after the dissolution,—especially where parties not members of the firm were interested in the trust property. *Ruggles v. Buckley* (1910) 27 *L.R.A.* (N.S.) 541, 99 *C. C. A.* 773, 175 *Fed.* 57, 20 *Ann. Cas.* 1057, rehearing denied in (1910) 101 *C. C. A.* 547, 177 *Fed.* 395.

So a partner who, upon the sale of the firm's business, voluntarily takes upon himself the duty of liquidation, the firm not having been dissolved, is not entitled to extra compensation for his services, in the absence of an express agreement, even though the services may have been more onerous because of the litigation which arose in the collection of outstanding debts. *Wiggins v. Brand* (1909) 202 *Mass.* 141, 88 *N. E.* 840.

Nor did his partner's request that he close the accounts and attend to the lawsuits subject him to any greater burden than he had assumed already voluntarily, or take the case out of the usual rule. *Ibid.*

And the fact that the receiver of a partnership employs one of the partners at a salary to assist in winding up the affairs of the partnership does not entitle the other partner, who held real estate in trust for the firm, to compensation for caring for and selling the trust property after dissolution of the partnership. *Ruggles v. Buckley* (*Fed.*) *supra*. It was insisted that payment of compensation to the partner as trustee was justifiable because the receiver who had in charge all the business of the firm except the trust lands employed the other partner at a good salary to assist him in that work, and hence it should follow that, since such partner received this compensation, the other partner should be paid for his work as trustee in connection with the trust land business. The court, in stating that there was no force in this insistence, said that the result to such partner was the same whether the receiver employed the other partner or someone else, and furthermore such partner rendered the services under an express agreement for compensation, while the other partner rendered his services as trustee without any such agreement, and without any expectation on the part of the persons in interest to allow him compensation.

An agreement which provides that a partner shall receive a fixed compensation for attending to the business of a firm engaged in active business is terminated by the dissolution of the firm, and precludes such partner, as liquidating partner, from receiving any compen-

sation under such agreement. *Murphy v. Marvel* (1912) 49 Pa. Super. Ct. 576.

—law partnership.

Supplementing note in 17 L.R.A. (N.S.) 398.

But in *Roth v. Boies* (1908) 139 Iowa, 253, 115 N. W. 930, the court, while conceding the general rule that, upon the dissolution of a partnership, each member is under the obligation to perform what work may be necessary for closing out the business without extra compensation, held that in the case of the dissolution of a law partnership, where the work of winding up the firm business is cast on one of the partners, an exception to the rule is proper, and such partner should be allowed extra compensation.

Surviving partner's right to compensation.

Supplementing note in 17 L.R.A. (N.S.) 399.

A surviving partner is not entitled to any compensation for his services in liquidating the partnership affairs. *Livingston v. Livingston* (1912) 26 Ont. L. Rep. 246, 4 D. L. R. 345, affirmed in (1914) 20 D. L. R. 960, appeal dismissed in (1916) 26 D. L. R. (Eng.) 140.

So a partner who, upon the death of one of the members of the firm and upon the other becoming insane, elects not to wind up the affairs of the partnership and dissolve it, as he would have a right to do under the law, but chooses rather to continue its operation, will not be heard to say that the terms upon which he entered the partnership were not sufficiently favorable to him, and that he should have a compensation not originally agreed upon. *Cole v. Cole* (1915) 119 Ark. 48, 177 S. W. 915.

And a surviving partner who continues business under a court order, on the representation that it will be necessary and beneficial, is not entitled to extra compensation where such continuance is against the consent of both the widow and a personal representative of the deceased partner, and no benefit or profit results, and especially where there is a long and unreasonable delay in making a final settlement. *Harrah v. Dyer* (1913) 180 Ind. 229, 102 N. E. 14, Ann. Cas. 1916B, 868.

But a surviving partner of a firm of contractors and builders, who continued the business for the purpose of completing a contract, was held in *Whittaker v. Jordan* (1908) 104 Me. 516, 72 Atl. 682, to be entitled on the accounting to deduct from the profits of such a job so much of

them as might fairly be attributable to his skill and services.

And it has been held that surviving partners would be entitled to compensation where, pending liquidation, it was necessary to continue the business in order to avoid great loss, and the personal representative of the deceased partner expected the business to be continued until an adjustment could be reached or the business could be advantageously sold. *Peck v. Knapp* (1912) 137 N. Y. Supp. 70.

And a surviving partner is entitled to compensation for his services where, instead of liquidating the business, he continues it with the consent of the heirs and next of kin of the deceased partner for his and their benefit. *McGibbon v. Tarbox* (1911) 144 App. Div. 837, 129 N. Y. Supp. 594, affirmed in (1912) 205 N. Y. 271, 98 N. E. 390.

Allowance by the surviving partner to a corporation organized to continue the business of a concern dissolved by death, of 2 per cent for collecting accounts, was held in *Didlake v. Roden Grocery Co.* (1909) 160 Ala. 484, 22 L.R.A. (N.S.) 907, 49 So. 384, 18 Ann. Cas. 430, not to be so unreasonable that he will not be credited with such amount in accounting with the representatives of the deceased partner. The court stated that, while it is true that, for his ordinary services in winding up the partnership, a surviving partner is not entitled to any compensation, yet he is entitled to reimbursement for any necessary expenses incurred, and in this case it would have been entirely proper for the surviving partner to employ a collector to collect the claims whose commissions would not have been much more than the 2 per cent, and the results of whose services would have been possibly not so satisfactory as those flowing from the arrangement made with the corporation.

—law partnership.

Supplementing note in 17 L.R.A. (N.S.) 402.

Also, in *Jones v. Marshall* (1913) 24 Idaho, 678, 135 Pac. 841, the court, while conceding the general rule that a surviving partner is not entitled to a salary or compensation for services rendered in settling up the partnership business, yet held that, in a case of a law partnership, an exception should be made to the general rule to the extent of allowing reasonable compensation for extra services necessary to complete and carry

out a contract or close employment already undertaken.

Contractual right to compensation.

Supplementing note in 17 L.R.A.(N.S.) 409 et seq.

An understanding between two of three partners, the third partner being insane, that one of them, who was the only one active in the business, should have a salary for his services, constituted an amendment of the original articles of copartnership, and so would not be binding upon the insane partner. *Cole v. Cole* (1915) 119 Ark. 48, 177 S. W. 915.

But the court, while conceding the general rule that, in the absence of an agreement to that effect, a managing owner of a boat would not be entitled to a salary as such, yet held in *Gonzalez v. Smith* (1913) 66 Fla. 85, 62 So. 913, that a small allowance, which was more in the nature of an operating expense, it being largely consumed in the incidental office expense of bookkeeping and the like, was authorized, as it had been uniformly recognized by the partners in their previous dealings, and without objection had been included in statements rendered to the other partners from time to time.

So, also, in *Arthur v. McCallum* (1917) — Mich. —, 162 N. W. 118, while conceding the general rule, the court stated that it did not follow that the court is precluded from taking into consideration all the surrounding facts and circumstances of the case, the course of dealings between partners, the reasonableness or unreasonableness of the claim made, the possibilities arising out of the conduct of the business, in determining whether an agreement for extra compensation existed. So, where it was shown that, at the beginning of a partnership, when one of the partners devoted his entire time, and the other very little of his time, to the business, there was an agreement that the former should receive compensation, but that later, when the latter furnished a building, heat, and light, and devoted more of his time to the business, such compensation by agreement ceased, it was held that such suspension of compensation was temporary only, and that such partner was entitled to compensation again upon the firm's L.R.A.1917F.

moving into a rented building and his partner devoting less time to the business.

And that a recovery for extra compensation may be sustained where there are circumstances from which an agreement therefor may be fairly implied was the decision in *Mondamin Bank v. Burke* (1914) 165 Iowa, 711, 147 N. W. 148, in which it was held that a verdict finding the existence of such an implied contract could be sustained where one partner in a banking house had full charge of the partnership business, attending to practically all its affairs, while the other partners tacitly or expressly acquiesced therein and devoted their own time and energy wholly to their personal affairs; and especially where there was, in addition, evidence which justified a jury in believing that the partners must have understood and expected that such partner should have reasonable compensation.

So, also, in *Maynard v. Maynard* (1917) — Ga. —, L.R.A. —, —, 93 S. E. 289, where the partnership was composed of father and son, the latter giving his whole time to the business, while the father, who had other large interests, gave but very little time to it, it was held that from these, and other circumstances in evidence, and from their course of dealing with each other, the inference was fairly authorized that there was an implied agreement for extra compensation.

The *Burke Case*, it will be observed, fully sustains the decision in *RAINS v. WEILER*, ante, 571, that the facts presented a case which warranted the inference that there was an implied contract that the active managing partner should receive extra compensation for his services as such. In addition, it is to be noted that in the *RAINS CASE* there is added ground for making an exception to the general rule that a managing partner, in absence of agreement, is not entitled to extra compensation, in that there was evidence of a custom or usage in mining districts to pay for the services of a managing partner, which usage, the court stated, necessarily entered into and became a part of the partnership agreement.

J. H. B.

OLKAHOMA SUPREME COURT.

ROBERT A. ZEBOLD, Plff. in Err.,

v.

HOMER S. HURST.

('— Okla. —, 166 Pac. 99.)

Bills and notes — want of consideration — defense.

1. A promissory note must be supported by a valid consideration; want or failure of consideration is a good defense in an action on a promissory note between the original or immediate parties.

For other cases, see Bills and Notes, I. c, in Dig. 1-52 N. S.

Pleading — action on note — denial of consideration.

2. In an action on a promissory note, where the answer contains a general averment, without stating further facts, that the note is without consideration, such answer is good against demurrer.

For other cases, see Pleading, III. d, in Dig. 1-52 N. S.

Same — demurrer.

3. Where plaintiff, payee, brings action on a promissory note, the defendant, maker, pleads in his answer as a defense want of consideration, and plaintiff files a general demurrer to the answer of defendant, it is error for the trial court to sustain such demurrer.

For other cases, see Pleading, VII. c, in Dig. 1-52 N. S.

Same — good in part.

4. When a pleading contains more than one paragraph, alleging more than one cause of action or defense, if the pleading states one cause of action or defense, it is error for the court to sustain a general demurrer to such pleading as an entirety.

For other cases, see Pleading, VII. c, in Dig. 1-52 N. S.

(June 6, 1917.)

ERROR to the District Court for Haskell County to review a judgment in plaintiff's favor in an action brought to recover the amount alleged to be due on a certain promissory note. Reversed.

The facts are stated in the Commissioner's opinion.

Mr. Guy A. Curry, for plaintiff in error:

Evidence is admissible in an action on a promissory note to show that there was no consideration for the execution and delivery of the note.

2 Enc. Ev. 491; 17 Cyc. 651; Waymack v. Heilman, 26 Ark. 449; Tinker v. Midland Valley Mercantile Co. 25 Okla. 160, 105 Pac. 333.

Headnotes by PRYOR, C.

Note. — As to sufficiency of general averment of want of consideration, see annotation following this case, post, 581.
L.R.A.1917F.

Messrs. A. L. Beckett and H. S. Hurst for defendant in error.

Pryor, C., filed the following opinion:

On the 29th day of April, 1914, the defendant in error, hereinafter designated plaintiff, commenced an action against the plaintiff in error, hereinafter designated defendant, on a certain promissory note given plaintiff by the defendant.

To the amended petition of plaintiff the defendant filed an answer wherein he makes a general denial of the allegations of plaintiff's petition, and pleads: First, want of consideration for said note; and, second, pleads or attempts to plead duress, to wit, that said note was executed under threats made by plaintiff to the defendant that if the defendant did not sign said note the plaintiff would start an action against the defendant and throw his abstract business into the hands of a receiver. To the answer of the defendant the plaintiff interposed a general demurrer, to wit, that the answer of the defendant does not state facts sufficient to constitute a defense to the plaintiff's cause of action.

On the 20th day of December, 1915, a regular term day of said court, the cause came on for hearing on said demurrer. The court sustained the same, and, upon the defendant's electing to stand on his answer, rendered judgment for the plaintiff, from which action of the court the defendant prosecutes his appeal to this court.

The defendant assigns as error of the court below the sustaining of the demurrer of the plaintiff to his answer and the rendering of judgment after the defendant elected to stand on his answer. The only question presented to this court is whether or not the court below erred in sustaining the said demurrer. Whether or not the court below committed error in sustaining the demurrer of the plaintiff to the defendant's answer depends on whether or not the answer of the defendant stated a defense to the plaintiff's cause of action.

In the second paragraph of defendant's answer he pleads that the promissory note sued upon was without consideration. It is an elementary principle of law that a promissory note must be supported by a consideration, and a plea of want or failure of consideration is a valid defense between the original or immediate parties. Story, Promissory Notes, 7th ed. §§ 181-183 and 187; Norton, Bills & Notes, 2d ed. 262; 7 Cyc. 690; 8 Cyc. 31; Hagan v. Bigler, 5 Okla. 575, 49 Pac. 1011. It is well settled by these authorities that a want or failure of consideration is a good defense in an action on a promissory note between the original or immediate parties. Of course, a

different rule obtains where the rights of a bona fide purchaser or holder in due course for consideration and without notice are involved.

The next question that presents itself to the court is whether or not the answer of the defendant sufficiently pleads want of consideration. The answer contains only a general averment that the note was made without consideration. In determining this question there are no Oklahoma decisions that render any assistance. This identical question was before the court of Kansas in the case of *Miller v. Brumbaugh*, 7 Kan. 343, and the court held: "Under an answer in a suit on a promissory note which alleges in general terms that the note was given without any consideration whatever, the defendant may offer testimony going to show a want of consideration, and the plaintiff may prove any consideration."

The allegation in the answer in the above case was: "The said promissory note in said petition mentioned was given by defendant to said plaintiff without any consideration whatever therefor."

In the opinion Justice Brewer uses the following language: "The answer denies that value was received; an affirmation that it was without value is equivalent to a denial that it was with consideration. This affirmance and denial make an issue. It is complete. Whether plaintiff could by motion have compelled defendant to set out the circumstances under which the note was given, the facts upon which he bases his averment that the note was given without consideration, it is useless to inquire. The parties were satisfied with the issues as made. They went to trial upon them. Under that general averment the defendant could offer any fact which tended to prove that the note was given without consideration, and the plaintiff, on the other hand, could show any consideration. *Chamberlain v. Painesville & H. R. Co.* 15 Ohio St. 225; *Wheeler v. Billings*, 38 N. Y. 263."

The supreme court of Indiana, in passing on the identical question, holds that a general averment of want of consideration is sufficient. *Webster v. Parker*, 7 Ind. 185; *Fisher v. Fisher*, 113 Ind. 474, 15 N. E. 832; *Moore v. Boyd*, 95 Ind. 134; *Osborne v. Hanlin*, 158 Ind. 325, 63 N. E. 572. In the cases of *Fisher v. Fisher* and *Moore v. Boyd*, supra, the allegations in the answers were that the note "was given without any consideration therefor," and the court held them sufficient.

The supreme court of Illinois has consistently held that a general averment is a good plea in an answer of want of consideration. *Taft v. Myerscough*, 92 Ill. App. 560.

Bates on Pleading & Practice, vol. 2, p. L.R.A.1917F.

1289, in regard to pleading want of consideration, lays down the rule as follows: "The mere general averment of want of consideration, without stating the facts, is sufficient (except for cases of failure of consideration.)"

An examination of the decisions of various state courts discloses that a majority of the states, and a greater majority of the Code states, hold that a general averment is sufficient in pleading want of consideration, without alleging or stating the facts. An examination of the authorities will disclose, while there is some conflict on this question, that the conflict is more apparent than real.

The cases cited by digests and text-writers in support of the contrary rule upon a close examination show that the question decided was more often the question of the failure of consideration, and are very often cited in support of the proposition that want of consideration must be pleaded. There is quite a distinction between want of consideration and failure of consideration. Want of consideration would often involve the single fact that nothing passed from the promisee or anyone else to the promisor for the promise, while more frequently, from its very nature, failure of consideration would involve a chain or combination of facts and circumstances, the facts and circumstances to be stated in pleading failure of consideration. When the simple fact of want of consideration has been presented to the court alone, and not coupled with allegations of failure of consideration or fraud or duress, the courts have by a great majority held that a general averment of want of consideration is sufficient and is good when assailed by demurrer.

The rule under our Code is that the answer should state the defense in ordinary concise language. If there is nothing involved except the simple fact that no consideration passes from the promisee to the promisor, it certainly seems that the expression used in this answer and in the cases cited, to wit, that the note was given without any consideration, is as plain and complete as one could make it. There is nothing else to be said. Express it in as many sentences and in as many forms as the mind can conceive, it conveys but one idea to the understanding; that is, that the defendant received nothing from the plaintiff in exchange for the note. It may seem brief and insignificant, yet it is a complete bar to the plaintiff's recovery. The defendant in his second paragraph pleads a good defense to the plaintiff's cause of action.

The defendant in the third paragraph of his answer, without stating anything inconsistent with the second paragraph thereof, attempts to allege duress. The only

threats complained of are threats of the plaintiff to sue the defendant and put his abstract business in the hands of a receiver. The acts complained of in the answer are not sufficient to constitute duress. One party's threatening to bring a civil action against another, or threatening another with civil process, does not constitute duress. *Fisher v. Bishop*, 36 Hun, 112; *Morse v. Woodworth*, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525; *Buck v. Axt*, 85 Ind. 512; *Snyder v. Braden*, 58 Ind. 145; *New Orleans & N. E. R. Co. v. Louisiana Constr. & Improve. Co.* 109 La. 13, 94 Am. St. Rep. 395, 33 So. 51; *Atkinson v. Allen*, 17 C. C. A. 570, 36 U. S. App. 255, 71 Fed. 58; *F. B. Collins Invest. Co. v. Easley*, 44 Okla. 429, 144 Pac. 1072. Therefore the third paragraph of the defendant's answer fails to state a defense. Thus we have an answer containing two paragraphs, one which states a defense, and one which does not. The question, then, arises as to what action the lower courts should have taken on a general demurrer filed to said answer. This question has been directly settled by ours and the Kansas courts.

If the plaintiff pleads more than one cause of action, and the petition is sufficient as to any one of them, or defendant pleads more than one defense, and the answer is sufficient to any one of them, the pleading is good as against a general demurrer directed against the entire pleading, and it is error for the trial court to sustain such demurrer. *Munn v. Taulman*, 1 Kan. 254, 81 Am. Dec. 508; *Hurst v. Sawyer*, 2 Okla. 470, 37 Pac. 817; *Stiles v. Guthrie*, 3 Okla. 26, 41 Pac. 383.

We therefore hold that the lower court erred in sustaining the demurrer of the plaintiff to the answer of the defendant, and it necessarily follows that it erred in rendering judgment when the defendant announced his intention to stand on his answer.

Therefore this cause should be reversed and remanded, with instructions to the lower court to overrule the demurrer of plaintiff to the defendant's answer, and set aside the judgment rendered in said cause, and grant the defendant a new trial.

Per Curiam:

Adopted in whole.

Annotation—Sufficiency of general averment of want of consideration.

On pleading failure of consideration as a defense to action on a purchase-price note, see note in 39 L.R.A.(N.S.) 949.

As stated in *ZEBOLD v. HURST*, ante, 579, an examination of the decisions of the various state courts discloses that a majority of the states, and a greater majority of the Code states, hold that a general averment is sufficient in pleading want of consideration, without alleging or stating the facts. It is to be observed, however, that even in jurisdictions which adhere to the general rule, its effect may be defeated in a particular case by a qualification of the general averment.

Ala.—Thus, in Alabama a general averment has been generally held sufficient. *Armstrong v. Walker* (1917) — Ala. —, 76 So. 280; *Ragsdale v. Gresham* (1904) 141 Ala. 308, 37 So. 367; *Milligan v. Pollard* (1896) 112 Ala. 465, 20 So. 620; *Kolsky v. Enslin* (1894) 103 Ala. 97, 15 So. 558; *Giles v. Williams* (1842) 3 Ala. 316, 37 Am. Dec. 692; *Weinstein Bros. v. Citizens' Bank* (1915) 13 Ala. App. 552, 69 So. 972; *Cochran v. Burdick Bros.* (1912) 7 Ala. App. 274, 61 So. 29.

But there are a few cases to the contrary.

In *Darby v. Berney Nat. Bank* (1892) L.R.A.1917F.

97 Ala. 643, 11 So. 881, it was held that the defendant's general plea of want of consideration was bad, in that it failed to aver the facts upon which reliance was had to defeat the action. Cases of a failure of consideration, which is a different defense and universally held to require specific statement, were given as authority for this proposition.

In *McAfee v. Glen Mary Coal & Coke Co.* (1893) 97 Ala. 709, 11 So. 881, a plea by the defendant, who, with others not sued, made the note sued upon, that there was no consideration to him for the note, was held bad upon the ground that it failed to negative consideration moving to the defendant's comakers of the note, which, of course, would support his obligation, though he personally received nothing. This statement of the case is itself sufficient to distinguish this case from those upholding a general averment of want of consideration.

The two preceding cases were referred to in *Kolsky v. Enslin* (1894) 103 Ala. 97, 15 So. 558, as not opposed to the general rule, the court stating that the pleas in those cases were apparently intended, and were so deemed by the court, as "pleas in short by consent," the consent not having been obtained.

In *Chandler v. Riddle* (1898) 119 Ala. 507, 24 So. 498, where the defendant

sureties, on appeal in an action for the breach of an official bond, assigned as error the rulings of the trial court in striking from the file some of their pleas, the appellate court said as to a plea so stricken out, alleging that there was no consideration for the execution of the bond, that it was indefinite and defective, and they would not consider it.

And in *Mertins v. Hubbell Pub. Co.* (1914) 190 Ala. 311, 87 So. 275, a demurrer to a plea that the contract sued upon was void for want of consideration was held properly sustained, where the complaint contained two of the common counts based upon express or implied promises to pay money in consideration of a precedent and existing debt, and the other counts showed a case of mutual promises. The court stated as the reason for this holding that if by this plea the defendant sought to open the way for proof that the contract was forbidden by statute, or unenforceable because procured by fraud, it should have alleged the facts upon which it relied; and if the plea was intended to answer the common counts, it did no more than deny plaintiff's cause of action, which was elsewhere in the answer done in proper form. But the court further said that as a statement of the defense that the defendant's promise was wholly without consideration in that the plaintiff had given or promised nothing at all, the plea in question might have been sufficient under the authority of *Milligan v. Pollard* (1896) 112 Ala. 465, 20 So. 620.

Ark.—In Arkansas it is held without dissent that a plea that the instrument sued on was without consideration is good. *Dickerson v. Hamby* (1910) 96 Ark. 163, 131 S. W. 674; *Taylor v. Purcell* (1895) 60 Ark. 606, 31 S. W. 567; *Catlin v. Horne* (1879) 34 Ark. 169; *Cheney v. Higginbotham* (1848) 10 Ark. 273; *Dickson v. Burk* (1845) 6 Ark. 412, 44 Am. Dec. 521.

Cal.—In *Gushee v. Leavitt* (1855) 5 Cal. 160, 63 Am. Dec. 116, it was held that, in defense to an action on a note, it is not sufficient to plead in general terms want of consideration, and that the note was obtained by fraud, but that the answer should set out the circumstances under which the note was given, and point out the facts which constitute the fraud.

And in *Rivera v. Cappa* (1916) 29 Cal. App. 496, 156 Pac. 1016, the court, while affirming a judgment for plaintiff, cited the preceding case with others, and stated that "it seems to be

the rule in this state that a general averment that the note or contract sued on was executed without any consideration whatever is but an allegation of a conclusion of law." But the supreme court in (1916) 29 Cal. App. 498, 156 Pac. 1017, upon a denial of a rehearing of the same case, disapproved this statement of the district court of appeal and said: "The only one of the cases cited upon this proposition which appears to support it is *Gushee v. Leavitt* (Cal.) supra. The court in that case was unfortunate in its mode of expression. In view of the well-established rule that an answer which avers, in so many words, that the note sued on was executed without any consideration whatever, states a good defense (9 Cyc. 738), it is hardly to be supposed that the court there intended to decide the contrary. The context shows, however, that what the court really intended to declare was the equally well-established rule that general allegations that the note was obtained by fraud are not sufficient, but that the facts constituting the fraud must be set forth."

Colo.—In *Welles v. Colorado Nat. Life Assur. Co.* (1911) 49 Colo. 508, 113 Pac. 524, a plea that there was no consideration for the execution of the note set out in the complaint was held insufficient. The court said: "In most states under the common-law practice the plea of no consideration, without stating the facts, appears to have been held good, while in Code states, with similar provisions to ours, there is some conflict; but in our opinion the weight of authority is to the effect that it does not present or make a proper issue. . . . There is another line of reasoning upon which we think that this plea should be held bad; that is, that it is simply a denial of the implied averments in the complaint which the note carries with it. This defense admits the execution of the note. This implies that it was executed for a valuable consideration, and the allegation that there was no consideration for its execution is simply a denial of indebtedness or of liability without denying the allegations of facts from which the indebtedness or liability is claimed to have arisen; to wit, the execution and delivery of the note without stating the facts which caused it to be so executed and delivered without any consideration, when a consideration is presumed by its execution."

Fla.—In Florida a general averment of want of consideration is insufficient.

Ahren v. Willis (1855) 6 Fla. 359; *Hunter v. Wilson* (1885) 21 Fla. 250; *Williams v. Peninsular Grocery Co.* (1917) — Fla. —, 75 So. 517. The reason given for this holding is that, as a consequence of a general averment, the plaintiff would frequently be surprised by the facts adduced in evidence at the trial, and that this result would be obviated by the rule requiring the defendant to state the facts upon which he relied to defeat the obligation as being without consideration.

Ga.—In *Dicks v. Andrews* (1907) 129 Ga. 756, 59 S. E. 782, it was held that a plea alleging that the note sued on was "without any valuable consideration, either moral or legal," was insufficient, since it did not mention a good consideration, which, as well as a valuable consideration, would support the note.

Ill.—In Illinois it is held, without any decision to the contrary, that an averment that there was no good or valuable consideration for the instrument in controversy is sufficient. *Sheldon v. Lewis* (1881) 97 Ill. 640; *Honeyman v. Jarvis* (1872) 64 Ill. 366; *Goding v. MacArthur Co.* (1913) 181 Ill. App. 373; *Massey v. Robertson* (1879) 5 Ill. App. 476.

Ind.—In Indiana a plea which in general terms alleges no consideration is good. *D. M. Osborne & Co. v. Hanlin* (1901) 158 Ind. 325, 63 N. E. 572; *Fisher v. Fisher* (1888) 113 Ind. 474, 15 N. E. 832; *Beard v. Lofton* (1885) 102 Ind. 408, 2 N. E. 129; *Moore v. Boyd* (1883) 95 Ind. 134; *Bush v. Brown* (1875) 49 Ind. 573, 19 Am. Rep. 695; *Hunter v. McLaughlin* (1873) 43 Ind. 38; *Hicks v. Reigle* (1869) 32 Ind. 360; *Parker v. Morton* (1867) 29 Ind. 89; *Starr v. Hunt* (1865) 25 Ind. 313; *Billan v. Hereklebrath* (1864) 23 Ind. 71; *Barner v. Morehead* (1864) 22 Ind. 354; *Kirkpatrick v. Hinkle* (1862) 19 Ind. 269; *Swope v. Fair* (1862) 18 Ind. 300; *Frybarger v. Cockefair* (1861) 17 Ind. 404; *Webb v. Bowless* (1860) 15 Ind. 242; *Webster v. Parker* (1855) 7 Ind. 185; *Clark v. Harrison* (1840) 5 Blackf. (Ind.) 302; *Kernodle v. Hunt* (1835) 4 Blackf. (Ind.) 57; *Ohio Thresher & Engine Co. v. Hensel* (1894) 9 Ind. App. 328, 36 N. E. 716.

But in *Anderson v. Meeker* (1869) 31 Ind. 245, it was held that a paragraph of an answer alleging "that defendant received no consideration for said note" was demurrable, because the consideration may have passed to another.

And for the same reason, the same L.R.A.1917F.

holding was made in *Bingham v. Kimball* (1870) 33 Ind. 184, as to an allegation that "the writing sued on in the complaint was given by this defendant to plaintiff's assignors without any consideration of any kind to this defendant."

In *Butler v. Edgerton* (1860) 15 Ind. 15, it was held that where the complaint sets out specially the consideration, a general allegation that the instrument was executed without any consideration therefor is included in the general denial, and may therefore be rejected on motion, as it adds nothing to the defense.

In *Honeywell v. Helm* (1862) 19 Ind. 321, sustaining a demurrer to an answer alleging that the note was obtained from defendant by the fraud, covin, misrepresentation, and deceit of plaintiff, and without any good or valid consideration whatever, the court said: "One party insists that this is a general answer of fraud, and therefore a demurrer was well taken to it; the other, that it is a general answer of want of consideration, and the said ruling consequently wrong. It does not appear to us to be either the one or the other. As a general answer of fraud, if it was such, it would be bad. It seems to admit that there was some consideration, but the pleader assumes to determine that it was not a valid one, for what reason we are not informed. It is too uncertain a mode of pleading; does not give the facts upon which the conclusion is drawn, that the consideration was invalid; of course this could not be done in an instance where it is expressly stated that there was no consideration. The demurrer was, therefore, properly sustained."

Iowa.—In Iowa a general averment of want of consideration is insufficient. *Chambers v. Games* (1849) 2 G. Greene, 320; *Sac County v. Hobbs* (1887) 72 Iowa, 69, 33 N. W. 368. In the latter case the court said: "Whether the contract is supported by a valid consideration depends upon the circumstances under which it was executed, and the purposes which the parties had in view when they entered into it. The allegation that it was without consideration is the mere statement of a conclusion. Under our system of pleading, the facts upon which a right of action or defense is based are required to be stated in the pleadings. This is required in order that the court and the opposite party may be advised of the real nature of the claim or defense relied upon."

And it is not permissible for a party to plead mere conclusions."

Ky.—In Kentucky a general averment was held sufficient. *Allnutt v. Allnutt* (1910) — Ky. —, 127 S. W. 986; *Evans v. Stone* (1882) 80 Ky. 78; *Rudd v. Hanna* (1827) 4 T. B. Mon. 528; *Boone v. Shackelford* (1815) 4 Bibb, 67; *Ralston v. Bullitts* (1814) 3 Bibb, 261; *Watt v. Hughes* (1894) 15 Ky. L. Rep. 846; and *Brady v. Mattingly* (1890) 12 Ky. L. Rep. 357.

But in *Higgins v. Gose* (1911) 144 Ky. 123, 137 S. W. 1038, it was held that an averment in an amended petition attacking a deed as fraudulent, that the deed was without consideration, was a mere conclusion, where no facts were alleged showing a want or failure of consideration.

And the same was held in *Ronsh v. Vanceburg, S. L. T. & M. Turnp. Co.* (1905) 120 Ky. 165, 85 S. W. 735, as to an averment that a transfer was without valuable consideration; the court stating that the statute against fraudulent conveyances required the consideration to be valuable to uphold the transaction, and that it was a pure question of law what was a valuable consideration, and therefore the pleader should state what the consideration was, to enable the court to decide whether it was a valuable consideration.

In *Coyle v. Fowler* (1830) 3 J. J. Marsh. 472, where it was held that a plea that the note was not executed on a consideration good and valid in law was insufficient as a plea of no consideration, because it meant, according to a rational construction, that there was a consideration in fact, but that said consideration was invalid by operation of law, the court stated that a plea that the note was given without any consideration would have been good.

And the court made the same statement in *Clay v. Johnson* (1824) 5 Litt. (Ky.) 176, where a plea that the note was executed without any good or valuable consideration rendered by the plaintiff and received by the defendants, or either of them, was held bad, upon the ground that such plea may have been true, and yet the note may have been given upon a valid consideration.

Minn.—In *Grimes v. Ericson* (1905) 94 Minn. 461, 103 N. W. 334, an allegation in general terms of want of consideration was held good.

But in *Dunning v. Pond* (1860) 5 Minn. 296, Gil. 234, an answer of an L.R.A.1917F.

indorser of a note that the maker received no sufficient consideration to charge him as indorser was held bad, because it in effect admitted that the maker received a consideration, and should have alleged the facts showing wherein it was insufficient.

Miss.—In Mississippi, under the common law, a general averment of want of consideration was sufficient. *Matlock v. Livingston* (1848) 17 Miss. 489; *Taylor v. McNairy* (1868) 42 Miss. 276.

But since the adoption of the Code, a general averment is demurrable. *Tittle v. Bonner* (1876) 53 Miss. 578; *Boone v. Boone* (1881) 58 Miss. 820.

Mo.—In Missouri a plea of want of consideration, in general terms, is sufficient. *Williams v. Mellon* (1874) 56 Mo. 262; *Fuller v. Tootle-Campbell Dry Goods Co.* (1915) 189 Mo. App. 514, 176 S. W. 1091.

Neb.—In *Bennett v. Bennett* (1902) 65 Neb. 432, 91 N. W. 409, affirmed on rehearing in (1902) 65 Neb. 441, 96 N. W. 994, it was held that an allegation, in a petition to cancel a conveyance, that the conveyance was without consideration, was a sufficient pleading of fact.

N. Y.—A general averment of want of consideration was held sufficient in New York. *First Nat. Bank v. Robinson* (1905) 105 App. Div. 193, 94 N. Y. Supp. 767, affirmed in (1907) 188 N. Y. 45, 80 N. E. 567; *Du Bosque v. Munroe* (1915) 168 App. Div. 821, 154 N. Y. Supp. 462.

But in *Hammond v. Earle* (1880) 58 How. Pr. 426, it was held that an allegation that the contract set forth in the complaint was inoperative and void for want of a sufficient and adequate consideration therefor stated simply a conclusion of law.

And in *McMurray v. Gifford* (1850) 5 How. Pr. 14, an answer which alleged that the note was obtained from the defendant by fraud, and was without consideration and void, was held bad because it did not set out the facts which showed that the note was obtained by fraud, or that it was without consideration or void.

Ohio.—In Ohio a plea of want of consideration, in general terms, seems to be insufficient, as it is held in *Eagle Ins. Co. v. Blymyer* (1900) 8 Ohio N. P. 275, 10 Ohio S. & C. P. Dec. 417, that a motion will lie to require such a plea to be made more definite and certain by a statement of the specific facts upon which the defense is based; and there is a dictum to the same effect in *Chamberlain v. Painesville & H. R. Co.* (1864) 15 Ohio St. 225, and in *Clark v. Clark* (1897) 16

Ohio C. C. 103, 8 Ohio C. D. 752, 9 Ohio C. D. 476.

In *Dalrymple v. Wyker* (1899) 60 Ohio St. 108, 55 N. E. 713, and *Bode v. Werner* (1902) 26 Ohio C. C. 206, it was held that an answer to a suit on a note, averring that there was no consideration for it moving to the promisor, was insufficient, because it did not preclude the possible fact of detriment or loss to the promisee.

Okl.—The rule that a general averment of want of consideration is sufficient is established in Oklahoma by *ZEBOLD v. HURST*, ante, 579.

Pa.—In Pennsylvania it is held that an allegation of no consideration in an affidavit of defense, without setting forth the facts upon which such allegation is based, is insufficient. *Superior Nat. Bank v. Stadelman* (1893) 153 Pa. 634, 26 Atl. 201; *Woods v. Watkins* (1861) 40 Pa. 458; *Willson v. Amwake* (1913) 22 Pa. Dist. R. 499; *Root v. Fox* (1892) 2 Pa. Dist. R. 339; *Hale v. Fenn* (1842) 3 Watts & S. 361.

In *Chambers v. McLean* (1904) 24 Pa. Super. Ct. 567, an allegation by one of the makers of a note that no consideration was paid to him was held insufficient, as the consideration may have passed to the other maker.

Tex.—In *First Nat. Bank v. Pearce* (1910) — Tex. Civ. App. —, 126 S. W. 285, a plea by one of the makers of a note that it was given for the accommodation of the plaintiff (the payee), and that such maker never at any time received any money or other consideration therefor, was held sufficient as against the objection that it should have further alleged that there was not any detriment or loss to the plaintiff.

Wash.—In *Griffith v. Wright* (1899) 21 Wash. 494, 58 Pac. 582, on reversing a case because of the denial by the trial judge of a motion to make a general averment of want of consideration more definite and certain, the court said: "We think . . . the better rule as to the manner of stating the want of consideration is to state the facts showing the want of consideration. We are aware, however, that the authorities are at variance here, and, while the formula alleging that a promissory note is without consideration is justly subject to the criticism that the statement may be a conclusion of law, yet it may also be construed as an issuable fact where the parties go to trial and place such construction upon it."

Eng.—The rule requiring a plea of want of consideration to set out the facts L.R.A.1917F.

seems to be settled in England. *Atkinson v. Davies* (1843) 11 Mees. & W. 236, 152 Eng. Reprint, 790; *Stoughton v. Kilmorey* (1835) 2 Crompt. M. & R. 72, 150 Eng. Reprint, 31, 3 Dowl. P. C. 705, 5 Tyrw. 568, 1 Gale, 91, 4 L. J. Exch. N. S. 138; *Graham v. Pitman* (1835) 3 Ad. & El. 521, 111 Eng. Reprint, 512, 5 Nev. & M. 37, 1 Harr. & W. 132, 4 L. J. K. B. N. S. 206; *Trinder v. Smedley* (1835) 3 Ad. & El. 522, 111 Eng. Reprint, 512; *Easton v. Pratchett* (1834) 1 Crompt. M. & R. 798, 149 Eng. Reprint, 1302, 6 Car. & P. 736, affirmed in (1835) 2 Crompt. M. & R. 542, 150 Eng. Reprint, 232, 4 Dowl. P. C. 549, 4 L. J. Exch. N. S. 335, 1 Gale, 250, 5 Tyrw. 1129 (holding that objection to plea could not be made after verdict); *Boden v. Wright* (1852) 12 C. B. 445, 138 Eng. Reprint, 980; *Hunter v. Wilson* (1849) 4 Exch. 489, 7 Dowl. & L. 221, 19 L. J. Exch. N. S. 8; *Forman v. Wright* (1851) 20 L. J. C. P. N. S. 148, 11 C. B. 481, 138 Eng. Reprint, 560, 15 Jur. 706; *Low v. Chifney* (1834) 1 Bing. N. C. 267, 131 Eng. Reprint, 1119, 1 Scott, 95, 4 L. J. C. P. N. S. 9.

Can.—And in Canada a general averment of no consideration is insufficient. *Osborne v. Pierson* (1875) 36 U. C. Q. B. 457; *Wismer v. Wismer* (1863) 22 U. C. Q. B. 446; *Bradford v. O'Brien* (1849) 6 U. C. Q. B. 417.

In *Muir v. Cameron* (1853) 10 U. C. Q. B. 356, and *Bank of British N. A. v. Sherwood* (1849) 6 U. C. Q. B. 213, it was held that a plea that the defendant made or indorsed the note by way of accommodation, without consideration, was bad.

G. V. I.

RHODE ISLAND SUPREME COURT.

SLATERSVILLE FINISHING COMPANY v.

ALBERT S. GREENE et al., Assessors.

(— R. I. —, 101 Atl. 226.)

Tax — mill site — destruction by flooding — effect.

The valuation for taxation in one township of land containing a mill site cannot be lowered because the site is flooded by a dam located in another township.

For other cases, see *Taxes*, III. b, 2, in *Dig.* 1-52 N. S.

(June 27, 1917.)

Note. — As to situs of mill site or water power for purposes of taxation, see annotation following this case, post, 591.

CERTIFICATION by the Superior Court for Providence and Bristol Counties for the determination by the Supreme Court of a petition for the abatement of taxes. Judgment for defendants.

The facts are stated in the opinion.

Messrs. Barney, Lee, & McCanna, for petitioner:

The right to use the power created or to use the water held back by a dam is a hereditament which can be taxed only at the point where the power is used, whether in the same or in an adjoining town.

Union Water Power Co. v. Auburn, 90 Me. 60, 37 L.R.A. 651, 60 Am. St. Rep. 240, 37 Atl. 331; Re Hall, 116 App. Div. 729, 102 N. Y. Supp. 5.

The effect upon the value of land by overflowing it from below is no different in the case of a mill privilege than in that of a farm or a grass lot.

People ex rel. Tibbits v. Canal Appraisers, 13 Wend. 355.

Messrs. Irving Champlain, James Harris, and John J. Lacey for defendants.

Sweetland, J., delivered the opinion of the court:

This is a petition brought under the provisions of § 15, chap. 58, Gen. Laws 1909, for relief against a tax assessed against the petitioner's ratable estate in the town of Burrillville. The petition has been certified to us upon an agreed statement of facts.

By said statement it appears that on August 1, 1910, the petitioner duly brought in before the assessors of said town an account of its ratable estate in said town, including a parcel of land described in said account as follows: "Slatersville Finishing Company, Slatersville, land lying southerly of the highway leading from Nasonville to Slatersville, bounding westerly by the Douglas pike, and by Inman road, so-called, on the east, \$500.

The assessors assessed said parcel as follows: "Slatersville Finishing Company, Slatersville, land, mill privilege, and water rights, formerly the Inman mill privilege, lying southerly of the highway leading from Nasonville to Slatersville, bounding westerly by the Douglas pike, and by Inman road, so-called, on the east, \$5,000."

The petitioner paid under protest so much of said tax as was assessed upon the valuation of said parcel in excess of the valuation set out in the petitioner's account. In said agreed statement it appears that said parcel was situated upon a stream of water the name of which is not given in the statement; that on said parcel was formerly located a mill known as the "Inman Scythe Works," the use of which L.R.A.1917F.

was discontinued, and which fell in ruins, many years ago; and that there was a dam, waterfall, and mill privilege connected with said land. The parcel was sold in January, 1860, by Ezekiel Daniels and others to John F. and W. S. Slater, who are the predecessors in title of the petitioner, the Slatersville Finishing Company. Either said Slaters, or the "Slatersville Mills," which succeeded them, erected or raised lower down on said stream at Slatersville, in the town of North Smithfield, a dam, thus creating a mill pond extending back over said stream into the town of Burrillville, and flowing out the Inman mill privilege and water rights, so that there is no fall of water there when the Slatersville dam is full. At and before the time of the raising of said dam and the flowing of said land, said land was assessed for its value as a mill privilege, and it is agreed that such value was not less than \$5,000. If the elements of value attributed to said land by the assessors ought not to have been considered by them in fixing the valuation at the time of said assessment, it is agreed that the value of said land for the purposes of taxation was \$500.

The petitioner contends that in this matter the court should adopt one or the other of two views, and that, in accordance with either, the petitioner should have the relief which it seeks. Its claim is that, by the erection and use of the dam at Slatersville, either said mill privilege and water rights in Burrillville have been destroyed as elements of value to be considered in assessing said land in Burrillville, or said privilege and water rights have become a part of and have increased the value of the water rights appurtenant to the mill at Slatersville, in the town of North Smithfield, and are only taxable there.

In support of its position that said mill privilege and water rights no longer exist as elements of value in the parcel of land under consideration, the petitioner relies chiefly upon language employed in certain cases dealing with claims for damages made by the owners of lands which have been permanently submerged through the construction of public works. In some of the cases cited there was a mill privilege upon the land flowed; in others, there was not. In no case is the question of taxation involved. In each case the court was considering whether because of the impairment or destruction of the owner's beneficial use of the land or mill privilege he should be entitled to compensation under constitutional requirements that just compensation shall be paid to owners of property taken for public use. We will briefly consider

the cases cited by the petitioner upon this point.

In *People ex rel. Tibbits v. Canal Appraisers*, 13 Wend. 355, it appeared that, in the course of construction for the improvement of canal and lock navigation, the state of New York had built a dam across the Hudson river at Troy. Thereby a waterfall belonging to the relator, situated on a branch of the Mohawk river, tributary to the Hudson above said dam, had been permanently overflowed. In these circumstances the court held that there had been a "taking" of said waterfall for public use, and the relator should have compensation. In *Velte v. United States*, 76 Wis. 278, 45 N. W. 119, and in *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557, the respective plaintiffs were seeking compensation for the permanent flowing of their lands through the erection of dams as part of public works for the improvement of the Fox and Wisconsin rivers. In each case it was held that the plaintiff's use of his land had been destroyed, and that the flowing constituted a "taking" of the land within the meaning of the Constitution. The petitioner cites *Hatch v. Dwight*, 17 Mass. 289, 9 Am. Dec. 145. The decision in that case, upon analysis, does not support the view that when a mill privilege has been flowed out by the raising of a dam below it on the same stream, the mill privilege is destroyed as an element of value in the land to which it was attached. The court held that the owner of a privilege so overflowed was entitled to an action for his damages, and approved an assessment of damages amounting to yearly interest upon the value of the privilege as it was before obstruction. This is by no means an authority for the contention that a privilege when flowed out is destroyed. The case proceeds upon the theory that the owner of the privilege had been deprived of its use, which use, in a sense, had been taken by the owner of the dam lower down, and for such taking he should pay an annual compensation while the taking continued. It cannot with reason be urged from this that the value of the privilege as an incident of the land had been destroyed and should be disregarded in negotiation for the sale of the land, or that the assessors of Northampton, where the land was situated, could not properly consider this element in placing a valuation upon said land for the purpose of taxation.

For the promotion of manufacturers, legislatures in most of the states have enacted so-called "Mill Acts," giving to a riparian proprietor upon a stream, where water power may be utilized, the right to increase the impelling force of the current at his

land by the erection of a dam and the setting back of the water of the stream beyond the limit of his own land and upon that of a proprietor above, with provision for compensation in damages, and with the restriction, generally expressed in the act, that a proprietor cannot flow back and obstruct the operation of a mill privilege above which has already been established by authority of law. This restriction is not expressed in the Rhode Island act. Chapter 148, Gen. Laws 1909, amended by Pub. Laws 1911-12, chap. 697. This court, however, has held that our Mill Act should receive a reasonable construction, and that it does not authorize the owner of an unoccupied privilege to erect thereon a dam and mill, and then to flow out an occupied privilege above. *Mowry v. Sheldon*, 2 R. I. 369.

The constitutionality of these Mill Acts has frequently been questioned. Their constitutionality has generally been supported, sometimes on the ground that the flowing out of the land above was a taking for public use under a delegation of the state's right of eminent domain. Perhaps the constitutionality of these acts is better supported on the ground that it is within the power of the legislature to regulate the manner in which the rights of riparian owners may be asserted and enjoyed with due regard to the interests of all and to the public good. *Head v. Amoskeag Mfg. Co.* 113 U. S. 9, 28 L. ed. 889, 5 Sup. Ct. Rep. 441.

Whether it be regarded as based on the right of eminent domain, or as legislative regulation of the common right of the different riparian proprietors to use the waters of a stream, such act does not work the destruction of the property which may be invaded in accordance with its provisions. The statute contemplates that the property submerged should remain as a valuable possession of the owner, even though he has been deprived of his unobstructed enjoyment. Although the owner may elect to have his damages in gross, the Rhode Island act provides for the appraisalment of the damages that the owner of land overflowed ought yearly to receive and recover from the owner of the dam below, his heirs and assigns, until five years after the dam shall be removed by its owner, his heirs and assigns. Similar provisions are contained in all the acts of other states which we have examined. The case of *Quinebaug Reservoir Co. v. Union*, 73 Conn. 294, 47 Atl. 328, we shall consider later in its bearings upon the other branch of the petitioner's claim. With reference to the point with which we are now dealing, viz., as to the taxable valuation of lands which have

been submerged to increase the water power at a mill site lower down on a stream, the court said that under the system which makes all real estate taxable by the town in which it is situated the court would expect that either the value of the power created by submerging the land, or so much of it as equals that of the land if left in its natural condition, would be made taxable in the same way in which the land had been before.

Many of the questions which might arise when the land submerged and the land on which the dam is located belong to different owners are not presented in the case at bar, where the petitioner owns both parcels of land. The value of land depends upon its capacity for improvement. The elements of its value may be its fertility, the minerals in its soil, its location, the configuration of its surface, and many other circumstances, one or more of which may be incident to a certain tract of land. In estimating its value for the purpose of sale or of taxation all these incidents should be considered, and the element or elements of value which lead to the most profitable form of improvement fix the proper valuation of the land. The owner may not see fit to improve his land at all. He may put it to uses which are much less profitable than others for which it is suited. He cannot thereby lessen its valuation for the purpose of taxation. Generally the chief element of value of a parcel of land on one of the principal streets of the city of Providence is its capacity for profitable use as the location of a building for business purposes. The owner of such parcel may permit it to remain unimproved, he may use it in a manner which produces little return, but the assessors of taxes would be justified in assessing it upon a valuation based upon its favorable location and its desirability for building purposes. The petitioner in the case at bar is the owner of a parcel of land admittedly of the value of \$5,000, in view of its possible use as a mill site. If the petitioner made no use of this parcel it could not claim that a valuation of \$5,000 was excessive. In the furtherance of its business it finds it profitable to employ this \$5,000 tract of land as part of its works to increase its water power at Slatersville. It is fair to presume that the added water power at Slatersville which is obtained by this use of the land is of greater value to the petitioner than any return which it would obtain from the use of the land simply as a mill privilege; and the capacity of the land to produce water power in this way to be used at Slatersville is an element of greater value than its capacity for producing water power to be

used on the land itself in Burrillville. In accordance with the suggestion made by the Connecticut court in *Quinebaug Reservoir Co. v. Union*, supra, it might be said that either the full value of the power so obtained at Slatersville through the use of this land, or so much of that value as equals the value of the land if it had been left in its natural condition, should be made taxable in the same way in which the land has been taxed before.

However that may be, and without reference to the value of the added power which the use of this land has enabled the petitioner to obtain at Slatersville, the valuation of the land made by the assessors should not be disturbed on the ground that because the petitioner has seen fit to employ this land for purposes which are either more or less profitable than that for which it surely is suited the petitioner has in that way destroyed certain elements of value which formerly pertained to it. It is true that the petitioner has submerged the land and concealed it from view, but in no proper sense can it be said to have destroyed any of its elements of value.

In support of the position that said privilege and water rights in Burrillville might properly be held to have become a part of the water rights appurtenant to the mill at Slatersville, and only taxable there, the petitioner relies mainly upon what it claims is the authority of *Boston Mfg. Co. v. Newton*, 22 Pick. 22, and *Union Water Power Co. v. Auburn*, 90 Me. 60, 37 L.R.A. 651, 60 Am. St. Rep. 240, 37 Atl. 331.

In considering this phase of the case we may start with the principle, generally conceded, that water power and water rights are not independently taxable. Power is a force and water is an element no more taxable than air. The respondent assessors did not assume to tax the mill privilege and water power independently, but as a part of the land. For the purpose of taxation, the right to use the water of a stream and the water power that arises from controlling the flow of its current must be considered as appurtenant to and an incident of some land. When the power has been applied at some place other than that at which it was produced there has been some slight disagreement in the cases, a disagreement, however, more apparent than real, in regard to the land to which the power shall be considered as appurtenant, whether to the land which from its situation and configuration was able to produce the power or to the land where the power is applied. It should be observed that the case at bar does not present the condition of power produced by a fall at one place and applied at another. However, cases which deal with

that condition furnish assistance in the determination of the petitioner's claim that some of the elements of value of the Burrillville land have been taken from it and annexed to the land at Slatersville.

In *Boston Mfg. Co. v. Newton*, supra, relied upon by the petitioner, it appears that the plaintiff was the owner of two milldams across the Charles river where it passed between the towns of Waltham and Newton, one half of each dam being in Newton and the other half in Waltham, and that the water power thereby created was applied exclusively to drive certain mills of the plaintiff in Waltham. The plaintiff was taxed in Newton, upon separate items, for one half of the value of each dam, for the value of the land in Newton covered by the river, and for one half of the water power. The action was brought solely for the purposes of trying the right of Newton to tax any portion of the water power, all of which was applied in Waltham. The court held that water power cannot be taxed independently of land, and further stated as their opinion that the water power had been annexed to the mills at Waltham and could only be taxed there. The plaintiff in that case did not question the taxation of the land under the river in Newton, and hence the court was not called to pass upon the elements of value which pertained to that land, or whether its value was increased by its capacity to create water power. The case is of little if any value in determining the matter before us.

In *Union Water Power Co. v. Auburn*, supra, it appears that the plaintiff was the owner of dams across the Androscoggin river where it flows between Auburn and Lewiston. None of the power created by these dams was used in Auburn, but was employed by the plaintiff in connection with its mills at Lewiston. The assessors of taxes of Auburn assessed a tax upon the plaintiff's dam and water rights. The action was for an abatement of said tax. The court held that water power, until applied, is potential, and that when applied to mills it becomes a part of the mill property and is a subject of taxation where the mills are located. From this opinion of a majority of the court Mr. Justice Emery dissented, and in an able opinion pointed out that in these circumstances water power as a force was not taxable either in Auburn or Lewiston, but as a waterfall or mill privilege it is a parcel of land over which a stream of water flows and falls, and is to be taxed in the town where it is situated. So far as the land is more valuable by reason of the stream and the falls, so far those facts are to be considered in the valuation of the

land. The owner of the land owns not strictly the power, but the gateway through which alone the power can be captured and led out. If the right to use the power has been acquired by the owner of a mill situated elsewhere, either personally or as an incident of the ownership of the mill, the value of such right is to be estimated in assessing the owner of the mill.

"It should not be assumed that taxing in Lewiston the right of the mill to have water power from the dam in Auburn should reduce the tax in Auburn upon the corresponding right of the dam to receive compensation therefor. The water power is not to be taxed in either town. The increased value of the real estate by reason of the incident natural monopoly, or incident acquired rights, is to be taxed in the town in which the real estate is situated."

The principles thus enunciated by Judge Emery have been followed in later Maine cases. They are in accordance with the rule in New Hampshire and in the later Massachusetts cases.

In *Saco Water Power Co. v. Buxton*, 98 Me. 295, 56 Atl. 914, the court said: "The property assessed here was a 'mill privilege.' It was the land and the dam, but it was the land and the dam situated as they were, with the capacity to hold the water of the stream and create power. By the terms of the assessment, the power was not assessed, and the water was not assessed. The 'privilege' was assessed. Its value might be greatly enhanced by the existence of the water and the means of creating the power."

In *Penobscot Chemical Fibre Co. v. Bradley*, 99 Me. 263, 59 Atl. 83, it appeared that the plaintiff was the owner of the entire dam and mill privilege of the Penobscot river as it flows between Oldtown and Bradley. The principal works of the plaintiff were situated in Oldtown, and nearly all the water power created by the dam was used there. The plaintiff urged that such water power should be regarded as appurtenant to the mills in Oldtown, "and that the additional value which the existence of the water power creates should not be assessed to the company in Bradley." The court said: "Land upon which a mill privilege exists is taxable, and the value of the land may be greatly enhanced by the fact that its topography is such that a dam may be maintained across a stream upon it, and water power thereby created. The capability of the land for such use, and the probability or certainty, as the case may be, of its use, certainly affect its value. . . . It is not, Where is the water power created by the appellant's dam used? but, How much is its

property in Bradley worth? How much is it worth as it stands,—not for farming merely, nor for house lots, nor for any other one thing, but for any and all purposes for which it may be used? How much is it worth, taking into account that it is part of a valuable mill privilege?"

The question now under discussion has arisen in a number of New Hampshire cases, and the supreme court of that state has passed upon it in very carefully considered opinions. Those cases are all opposed to the contention of the petitioner that a part of the value of the mill privilege in Burrillville shall be held to have become appurtenant to the mill at Slatersville, and to be taxable solely in the town of North Smithfield. *Cocheco Co. v. Strafford*, 51 N. H. 455; *Winnipisaukee Lake Cotton & Woolen Mfg. Co. v. Gilford*, 64 N. H. 337, 10 Atl. 849; *Amoskeag Mfg. Co. v. Concord*, 66 N. H. 562, 32 L.R.A. 621, 34 Atl. 241.

In *Pingree v. Berkshire County*, 102 Mass. 76, it appeared that the petitioner was the holder of land and a dam in the town of Windsor, which was used to form a reservoir to hold back water to be used at mills in the towns of Dalton and Pittsfield. The dam, independent of its use for the purpose of a reservoir, was of nominal value, but for that purpose was of great value; the land while covered by water was of only nominal value considered merely as land without regard to reservoir purposes. The assessors of Windsor taxed the dam and land for \$15,000. The plaintiff asked for an abatement of the tax, contending that the said valuation and tax must have been made and assessed upon the water power, none of which was applied in Windsor. The court pointed out that *Boston Mfg. Co. v. Newton*, 22 Pick. 22, apparently relied upon by the plaintiff, as it is by the petitioner in the case at bar, while it decided that the water power should be regarded as incident to the mills to which it was applied, did not decide that the land and the structures by which the water power was created were not taxable at their value for such purposes. The court in the *Pingree Case* sustained the valuation and tax; held that the land and the dam are taxable in Windsor, and "that the valuation should be made, not subject to the use to which they are, for the time, appropriated, nor independently of that use in any sense which excludes it from consideration as a means by which their value is made available."

In *Blackstone Mfg. Co. v. Blackstone*, 200 Mass. 82, 18 L.R.A.(N.S.) 756, 85 N. E. 880, it appeared that a Rhode Island corporation erected in Massachusetts a dam

across the Blackstone river, and constructed in connection therewith, upon land owned by it, canals, ponds, and trenches in the town of Blackstone, but, without making any application of the water power in Massachusetts, carried the water in a trench with a slight fall into Rhode Island, where it was used in a power house to generate electricity with which to run a mill in that state. The assessors of Blackstone taxed such of the property of the corporation as was in that town, including the dam, the pond, the canals, and the trench, with reference to its value as a means of furnishing power at the corporation's power house in Rhode Island, and the corporation petitioned to have the tax abated. As part of a very fully considered opinion, the court said: "What is the value of the petitioner's property, having reference to any and all of the uses to which it is adapted? . . . If conditions in Rhode Island were disregarded, the value of the property in Massachusetts, including with the land and water the fall which the land furnishes, and the dam, pond, canals, and other appurtenances, would be estimated in reference to the most profitable uses to which it could be put, and especially its use to furnish power to a mill in Massachusetts, situated near the line of the state of Rhode Island. Inasmuch as it has been joined to the property in Rhode Island, and used with the slight additional fall there to produce a single unit of water power, and inasmuch as it is found that this is the most valuable use to which it can be put, there is no reason why its value should not be considered in reference to the use to which it is adapted, and which is now made of it in connection with the property in the other state."

In the state of Connecticut it is provided by statute that when water power is used in a different town from that in which it is created such power shall be listed for taxation only in the town where it is used. In *Quinebaug Reservoir Co. v. Union*, 73 Conn. 294, 47 Atl. 328, it appeared that the plaintiff was the owner of certain water rights in the town of Union, which the court held to be an incorporeal hereditament and real estate. The plaintiff employed these water rights for the purpose of accumulating a water supply for use by mills lower down on the stream in the state of Massachusetts. The court held that the said statute was to be construed as applicable only to towns in Connecticut. As the power was used in Massachusetts the ordinary rule governed, and the water privilege was properly taxed in Union.

"When water is artificially stored upon land so as to create mechanical power by its fall, the necessary result is to bring into existence a new element of value. If the land thus used for storage purposes would be more valuable for other purposes, the value gained is less than the value lost. If, on the other hand, the power created has a value exceeding that of the land occupied, the taxable resources of the state in which that land is situated are increased."

In our opinion, the better reason, well supported by the weight of authority, is that land should be taxed with all its elements of value in the town where the land is situated. If land upon a stream has such topography, either natural or artificial, as to give to the land the capacity to control the current of the stream, and to pour out the water of the stream from an elevation, thus creating water power, these circumstances enhance the value of that land and furnish a basis for taxation. This is true whether that ca-

capacity is employed to create water power to be used on that land, or upon other land in another town or another state, and also even in case such capacity of the land is not employed at all. If water power thus created is conducted to mills situated elsewhere, and there applied, that circumstance may reasonably be regarded as increasing the value of the mills receiving such power, and may be considered in the taxation of such mills; but no element of value is thereby taken from the land where the power is created, and transferred and made appurtenant to the mills where the power is used.

In our opinion, the petitioner is not entitled to relief upon either of the grounds that it has urged before us. We give decision in favor of the respondents for their costs.

The papers are ordered to be sent back to the Superior Court with this decision certified thereon, and with direction to enter final judgment upon said decision.

Annotation—Situs of mill site or water power for purposes of taxation.

Some cases otherwise within the scope of this note are not included herein for the reason that they have been treated in the note to *Blackstone Mfg. Co. v. Blackstone*, 18 L.R.A.(N.S.) 755, on "Taxation of water power on interstate stream."

It will be observed that in *SLATERSVILLE FINISHING CO. v. GREENE*, ante, 585, the petitioner was held not entitled to relief upon either of the grounds urged, the court taking the view that the flowing out of a mill privilege by the raising of a dam below it on the same stream does not destroy such mill privilege as an element of the value in the land to which it was attached; that if water power is conducted to mills situated elsewhere and there applied, that circumstance may reasonably be regarded as increasing the value of the mills receiving such power, and may be considered in the taxation of such mills; but no element of value is thereby taken from the land where the power is created, and transferred and made appurtenant to the mills where the power is used.

The damage cases relied on by petitioner to support its claim that by the erection and use of the dam at Slatersville the mill privilege and rights in Burrillville had been destroyed as elements of value to be considered in assessing the land in Burrillville, and con-

sidered in the opinion of *SLATERSVILLE FINISHING CO. v. GREENE*, are not within the scope of this note, as they did not involve any question in relation to taxation.

The case of *Boston Mfg. Co. v. Newton* (1839) 22 Pick. (Mass.) 22, relied on by the petitioner in *SLATERSVILLE FINISHING CO. v. GREENE* as supporting the position that the privilege and water rights in question were made appurtenant to the mill where used and there taxable, holds that a water power extending across a river dividing two towns which was applied exclusively to mills in one of the towns was not subject to taxation in the other. It is said in *Blackstone Mfg. Co. v. Blackstone* (1908) 200 Mass. 82, 18 L.R.A.(N.S.) 755, 85 N. E. 880, that the *Newton Case* has been treated as settling the law in Massachusetts that the possibility of deriving power from the water of a stream before the water is appropriated or used for furnishing power is not taxable property by itself alone; and that, when water is appropriated and used for power, it is, as between different owners and municipalities, taxed with the property to which it is applied.

The *Blackstone Case* also points out that in the *Newton Case* the water power is dealt with only in connection with an attempt to tax it as a distinct subject, apart from the land in *Newton* over

which the water flowed, and apart from the part of the dam which was in that town, and that the tax upon the dam as well as that upon the land was held to be rightly assessed.

The reasons for the decision in the Newton Case, observes Knowlton, Ch. J., in *Blackstone Mfg. Co. v. Blackstone (Mass.)* supra, are found in legislation relative to the erection of mills, which did not affect the right to consider for purposes of taxation a fall of water, a dam, and other structures in connection with land in Massachusetts upon which they are located, although the power is utilized across the border in another state. (As to this point, see note in 18 L.R.A.(N.S.) 755, above referred to.)

So, in *Union Water Power Co. v. Auburn* (1897) 90 Me. 60, 37 L.R.A. 651, 60 Am. St. Rep. 240, 37 Atl. 331, water power is held not taxable at the site of the dam if used elsewhere, since until applied it is potential and not actual in the sense that it is property subject to taxation. See comment on this case in the opinion in the SLATERSVILLE CASE.

It was claimed in *Bellows Falls Canal Co. v. Rockingham* (1865) 37 Vt. 622, that the value of the canal as a reservoir furnishing water power was either twice included, once under the head of "locks and canals," and again with each mill and shop, or else that it was wholly included under the head of "locks and canals," separate from the mills carried by it, and that either mode made the list illegal. The court said: "It does not appear but that such part of the water power furnished by the canal as was applied to any mill or shop was included in the valuation of such mill or shop. If there was any remaining capacity in the canal to furnish water power, not used, which made the structure or reservoir more valuable, it was properly appraised with, and as a part of, the property itself. It may be conceded that a water power as such, unconnected with any mill or other erection, and disconnected from any land, is not a proper subject of taxation. But when applied to a mill or factory, to the extent it is thus applied it becomes a part of the mill or factory itself, and should be taxed with and as a part of it; and when unimproved it is to be taxed with the land to which it belongs, if its existence adds to the value of the property."

In *Lowell v. Middlesex County* (1863) 6 Allen (Mass.) 131, the owners of the locks and canals had a surplus water power which was unemployed. In assessing the value of the locks and canals L.R.A.1917F.

this surplus water power was added to their value, and it was decided that this was proper and legal.

As stated in the *Blackstone Case*, the subject has been considered in New Hampshire on general principles, seemingly without reference to the Mill Acts, and it is held broadly that the elements in the real estate which create the power are to be treated as creating its value; and that the whole is to be assessed in the town where these are situated, without reference to the location of the mill where the power is applied.

Thus, in *Cocheco Mfg. Co. v. Strafford* (1871) 51 N. H. 455, water power is held taxable as part of the real estate at the place where it is created, although the mills with the water power attached may be taxed in the separate townships in which they are situated. Other New Hampshire cases sustaining the view are cited in the note in 18 L.R.A.(N.S.) 755.

Where petitioner had the right to use or draw off water from a certain lake to operate mills, the lake being located in a town adjoining that in which the land lay, but petitioner having no ownership in the lands under the water of the lake or in any of the lands adjoining, it was held in *Re Hall* (1907) 116 App. Div. 729, 102 N. Y. Supp. 5, that the water right was incorporeal and appurtenant to petitioner's land, and should be taxed as a part of it in the town where the land lay. (Order affirmed in (1907) 189 N. Y. 552, 82 N. E. 1127.)

In *Pingree v. Berkshire* (1869) 102 Mass. 76 (discussed in SLATERSVILLE FINISHING CO. v. GREENE, ante, 585), a tax upon a dam and land in Windsor used to make a reservoir to furnish power for mills in Dalton and Pittsfield was held rightly assessed in Windsor on their value for use in producing the power. The court said that the Newton Case did not decide that the land and structures by which the power is created are not taxable for their value as such.

The question presented in *Hazard Powder Co. v. Enfield* (1908) 80 Conn. 486, 69 Atl. 16, is whether a water power connected with mills that have been shut down with the bona fide intention on the part of the owner to discontinue work there is to be considered in fixing the value of the plant for assessment. The statute provides that "when water power created or reserved in any manner by work wholly located in the same town in which it is appropriated and used, is used by its owner, the whole shall be assessed and set in the list as incidental to the machinery which is operated by it

and not separately as distinct property." The court expresses the opinion that an owner who has the water power applied to his own mills so that the same is available for immediate use in connection therewith is using it within the meaning of the statute, so that it should be assessed and set in his list as incident to the machinery, although the mills and machinery may at the date for assessing it stand idle, and whether it be his intention that they shall remain permanently so or not. The court said that it is true that the water power was not in use actually operating the mill and machinery, but it was not disconnected from them, and was capable of such use by hoisting the gates. "It was supplying the power for their operation as truly as though actually operating them, and thus was as much an incident of the mills and their machinery as when actually operating them. It added to the market value of the mills the same as it would if they were in operation. It was thus as effectively appropriated by the plaintiff to its own use in connection with its mills as when they were in operation. If the assessment depended upon the actual use of the water power in operating the machinery, then any temporary stoppage of the mills on the first day of October would render an assessment impossible. When the owner stops his mill, whether for a short time or with the intention of permanently discontinuing its work, there would seem to be no good reason for assessing the water power and works by which it is created disconnected from the mill and the mill disconnected from its power." The court further observed that "after mills in such cases have gone to decay or been dismantled so that they are no longer liable to assessment as 'mills and manufactories,' the water power, not then being incident to any machinery, could only be assessed as incident to the lands and works by which it is created. In the present case the evidence, which is made part of the record, shows that nothing had been done toward dismantling the mills at the date of the assessment. The water power should have been considered, therefore, as incident to the machinery in valuing the mills and manufactories."

A dam and reservoir located partly in one town and partly in another was in *East Granby v. Hartford Electric Light Co.* (1903) 76 Conn. 169, 56 Atl. 514, held to have been located for the purpose of taxation in the town where the power was applied, under a statute providing that water power shall be assessed in the

town in which it is used and appropriated as incidental to the machinery which is operated by it.

In *Saco Water Power Co. v. Buxton* (1903) 98 Me. 295, 56 Atl. 914, the property consisted of land on the shore of a stream, and an unused dam across the stream. The contention was that the assessors could only assess the land for what it was worth as land, independent of it being a parcel of a mill privilege, and the dam for what it was worth as a structure. The court, distinguishing *Union Water Power Co. v. Auburn* (1897) 90 Me. 60, 37 L.R.A. 651, 60 Am. St. Rep. 240, 37 Atl. 331, states that in that case the assessors assessed "dam and water rights." The "water rights" were a distinctive element of assessment. They were assessed for what they were supposed to be worth as property, and not regarded as merely a condition which gave the dam an enhanced value. And the court in considering the assessment treated it as an assessment of water power, as such, and so held that it was illegal. In the *Saco Case*, however, the mill privilege only was assessed, and by no fair construction can it be regarded as an assessment of water power as property. Besides, in the *Saco Case* the water power was not appurtenant to mills in other towns, as was held to be the case in *Union Water Power Co. v. Auburn*, but was incident to land and a dam where there were no mills. The court observed: "Suppose there were no dam. Could it be successfully contended that the land was to be assessed only for its value as land for farming, or for any other use to which it might be put, disconnected from the stream? Is land upon which there is a valuable unimproved water privilege, where no power is being developed, to be assessed only for the value of the land, without the privilege? May it not be the chief value of the land that it had a privilege upon it? And does the fact that an unused dam has been built upon the privilege make it any other than an unused privilege, and assessable for its value as a privilege? We think not. We think that in so far as this land was made more valuable by the stream and fall, so far these were properly to be considered in the valuation of the land."

So in *Penobscot Chemical Fibre Co. v. Bradley* (1904) 99 Me. 263, 59 Atl. 83, it is held that the value of land may be enhanced by reason of its capacity to create water power, and that a water power or mill privilege is taxable as part of the land where the land is situated,

although the power is applied elsewhere. See discussion of this case in opinion of *SLATERSVILLE FINISHING CO. v. GREENE*.

So it is stated in *Lowell v. Middlesex County* (1890) 152 *Mass.* 372, 9 *L.R.A.* 356, 25 *N. E.* 469, that water power when used should be taxed with the land of which it is parcel or to which it is appurtenant.

The decision *Cheshire v. Berkshire County* (1875) 118 *Mass.* 386, holds unconstitutional and void a statute which provides that "all reservoirs of water with the dams connected therewith and the lands under the same, used to maintain a uniform supply of water for mill

power, shall be assessed for the purposes of taxation in the town or towns where located, at a valuation not exceeding a fair valuation of land of like quality in the immediate vicinity."

The decision *Re Ontario & M. Power Co.* (1916) 35 *Ont. L. Rep.* 459, 9 *Ont. Week. N.* 404, 28 *D. L. R.* 30, holds that in assessing land it is proper to take into consideration its special adaptability to such a use as a water-power block is being put to,—its use in developing a valuable water power which without it could not have been developed.

J. D. C.

FLORIDA SUPREME COURT.

JAMES H. MURPHY, Appt.,

v.

EMMETT HOHNE.

(— Fla. —, 74 So. 973.)

Specific performance — discretion.

1. Applications for the enforcement of specific performance of contracts for the sale of real estate are addressed to the sound judicial discretion of the chancellor. Such discretion is controlled by the provisions and principles of law and equity applicable to the particular facts and circumstances; and unless it clearly appears that the chancellor has erred in his decree in refusing a specific performance it will not be disturbed on appeal.

For other cases, see Appeal and Error, VII. i, in Dig. 1-52 N. S.

Same — right of parties.

2. The enforcement by a court of equity of a specific performance of a contract is not a matter of right in either party to such contract, but a matter for the exercise of a sound judicial discretion by the court, and should only be exercised when a decree for specific performance would be strictly equitable as to all the parties under the facts as they exist.

For other cases, see Specific Performance, I. a, in Dig. 1-52 N. S.

Same — improvements — effect.

3. Improvements afford no independent ground for specific performance unless they are both valuable and permanent and are warranted by the contract.

For other cases, see Specific Performance, I. e, in Dig. 1-52 N. S.

Headnotes by WHITFIELD, J.

Note. — As to right of vendee to specific performance with abatement from purchase price where vendor is unable to convey a good and unencumbered title, see annotation following this case, post, 597. *L.R.A.* 1917F.

Same — legal rights.

4. An enforcement in equity of the specific performance of a contract to convey real estate is not a matter of right except as such enforcement may be essential to the maintenance of a legal right to which the movant is clearly and equitably entitled.

For other cases, see Specific Performance, I. e, in Dig. 1-52 N. S.

(March 31, 1917.)

APPEAL by complainant from an order of the Circuit Court for Hillsborough County sustaining a demurrer to a bill filed to compel specific performance of a contract to convey certain real estate. Affirmed.

The facts are stated in the opinion.

Messrs. Hilton S. Hampton and Fred J. Hampton, for appellant:

Specific performance can be successfully invoked in every case where to refuse relief would be to work hardship or injustice upon the party appealing to the equitable forum.

Leach v. Forney, 21 *Iowa*, 271, 89 *Am. Dec.* 574; *Troutman v. Lowing*, 16 *Iowa*, 415; *Warvelle, Vend. & P.* 2d ed. § 753; *Beckman v. Sonntag Invest. Co.* 67 *Fla.* 293, 64 *So.* 948; *Wright v. Young*, 6 *Wis.* 127, 70 *Am. Dec.* 453; 26 *Am. & Eng. Enc. Law*, 2d ed. pp. 83, 84, 89; *Taylor v. Mathews*, 53 *Fla.* 776, 44 *So.* 146; *Overman v. Hathaway*, 29 *Kan.* 434; *Walker v. Kelly*, 91 *Mich.* 212, 51 *N. W.* 934.

Mr. Charles B. Parkhill for appellee.

Whitfield, J., delivered the opinion of the court:

The bill of complaint herein is as follows:

"James H. Murphy, by his solicitor, Hilton S. Hampton, brings this his amended bill of complaint against Emmett Hohne, and thereupon your orator complains and says: That on the 18th day of June, 1915, the defendant was seised and possessed of

the following premises lying in Hillsborough county, Florida: Lots 1, 2, and 3 of block 3 of Luna Park, as per revised map of the same recorded in the records of Hillsborough county, Florida. And desiring to sell the same to the complainant, thereupon the complainant then and there agreed to pay the sum of \$449 in cash, and the complainant further agreed to assume and pay all taxes now due and owing on said premises, together with three paving certificates, one for \$116.15, another for the same amount, and a third for the sum of \$175.20, together with the taxes thereon amounting to approximately the sum of \$150, and further agreed to furnish an abstract at a cost of \$21.50.

"And the said defendant agreed for the consideration above named to execute and deliver a warranty deed of conveyance conveying the property to your orator, clear of encumbrances, save and except the taxes and paving above specified, and in pursuance of said agreement your orator then and there paid to the defendant \$50 cash, and was then and there let into the possession of the property, and proceeded to improve the same; that after the consummation of said agreement the defendant stated to your orator that he had a wife who was in Brewton, Alabama; therefore he could not immediately deliver a deed, but, having previously given your orator a receipt, which is attached to this bill as a part of the same and marked Exhibit A, agreed that he would take with him a warranty deed and would have the same executed in Brewton, Alabama, would procure his wife's signature and separate acknowledgment to the same, and would send it to the American National Bank of Tampa, Florida, at which time your orator was to pay the balance of the purchase price, amounting to \$289.

"Your orator further represents that at the time of purchase your orator agreed to pay the defendant a price then considered by your orator in excess of the value of the land, for the reason that your orator's wife has become very much attached to said lot and desired the same for a home by reason of its location, and has frequently begged your orator to ascertain the owner of the same and purchase it.

"Your orator further represents that, although he has paid the part of the purchase price demanded, has been let into possession of the said property, and is now in possession of the same, has expended divers sums of money in improving said property, in grubbing, grading, and clearing the same for building, has purchased the abstract as above specified, has done all things on his part agreed to be done and performed, and is ready, willing, and able to carry out all

conditions, payments, and stipulations on his part agreed to be done and performed, yet the defendant, notwithstanding the premises and the said payments, but with a fraudulent design to extort the payment of additional money from your orator, in bad faith, and with the purpose of escaping his just obligations, has refused to make and execute and deliver said deed, and, as the defendant is insolvent, your orator has been compelled, having no other remedy save in a court of equity, to file this bill of complaint.

"Your orator further represents that the said complainant is now the holder of the legal title to the foregoing property, and same is clear of encumbrance, save and except the taxes and paving certificate, which under the agreement of purchase your orator has assumed as part consideration, and your orator is ready, able, and willing to make said payments, and hereby offers and tenders to pay the balance of the purchase price upon tender of a deed in accordance with the contract of the parties.

"The premises considered, your orator prays:

"(1) That the said Emmett Hohne, who is made a party defendant to this bill, may be decreed to answer the same, answer under oath being hereby waived.

"(2) That on final hearing this court will order and decree that the defendant do specifically perform the agreement hereinbefore set forth by making, executing, and delivering to your orator, upon payment of the balance of the purchase price, as agreed, a deed of conveyance as contracted, conveying the property described in this bill of complaint to your orator, clear of encumbrance save and except taxes and paving certificates, and in the event of his failure to do so that the decree of this court may operate as such conveyance; that he do procure to the said deed, as agreed, the signature of his wife, relinquishing her dower therein in the manner required by the laws of the state of Florida, and in case of his failure to procure the signature of his said wife, and her separate acknowledgment to said deed in the form required by law, that the value of the existing dower interest of his said wife may be computed, and that your orator may have credit therefor on the purchase price of the land sought to have conveyed, or have indemnity therefor.

"(3) That your orator may have such other and further relief in the premises as may be agreeable to equity, and as the circumstances of this case shall warrant.

"(4) That a writ of subpoena do issue directed to the defendant, Emmett Hohne, requiring him on a day and under a penalty

to be therein fixed to be and appear before this honorable court, full, true, and perfect answer to make to all and singular the allegations in this bill of complaint, and to stand to and perform such other and further order in the premises as may be proper."

Exhibit A is as follows:

Received from James H. Murphy the sum of fifty (\$50.00) dollars, being part payment for the purchase price of the following property in Hillsborough county, Florida:

Lots 1, 2, and 3 in block 3 of Luna Park, a subdivision, as per recorded plat thereof.

I agree to furnish a warranty deed, clear of encumbrances, save taxes since 1903 and assessments for paving, to the said Murphy upon his paying to me the balance of the purchase price, to wit, \$289, the total purchase price of the property being \$339.99, plus taxes and paving, which Mr. Murphy agrees to pay since 1908.

Witness my hand and seal on this 18th day of June, A. D. 1915.

Emmett Hohne. [Seal.]

A demurrer to the bill of complaint was filed on the following grounds:

"(1) The bill is without equity.

"(2) The allegations of the bill of complaint do not entitle the complainant to the relief prayed for therein.

"(3) The allegations of the bill of complaint show that the complainant is not entitled to the relief prayed for therein.

"(4) The allegations of said bill seek to vary the terms of the written contract by parol testimony."

This demurrer was sustained, and the complainant appealed.

Applications for the enforcement of specific performance of a contract for the sale of real estate are addressed to the sound judicial discretion of the chancellor. Such discretion is controlled by the provisions and principles of law and equity applicable to the particular facts and circumstances; and unless it clearly appears that the chancellor has erred in his decree in refusing a specific performance, it will not be disturbed on appeal. *Gaskins v. Byrd*, 66 Fla. 432, 63 So. 824.

The enforcement by a court of equity of a specific performance of a contract is not a matter of right in either party to such contract, but a matter for the exercise of a sound judicial discretion by the court, and should only be exercised when a decree for specific performance would be strictly equitable as to all the parties under the facts L.R.A.1917F.

as they exist. *Rose v. Henderson*, 63 Fla. 504, 59 So. 138.

Improvements afford no independent ground for specific performance unless they are both valuable and permanent and are warranted by the contract. *L'Engle v. Overstreet*, 61 Fla. 653, 55 So. 381.

An enforcement in equity of the specific performance of a contract to convey real estate is not a matter of right except as such enforcement may be essential to the maintenance of a legal right to which the movant is clearly and equitably entitled. As the complainant below has no right to enforce specific performance against the wife, and as when the contract was made the complainant, not knowing the defendant was a married man, contemplated a conveyance by the defendant of the entire property rights in the land, which could not have been contracted for if contemplated by the defendant, he knowing he had a wife, and no contract by her being made as required by the statute, the court will not require specific performance in part and compensation for the remainder, that relief not appearing in this case to be essential to the maintenance of the legal rights of the complainant growing out of the contract as it was accepted by him. It does not clearly appear that appropriate proceedings at law will not afford a complete remedy. The defendant apparently owns the property in controversy.

An abuse of discretion is not shown in the order sustaining the demurrer to the bill of complaint which was appealed from, and such order is affirmed.

Browne, Ch. J., and Taylor, Shackelford, and Ellis, JJ., concur.

A petition for rehearing having been filed, the following *Per Curiam* response was handed down on April 19, 1917:

The allegations of the complainant clearly show that in accepting the contract to convey he did not contemplate the existence of or the conveyance of a dower interest in the land; and though the complainant may have been deceived as to the defendant's right to convey the land, this does not afford an equity for specific performance. Deception may give a right of action at law or in equity for appropriate relief; but specific performance is not a general remedy for deception, and the allegations in this case do not show a clear right to enforce in part a contract to convey land.

Rehearing denied.

All the Justices concur.

Annotation—Right of vendee to specific performance with abatement from purchase price where vendor is unable to convey a good and unencumbered title.

Earlier cases discussing the question under annotation will be found in notes to *Barbour v. Hickey*, 24 L.R.A. 763, 765; *Eppstein v. Kuhn*, 10 L.R.A.(N.S.) 117; and *Kuratli v. Jackson*, 38 L.R.A.(N.S.) 1195.

As shown by the earlier notes the general rule is that a vendor may at the instance of his vendee be compelled to perform to the extent of his ability a contract which he is not able to carry out in full. This rule finds further support in other cases.

Thus, a purchaser who insists on the specific performance of a contract by a vendor who has agreed to sell a larger interest in land than he has is entitled to a decree as to that which the vendor can convey, with an abatement from the purchase price. *Melin v. Woolley* (1908) 103 Minn. 498, 22 L.R.A.(N.S.) 595, 115 N. W. 654, 946; *Lathrop v. Columbia Collieries Co.* (1912) 70 W. Va. 58, 73 S. E. 299; *Gottesman v. Warner* (1912) — Ont. —, 3 D. L. R. 296; *Chapman v. Edwards* (1911) 16 B. C. 334.

And so a vendee may have a decree of specific performance of so much land as a vendor is able to convey a good title to with an abatement from purchase price, where the vendor as to a portion of the land contracted to be conveyed can give a life estate only. *Ontario Asphalt Block Co. v. Montreuil* (1913) 29 Ont. L. Rep. 534.

And where a vendor is able to give title to only a three-fourths interest in land he had contracted to convey, the vendee is entitled to a decree of specific performance as to such three-fourths interest with abatement of proportionate part of purchase price. *Farrell v. Bork* (1910) 76 N. J. Eq. 615, 79 Atl. 897.

And a vendee who has contracted to purchase land upon which there are encumbrances of which he was without knowledge at the time he entered into the contract, and which cannot be removed by the vendor, is entitled to a decree of specific performance with a deduction of a proportionate part of the purchase price to cover the encumbrances, the conveyance to be so drafted as to exclude from covenants of warranty such encumbrances. *Cashman v. Bean* (1917) 226 Mass. 198, 115 N. E. 574. The encumbrances in this case were for a party wall and a passageway.

So, in *Milam v. Williams* (1914) 73 L.R.A.1917F.

W. Va. 467, 80 S. E. 770, where a contract by a husband and wife for the sale of two lots owned separately was not acknowledged by the wife, there could be a decree of specific performance against the husband for the lot owned by him, with an abatement from the purchase price of such amount as the value of the wife's lot bore to the entire purchase price.

And where one contracts to convey by special warranty deed a government subdivision of land, title to which he had acquired under tax foreclosure, and title to a portion thereof is divested by a decree vesting title in a third party, the vendee is entitled to specific performance as to the remainder of the tract with an abatement from the purchase price of the value of the portion to which title in the vendor has failed. *Baldwin v. Brown* (1908) 48 Wash. 303, 93 Pac. 413.

And where part of several tenants in common of a tract of land contract to convey the entire tract, it being contemplated that all the owners will join in the conveyance, if the contract cannot be carried out as to the entire tract because of the refusal of one of the owners to sign and a homestead claim of another, the vendee may have specific performance as to the interests which are able to be conveyed, with a proportionate abatement of the purchase price. *Ward v. Walker* (1913) — Tex. Civ. App. —, 159 S. W. 320.

Also, where one as agent of another contracts to sell 75 feet, and as executor of an estate 25 feet, of a certain lot, and the contract is not binding as to the estate for want of authority in the executor to sell, the vendee is entitled to a decree of specific performance as to the 75 feet, with a proportionate abatement from the purchase price. *Hazzard v. Morrison* (1912) 104 Tex. 589, 143 S. W. 142.

And where a realty company had platted a proposed addition to a town into blocks 350 by 286 feet, each containing 14 lots, and later, so as to render the land admissible as an addition, was required by the city to reduce the area of the blocks to 300 by 280 feet, to contain 12 lots, a vendee who had contracted to purchase a block as first platted was held in *Wellington Realty Co. v. Gilbert* (1913) 24 Colo. App. 118, 131 Pac. 803, entitled to specific performance of his

contract in so far as the vendor was able to fulfil it, with an abatement of the purchase price for the land which it was not able to convey.

However, as is shown in the earlier notes, the general rule is qualified by important limitations.

Thus, a vendee who contracts for the purchase of land knowing that his vendor has only a partial interest therein cannot, upon the refusal of the other co-owners to sell, have specific performance against his vendor as to his interest, with a proportionate abatement from the purchase price, such a case being distinguishable from cases where a vendor enters into a contract for the sale of land, representing it, and agreeing to sell it, as his own. *Tremblay v. Dussault* (1913) 23 *Manitoba L. R.* 128.

And one who contracts to purchase an entire tract with knowledge that his vendor has only an undivided one-half interest therein is not entitled to a decree of specific performance as to such one-half interest with an abatement from purchase price. *Moore v. Lutjeharms* (1912) 91 *Neb.* 548, 136 *N. W.* 343.

And a vendee who has or ought to have knowledge that land contracted for is subject to certain rights thereon of a railroad company is not entitled to a decree as to specific performance with an abatement from the purchase price because of such encumbrance. *Wetherby v. Griswold* (1915) 75 *Or.* 468, 147 *Pac.* 388.

Specific performance with abatement in price for alleged shortage will not be decreed where the contract to sell was of a definite tract of land, and not by acreage, and there were no warranties or guaranties as to amount. *Bethell v. McKinney* (1913) 164 *N. O.* 71, 80 *S. E.* 162.

And it was held in *Old Colony Trust Co. v. Chauncey* (1913) 214 *Mass.* 271, 101 *N. E.* 423, where a vendor contracted to convey only in case he could give a good, clear title, that the vendee upon the title proving defective as to a certain undivided interest could not compel specific performance of the contract with a deduction for the alleged cloud on title.

Also, a widow who, believing that upon the death of her husband she became the owner of his land, contracts to sell the same, cannot, it being ascertained that the land belongs to his estate, be compelled at the instance of a vendee to convey such interest as she as his widow has in the land with an abatement from the purchase price, as until the estate is settled the amount of her interest cannot be known. *Meighen v. Couch* (1913) *L.R.A.* 1917F.

23 *Manitoba L. R.* 117. The court added that it doubted if it could even be specifically decreed were she the absolute owner of a third interest, as such interest was so out of proportion to the entirety.

And because the court cannot do equity, a vendor who has contracted to make good title to a parcel of land the title to which depends upon the legality of a tax sale will not be compelled at the instance of the vendee to convey what interest he has, and receive the purchase money less an abatement thereof equal to the value of the interest not conveyed, based on the assumption that he can convey a life estate only, since in case there should thereafter be a direct proceeding to test the validity of the tax sale and it should be sustained, the estate conveyed would be a fee simple, and the vendor would have been deprived of his property without fair compensation. *Brisbane v. Sullivan* (1916) 86 *N. J. Eq.* 411, 99 *Atl.* 197, reversing (1914) 83 *N. J. Eq.* 182, 93 *Atl.* 705.

Where there is a contract to exchange lands and one of the parties is unable to convey the entire tract which she has agreed to convey, the other party cannot have specific performance in the way of conveyance of that portion of the contract to which title can be given and compensation in the form of money value for that portion which is unable to be conveyed, as the effect of such a judgment would be for the court to make a new contract for the parties and a different one from that entered into between them, which it is without authority to do. *Williams v. Pearman* (1914) — *Tex. Civ. App.* —, 164 *S. W.* 43.

But in *Mundy v. Irwin* (1915) 20 *N. M.* 43, 145 *Pac.* 1080, it was held that under a contract for exchange of real estate a vendee may have specific performance of the part of a contract which the vendor can perform with compensation for that part which he cannot perform, the same as in ordinary cases of sale of real estate. The court stated: "In a case like this, where the vendee having performed on his part and seeking specific performance against vendor for all that the vendor can convey, with compensation at the market value for that which he cannot convey, we know of no reason, in principle or on authority, why the relief should not be awarded."

Claim for dower.

Supplementing notes in 10 *L.R.A.* (N.S.) p. 121, and 38 *L.R.A.* (N.S.) p. 1196.

As to whether there should be an abatement from the purchase price where the vendor's wife refuses to join in a conveyance, the same conflict of opinion disclosed by the cases in the earlier notes is shown in the later cases.

Thus, that a vendee may have specific performance with abatement from purchase price for the dower interest of the vendor's wife has been held in *Minge v. Green* (1912) 176 Ala. 343, 58 So. 381; *Maas v. Morgenthaler* (1910) 136 App. Div. 359, 120 N. Y. Supp. 1004; *Hirschman v. Forehand* (1914) 114 Ark. 436, 170 S. W. 98; *Williams v. Wessels* (1915) 94 Kan. 71, 145 Pac. 856; *Farley v. Secor* (1915) 167 App. Div. 80, 152 N. Y. Supp. 787; *Bethell v. McKinney* (1913) 164 N. C. 71, 80 S. E. 162; *Tebeau v. Ridge* (1914) 261 Mo. 547, L.R.A. 1915C, 367, 170 So. 871.

However, in Alabama the deduction allowed where the encumbrance is a dower estate, even though already vested, is not a gross compensation, but only an indemnity against loss therefrom. The court in the *Minge Case* (1912) 176 Ala. 343, 58 So. 381, said: "This indemnity is in contemplation of an actually vested dower estate, and the amount of the reservation of purchase money will be measured by the relative quantum of that estate. . . . The object in view is merely to indemnify the vendee against the contingent future assertion of the dower right, and this will be accomplished by regarding the following rules: (1) The amount of the reservation should be one half or one third of the purchase price, as the wife may presently appear to be entitled under § 3813 of the Code, prescribing the quantum of the dower estate. (2) If the dowress expectant die before her husband, the amount reserved, with legal interest to that date, should be forthwith paid to the vendor. (3) If she survive her husband, the amount reserved falls due upon her death, and is then payable to the vendor's heirs at law or assigns, with legal interest accruing during the vendor's lifetime only. (4) The ultimate payment of the amount reserved should be secured by a decretal order making it a lien on the land, or else by a mortgage on the land conditioned and payable as above prescribed, as the chancellor may in his discretion determine. The foregoing are general rules. It is evident that there can be no reservation of purchase money in any case except to the extent that the consideration is payable in money. . . . During the vendor's life the purchaser's L.R.A.1917F.

possession and use cannot be disturbed, and it would be extremely inequitable to permit the vendee to enjoy the use of both the land and the purchase money at the same time. While he has the land he ought to pay interest on the money. Of course the court cannot require the wife to execute a release of her dower right, and such is not the purpose of the bill."

There was a strong dissenting opinion in this case by two judges, which pointed out the many elements of uncertainty in calculating the present value of inchoate right of dower under the statute as to dower, the dissenting judges claiming it to be an impossibility for any human agency to approximate such value.

In the *Hirschman Case* (1914) 114 Ark. 436, 170 S. W. 98, the court stated that "the authorities are not altogether in accord, but according to the great weight of authority the refusal of the wife to join in the deed does not afford sufficient ground to deny the vendee the right to compel a specific performance of the contract. He may elect to refuse to accept the conveyance on account of the outstanding inchoate dower right and sue to recover damages for the breach of the contract, or he may accept the conveyance of such interest as it is within the power of the vendor to give. . . . The authorities are not altogether in accord on this question, and Judge Story in his work on Equity Jurisprudence expresses some doubt as to the justice of that rule. 2 Story, Eq. Jur. § 734. But we are of the opinion that such is the established rule, and that it is the just and equitable one. The real division between the authorities is concerning the question whether if the vendee elects to accept the conveyance he can require an abatement of the price to the extent of the value of the outstanding dower interest. Upon that question this court is committed to the rule that the vendee may require a deed and have an abatement to the extent of the value of the contingent interest of the wife."

In the *Tebeau Case* (1914) 261 Mo. 547, L.R.A.1915C, 367, 170 So. 871, the court held that in enforcing specific performance of a contract to convey real estate in favor of one who did not know that the grantor was unmarried, diminution of the purchase price by the present value of the wife's inchoate right of dower may be allowed where the vendor has not attempted to secure her signature to the conveyance and the contract does not call for a warranty deed. In referring

to Aiple-Hemmelmann Real Estate Co. v. Spelbrink (1903) 211 Mo. 671, 111 S. W. 480, 14 Ann. Cas. 652 (cited in note in 38 L.R.A.(N.S.) p. 1196), which held that where a vendor contracts to sell land covenanting for a warranty deed and his wife refuses to join in the deed specific performance with abatement of purchase price will not be decreed at the instance of the vendee in the absence of fraud, the court in the Tebean Case stated that the Spelbrink Case should no longer be followed, and that the views expressed in the dissenting opinion of that case should be followed, as being more in consonance with the reason of things, and more in accord with the great weight of authority.

On the other hand, a vendee has been denied specific performance with an abatement for an outstanding dower interest in Long v. Chandler (1914) — Del. Ch. —, 92 Atl. 256; MURPHY v. HOHNE, ante, 594; Haden v. Falls (1914) 115 Va. 779, 80 S. E. 576, Ann. Cas. 1915C, 1034; Milam v. Williams (1914) 73 W. Va. 467, 80 S. E. 770.

So also, in Leo v. Deitz (1912) 63 Or. 261, 127 Pac. 550, it was held on the authority of Kuratli v. Jackson (1911) 60 Or. 203, 38 L.R.A.(N.S.) 1195, 118 Pac. 192, 1013, 3 Ann. Cas. 1914A, 203, that one taking a contract for the conveyance of real estate without securing the signature of the husband of the grantor, whom he knows to be living, cannot have a decree of specific performance with abatement for purchase price

for the value of the inchoate right of curtesy.

The basis of the decision in the Haden Case (1914) 115 Va. 779, 80 S. E. 576, Ann. Cas. 1915C, 1034, seems to be that a wife should not be coerced directly or indirectly, or even remotely, to release her right, or even put under pressure to surrender her free and untrammelled volition, and that an abatement of the purchase price would be a coercion.

And in the Long Case (1914) — Del. Ch. —, 92 Atl. 256, the denial of specific performance with an abatement from purchase price seems to be on the ground that the value of inchoate dower cannot be properly valued and mortality tables are inadequate for the purpose. The court in this case said that while there is some merit in the proposition that if the vendor agrees to convey more than he owns or can convey a good title to he should at the demand of his vendee be required to convey what he has, with an abatement in the price based on the value of that which he is unable to convey, provided this value may be ascertained with reasonable certainty, yet, as under the Delaware statute relating to dower rights the present money value of the dower rights of a wife on her husband's life cannot be fairly and justly estimated because the quantum of it is not ascertainable until his death, and because of the double contingency of her survivorship of him, therefore there can be no decree of a conveyance by him with an abatement of the purchase price.

J. H. B.

GEORGIA SUPREME COURT.

UNITED STATES NATIONAL BANK OF
OMAHA, NEBRASKA, Plff. in Err.,
v.

H. D. GLANTON, Receiver, etc., of the
Bank of West Point.

(146 Ga. 786, 92 S. E. 625.)

Banks — collections — trust in fund.

Where one bank sends a draft to another bank for collection, without any specific instructions, and, in the usual course of business, the receiving bank collects the draft by accepting a check of the drawee, drawn on itself, and charging the amount thereof against the drawee's account, this transaction does not establish the relation of trust

and cestui que trust between the two banks as to the amount of the draft, but it does establish the relation of debtor and creditor, the forwarding bank having no preference over general creditors.

For other cases, see Banks, IV. b, 2, in Dig. 1-52 N. S.

(May 16, 1917.)

ERROR to the Superior Court for Troup County to review a judgment denying the claim of intervener to a preference, in a proceeding by the state to wind up the affairs of the Bank of West Point. Affirmed.

Statement by Gilbert, J.:

At the instance of the state of Georgia, a receiver was appointed for the Bank of West Point. The United States National Bank of Omaha, Nebraska, filed an intervention to the proceedings in the superior court, in which it sought the payment of a

Headnote by GILBERT, J.

Note. — As to trust in proceeds of collection made by a bank when insolvent, see annotation following this case, post, 603. L.R.A.1917F.

draft intrusted to the Bank of West Point for collection. By agreement of the parties, the case was heard by the court without the intervention of a jury. The court held that the intervener was a common creditor, and was not entitled to any preference or priority over other creditors. The intervener excepted.

The material facts, as deduced from the evidence, were as follows: The intervener sent to the Bank of West Point, for collection, a draft for \$922.45, on the West Point Wholesale Grocery Company. The Bank of West Point collected the draft on January 12, 1916, receiving a check, drawn by the West Point Wholesale Grocery Company on the Bank of West Point, in settlement of the draft. The check was charged to the general checking account of the West Point Wholesale Grocery Company, and the Bank of West Point issued its check on the Hanover National Bank, and mailed it to the intervener. No cash was paid on the draft by the drawee. After the payment of the draft, the Bank of West Point continued to do a general banking business until the close of business on January 18, 1916. The transaction was regular and in accordance with the usual customs of banking business. Payment of the draft was stopped, on January 18, 1916, by the state bank examiner in charge of the Bank of West Point; and payment was refused by the Hanover National Bank. The cash on hand in the Bank of West Point was as follows on the days stated: January 11, 1916, \$11,581.88; January 12, \$10,667.97; January 13, \$8,750.18; January 14, \$8,004.92; January 15, \$5,808.37; January 17, \$6,742.28; January 18, \$5,023.49.

Mr. Hatton Lovejoy, for plaintiff in error:

It is presumed that the bank did not convert the proceeds of the collection, and that the proceeds are in the cash on hand.

Knatchbull v. Hallett, L. R. 13 Ch. Div. 696, 49 L. J. Ch. N. S. 415, 42 L. T. N. S. 421, 28 Week. Rep. 732; *Re Johnson*, 103 Mich. 109, 61 N. W. 352; *Importers & T. Nat. Bank v. Peters*, 123 N. Y. 272, 25 N. E. 319; *Hunt v. Townsend*, — Tex. Civ. App. —, 26 S. W. 310; *Continental Nat. Bank v. Weems*, 69 Tex. 489, 5 Am. St. Rep. 85, 6 S. W. 802; *Guignon v. First Nat. Bank*, 22 Mont. 140, 55 Pac. 1051, 1097; *Kansas State Bank v. First State Bank*, 62 Kan. 788, 64 Pac. 634; *Plano Mfg. Co. v. Auld*, 14 S. D. 512, 86 Am. St. Rep. 769, 86 N. W. 21; *Butler v. Western German Bank*, 86 C. C. A. 306, 159 Fed. 116; *Merchants' Nat. Bank v. School Dist.* 36 C. C. A. 432, 94 Fed. 705; *Boone County Nat. Bank v. Lati-* L.R.A.1917F.

mer, 67 Fed. 27; *State v. Bank of Commerce*, 54 Neb. 725, 75 N. W. 28.

The right of this plaintiff to recover out of the cash in the hands of the receiver should not be denied merely because the collection was made by a check taken as cash, instead of actual specie.

Kansas State Bank v. First State Bank, 62 Kan. 788, 64 Pac. 634; *Arnot v. Bingham*, 55 Hun, 553, 9 N. Y. Supp. 68; *People v. Merchants' Bank*, 92 Hun, 159, 36 N. Y. Supp. 989.

Messrs. R. H. Freeman and A. H. Thompson, for defendant in error:

After the collection of the draft by the Bank of West Point, it became an ordinary contract debtor of the owner, and not a trustee.

Ober & Sons Co. v. Cochran, 118 Ga. 396, 98 Am. St. Rep. 118, 45 S. E. 382; *Citizens Nat. Bank v. Haynes*, 144 Ga. 490, 87 S. E. 399; *Cronheim v. Postal Teleg. Cable Co.* 10 Ga. App. 716, 74 S. E. 78; *Bowman v. First Nat. Bank*, 9 Wash. 614, 43 Am. St. Rep. 870, 38 Pac. 211; *First Nat. Bank v. Davis*, 114 N. C. 343, 41 Am. St. Rep. 795, 19 S. E. 280; *Union Nat. Bank v. Citizens Bank*, 153 Ind. 44, 54 N. E. 97; *Akin v. Jones*, 93 Tenn. 353, 25 L.R.A. 523, 42 Am. St. Rep. 921, 27 S. W. 669; *Philadelphia Nat. Bank v. Dowd*, 2 L.R.A. 480, 38 Fed. 172; *First Nat. Bank v. Wilmington & W. R. Co.* 23 C. C. A. 200, 42 U. S. App. 232, 77 Fed. 401; *Anheuser-Busch Brewing Assn. v. Clayton*, 6 C. C. A. 108, 13 U. S. App. 295, 56 Fed. 759; *Peters Shoe Co. v. Murray*, 31 Tex. Civ. App. 259, 71 S. W. 977; *State ex rel. North Carolina Corp. Commission v. Merchants & Farmers Bank*, 137 N. C. 697, 50 S. E. 308, 2 Ann. Cas. 537; *American Nat. Bank v. Owensboro Sav. Bank & T. Co.* (American Nat. Bank v. Pedley), 146 Ky. 194, 38 L.R.A.(N.S.) 140, 142 S. W. 239; *Gonyer v. Williams*, 168 Cal. 452, 143 Pac. 736; *Young v. Teutonia Bank & T. Co.* 134 La. 879, 64 So. 806; 1 Michie, Banks & Bkg. 625.

Plaintiff is not entitled to a preference, by reason of the fact that it is unable to trace the trust fund into the funds in the hands of the receiver.

Ober & Sons Co. v. Cochran, 118 Ga. 396, 98 Am. St. Rep. 118, 45 S. E. 382; *Citizens Nat. Bank v. Haynes*, 144 Ga. 490, 87 S. E. 399; *Shields v. Thomas*, 71 Miss. 260, 42 Am. St. Rep. 458, 14 So. 84; *Freiberg v. Stoddard*, 161 Pa. 259, 28 Atl. 1111; *Travelers Ins. Co. v. Caldwell*, 59 Kan. 156, 52 Pac. 440; *Drovers' & M. Nat. Bank v. Roller*, 85 Md. 495, 36 L.R.A. 767, 60 Am. St. Rep. 344, 37 Atl. 30; *Slater v. Oriental Mills*, 18 R. I. 352, 27 Atl. 443; *Midland Nat. Bank v. Brightwell*, 148 Mo. 358, 71 Am. St. Rep. 608, 49 S. W. 994; *Ferchen v.*

Arndt, 26 Or. 121, 29 L.R.A. 664, 46 Am. St. Rep. 603, 37 Pac. 161; Philadelphia Nat. Bank v. Dowd, 2 L.R.A. 480, 38 Fed. 172; Italian Fruit & Importing Co. v. Penniman, 100 Md. 698, 1 L.R.A.(N.S.) 252, 61 Atl. 694; Billingsley v. PoHock, 69 Miss. 759, 30 Am. St. Rep. 585, 13 So. 828; Com. ex rel. Bell v. Tradesmen's Trust Co. 250 Pa. 378, L.R.A.1916C, 10, 95 Atl. 577.

Gilbert, J., delivered the opinion of the court:

The question to be determined in this case is whether the United States Bank of Omaha, hereinafter called the intervener, is entitled to a preference over general creditors of the insolvent Bank of West Point, by reason of the facts set out in the record. The solution of this question has been simplified by the clear statement of the contentions in the briefs of counsel for the respective sides. Both sides admit that there must be an identification of the funds collected by the insolvent bank, in the hands of the receiver, before there can be a preference. Both sides agree that the intervener can have no preference or priority in the general assets of the insolvent bank, nor in any collections made by the receiver. Both sides admit that the relation of trustee and cestui que trust between the insolvent bank and the intervener must have existed and that the funds collected constituted a trust fund, before there can be a preference over the general creditors. Counsel for the plaintiff in error contends that the transaction constituted such a trust relation. The plaintiff in error further contends that payment of the draft by the drawee by means of a check instead of cash in no way affects his rights, since the result is the same in either instance. Thus it will be seen that the only disputed issues are: (1) Did the payment of the draft by a check instead of cash change the legal character of the transaction, and thus alter the rule? (2) Do the facts constitute a trust relation entitling the intervener to a preference over general creditors? Should the latter question be answered in the affirmative, then, and then only, it must be determined if the proceeds of the collection have been definitely traced and identified.

As is seen from what precedes, counsel, by the exercise of great ability and zeal, have furnished an elaborate array of authorities to support their respective contentions. The transaction at the base of the litigation is of such frequent and ordinary occurrence in the channels of business that it has often been the subject-matter of judicial deliverance. It is not to be wondered that the courts have disagreed, especially since there is not wanting a basis for strong

and appealing argument on both sides of the question. While this is true, there is not so much real conflict of principle as the alignment in the briefs would indicate. Some of the cases differ only because of special facts peculiar to themselves. It is useless to consume time and space in a vain endeavor to reconcile conflicting cases, for the decisions themselves abound in such discussions, explanations, modifications, and retractions. This court has discussed many of the decisions on the question, and we are already committed on the fundamental principles underlying the case.

We think that the rule applying to such transactions is not altered by reason of payment of the draft by a check. We agree with counsel for the plaintiff in error that the practical result is the same whether payment was by a check, or whether the drawee, who was a customer of the Bank of West Point, undertook the useless routine of first drawing out the money, and then paying it back into the same bank, except that, when there is payment by a check, the difficulty of tracing and identification is much greater.

In Pollak Bros. v. Niall-Herlin Co. 137 Ga. 25, 35 L.R.A.(N.S.) 13, 72 S. E. 416, it was said: "Courts should deal with practical problems in a practical way, and give the same sense to a plain and ordinary business transaction which is uniformly attached to it by the business world."

Continuing, the court said: "Our Code declares that judicial notice will be taken of the general customs of merchants and similar matters of public knowledge. Civil Code 1910, § 5734. . . . We dare say that no depositor who paid a note or draft payable at his own bank ever went through the senseless ceremony of first taking out his money at one window and immediately paying it in at another window. He pays the note or demand which his bank holds against him with his check; and if he has the money to his credit, and the bank is a going concern, with money on hand sufficient to cash the check, the payment is equivalent, in law and in fact, to a payment in money."

When a merchant or a forwarding bank sends to a collecting bank a draft on a customer, the sender understands that the collecting bank will follow the usual custom of the banking business, and impliedly assents to the same. Young v. Teutonia Bank & T. Co. 134 La. 879, 64 So. 806.

Under the facts of this case, we think it is clear, from the standpoint of reason and justice, and by the weight of authority, that, when the collecting bank sent its check by the usual course of business, no trust existed, but, on the contrary, that the relation was simply that of debtor and creditor.

Some courts have drawn a distinction between cases where the collections have been made without any specific instructions, but only under the implied instructions to collect and remit in the usual course of business, and those where there have been specific instructions to "collect and remit." The argument in favor of holding the transaction to be a trust would be stronger where there were specific instructions. In this case, however, it is not contended that there were any specific instructions. The question in this state, however, has been completely foreclosed. *Citizens' Nat. Bank v. Haynes*, 144 Ga. 400, 87 S. E. 399; *Ober & Sons Co. v. Cochran*, 118 Ga. 396, 404, 98 Am. St. Rep. 118, 45 S. E. 382. In the case last cited the court quoted from *Sayles v. Cox*, 32 L.R.A. 719, note, with approval: "The general rule, where the bank has completed the collection and mixed the funds with its own, is that the bank is no longer a trustee, but simply a debtor, and that the owner of the paper cannot claim a preference out of its assets."

This is followed by an elaborate discussion and the citation of many authorities. It is true that the efforts in these cases were to impress with a trust funds collected by a receiver. But the ruling that the relation was simply that of debtor and creditor would be fatal whether the claim for a preference applied to funds realized by the receiver, or to funds already in possession of the insolvent bank when the receiver took charge.

Having ruled that the intervener was not entitled to a preference over the general creditors, it is unnecessary either to state or to discuss the contentions of the plaintiff in error in regard to identification of the funds. The assignments of error in regard to the admission of evidence, not being mentioned in the brief of counsel for the plaintiff in error, are considered as abandoned.

Judgment affirmed.

All the Justices concur.

Annotation—Trust in proceeds of collection made by a bank when insolvent.

The earlier cases on this question are discussed in the notes to *Sayles v. Cox*, 32 L.R.A. 715, and that to *American Nat. Bank v. Pedley*, 38 L.R.A.(N.S.) 146.

In order to understand the principles underlying the question under annotation, it is necessary to distinguish between the existence of a trust in the proceeds of collections made by an insolvent bank, and the ultimate right of the owner of the paper so collected to a preference in the funds of the insolvent bank. If no trust exists, the owner of such paper is not entitled to a preference; but it does not follow that, if a trust does exist, the owner is entitled to a preference. It is still necessary for the trust funds to be traced. In other words, two conditions must be established to entitle the owner to a preference: (a) The existence of a trust relation, and (b) a tracing of the trust funds. In accord with this, it is stated in *Macy v. Roedenbeck* (1915) L.R.A. 1916C, 12, 142 C. C. A. 42, 227 Fed. 346, in case of the collection of a note sent to a bank, that it must be conceded that the relation of debtor and creditor never existed between the owner of the note and the collecting bank, thus assuming that a trust existed. It is then stated that "the ownership of this note and the fact that Roedenbeck was the L.R.A.1917F.

owner of the proceeds of its collection, after the proceeds had been misapplied by the Bank of Sully, to which it had been intrusted, did not entitle Roedenbeck to a general lien upon the assets of the trustee in bankruptcy of such bank for the value of such property. He can only follow the note, or the proceeds of the collection, so far as it can be traced in its original form, or in other forms into which it has been converted."

There are various theories as to what must be done to trace the trust funds. According to some courts nothing more need be done than show the collection and that the cash on hand in the bank did not fall below this amount thereafter and until it passed into the hands of a receiver. With the theories as to the tracing of trust funds this note is not concerned. The subject of identifying misapplied trust funds to follow and recover them is discussed in the note in L.R.A.1916C, 21. See also other notes referred to in the introduction to that note.

Some courts seemingly make the existence of the trust depend upon whether or not the funds can be traced. This seems to be an erroneous theory. The ultimate right to a preference may depend upon the ability to trace the fund, but the existence of the trust does not so depend. The cestui que trust under

trusts the existence of which cannot be questioned—as in case of an express trust—may be unable to recover misapplied trust funds because of inability to trace them. But his failure so to recover does not negative the existence of the trust. So it is in case of trusts in collections made by an insolvent bank. This note is concerned only with the question as to the existence of the trust.

As stated in the note in 38 L.R.A. (N.S.) 146, the determining factor as to the existence or nonexistence of a trust in the proceeds of a collection made by an insolvent bank is whether or not the relation of debtor and creditor exists. If such relation does exist there is no trust. *First Nat. Bank v. Dennis* (1915) 20 N. M. 97, 146 Pac. 948, citing the above note.

It is a theory quite generally adhered to in the cases that where paper is deposited in a bank for collection, before the collection is actually made, the relation existing between the owner of the paper and the bank is that of principal and agent. 3 R. C. L. p. 634, § 262; *State Nat. Bank v. First Nat. Bank* (1916) 124 Ark. 531, 187 S. W. 673. The indorsement of items "for collection and remittance" is stated in *Lippitt v. Thames Loan & T. Co.* (1914) 88 Conn. 185, 90 Atl. 369, to be a restrictive endorsement, and to create the relation of principal and agent between the sending and collecting bank.

When the collection is made, the relation existing is dependent upon the intention of the parties. 3 R. C. L. p. 632, § 261. If the parties intended that the relation of debtor and creditor should then arise, there is no trust in the proceeds. *Lippitt v. Thames Loan & T. Co.* (Conn.) supra. As evidencing an intention to create the relation of debtor and creditor emphasis has been placed upon the custom of banks to credit those for whom collections are made with the proceeds of the collection; it is presumed that the party sending the paper for collection had knowledge of this custom, and contracted with reference thereto. Accordingly the relation of debtor and creditor is held to arise when the collection has been made. *Gonyer v. Williams* (1914) 168 Cal. 452, 143 Pac. 736; *Lippitt v. Thames Loan & T. Co.* (Conn.) supra; *UNITED STATES NAT. BANK v. GLANTON*, ante, 600; *Young v. Teutonia Bank & T. Co.* (1914) 134 La. 879, 64 So. 806. With reference to this custom the court in *Lippitt v. Thames Loan & T. Co.* (Conn.) supra, states: "We think the custom of the banking business is

so universal that we may take judicial notice of it that items collected for another bank are in fact credited, whether the provision 'for collection and remittance' be among the printed directions of the letter of the forwarding bank to its correspondent or not." It was urged in this case that the payment of a fee for the collection indicated a custom that immediate remittance of the item collected should be made; in answer to this the court states that "we could not so hold without a finding of the custom. Until the case is presented of such custom, it will not be necessary to consider the effect of violation of its contract by the agent by crediting the collections made."

Accordingly there has been held to be no trust in the proceeds of the collection of a draft by a bank—

—where the collection was made on the day before the bank was closed, and the amount, after deducting the usual charge for collection, was remitted by draft on the collecting bank's New York correspondent, which draft was not paid because not presented until after the collecting bank had closed its doors, *Gonyer v. Williams* (Cal.) supra;

—where the collection was made on the day before the bank was enjoined by order of court from paying out any moneys, *Lippitt v. Thames Loan & T. Co.* (Conn.) supra;

—where the bank was insolvent at the time it received the draft for collection with specific instructions to collect and remit the proceeds to the sending bank, and it collected the same and remitted by draft upon its New York correspondent, which draft was not paid because not presented until after the collecting bank had been placed in the hands of the state bank examiner. *Young v. Teutonia Bank & T. Co.* (1914) 134 La. 879, 64 So. 806. The same was held in *Young v. Teutonia Bank & T. Co.* (1914) 135 La. 66, 64 So. 984, in case of a check sent the bank for collection and return.

See *UNITED STATES NAT. BANK v. GLANTON*.

The existence of a trust in case of a collection does not seem to be denied in *Alexander County Nat. Bank v. Conner* (1916) 110 Miss. 653, 70 So. 827, but merely the right to a lien upon funds in the hands of the receiver, where the owner of the paper collected had not traced the identical money received on the collection into the money so held by the receiver. The claimant sought to impress the trust upon the general funds in the hands of the receiver on the theory

that the amount collected on the draft was a trust fund which increased the assets of the bank to that extent, and that a lien could be fixed on the assets in the hands of the receiver for that amount. The court adheres to the decision in *Billingsley v. Pollock* (1892) 69 Miss. 759, 30 Am. St. Rep. 585, 13 So. 828. In that case it is stated that the holder of a draft which has been collected by an insolvent bank does not have "an equitable lien on all the assets of the bank," securing precedence over all other creditors. It seems to be admitted, however, that if the owner of the draft could identify the money paid, he could then recover it. At any rate, it is stated in the *Billingsley* Case that "it is enough to allow the correspondent who sends his claim to a bank 'for collection' to pursue and reclaim his own, without depriving others of their rights."

In *Citizens' Nat. Bank v. Haynes* (1915) 144 Ga. 490, 87 S. E. 399, there was held to be no trust in the proceeds of the collection of certain notes sent by one bank to another for collection with instructions that "all payments that are made on these collections are to be remitted by you to this bank on the day same are made," but the collecting bank, instead of obeying the instructions, deposited the collection made to the credit of the sending bank, and used the money in its own business. Only a syllabus of this case appears and the principles governing the decision are not clearly stated.

The test as to the existence or non-existence of a trust being whether or not the relation of debtor and creditor exists, if facts appear that negative the existence of an intention to create this relation a trust may be found to exist. A trust in the proceeds of a collection was held to exist in *First Nat. Bank v. Dennis* (1915) 20 N. M. 97, 146 Pac. 948, where a draft had been sent to the insolvent bank by another which had previously had no business transactions with the insolvent bank, with instructions that the draft was to be collected and the proceeds returned to the transmitter, and where a cash sum greater than the amount collected on draft had at all times thereafter been in the bank. The court states: "These facts, we believe, clearly establish that the relation was not one of debtor and creditor, but that of principal and agent, and the breach of the terms of the agreement which arose upon the acceptance of the conditions of the collection constituted a fraud entitling the forwarding bank to a preference in the assets of the receiving

or collecting bank, now insolvent." It seems that the insolvent bank did not forward the proceeds of the collection although the collection was made twelve days before the bank was found to be insolvent and placed in the hands of the state bank examiner.

It is the doctrine of one case decided within the period covered by this note that, in the absence of anything indicating that the parties intended that drafts sent for collection, or the proceeds thereof, should not remain the property of the owner, the proceeds of drafts sent a bank for collection and remittance remain the property of the owner and a trust therein results which enables the owner to reclaim the same from a receiver. *State Nat. Bank v. First Nat. Bank* (1916) 124 Ark. 531, 187 S. W. 673. The court does not notice the custom of banks to credit those for whom collections are made with the proceeds of the collections, heretofore discussed. It is stated: "There is no question in either of these cases but that the drafts were sent for collection only, with the expectation that the proceeds should be remitted immediately upon the receipt thereof by the collecting bank, and nothing indicating that the parties intended that the drafts or proceeds should not remain the property of the owner. Such being the case, we hold that the deposit by the State National Bank of the funds collected from the Darragh company upon the draft of a Kansas bank did not become the property of the collecting bank, nor establish the relation of debtor and creditor for the amount thereof between it and the drawer bank, and that the relation of principal and agent continued, and the bank having failed before the payment of its check or the presentation thereof in the due course of business for payment, the drawer was entitled to the proceeds of the collected drafts out of the defunct bank's cash going into the hands of the receiver, in preference to the general creditors." The fact that the sending bank instructed the collecting bank to remit proceeds in the exchange of a certain city does not change this. The court states with reference to this point that "we do not think this indicated an intention upon its part that the bank should take the title to the proceeds, nor consent that the relation of debtor and creditor should arise, but the intention rather that no such relation should be created. The bank was making the collection merely, and the direction to remit immediately in Little Rock exchange shows

unmistakably that the draft was sent for collection, and that there was no intention of the drawer to receive credit from the bank, but an expectation that the proceeds would be immediately forwarded; and the suggestion, "remit in Little Rock exchange," was only to facilitate the receipt of the money, the drawer of the draft living in the city where such exchange would be payable, and relieved the necessity for forwarding the check or draft used as a medium of payment for collection." *State Nat. Bank v. First Nat. Bank (Ark.) supra.*

It was urged in *State Nat. Bank v. First Nat. Bank (Ark.) supra*, that since the collections involved in that case were made by the receipt of a check from the drawee of the draft against its account in the collecting bank, and the charge of the amount thereof against the same, that no money was in fact received nor the cash assets of the bank thereby increased, and that therefore the funds of the bank coming into the hands of the receiver could not be impressed with a trust for the payment of the proceeds of the draft collected. In answer to this the court states: "We do not agree to this contention. It is uniformly held that an agent, having for collection obligations due to his principal, can receive only money in payment unless otherwise directed, and these principles, of course, apply to banks holding drafts for collection." The court then states that the payment by the delivery of the check against the account of the drawee in the collecting bank, and the charging of the amount against his account, constituted, to all intents and purposes, a payment in cash of the draft, the check being merely the vehicle of transfer of the cash.

In some cases a trust is held, or at least assumed, to exist in case of collections by insolvent banks without any emphasis being placed upon the existence of the trust, the discussion having to do with the ultimate question whether the owner of the paper is entitled to a preference. Thus it seems to be assumed in *First Nat. Bank v. Union Trust Co. (1913)* — *Tex. Civ. App.* —, 155 S. W. 989, that a trust exists in the proceeds of a note sent by one bank to another for collection, with instructions to collect the money and return the proceeds thereof to the sending bank, where the collection was made three days before a receiver was appointed for the bank and no remittance was made. The question in that case was whether the sending bank was entitled to a preference. This was held *L.R.A.1917F.*

to depend upon his ability to trace the fund. It was shown that the collecting bank had in its possession more money than the amount collected upon the appellant's claim from the time of the collection until the appointment of the receiver, and the sending bank was accordingly held entitled to a preference. The collection in this case was made by a branch of the insolvent bank, and the fact that the branch at which the collection was made did not have enough cash in its possession to pay the entire claim was held immaterial. The court states that the true logic and doctrine is that such collections as that involved in this case constitute a trust fund, and that as long as the collecting banks keep on hand as much or more than the amount of money so collected, the trust will attach to the fund so held, although the identical money collected may have been paid out.

It has been stated in treatises on this question that if the collection is made after the insolvency of the bank, a trust in the proceeds exists. This statement appears also in the cases. *Lippitt v. Thames Loan & T. Co. (1914)* 88 *Conn.* 185, 90 *Atl.* 369. The statement lacks certainty. It seems evident that the collection is made in a majority of the cases after the bank is insolvent in the sense that its liabilities exceed its assets. In fact, the exact time when a bank becomes insolvent in this sense is difficult to determine. It expressly appears in some of the foregoing cases that the bank was insolvent at the time of receiving the draft. *Young v. Tentionia Bank & T. Co. (1914)* 134 *La.* 879, 64 *So.* 806. What is probably meant by the term "insolvency" in such a statement is the closing of the bank, or an adjudication of insolvency and the appointment of a receiver, or at least a known condition of insolvency. In *Lippitt v. Thames Loan & T. Co. (Conn.) supra*, the bank was enjoined by an order of court from paying out funds or deposits and from declaring and paying dividends on its deposits or capital stock. A little over two months thereafter, a receiver was appointed. Collections made after the order of court were held to be in the same position as a claim collected after an adjudication in insolvency, and a trust was held to exist therein.

If the bank officials have knowledge of the bank's insolvency it has been held that it is fraudulent to thereafter receive a deposit, and upon that ground the proceeds of collections made thereafter have been recovered as trust funds.

Thus, in *Pennington v. Third Nat. Bank* (1913) 114 Va. 674, 45 L.R.A.(N.S.) 781, 77 S. E. 455, a bank which had sent a draft to another bank, known by its officials to be insolvent, was allowed to trace the fund into the hands of a correspondent of the insolvent bank and recover the same. The draft in this case was sent with instructions, "For collection and return, remit to National Park Bank, New York, for our credit, and advise." The court states generally that the authorities are agreed that when a bank, with knowledge of its insolvency, receives a deposit, it perpetrates a fraud on the customer, and is held to be a constructive trustee of the deposit, and the depositor may recover of the receiver the deposit if it can be identified, or its equivalent if it cannot be identified, when the customer's money has been mingled with the bank's funds which, to an amount equal to the deposit, have gone into the hands of its receiver. The correctness of this general principle seems to have been conceded in this case, but it was claimed that the case was not within the principle because the knowledge of the insolvency could not be imputed to the bank because of the fact that the insolvency was due to the defalcations of the cashier and assistant cashier, who alone had knowledge of the insolvency. (A note to this case in 45 L.R.A.(N.S.) 781, considers the general question whether a bank officer's knowledge of the insolvency of the bank, resulting from his own misconduct, is chargeable to the bank.)

See *Walker v. McNeil* (1914) 68 Fla. 181, 66 So. 994, *infra*.

In *Gonyer v. Williams* (1914) 168 Cal. 452, 143 Pac. 736, a case involving both a collection of a check for a customer of the bank and a collection of a draft for one not a customer, the court says nothing about the effect of the insolvency of the bank in the part of the opinion relating to the draft, although the draft was collected on the same day that the check was deposited, it being admitted that the bank was then insolvent, although there was neither allegation nor finding that such insolvency was known at that time to the officers of the bank. See *infra* for the discussion of the court on this point with reference to the collection of the check for the customer.

In case of collections made for customers of the insolvent bank, questions arise which are closely connected with this discussion, but which do not deal L.R.A.1917F.

with the existence of a trust. The title to a check drawn on another bank, which has been credited to a depositor, is discussed in notes to *Fayette Nat. Bank v. Summers*, 7 L.R.A.(N.S.) 694, and *Plumas County Bank v. Bank of Rideout, S. & Co.* 47 L.R.A.(N.S.) 552. The present note is confined to the question whether a trust exists in the proceeds of such a collection.

In *Gonyer v. Williams* (Cal.) *supra*, the court adheres to the theory that the title to a check payable to a customer, deposited by him, indorsed in blank, passed to the bank, and the relation of debtor and creditor was thereby created. Before the close of business on the day on which the check was deposited the books of the bank were posted and balanced, and the amount of the check was placed to the credit of the customer. The bank was closed by the superintendent of banks shortly before noon on the next day. Before the doors were thus closed the bank on which the check had been drawn, and to which it had been sent, balanced its account with the insolvent bank, with the result that a sum was found to be due by the insolvent bank to the bank on which the check was drawn. It was admitted that the bank was insolvent at the time the check was thus deposited, but there was neither allegation nor finding that such insolvency was known at that time to the officers of the bank. The theory on which the customer sought to recover of the superintendent of banks was that the function of the bank was to collect from the bank on which the check was drawn the amount of the check, and place it to the account of the depositor, and that until such contract was consummated by the balancing of the account by the two banks, the customer did not become a general creditor of the insolvent bank, and that, as the insolvent bank was under the supervision of the state superintendent of banks when the balance between the two institutions was sought to be figured, it was incapable of conducting business, and therefore no general deposit of the proceeds of the check was completed. This the court denied, stating that the deposit of the check in the ordinary course of business transferred the title to the instrument from the customer to the bank; the transaction is stated not to have been one which created the relation of principal and agent, but rather that of creditor and debtor.

In *Schofield Mfg. Co. v. Cochran*

(1904) 119 Ga. 901, 47 S. E. 208, a draft was drawn payable to the cashier of a bank; the bank, upon being notified that the draft would be paid, issued a deposit slip to the person for whose benefit the draft was drawn, and forwarded the draft in the usual course for collection. The draft was paid, but before the money was returned to the first bank, that bank was placed in the hands of a receiver. In answer to the claim that this was a special deposit in the nature of a bailment, which did not create the relation of debtor and creditor between the parties, the court states: "There is nothing in the evidence to show that the deposit made to Black's account was a special deposit, or even what is sometimes called in banking law a 'deposit for a specific purpose.' . . . No special instructions were given the bank officials as to how, when, or under what circumstances the money deposited was to be paid to Black. From aught that appears, it was to be held subject to his check, and he was at liberty to withdraw it in whole or in part, or to add to it by making other deposits, as he might see fit." Upon the authority of the Schofield Case it is held in *Cronheim v. Postal Teleg. Cable Co.* (1912) 10 Ga. App. 716, 74 S. E. 78, that there is no trust in the proceeds of a check which is delivered to a bank for collection, although, before the proceeds are remitted to the bank from its correspondent, the bank fails and is placed in the hands of a receiver. The question arose in the *Cronheim Case*, an action by the depositor against a telegraph company for failure to deliver a telegram directing the refusal of payment on a check, in answer to the contention of the telegraph company that the depositor was a preferred creditor of the bank, and could have avoided loss by following the funds into the hands of the receiver.

The rights, as against receiver, as to paper deposited before, but not collected at the time, the bank closed its doors is discussed in note to *Knaff v. Knoxville Bkg. & T. Co.* L.R.A.1915D, 402. And see subsequent case of *Alleman v. Sayre*, — W. Va. —, L.R.A.1917D, 1002, 91 S. E. 805.

If the bank is insolvent at the time of receiving a check from a customer, and its insolvency is known to its officers, a trust in the proceeds exists. *Re Jar-mulowsky* (1917) 243 Fed. 632. This is true although the check was deposited L.R.A.1917F.

under such circumstances that ordinarily the title thereto would have passed to the bank. *Ibid.* But the fact that the bank was insolvent at the time of receiving the paper for collection does not give rise to a trust where the officers of the bank are not shown to have known of such insolvency. *Gonyer v. Williams* (1914) 168 Cal. 452, 143 Pac. 736. It has been held that the fact that the bank was in the hands of a receiver when the proceeds of the collection thus made for a depositor were returned to it from a correspondent to which the paper had been sent does not negative the existence of the relation of debtor and creditor. Thus, it is held in *Schofield Mfg. Co. v. Cochran* (Ga.) *supra*, under the circumstances of the case (set forth above) that the relation of debtor and creditor is created although the bank was placed in the hands of a receiver before the money collected on a draft by a correspondent to which it had been sent was returned to it. There is, however, no discussion in the opinion as to the effects of this fact. But in *Cronheim v. Postal Teleg. Cable Co.* (Ga.) *supra*, it was urged that the rule announced in these cases should not be applied where the bank became insolvent before the collection was made, and the fund was paid over to the bank's receiver; that in such a case the fund is an asset of the depositor, in the custody of the court; that the depositor not having become a creditor of the bank, and the agency to collect having been terminated by the insolvency of the bank, the receiver has no right to mingle the fund with the general assets of the insolvent bank, but should hold it as a trust fund, to be paid over to the depositor upon demand. In answer to this the court states that there is much in the argument to commend it; that the receiver is not bound to accept the fund, and if he does so it would seem to be equitable and right for him to pay it over to the person who employed the bank to make the collection; but, referring to *Schofield Mfg. Co. v. Cochran*, the court states that in that case the bank failed and was placed in the hands of a receiver before the money was returned, and it was held that the owner of the draft which was thus collected was not entitled to priority over general creditors; that this decision settles the question adversely to the above contention.

But if the check was deposited under

such circumstances that the title does not pass at the time of the deposit, and the collection is made after the bank has been placed in the hands of a receiver, a trust in the proceeds exists. *Re Jarmulowsky* (Fed.) *supra*. Checks deposited by a customer of the bank were held not to become the property of the bank at the time of the deposit, where the pass book contained a provision that "deposits of checks shall not be drawn against until collected."

In *Walker v. McNeil* (1914) 68 Fla. 181, 66 So. 994, where it was easily apparent to the bank's officers at the time the draft was deposited for collection, to be credited to the holder when collected, that it was unable to pay its obligations, and that it would soon be obliged to suspend, there was held to be a trust in the proceeds of the draft. The draft was deposited shortly before the close of banking hours on the day before the bank closed, and the proceeds were actually collected after the close of the bank, and passed into the bank's assets in the hands of the receiver, for the benefit of creditors and stockholders.

Some cases have denied the existence of a trust in the proceeds of collections made for a depositor in the bank on the same theory that is applied to the collection of drafts or checks for other banks or persons not depositors; that is, that the custom of banks being to mingle the proceeds of such collections with their general funds, the depositor is presumed to know this and contract with reference thereto. Thus, in *Young v. Teutonia Bank & T. Co.* (1914) 135 La. 65, 64 So. 983, there was held to be no trust in the proceeds of a collection made by the bank and placed to the credit of the person for whom the collection was made, in an account subject to his check.

In case of collections for a customer, the paper may be deposited with the bank under circumstances which show an intention not to create the relation of debtor and creditor, and a trust has been held to exist. In *Hall v. Beymer* (1912) 22 Colo. App. 271, 125 Pac. 561, there was held to be a trust where the depositor directed that the proceeds should not be deposited. In this case a note was deposited eleven days before the bank closed, was forwarded to another bank, and by it collected and a draft of remittance made four days before the closing of the bank. This draft was received by the bank three days before it closed, and on the day

that it closed the customer was notified of the collection. After stating that the instructions were that the proceeds were not to be deposited, the court states: "Clearly, then, from this stipulation and from the testimony without apparent contradiction, the bank did not receive the proceeds of the note for and as a deposit, but with special instructions to the contrary, and that in all respects the bank was acting solely as the agent of Beymer in the matter of the collection, and was holding the proceeds after collection, solely as the bailee of Beymer." The bank here had placed the proceeds to the credit of the owner, and the court states that this was a commingling of the trust funds with funds of his own; that in such a situation the "whole would be treated as trust property, except in so far as the defaulting trustee might be able to distinguish his own property from the trust estate."

In *Titlow v. McCormick* (1916) 149 C. C. A. 399, 236 Fed. 209, the owner of school warrants deposited them with the bank for collection and received a receipt from the bank acknowledging the receipt of the warrants, and stating that they had been received "for collection." The warrants were subsequently collected, but, upon inquiry by the owner thereof, the bank informed the owner that they had not been collected. No further facts appear as to what took place between the owner of the warrants and the bank. The court states that it is clear the relation of cestui que trust and trustee existed between the owner of the warrants and the bank, the main part of the opinion being taken up by a discussion of the ability to trace the funds.

A trust was held to exist in the proceeds of the collection of a draft by a bank for a city where the bank had not given the bond required by statute to become a depository of public funds, although the proceeds of the collection had been credited to the city treasury and interest paid on it for several months before the failure of the bank. The court states that it is not necessary to determine whether the city treasurer intended or consented to the depositing of the money in the bank. In the face of the statute, the title to the money could not pass to the bank without the requisite bond. *Centralia v. United States Nat. Bank* (1915) 221 Fed. 755.

W. A. E.

KANSAS SUPREME COURT.

L. C. FISHER

v.

W. H. O'BRIEN, Appt.

(99 Kan. 621, 162 Pac. 317.)

Automobile — absence of light — negligence.

1. Independently of any statute, it is negligence as a matter of law to drive an automobile along the highway on a dark night at such speed that it cannot be stopped within the distance that objects can be seen ahead of it.

For other cases, see Automobiles, II. a, in Dig. 1-52 N. S.

Same — lantern.

2. The rule above stated applies where, by reason of his headlights having given out, the driver is using a lantern hung in front of his radiator.

For other cases, see Automobiles, II. a, in Dig. 1-52 N. S.

Same — dangerous speed — negligence.

3. In an action against the driver of an automobile on account of personal injury resulting from a collision, alleged to have been due to excessive speed and a dim light, it is not error to instruct that if, by such driving, the life or limb of anyone was endangered, this constituted negligence because of the violation of the statute forbidding a rate of speed such as to endanger the life or limb of any person.

For other cases, see Trial, III. c, 4, in Dig. 1-52 N. S.

Evidence — knowledge of jury.

4. An instruction that the jury may make use of the general knowledge they possess in common with the rest of mankind is unobjectionable.

For other cases, see Trial, III. c, 1, in Dig. 1-52 N. S.

Trial — refusal of instructions.

5. The refusal of various requested instructions held not to have been erroneous.

For other cases, see Trial, III. c, in Dig. 1-52 N. S.

Headnotes by MASON, J.

Note. — The question of speed as negligence in operating automobiles is covered generally in the annotation to *Lauson v. Fond du Lac*, 25 L.R.A.(N.S.) 40, which is supplemented as to pedestrians in subdivisions of the notes in 38 L.R.A.(N.S.) 488; 42 L.R.A.(N.S.) 1180; and 51 L.R.A.(N.S.) 993.

See also, as to speed, subdivisions of note to *Calahan v. Moll*, L.R.A.1916A, 744, on liability for collision between automobiles or an automobile and another vehicle at or near corner of streets or highways.

As to sufficiency of lights or signals, see subdivisions of the note on reciprocal duty of operator of automobile and pedestrian to use L.R.A.1917F.

Evidence — disobedience of order.

6. In an action against the driver of an automobile charged with having negligently run into a wagon, where the defendant maintained that the injury complained of was the result of the frightening of led horses attached thereto, evidence offered by him that the plaintiff had been instructed by his employer to bring the horses by a different road on account of their wildness held to have been properly rejected.

For other cases, see Evidence, XI. h, in Dig. 1-52 N. S.

(January 6, 1917.)

APPEAL by defendant from a judgment of the District Court for Sedgwick County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. **Affirmed.**

The facts are stated in the opinion.

Messrs. Adams & Adams for appellant.

Messrs. Clyde E. Souders and Otto R. Souders, for appellee:

It is the duty of the motorist to keep a vigilant watch ahead for other vehicles as well as for pedestrians upon the highway, and the lights are required to enable him to see persons and vehicles on the highway in time to avoid them, as well as to protect those occupying the automobile.

Giles v. Ternes, 93 Kan. 144, 143 Pa. 491.

If defendant violated a state law resulting in an injury to plaintiff, that violation is negligence as a matter of law, unless plaintiff was guilty of contributory negligence.

Houren v. Chicago, M. & St. P. R. Co. 236 Ill. 620, 20 L.R.A.(N.S.) 1111, 127 Am. St. Rep. 300, 86 N. E. 611.

If defendant's negligence caused the injury, he would be liable.

Thompson v. Aultman & T. Mach. Co. 94 Kan. 457, 146 Pac. 1188, 9 N. C. C. A. 309.

The court did not err in rendering judgment in favor of plaintiff.

State v. Pfeifer, 96 Kan. 794, 153 Pac. 552; *Hoffman v. Charlett*, 97 Kan. 554, 155 Pac. 953; *Pens v. Kreitzer*, 98 Kan. 750, 160 Pac. 200.

care, in 38 L.R.A.(N.S.) 489, and 51 L.R.A.(N.S.) 996, and also subdivision on failure to display proper light, in the note on duty and liability of operator of automobile as to horses encountered on the highway, in 48 L.R.A.(N.S.) 964.

As to duty owed to others by one blinded by light on highway, see note to *Foster v. Cumberland County Power & Light Co.* L.R.A.1917E, 1044.

And as to liability for injuries to one blinded by headlight, see annotation to *Spootea v. Berkshire Street R. Co.* 42 L.R.A.(N.S.) 876, and *Jaquith v. Worden*, 48 L.R.A.(N.S.) 827.

Mason, J., delivered the opinion of the court:

L. C. Fisher brought an action against W. H. O'Brien for injuries he claimed to have received in consequence of a spring wagon in which he was driving being run into by an automobile driven by O'Brien in the same direction. The plaintiff recovered a judgment, and the defendant appeals.

The petition alleged that the accident was due to the negligence of the defendant in traveling without any light other than that furnished by a lantern fastened in front of the automobile, in running at too high a rate of speed, in being intoxicated, in failing to keep an outlook, and in failing to stop or turn out after he discovered or should have discovered the wagon. The answer contained a general denial and alleged that any injuries the plaintiff received were due to the frightening of some horses which were being led by him and a companion, in a careless and improper manner, and to his negligence in not being provided with a secure seat, in not turning out so as to give the defendant room to pass, and in not controlling his horses. The jury found that the defendant was not intoxicated, that they did not know whether he was traveling faster than 20 miles an hour, and that his negligence consisted in "driving his car without sufficient lights." The defendant complains of the giving and refusal of instructions, of the rejection of evidence, and of the refusal to set aside the verdict and the finding of negligence as unsupported by the evidence. An instruction regarding the effect of the intoxication of the driver of an automobile was rendered immaterial by the finding that he was sober. Instructions as to various other forms of negligence need not be considered, since the verdict was based upon the absence of proper lights.

1. The defendant maintains that the province of the jury was invaded by an instruction to the effect that, independently of any statute on the subject, it is negligence as a matter of law for a motorist to run an automobile along the highway on a dark night at such speed that he cannot stop his machine within the distance he can see objects ahead of him. This rule was declared in *Lauson v. Fond du Lac*, 141 Wis. 57, 25 L.R.A.(N.S.) 40, 135 Am. St. Rep. 30, 123 N. W. 629, and was referred to with inferential approval, in support of the proposition that one of the purposes of head-lights is to enable the driver to see ahead of him; in *Giles v. Ternes*, 93 Kan. 140, 144, 143 Pac. 491, where it was said that the lights must be sufficient to enable him to see a reasonable distance in the direction in which the automobile is proceeding (p. 144). The rule has also been applied

in the following cases which are collected in notes to *Berry, Automobiles*, 2d ed. § 133: *Harnau v. Haight* (1915) 189 Mich. 600, 155 N. W. 563; *Curran v. Lorch*, 247 Pa. 429, 93 Atl. 492; *West Constr. Co. v. White*, 130 Tenn. 520, 172 S. W. 301.

In the Kansas case cited, this court has determined that, where a light is required at all, one of its objects is that the driver may be advised of possible obstacles in the road, and that to be adequate to the purpose it must enable him to see ahead for a reasonable distance. We think it can safely be said as a matter of law that the distance is not "reasonable" unless the road is illuminated for at least as far as the distance required for stopping the vehicle. The instruction given by the trial court is therefore approved.

2. The defendant lived 8 miles south of Garden Plain, and was on his way home from that place when the accident occurred. He testified that before he got out of town his lights were very dim, and before he had gone a mile he had no lights at all; that he rode on until he reached the place of an acquaintance, where he borrowed the lantern, which he hung in front of the radiator. It is argued that these circumstances justified his proceeding without other lights, and that the rule just stated did not apply in such a situation. The findings of the jury that the defendant was not, so far as they knew, going as fast as 20 miles an hour, and that his negligence consisted in driving his car without sufficient lights, must be interpreted as meaning that he was negligent in traveling in the manner he did, at the speed he was going, without better lights; that the rate of travel was not negligent in itself, but was such as to make it negligence not to have a more effective illumination. The speed and the range of the lantern were correlative, and the same idea is conveyed whether the negligence is described as traveling too fast with such a dim light, or in having such a dim light while traveling so fast. The light was constant, but its protective effect varied inversely with the speed. The situation was not merely one to which the rule stated was applicable; it was peculiarly adapted to illustrate its soundness.

3. An instruction was given to the effect that a violation of the statute which results in an injury to another is negligence as a matter of law; and therefore if the defendant operated his automobile in the manner alleged [that is, at a high speed, or, what is essentially the same thing, with a dim light], so as to endanger the life or limb of any person [that being forbidden by § 7 of chapter 65 of the Laws of 1913], and thereby caused the injury complained

of, the verdict should be for the plaintiff, unless he were guilty of contributory negligence. This is objected to as eliminating all questions of the plaintiff's diligence and of the defendant's negligence being the proximate cause of the injury. Elsewhere the jury were told that the negligence of the defendant would not furnish foundation for recovery unless it was the proximate cause (which was duly defined) of the injury, and that contributory negligence was a complete defense if established. The instruction is also criticized as too indefinite, because it does not designate what provision of the statute is referred to. We think the fair interpretation of the language used was that indicated in the bracketed clauses, inasmuch as a subsequent instruction quoted the provision from the section above cited, forbidding the operation of a motor vehicle at a rate of speed such as to endanger the life or limb of any person. The instruction in which that quotation occurs is criticized as submitting questions not within the pleadings. The petition did not allege that the defendant ran his car at such a rate of speed as to endanger the plaintiff's life or limb, but it alleged that the speed was over 25 miles an hour and was unlawful, and that the injury resulted therefrom. Under this allegation, the issue was not confined to the particular rate of speed named, and it was proper to submit the question whether the speed was such as to endanger life or limb.

4. Exception is taken to an instruction that the jury, in arriving at their verdict, were at liberty to make use of the general knowledge which they possessed in common with the rest of mankind. This is in accordance with approved practice. *Missouri River R. Co. v. Richards*, 8 Kan. 101.

5. Complaint is made of the refusal to give a number of instructions, chiefly relating to contributory negligence. The allega-

tions of the answer invoking this defense were set out quite fully in the charge, and, as already stated, the jury were instructed on the subject in general terms. The omission to deal with the matter at greater length does not appear to us to have been prejudicial. A requested instruction regarding proximate cause which was refused was covered by a definition of the term, coupled with a statement that the negligence of the defendant would not furnish a foundation for a verdict for damages unless it were the proximate cause of the plaintiff's injury. The trial court refused to instruct that no recovery could be had unless there was an actual physical contract and impact between the automobile and the rear end of the wagon, that being the allegation of the petition. To have given it would have held the plaintiff too closely to the literal allegations of his pleading. If, for instance, the evidence had shown the automobile struck the side of the wagon, or struck a led horse and threw it against the wagon, there would have been no substantial variance.

6. Evidence was introduced by the defendant that the plaintiff had been told by the owner of the horses that were being led, and in whose employ he was, to bring them by a different road, on account of their wildness, and to get them home before dark. This was stricken out on the motion of the plaintiff, and the ruling is complained of. Whatever relevance this evidence might have had in a controversy between the plaintiff and his employer, it had no place in the present action. If the plaintiff disobeyed his instructions, he thereby violated no duty which he owed to the defendant.

The contention that the evidence did not warrant the verdict or findings is held not to be well founded, but is not thought to require further discussion.

The judgment is affirmed.

MINNESOTA SUPREME COURT.

JOHN S. CHRISTISON, Appt.,

v.

ST. PAUL FIRE & MARINE INSURANCE COMPANY, Resp't.

(— Minn. —, 163 N. W. 980.)

Insurance — automobile — indemnity.
Defendant insurance company issued a policy to plaintiff insuring him against loss

Headnote by BUNN, J.

Note. — As to automobile liability insurance, see annotation following this case, post, 615.
L.R.A.1917F.

by reason of liability imposed by law for the destruction of or injury to the property of others arising from plaintiff's ownership, maintenance, or use of certain automobiles. A clause of the policy provided that "the company's liability is limited to the actual intrinsic value of the property damaged or destroyed at the time of its damage or destruction, which shall not be greater than the actual cost of the repair or replacement thereof." One of plaintiff's automobiles collided with another car and damaged it, under circumstances which rendered plaintiff liable. Defendant paid the owner of the injured car the amount of the bill for repairs paid by him. Thereafter the owner of the injured car recovered a judgment against plaintiff for the depreciation in the

value of his car, caused by the accident, over and above the amount paid for repairs. Plaintiff paid this judgment, and brought this action to recover the amount so paid, with attorneys' fees, from defendant under the policy. It is held by a majority of the court that the limitation clause above quoted does not limit the liability of defendant to the actual cost of repairs made, when it appears that they do not and cannot make the car as good as it was before the accident, and that plaintiff may recover the amount of the judgment paid by him for depreciation in the value of the car, with attorneys' fees incurred in defending the suit.

For other cases, see Insurance, VIII. in Dig. 1-52 N. S.

(July 20, 1917.)

A PPEAL by plaintiff from a judgment of the District Court for Ramsey County in defendant's favor in an action brought to recover the amount alleged to be due on an automobile insurance policy. Reversed.

The facts are stated in the opinion.

Messrs. O'Brien, Young, & Stone, for appellant:

The policy will be construed most strictly against the insurance company.

Zeitler v. National Casualty Co. 124 Minn. 478, 145 N. W. 395; Harris v. American Casualty Co. 83 N. J. L. 641, 44 L.R.A. (N.S.) 70, 85 Atl. 194, Ann. Cas. 1914B, 846; Lowenstein v. Fidelity & C. Co. 88 Fed. 474; Chandler v. St. Paul F. & M. Ins. Co. 21 Minn. 85, 18 Am. Rep. 386; George A. Hornel & Co. v. American Bonding Co. 112 Minn. 288, 33 L.R.A. (N.S.) 513, 128 N. W. 12; Symonds v. Northwestern Mut. L. Ins. Co. 23 Minn. 491.

And with reference to the nature of the property which it covers.

De Graff v. Queen Ins. Co. 38 Minn. 501, 8 Am. St. Rep. 685, 38 N. W. 696.

Any repairs which failed to put the property in as good condition as it was before the accident were not complete.

34 Cyc. 1336; Farraher v. Keokuk, 111 Iowa, 310, 82 N. W. 773; American Bonding Co. v. Ottumwa, 70 C. C. A. 270, 137 Fed. 572; Fuchs v. Cedar Rapids, 158 Iowa, 392, 44 L.R.A. (N.S.) 590, 139 N. W. 903; Good-year Shoe Machinery Co. v. Jackson, 55 L.R.A. 692, 50 C. C. A. 159, 112 Fed. 146; Dougherty v. Taylor & N. Co. 5 Ga. App. 773, 63 S. E. 928; Walker v. Detroit, 143 Mich. 427, 106 N. W. 1123; 7 Words & Phrases, 6097; Vincent v. Frellich, 50 La. Ann. 378, 69 Am. St. Rep. 436, 23 So. 373; First Nat. Bank v. Sarlis, 129 Ind. 201, 13 L.R.A. 481, 28 Am. St. Rep. 185, 28 N. E. 434; Douglass v. Com. 2 Rawle, 262; Elliott & B. Engineering Co. v. Baker, 134 Mo. App. 95, 114 S. W. 71; Leeds & C. Co. v. L.R.A. 1917F.

Victor Talking Mach. Co. 213 U. S. 325-337, 53 L. ed. 816-820, 29 Sup. Ct. Rep. 503; Beach v. Crain, 2 N. Y. 86, 49 Am. Dec. 369.

The respondent was not justified in dividing the damages between the amount paid to mechanics for work and labor and the depreciation in the property.

Farraher v. Keokuk, 111 Iowa, 310, 82 N. W. 773; Martinez v. Thomson, 80 Tex. 568, 16 S. W. 334; Brown County v. Keya Paha County, 88 Neb. 117, 129 N. W. 250, Ann. Cas. 1912B, 790.

Messrs. Ware & Junell for respondent.

Bunn, J., delivered the opinion of the court:

This is an appeal by plaintiff from a judgment in favor of defendant, entered pursuant to a decision after a trial by the court without a jury.

Plaintiff contends that the findings of the trial court do not sustain the conclusions of law or judgment. The facts, as stipulated and found by the court to be true, omitting those that are not material on this appeal, are as follows:

Plaintiff is under contract to transport mails from the stations in St. Paul and Minneapolis to the postoffices, and, in performing this contract, uses a large number of automobiles. June 30, 1915, defendant issued to plaintiff its policy of insurance by which it agreed to indemnify plaintiff against loss or damage to any of said automobiles from fire or theft, and also to indemnify plaintiff against loss from liability imposed by law for damages on account of bodily injuries, including death, by reason of the use of the automobiles, for the period of one year. As originally issued the policy did not insure against liability on account of injury to or destruction of the property of others, the printed provisions in the policy applicable to this kind of insurance being marked "Void." November 9, 1915, in consideration of an additional premium, a "rider" was executed and attached to the policy. This revived the provisions of the policy so marked void, and insured plaintiff until the policy expired against loss by reason of liability imposed by law upon plaintiff for destruction of or injury to property of others arising from the ownership, maintenance, or use of the automobiles. As the question in the case turns on the proper construction to be given a clause of this rider, we here give it: "The company's liability is limited to the actual intrinsic value of the property damaged or destroyed at the time of its damage or destruction, which shall not be greater than the actual cost of the repairs or replacement thereof, and in no event in excess of the

sum of \$1,000, for one accident resulting in damage or destruction of property whether the property of one, or more than one, person."

November 11, 1915, one of plaintiff's automobiles collided with an automobile owned by one Brown, resulting in damage to Brown's car. Defendant paid Brown the sum of \$104.90 in settlement, and took a receipt which recited that the amount was received from the insurance company and settlement and satisfaction of all claims for property damage sustained by Meyer Brown to his automobile on or about November 11, 1915, for which it is claimed J. S. Christison is liable." Then followed this: "It being expressly understood and agreed between the parties hereto that Meyer Brown does not release any other claim for damages growing out of said accident by reason of depreciation in the value of his said automobile or by reason of his loss of the use of the same while being repaired."

In February, 1916, Brown brought an action against plaintiff to recover \$200, alleged to be his loss by reason of depreciation in the value of his car on account of the accident, and the same amount for the loss of the use of the car while it was being repaired. Plaintiff immediately notified defendant of the bringing of this action, and demanded that it undertake the defense thereof. Defendant declined, and plaintiff defended the action, which resulted in a verdict of \$100 in favor of Brown and against plaintiff herein. Under the charge of the court in the case referred to, the recovery was for depreciation in the value of the car by reason of the accident, over and above the amount paid Brown by defendant. Judgment was entered on the verdict for \$114.30 and was paid by plaintiff. It is to recover the sum so paid, with \$65 attorneys' fees incurred, that the present action was brought.

The amount paid by defendant insurance company to Brown, \$104.90, was the amount of the charges made against Brown by mechanics for work, labor, and material done and furnished upon the car and made necessary by the collision.

The decision of the trial court that plaintiff was not entitled to recover in this action was based upon the quoted condition of the policy that the company's liability "is limited to the actual intrinsic value of the property damaged or destroyed, . . . which shall not be greater than the actual cost of the repair or replacement thereof." Plaintiff contends that, notwithstanding this limitation, defendant is liable for depreciation in the value of the automobile caused by its having been in a collision. This depreciation in value is over and above the cost

of all repairs that it is possible to make. A car that has been in an accident that makes repairs necessary depreciates in value, although all broken or damaged parts are repaired or replaced and the car is apparently as good as ever. At least, this was the basis of Brown's recovery in his suit against plaintiff, and is conceded to be the fact. The receipt given by Brown for the payment of the bill for repairs by the insurance company shows quite clearly what the question is, but is of little importance otherwise, save as it indicates that the question was left open.

We appreciate that the question is important, though the amount involved is small. Counsel for plaintiff argue that the policy promised indemnity from liability imposed by law upon the assured for the destruction of or injury to the property of others, and that the limitation clause should be construed liberally so as not to defeat recovery for liability imposed by law for all injury to the property of others. It is clear enough that Brown's car was injured over and above the cost of the repairs made. It is also clear that this injury could not be remedied by repairs, but it was nevertheless an injury to Brown's property for which the law imposed liability upon plaintiff. But for the limitation clause there would be no doubt of the liability of the insurer. Was it intended by the limitation clause to preclude liability when the insured was compelled to pay for injuries that could not be remedied by mechanical repairs? Is this clause so free from ambiguity that it is necessary to so construe it? To repair an automobile means to restore it to a sound or good state after injury or partial destruction, to restore it to its original condition. "Replacement" has much the same meaning, but as used would seem to refer to cases where property is destroyed rather than merely damaged, where repairs only will not restore it to its original condition. But there are many articles of property which are never again of the same value after injury and repair. It would be often impossible to restore a damaged article to its original condition by repairing it. It was not possible to make Brown's car as good as it was before it was damaged. But all was done that was possible to this end, without buying him a new car. The members of the court are divided in their opinions as to whether the decision of the trial court is sound. The writer thinks that under the clause providing that the liability of the insurer is limited to the actual value of the property damaged or destroyed, "which shall not be greater than the actual cost of repair or replacement thereof," defendant is not liable beyond the amount actually

paid by Brown for repairs to his car. A majority of the court thinks that this is too narrow a construction of the language of the limitation clause; that where there are damages to the property that are not and cannot be fully remedied by repairing it, there is a liability for the full loss, limited, of course, by the money limit specified. We have found no authorities that are helpful,

and were cited to none. The view of a majority of the court leads to a reversal.

Judgment reversed, with directions to amend the conclusions of law in accordance with this opinion, and to enter judgment in favor of plaintiff for the amount claimed.

Brown, Ch. J., concurs in the view of Mr. Justice Bunn.

Annotation—Automobile liability insurance.

The earlier cases dealing with insurance of an automobile owner against liability for damages or injuries to another are covered in the annotations in 44 L.R.A.(N.S.) 73; 51 L.R.A.(N.S.) 584; and L.R.A.1915E, 580, to which this is supplementary. As to insurance against theft of automobile, see note to *Phoenix Assur. Co. v. Eppstein*, ante, 540.

As to automobile insurance against theft, robbery, or pilferage, see annotations in 44 L.R.A.(N.S.) 75; 51 L.R.A.(N.S.) 584; and L.R.A.1915E, 579, and that accompanying *Phoenix Assur. Co. v. Eppstein*, supra.

As to automobile accident insurance and fire insurance, see annotations in 44 L.R.A.(N.S.) 71, 51 L.R.A.(N.S.) 583, and L.R.A.1915E, 575.

A peculiar question was before the court in *CHRISTISON v. ST. PAUL F. & M. INS. CO.* ante, 612, that of whether one holding a policy insuring him against loss by reason of liability imposed by law upon him for destruction of or injury to property of others, arising from the use of his automobile, was entitled to recover not only the actual cost of repairs to a machine which was damaged by his car, but also the amount which he was obliged to pay for depreciation in the value of the automobile, caused by its having been in a collision. It was decided that such a recovery might be had although the policy contained a limitation clause that the insurer's liability "is limited to the actual intrinsic value of the property damaged or destroyed . . . which shall not be greater than the actual cost of the repairs or replacement thereof." This seems to be the first case which has considered such a question.

In *Collins v. Standard Acci. Ins. Co.* (1916) 170 Ky. 27, 185 S. W. 112, the provision of a policy indemnifying against liability for injuries by an automobile, requiring insured to aid in resisting the recovery of damages against her, was held not violated by her re-

fusal to rely on the defense that the negligence of the chauffeur was imputable to the injured person, a guest, since, under the facts shown in that behalf, there was no ground for the defense. (As to imputed negligence of passenger riding in automobile driven by another, precluding recovery against third person for injury, see note in L.R.A.1915B, 953; and later case, *Hardie v. Barrett*, ante, 444, and other cases cited in the footnote thereto. Generally as to liability of owner or operator for injury to guest, see notes in 50 L.R.A.(N.S.) 1100 and L.R.A. 1916E, 1193.)

In the *Collins Case*, where the insured sought indemnity by reason of a recovery against her by her sister, who was injured while riding with her as a guest, the evidence was held to authorize the submission to the jury of the issue as to the insured's fraud and collusion in connection with the action brought by her sister, and also the question of her failure to aid the insurer in such action, as required by the policy; and the evidence was held sufficient to support a finding in favor of the insurer.

In *Oakland Motor Car Co. v. American Fidelity Co.* (1916) 190 Mich. 74, 155 N. W. 729, where both the inspector and superintendent of mechanical parts and the head tester of an automobile company holding a policy indemnifying it against loss or liability on account of bodily injuries inflicted by its automobiles had notice of an accident and injuries caused by one of its cars and of the claim by the injured person a few days after the accident occurred, and investigated it, and decided to believe the denial of the company's testers that any accident had occurred, the company was held not relieved from compliance with a provision of the policy requiring "immediate notice" of the occurrence of accidents and claims made on account thereof. This condition of the policy was held to require that notice be given

within a reasonable time after the insured learned of the accident or claim, and it was held that it had not been complied with where the insured was located about 30 miles from the insurer's office, with all modern means of communication between the places, but gave no notice of the occurrence of the accident until three months thereafter.

The insurer in the Oakland Motor Car Co. Case was held not precluded from asserting as a defense a failure to comply with the provision requiring immediate notice of the accident and claim for damages because it took charge of the defense of an action against the insured under a belief that the latter had first learned of the matter when summons was served, and did not learn that this was not so until the trial, especially where an agreement had been entered into between the parties that all acts with reference to the conduct of the defense of the case against the insured should be considered as done without prejudice to their rights under the policy.

It has been held that a provision in an automobile indemnity policy that the insured, on the occurrence of an accident, shall give immediate written notice thereof, with the fullest information obtainable at the time, is a reasonable requirement, but that the term "immediately" must be reasonably construed in connection with the attendant circumstances. *Chapin v. Ocean Acci. & G. Corp.* (1914) 96 Neb. 213, 52 L.R.A.(N.S.) 227, 147 N. W. 465. This provision in a policy undertaking to indemnify against loss from liability imposed by law upon the insured for damages on account of bodily injuries (including death at any time resulting therefrom) accidentally suffered was construed in the *Chapin Case* not to require notice of all accidents, but only of such as resulted in bodily injuries. And it was therefore held that where there was no bodily injury apparent at the time an accident occurred, and no reasonable ground to believe that a claim for damages against the automobile owner would arise therefrom, he was not required to give notice until the subsequent facts would suggest to one of ordinary and reasonable prudence that a liability to the person injured might arise; and his duty was held to be performed where, at the time he first received knowledge that the injured person was liable to make a claim for damages, he immediately notified the insurer.

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On a subsequent appeal of *Mayor, L. & Co. v. Commercial Casualty Ins. Co.* the former appeal ((1914) 150 N. Y. Supp. 624) of which is set out in the annotation in L.R.A.1915E, 580, the court reached the same conclusion as before, holding that a provision that "none of the automobiles herein described are rented to others" was merely a warranty that the trucks were not rented at the time the policy took effect, and did not constitute a warranty that they were not to be rented subsequently. (1915) 169 App. Div. 772, 155 N. Y. Supp. 75.

In the last case, it was held that it could not be decided as a matter of law that the chauffeur operating the insured's truck was its servant and engaged in its business at the time of the accident in question, where it appeared that the insured had put its truck in storage with a company which had the right to rent it, and that on the day of the injury it was sent out by the storage company in charge of a chauffeur hired and paid by that company, and that the insured, in an action brought against it on account of the injury, denied in its answer that the chauffeur was its servant and engaged in its business.

In the *Mayor, L. & Co. Case* the insurer was held guilty of a breach of its contract in failing to defend the suit against the insured; and a condition in the policy forbidding settlement by the insured without the written consent of the insurer was held to be limited to cases in which the latter performed its contract with respect to defending an action; and that therefore the insured was not precluded from recovering because he settled the action brought against him after the insurer had refused to defend it. But it was held that the insured, having seen fit to settle the action brought against him after the insurer had refused to defend, assumed the risk in an action by him against the latter of showing not only a liability covered by the policy, but also the amount of the liability; and that the recovery against the insurer was limited by the loss sustained, even though the evidence might show that the settlement was for less than such liability.

A provision of the policy to the effect that no action shall lie against the insurer to recover for any loss or expense under the policy unless it shall be brought by assured for loss or expense actually sustained and paid in money by the assured "after actual trial of

the issue" was held in the *Mayor, L. & Co. Case*, supra, in view of the rule of strict construction which obtains against the insurer, to be satisfied, as in the case at bar the assured refrained from settling until after the close of the evidence, although before submission to the jury. It was so held even upon the assumption that the insurer was entitled to the benefit of the provision, notwithstanding its own breach of contract by failing to defend the action. The court distinguished the cases decided under policies limiting the liability of the insurer to losses sustained and paid by the assured "after judgment."

A complaint in an action by insured to recover the amount he had contributed to the sum within the limit of the insurer's liability, paid in settlement of the claim of the injured person, was held demurrable in *Levin v. New England Casualty Co.* (1916) 97 Misc. 7, 160 N. Y. Supp. 1041, where it alleged that the contribution was made under a threat of the insurer that otherwise it would allow the case to go to trial and subject insured to the hazard of suffering a verdict in excess of the amount of the insurance, but did not allege that, by the terms of the policy, the insurer agreed to consent to settlement for less than the face of the policy, and less than the amount which the claimant would probably recover, the allegation in that regard being a mere conclusion of the pleader.

Generally as to power of insurer with respect of settlement of claims, see annotations to *New Orleans & C. R. Co. v. Maryland Casualty Co.* 6 L.R.A. (N.S.) 562, and *C. Schmidt & Sons Brewing Co. v. Travelers' Ins. Co.* 52 L.R.A. (N.S.) 126. And as to participation by indemnity insurer in defense of suit against insured as estoppel to assert that latter's liability was predicated on ground not covered by the policy, see annotation to *Sargent Mfg. Co. v. Travelers' Ins. Co.* 34 L.R.A. (N.S.) 491.

It has been held that where a verdict had been recovered against the holder of a policy indemnifying him against loss through injuries inflicted by his automobile, and the insurer had agreed to appeal from the judgment, and had assured the plaintiff that an appeal had been taken, but, without the latter's knowledge, permitted the time within which an appeal might be taken to expire without having taken it, a recovery for the amount of the judgment that the plaintiff had been obliged to pay L.R.A.1917F.

in excess of the amount of the policy may be had against the insurer for its negligence. *McAleenan v. Massachusetts Bonding & Ins. Co.* (1916) 219 N. Y. 564, 114 N. E. 114, affirming (1916) 173 App. Div. 100, 159 N. Y. Supp. 401.

In *McAleenan v. Massachusetts Bonding & Ins. Co.* (1916) 173 App. Div. 100, 159 N. Y. Supp. 401, it was held that the refusal of the insurer to permit the insured to accept the injured person's offer to accept a specified sum in full settlement of any damages that might be recovered in excess of the amount of the insurance did not render the insurer liable for the larger amount which the insured was obliged to pay. Two of the justices apparently placed the decision on the ground that the insured had expressly agreed that he would not, without the written consent of the insurer, settle any claim or interfere with any legal proceeding. Scott, J., apparently speaking for the majority of the court, however, said that the provision did not stand in the way of the acceptance of the offer, observing that it merely provided that the insured might not incur expense or settle a claim "except at his own cost;" and added that if such payment would not increase the company's liability or enhance its difficulties in defending the action, it would not amount to a breach of the contract. (See, in this connection, the note to *General Acci. Fire & Life Assur. Corp. v. Louisville Home Teleph. Co.* L.R.A.1917D, 957, on Right of insured, under a policy indemnifying against liability for damages or injuries, to settle the part of a claim in excess of the insurer's liability.) The decision against the cause of action in question was affirmed by the court of appeals in *McAleenan v. Massachusetts Bonding & Ins. Co.* (1916) 219 N. Y. 564, 114 N. E. 114.

On a subsequent appeal of this case, in (1917) — App. Div. —, 166 N. Y. Supp. 184, it was held that, as the provisions of the policy did not preclude the plaintiff settling with respect to his liability in excess of the indemnity for which the insurer was liable, it was immaterial whether the insurer granted or withheld its consent to a settlement, or whether it acted in good or bad faith.

There is no violation of a provision of an automobile indemnity policy that the insured shall not "interfere in negotiations for compromise" where, the day after the accident, the insured telephoned the claimant, stating that he was insured and that his attorney would endeavor to get a settlement from the

insurance company, and subsequently stated that a lawyer, who was coming to see the claimant, was not the insured's, but the insurance company's, though he

might call himself the insured's. *Hopkins v. American Fidelity Co.* (1916) 91 Wash. 680, 158 Pac. 535. J. T. W.

DISTRICT OF COLUMBIA COURT OF APPEALS.

WILLIAM HENRY WHITE, Surviving Trustee, Appt.,
v.
MAHLON A. WINTER.

(46 App. D. C. 355.)

Contract — to suppress action to set aside divorce — validity.

A contract by a man to pay his former wife an allowance in consideration of her not filing a bill to set aside a divorce decree which is alleged to have been secured by fraud is void as against public policy.

For other cases, see Contracts, II. c, 1, in Dig. 1-52 N. S.

(April 23, 1917.)

A PPEAL by plaintiff from a judgment of the Supreme Court in favor of defendant in a suit to enforce an agreement to provide for the support of his divorced wife. Affirmed.

The facts are stated in the opinion.

Messrs. Andrew Wilson and William L. Symons, for appellant:

Defendant's own prior misdeeds in divorcing an insane wife, his subsequent marriage, and the birth of a child, cannot take away the wife's rights nor amount to duress.

Baker v. Morton, 12 Wall. 157, 20 L. ed. 264; *French v. Shoemaker*, 14 Wall. 332, 20 L. ed. 856; *United States v. Huckabee*, 16 Wall. 414-432, 21 L. ed. 457-463; *Baltimore v. Lefferman*, 4 Gill, 425, 45 Am. Dec. 145; *Loneragan v. Buford*, 148 U. S. 581, 590, 37 L. ed. 569, 572, 13 Sup. Ct. Rep. 684; *Radich v. Hutchins*, 95 U. S. 210, 213, 24 L. ed. 409, 410; *United States v. Old Settlers*, 148 U. S. 427, 473, 37 L. ed. 509, 526, 13 Sup. Ct. Rep. 650; *Chesebrough v. United States*, 102 U. S. 253, 259, 48 L. ed. 432, 434, 24 Sup. Ct. Rep. 262; *Fulton v. Hood*, 34 Pa. 365, 75 Am. Dec. 664; *Sulzner v. Cappeau-Lemley & M. Co.* 234 Pa. 162, 39 L.R.A.(N.S.) 421, 83 Atl. 103; *Motz v. Mitchell*, 91 Pa. 114; *Bianchi v. Leon*, 138 App. Div. 216, 122 N. Y. Supp. 1004; *United States Bkg. Co. v. Veale*, 84 Kan. 385, 37 L.R.A.(N.S.)

Note. — For contract made to prevent attack upon divorce decree as contrary to public policy, see annotation following this case, post, 621.
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541, 114 Pac. 229; *Flack v. National Bank*, 8 Utah, 193, 17 L.R.A. 583, 30 Pac. 746; *Felton v. Gregory*, 130 Mass. 176; *De la Cuesta v. Insurance Co. of N. A.* 136 Pa. 62, 9 L.R.A. 632, 20 Atl. 505; *Fisher v. Bishop*, 36 Hun, 112; *Seymour v. Prescott*, 69 Me. 376; *Morse v. Woodworth*, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525; *Buck v. Axt*, 85 Ind. 512; *Snyder v. Braden*, 58 Ind. 143; *Mascolo v. Montesanto*, 61 Conn. 50, 29 Am. St. Rep. 170, 23 Atl. 714; *Hilborn v. Bucknam*, 78 Me. 482, 57 Am. Rep. 816, 7 Atl. 272; *Thorn v. Pinkham*, 84 Me. 101, 30 Am. St. Rep. 335, 24 Atl. 718; *Parker v. Lancaster*, 84 Me. 512, 24 Atl. 952; *St. Louis, A. & T. H. R. Co. v. Thomas*, 85 Ill. 464; *Youngs v. Simm*, 41 Ill. App. 28; *Rendleman v. Rendleman*, 156 Ill. 568, 41 N. E. 223; *Harris v. Tyson*, 24 Pa. 347, 64 Am. Dec. 661, 14 Mor. Min. Rep. 634; *Stokes v. Anderson*, 118 Ind. 533, 4 L.R.A. 313, 21 N. E. 331; *Robinson v. Robinson*, 77 Wash. 663, 51 L.R.A.(N.S.) 534, 138 Pac. 288; *Griffin v. Griffin*, 130 Ga. 527, 16 L.R.A.(N.S.) 937, 61 S. E. 16, 14 Ann. Cas. 866; *Saxton v. McNair*, 71 Wis. 459, 37 N. W. 439; *Bolln v. Metcalf*, 6 Wyo. 1, 71 Am. St. Rep. 898, 42 Pac. 12, 44 Pac. 694; *Dunham v. Griswold*, 100 N. Y. 224, 3 N. E. 76; *Clark v. Turnbull*, 47 N. J. L. 265, 54 Am. Rep. 157.

Where it is sought to avoid a contract because induced by duress, the person seeking such avoidance must proceed within a reasonable time after the removal of the duress. If he remains silent for an unreasonable length of time, or if he keeps property which he may have acquired under the contract, or recognizes the validity of it, either by making payments thereon, or otherwise, he will be held to have elected to waive the duress and ratify the contract.

10 Am. & Eng. Enc. Law, 2d ed. 337; *Carver v. United States*, 111 U. S. 609, 28 L. ed. 540, 4 Sup. Ct. Rep. 561; *Brown v. Piper*, 91 U. S. 37, 23 L. ed. 200; *Pence v. Langdon*, 99 U. S. 578, 25 L. ed. 420, 13 Mor. Min. Rep. 32; *Grymes v. Sanders*, 93 U. S. 55, 23 L. ed. 798, 10 Mor. Min. Rep. 445; *Griswold v. Hazard*, 141 U. S. 295, 35 L. ed. 692, 11 Sup. Ct. Rep. 972, 999; *McLean v. Clapp*, 141 U. S. 432, 35 L. ed. 806, 12 Sup. Ct. Rep. 29; *Hoyt v. Latham*, 143 U. S. 567, 36 L. ed. 264, 12 Sup. Ct. Rep. 568; *Shappirio v. Goldberg*, 192 U. S. 242, 48 L. ed. 425, 24 Sup. Ct. Rep. 259.

Messrs. George X. McLanahan, H. Ralph Burton, and James S. Easby-Smith, for appellee:

The court below properly submitted to the jury the question of duress, upon which the jury found for the defendant.

United States v. Huckabee, 16 Wall. 414, 21 L. ed. 457; Atwood v. Jarrett, 81 Conn. 532, 71 Atl. 569; O'Toole v. Lamson, 41 App. D. C. 276; Harris v. Carmody, 131 Mass. 51, 41 Am. Rep. 188; Rose v. Owen, 42 Ind. App. 137, 85 N. E. 129; Haynes v. Rudd, 30 Hun, 239, 83 N. Y. 253; Morse v. Woodworth, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525; Salvador v. Feeley, 105 Iowa, 478, 75 N. W. 476; Ubhoff v. Brandenburg, 26 App. D. C. 3; 23 Cyc. 779.

Mr. Justice Robb delivered the opinion of the court:

This appeal is from a judgment in the supreme court of the District upon a verdict for the appellee, Mahlon A. Winter, defendant below.

The suit was based upon the following agreement:

Agreement.

This agreement entered into this 11th day of January, A. D. 1909, in duplicate, between Mahlon A. Winter, of Washington, District of Columbia, party of the first part, and William Henry White and Noel W. Barksdale, of Washington, D. C., as attorneys for Erminie L. Winter, of Lynchburg, Virginia, parties of the second part, witnesseth; that

Whereas, the said Mahlon A. Winter and Erminie L. Winter were divorced by a decree in Equity Cause No. 24,919 in the supreme court of the District of Columbia, passed January 14, 1905, and concerning which a difference has arisen and exists between them; and

Whereas, the parties hereto have reached an amicable adjustment in settlement and compromise of their matters of difference, they now agree as follows:

1. The said Mahlon A. Winter, for the support of Erminie L. Winter, will pay unto said William Henry White and Noel W. Barksdale, or the survivor of them, for and on her behalf, the sum of sixty dollars (\$60) and a like sum of sixty dollars (\$60) on the first day of February, 1909, and the sums of sixty dollars (\$60) on the first day of each and every month thereafter during the lifetime of the said Erminie L. Winter, or until her remarriage, to the payment of which sums the said Mahlon A. Winter binds himself, his heirs, executors, administrators, and assigns.

2. The said William Henry White and Noel W. Barksdale, as such attorneys, agree L.R.A.1917F.

that so long as said sums are promptly paid, no action shall be taken in the premises by the said Erminie L. Winter or her counsel against the said Mahlon A. Winter, looking either to disturbing said decree or seeking any additional sums for her maintenance or support and they agree that at the signing hereof the mother of said Erminie L. Winter, Mary E. Tanner, and her friend, Mrs. Anna C. Pollok, shall in writing concur in and approve the terms hereof.

In witness whereof, the parties have hereunto set their hands and seals this 11th day of January, A. D. 1909.

M. A. Winter. [seal.]

Wm. Henry White, [seal.]

Attorney for Erminie L. Winter.

Noel W. Barksdale, [seal.]

Attorney for Erminie L. Winter.

Witness:

G. W. Faria.

The facts which we deem material are substantially as follows: The appellee, Mahlon A. Winter, and Erminie L. Winter, were married in November, 1891, and lived together until 1904, when appellee filed a petition for divorce in the supreme court of the District, alleging infidelity, and naming his own son by a former marriage, born January 14, 1888, as correspondent. No defense was made to this suit and in January, 1905, a divorce was granted. Thereafter, in December of 1908, counsel for Mrs. Winter notified appellee in writing that they had been advised that the decree was procured while Mrs. Winter was insane, and that they therefore had prepared and proposed to file a bill to set aside the decree. They further suggested that appellee have his counsel call to see them about the matter. The result was a series of interviews between counsel. In addition to this, appellee, and his counsel went to Lynchburg, Virginia, where his former wife then lived in straitened and necessitous circumstances, and made an independent investigation.

The bill of complaint to which counsel for appellant referred in his communication to appellee was exhibited to counsel for appellee during the course of the negotiations and its contents made known to him. In the bill it was alleged that at the time of the filing of said petition for divorce Mahlon A. Winter and Erminie L. Winter were living in the city of Washington; that Courtney P. Winter, the son of Mahlon A. Winter, above referred to, was living with them, and that Ida B. Creel was housekeeper; that on the date the divorce suit was filed Mrs. Winter and Courtney P. Winter, the correspondent, were

duly served with process and on September 30, 1904, said corespondent appeared in court, when a guardian ad litem was appointed to answer for him; that an answer thereafter was filed on his behalf; that some time between the 21st and the 26th of September, 1904, appellee directed said Erminie L. Winter, who then was living with him at his residence in this city, to call an attorney at his office by telephone and request said attorney to represent her in said divorce case; that she did call said attorney, and, through fear of appellee and under his direction, she informed said attorney that she did not wish to make any defense to said suit; that she neither answered the bill nor introduced any testimony in said cause; that thereafter two depositions on behalf of the complainant were filed, one being the deposition of the petitioner and the other of Ida B. Creel. Upon hearing, the court recommitted the cause for the taking of further testimony, whereupon the deposition of Courtney P. Winter was taken and filed, and thereafter the decree of divorce was passed.

The bill further averred that the allegations of infidelity in said petition for divorce and the testimony in support thereof were false and known to be false by the parties testifying; that the said petition for divorce was filed by said Mahlon A. Winter as part of a prearrangement and understanding between him and his housekeeper that a divorce should be procured and that thereafter they should be married; that they did go through a form of marriage ceremony in the spring of 1905, after the granting of said divorce. It was further averred that said Erminie L. Winter had been of unsound mind since 1896, and that this was well known to the said Mahlon A. Winter, Ida B. Creel, and Courtney P. Winter; that "the said parties purposely, knowingly, wilfully, and fraudulently imposed upon this court as well as upon the attorney in said suit, by failing to impart the information of said facts to the counsel in the cause and to the court;" that the attorney for the said Erminie L. Winter had not seen her before he called upon her upon the occasion above mentioned; that he then saw her for less than twenty minutes and did not see her afterwards, and did not learn of her condition until after the decree was passed. It was prayed that the divorce decree be set aside. The proposed bill was signed and sworn to by Mary E. Tanner, mother and next friend of Mrs. Winter.

The negotiations before mentioned resulted in the contract involved and appellee promptly made the payments called for therein until January, 1914, when he dis-

continued them on the ground that the signing of the contract by him was induced by duress, and that was the question submitted to and determined by the jury. The view we have taken of the case renders it unnecessary to consider the various exceptions taken during the course of the trial.

Marriage is not only the most important relation in life, but has more to do with the morals and civilization of the people than any other institution. It is a relation which, once entered into, may not be changed without the express sanction of the law. "Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress." *Maynard v. Hill*, 125 U. S. 190, 211, 31 L. ed. 654, 659, 8 Sup. Ct. Rep. 723. Agreements between husband and wife having for their object the procurement of a divorce are frowned upon by the courts, for the reason that good faith is demanded of the parties to a divorce proceeding, to the end that the court may be fully advised as to the facts. *Cronan v. Cronan*, 46 App. D. C. 343. In that case this court declared that it would not lend its aid in the enforcement of a contract between husband and wife if it appeared that such contract was induced by a promise by one party to procure a divorce from the other. Obviously, if the facts alleged in the proposed bill for the annulment of the divorce decree are true, a far greater fraud was practised upon the court here, and it was counsel's duty to file the bill. We must assume that the averments of the bill were made in good faith and that counsel for appellant had reasonable cause to believe them true. And yet, instead of filing the bill, counsel representing this unfortunate woman entered into the agreement in question, whereby a decree of divorce alleged to have been obtained upon false testimony and through fraud was permitted to stand. It results that this woman continues to bear the brand of an adulteress, her legal right to be cared for and supported by her husband has been stricken down, and an attempt has been made to bargain away the dignity and authority of the court.

Appellee testified that he signed this agreement to prevent the filing of the said bill, and the agreement provides that "so long as said sums are promptly paid, no

action shall be taken in the premises by the said Erminie L. Winter or her counsel against the said Mahlon A. Winter, looking either to *disturbing said decree* or seeking any additional sum." It is beyond controversy, therefore, that the agreement we are asked to recognize and enforce contemplated and required the suppression of evidence of collusion and fraud practised in a court of justice. To sustain and give effect to such an agreement it would be necessary for justice to be halt as well as

blind. It matters not that counsel for Mrs. Winter thought they were acting for her best interests, since the result is exactly the same; namely, the recognition of an alleged fraudulent decree of divorce under an agreement to withhold knowledge of the fraud from the court. Such an agreement is violative of every rule of public policy and will not be recognized.

The judgment must be affirmed with costs.

Annotation—Contract made to prevent attack upon divorce decree as contrary to public policy.

The cases most nearly in point on the question presented, disclosed by a diligent search, are *Comstock v. Adams* (1880) 23 Kan. 513, 33 Am. Rep. 191, *Blank v. Nohl* (1892) 112 Mo. 159, 18 L.R.A. 350, 20 S. W. 477, and *Bloom v. Bloom* (1912) 134 N. Y. Supp. 581, involving the validity of contracts not to appeal from a decree of divorce, and which are set out in the note to *Pierce*

v. Cobb, 44 L.R.A. (N.S.) 387, treating generally of the validity of contracts upon condition, or in consideration, of procuring divorce.

As to validity of contract between husband and wife to compromise pending or contemplated divorce suit, see note to *Oppenheimer v. Collins*, 60 L.R.A. 406.

J. D. C.

KANSAS SUPREME COURT.

WILLIAM PINSON et al.

v.

WILLIAM YOUNG et al., Doing Business as Young Brothers, et al., Appts.

(100 Kan. 452, 164 Pac. 1102.)

Evidence — negligence.

1. Evidence examined, and held sufficient to fix responsibility for the negligent storage of dynamite.

For other cases, see *Evidence*, XII. d, in Dig. 1-52 N. S.

Explosives — storage — cause of death.

2. Where dynamite is stored in a building in violation of a city ordinance and the dynamite is exploded by a fire in the building, and a fireman on duty at the building is killed thereby, such negligent storage of the dynamite is a proximate cause of the death of the fireman.

For other cases, see *Proximate Cause*, II. d, in Dig. 1-52 N. S.

Trial — requested instructions.

3. Requested instructions examined, and held properly refused, and appellant's rights duly recognized in those given.

For other cases, see *Trial*, III. c and e, in Dig. 1-52 N. S.

(May 12, 1917.)

Headnotes by DAWSON, J.

Note. — For unlawful or negligent storage of explosives as proximate cause of injuries from explosion caused by fire, see annotation following this case, post, 624. L.R.A.1917F.

APPPEAL by defendants from a judgment of the District Court for Cherokee County in favor of plaintiffs in an action brought to recover damages for the wrongful death of their son alleged to have been caused by defendants' negligence. Affirmed.

The facts are stated in the opinion.

Messrs. J. W. McAntire, William F. Sapp, and A. S. Wilson, for appellants:

The court should withdraw a case from a jury and direct a verdict when the undisputed evidence is so conclusive that the court should set aside a verdict in opposition thereto.

Goodlander Mill Co. v. Standard Oil Co. 27 L.R.A. 583, 11 C. C. A. 253, 24 U. S. App. 7, 63 Fed. 404; *Ætna F. Ins. Co. v. Boon*, 95 U. S. 117-130, 24 L. ed. 395-398; *Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 469-472, 35 L. ed. 213-215, 11 Sup. Ct. Rep. 569; *North Pennsylvania R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, 31 L. ed. 287, 8 Sup. Ct. Rep. 266; *Elliott v. Chicago, M. & St. P. R. Co.* 150 U. S. 245, 37 L. ed. 1068, 14 Sup. Ct. Rep. 85; *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 598; *Waters-Pierce Oil Co. v. Van Elderen*, 70 C. C. A. 255, 137 Fed. 557.

The fire was the proximate cause of the injury.

Goodlander Mill Co. v. Standard Oil Co. 27 L.R.A. 583, 11 C. C. A. 253, 24 U. S. App. 7, 63 Fed. 404; *Stone v. Boston & A. R. Co.* 171 Mass. 536, 41 L.R.A. 794, 51 N. E. 1, 4 Am. Neg. Rep. 490; *The Santa Rita*,

173 Fed. 413; *Lynn Gas & E. Co. v. Meriden F. Ins. Co.* 158 Mass. 570, 20 L.R.A. 297, 35 Am. St. Rep. 540, 33 N. E. 690; *Russell v. German F. Ins. Co.* 100 Minn. 528, 10 L.R.A.(N.S.) 326, 111 N. W. 400; *Beckham v. Seaboard Air-Line R. Co.* 127 Ga. 550, 12 L.R.A.(N.S.) 476, 56 S. E. 638; *Davis v. Chicago, M. & St. P. R. Co.* 93 Wis. 470, 33 L.R.A. 654, 57 Am. St. Rep. 935, 67 N. W. 16, 1132, 10 Am. Neg. Cas. 507; *Cole v. German Sav. & L. Soc.* 63 L.R.A. 416, 59 C. C. A. 595, 124 Fed. 115, 14 Am. Neg. Rep. 676; *Blythe v. Denver & R. G. R. Co.* 15 Colo. 333, 11 L.R.A. 618, 22 Am. St. Rep. 403, 25 Pac. 702.

There was not a particle of evidence showing or tending to show that the Independent Powder Company was aiding or assisting in the violation of the city ordinance, and where there is no evidence showing that the defendant was a joint tort-feasor or was guilty of negligence the court should direct a verdict for such defendant.

Union P. R. Co. v. Diehl, 33 Kan. 422, 6 Pac. 566; *Irwin v. Thompson*, 27 Kan. 643; *Atchison, T. & S. F. R. Co. v. Wagner*, 33 Kan. 660, 7 Pac. 204, 15 Am. Neg. Cas. 19; *King v. King*, 155 Mo. 424, 56 S. W. 534; *Feitl v. Chicago City R. Co.* 211 Ill. 279, 71 N. E. 991; *Block v. Swift & Co.* 161 Ill. 107, 43 N. E. 591; *McCarty v. Rood Hotel Co.* 144 Mo. 397, 46 S. W. 172, 4 Am. Neg. Cas. 169; *Keenan v. Edison Electric Illuminating Co.* 159 Mass. 379, 34 N. E. 366; *Kelley v. Boston Lead Co.* 128 Mass. 456; 17 Cyc. 754; *Warner v. Crandall*, 65 Ill. 195; *Wheelan v. Chicago, M. & St. P. R. Co.* 85 Iowa, 167, 52 N. W. 119; *Lyons v. Terre Haute & I. R. Co.* 101 Ind. 419; *Baird v. Abbey*, 73 Mich. 347, 41 N. W. 272; *Newcomb v. Jones*, 37 Mo. App. 475; *Wilson v. Cobb*, 28 N. J. Eq. 177; *Cunard S. S. Co. v. Kelley*, 61 C. C. A. 532, 126 Fed. 617; *Smith v. Lawrence*, 98 Me. 92, 56 Atl. 455; *Jewett v. Dringer*, 29 N. J. Eq. 199; *Central Branch Union P. R. Co. v. Shoup*, 28 Kan. 394, 42 Am. Rep. 163; 38 Cyc. 1534-1536; *Armstrong v. Penn.* 105 Ga. 229, 31 S. E. 158.

Messrs. A. D. Schreiner and Charles Stephens, for appellees:

The presence of the mining powder in the boiler room, in violation of the laws of the city of Galena, was the proximate cause of the injury.

Coffeyville Min. & Gas Co. v. Carter, 65 Kan. 568, 70 Pac. 635, 12 Am. Neg. Rep. 594; *Caspar v. Lewin*, 82 Kan. 604, 49 L.R.A.(N.S.) 526, 109 Pac. 657; *Luengene v. Consumers Light, Heat & P. Co.* 86 Kan. 876, 122 Pac. 1032; 16 Am. & Eng. Enc. Law, 440; 4 *Thomp. Neg.* 2d ed. § 3857; *Shearm. & Redf. Neg.* 3d ed. § 10, 5th ed. § 32; *Union Street R. Co. v. Stone*, 54 Kan. 83, 37 Pac. 1012; *Rodgers v. Missouri P. R. Co.* L.R.A.1917F.

75 Kan. 231, 10 L.R.A.(N.S.) 658, 121 Am. St. Rep. 416, 88 Pac. 885, 12 Ann. Cas. 441; *Cooley, Torts*, 3d ed. p. 99; *French v. Center Creek Powder Mfg. Co.* 173 Mo. App. 220, 158 S. W. 723; *Clark v. E. I. du Pont de Nemours Powder Co.* 94 Kan. 268, L.R.A. 1915E, 479, 146 Pac. 320, Ann. Cas. 1917B, 340.

Dawson, J., delivered the opinion of the court:

The plaintiffs are the father and mother of John Pinson, a Galena fireman, who was killed by an explosion while he was extinguishing a fire in a building containing dynamite. The deceased was a single man and his parents were partly dependent upon him for support, and they brought this action against the defendants for damages for the wrongful death of their son.

The defendants Young Brothers were engaged in mining operations in and about the city of Galena and were tenants of the building. In one corner of it they had constructed a small room for the storage of explosives. There is a city ordinance in Galena regulating the keeping of explosives, making it unlawful to store over 200 pounds of powder in any building within the city except "in a perfectly constructed powder house, subject to the approval of the mayor and council." The Independent Powder Company, another defendant, is a corporation engaged in the manufacture, sale, and distribution of explosives in and about the Galena mining district. Still another defendant was the owner of the building, but its relation to this lawsuit needs no attention. The plaintiffs charged that Young Brothers and the Independent Powder Company brought about the death of their son by negligently storing large quantities of dynamite and other explosives in the building in violation of the city ordinances, and that the explosives thus stored were a dangerous nuisance, and, "that said deceased, acting in the line of his duty and in the exercise of ordinary care, not knowing of the existence in said building of any of said explosives herein described, was standing on the regularly traveled sidewalk just north of said building, where he and all others had, at all times, a right to be, near the north end of said brick building, holding in his hands a large rubber fire hose, through which he was directing water onto said flames, when, because of the recklessness, gross and wanton carelessness, and negligence of said defendants, their agents and employees, and each of them, as herein alleged, the said dynamite and detonating caps, stored in said building as aforesaid, exploded with terrific force and violence, completely demolishing said brick building,

throwing the north wall upon the said John Elmer Pinson and then and there killing him instantly; that the proximate cause of his death was the gross and wanton carelessness and negligence of said defendants, their agents and employees, and each of them, in there maintaining an inherently and extremely dangerous nuisance by storing and keeping of said explosives in said brick building as herein alleged."

Issues were joined, and the cause was tried to a jury, which made special findings and rendered a general verdict for the plaintiffs and against Young Brothers and the Independent Powder Company.

The powder company is the principal appellant, and it assigns certain errors which will be noted in order. It contends first that there was no evidence to prove that the powder company was connected in any way with Young Brothers in the ownership or control of powder in their magazine. But there was substantial evidence to show that the explosion which caused the greatest damage was not occasioned, or not occasioned alone, by the relatively small amount of powder in the magazine or room constructed in the corner of the building for powder storage, but by the explosion of a much larger quantity of dynamite deposited in the building outside this storage room. Some of the evidence tended to show that while it was the custom to supply the mining operators in and about Galena, including Young Brothers, with powder in the early hours of the day, the powder company was frequently seen to unload powder at this building in the evening, and that it usually commenced its daily business each morning at Young Brothers' building, from which it might properly be inferred that it used this building as a powder storehouse at night and as a place of supply or partial supply for its morning trade. Certain other incidents tended to show that the powder company kept a supply of powder in this building from which it made deliveries at later hours of the day. A day or two before the explosion a large number of boxes of dynamite was seen in the building outside the powder storage room. The day before the accident, a number of such boxes was observed, bearing the words, "Independent Powder Company." At least five such boxes (250 pounds) were placed in the building the evening before the explosion by the defendant company's delivering agent. After the fire, it was seen that the depression or cavity in the ground where the dynamite had exploded was not in the corner of the building where the powder storage room had been, but farther from that corner, and near where the dynamite boxes had been seen before the fire. We note, of course, that the evidence L.R.A.1917F.

on this point is conflicting,—a controverted question of fact for the jury's consideration. Other circumstances tended to show that the powder company kept temporary supplies of powder in the building, and while it may be true that the powder company was not interested with Young Brothers as owner or in control of the dynamite kept in the storage room, that fact would not relieve the company from the consequences of its negligent acts in relation to the explosives in the building which it did own, and which were sufficiently identified and proved as its property to require the question of its ownership and control to be submitted to the jury. Moreover, if it were established that the powder company knowingly aided or abetted Young Brothers in the maintaining of this dangerous nuisance, the company would not be relieved of liability, even if it did not own the powder wrongfully or negligently stored in disregard of the public safety or in disregard of the city ordinance. The mere question of ownership of the powder was not primarily important. Who were responsible for the negligence? By whose negligent acts and omissions was this large amount of dynamite placed where it had no right to be? Who aided and abetted in this wrongdoing? These were the primary considerations in fixing the responsibility for the death of John Pinson. The relation of the powder company to these derelictions was sufficiently established to make its responsibility a question for the jury's determination.

It is next contended that the fire, and not negligent storage of the dynamite, was the proximate cause of Pinson's wrongful death. Both were proximate causes. The fire alone would not have caused his death. The dynamite alone might not have caused it. Perhaps the fire was the result of negligence. The storage of the dynamite was undoubtedly so. These two contributing delinquencies, the fire and the negligent storage of the dynamite, both proximate, wrought this result. *Kansas City v. Slangstrom*, 53 Kan. 431, Syl. par. 2, 36 Pac. 706; *Union Street R. Co. v. Stone*, 54 Kan. 83, Syl. par. 7, 37 Pac. 1012; *Luengene v. Consumers Light, Heat & P. Co.* 86 Kan. 866, Syl. par. 5, 122 Pac. 1032; *Johnson v. Northwestern Teleph. Exch. Co.* 48 Minn. 433, 436, 51 N. W. 225; *Young v. Syracuse, B. & N. Y. R. Co.* 45 App. Div. 296, 61 N. Y. Supp. 204; *Ring v. Cohoes*, 77 N. Y. 83, 33 Am. Rep. 574; *Phillips v. New York C. & H. R. R. Co.* 127 N. Y. 657, 27 N. E. 978; *Mexican Nat. R. Co. v. Mussette*, 86 Tex. 708, 719, 24 L.R.A. 642, 26 S. W. 1075.

The appellant powder company complains of the trial court's refusal to give certain instructions. These have been carefully ex-

amined. Those requested were constructed on the theory that the appellant was not responsible for the dynamite which it had sold and delivered to Young Brothers and which was stored in the magazine, but they persistently ignored the responsibility attaching to appellant for the much larger amount of dynamite stored in the building, and which was no part of the amount supplied to Young Brothers for the use of the latter. The appellant's rights were duly recognized in the instructions given by the court, particularly in instruction 14, which reads: "14. The court instructs the jury that the mere fact that the Independent Powder Company from day to day, upon the request of Young Brothers or their engineer, sold and delivered to Young Brothers such quantities of dynamite and detonating caps as were ordered would not be sufficient to make the defendant Independent Powder Company liable in this action; and if you

find and believe from the evidence that powder was being used in the mine by Young Brothers while working therein, and that the Independent Powder Company did not, at any one time in September, 1912, sell and deliver to them more than 200 pounds or four boxes of powder, and did not store or keep in the building destroyed by fire on September 25, 1912, any powder belonging to the Independent Powder Company, even though you may believe from the evidence that Young Brothers had more than 200 pounds of dynamite in their possession which was owned by them on the 25th day of September, 1912, or prior thereto, you should find the issues for the defendant the Independent Powder Company on both counts of the plaintiff's petition."

Nothing approaching the gravity of reversible error appears anywhere in the record, and the judgment is affirmed.

Annotation—Unlawful or negligent storage of explosives as proximate cause of injuries from explosion caused by fire.

The storage of explosives as constituting a nuisance is covered in note to *Henderson v. Sullivan*, 16 L.R.A.(N.S.) 691, supplemented by note to *State ex rel. Hopkins v. Excelsior Powder Mfg. Co.* L.R.A.1915A, 615. In the present annotation it is assumed that the storing of the explosives was negligent or unlawful, and the only question annotated is the proximate cause of the injury where a fire of independent origin causes the explosives to explode and the explosion in turn causes the injury.

Cases where the fire is definitely traced to the intervening negligent act of a third person are not included in the present note, but are included in the note to *Clark v. E. I. Du Pont de Nemours Powder Co.* L.R.A.1915E, 479, on the general subject, "Intervening act of third person as affecting proximate cause in case of injury by explosives." Many other notes of collateral interest on the subject now under discussion are cited in the note just referred to.

The conclusion reached by the court in *PINSON v. YOUNG*, ante, 621, that negligence in storing explosives is a proximate cause of injury resulting from an explosion thereof caused by fire from an independent source, is directly supported by the following authorities: *Willson v. Colorado & S. R. Co.* (1914) 57 Colo. 303, 142 Pac. 174; *Wright v. Chicago & N. W. R. Co.* (1887) 27 Ill. App. 200; *Brown v. West Riverside Coal Co.* (1909) 143 Iowa, L.R.A.1917F.

662, 28 L.R.A.(N.S.) 1260, 120 N. W. 732, 21 Am. Neg. Rep. 646 (even though cause of explosion is unknown); *Prusak v. Hutton* (1898) 30 App. Div. 66, 51 N. Y. Supp. 761; *Schuck v. Main* (1902) 39 Misc. 251, 79 N. Y. Supp. 399 (see citation of this case, *infra*); *Ft. Worth & D. C. R. Co. v. Beauchamp* (1902) 95 Tex. 496, 58 L.R.A. 716, 93 Am. St. Rep. 864, 68 S. W. 502 (see citation of case, *infra*).

In *Willson v. Colorado & S. R. Co.* (Colo.) *supra*, it is held that the fact that the fire which caused the explosion of dynamite loaded on defendant's car was of incendiary origin would not excuse the defendant if it was determined that it was negligent in its care of the dynamite, and that if its conduct constituted a nuisance it was immaterial to prove the immediate cause of the explosion, as the original and primary cause of the injury therefrom was the establishment of the nuisance.

In *Wright v. Chicago & N. W. R. Co.* (1887) 27 Ill. App. 200, defendant's storehouse caught fire, exploding a quantity of petroleum, gasoline, etc., stored therein; as a result of such explosion the fire spread so rapidly as to burn property of the plaintiff in a nearby building which might otherwise have been saved. The court said: "The mere act of keeping the oils in its building, although prohibited by the ordinance, gives no right of action to appellants; it is still a question of fact whether the

damage alleged was the proximate consequence of such keeping." Whether the explosion caused the injury or not was held to be a question for the jury.

In *Brown v. West Riverside Coal Co.* (1909) 143 Iowa, 662, 28 L.R.A.(N.S.) 1266, 120 N. W. 732, 21 Am. Neg. Rep. 646, it is held that a master's negligence in storing dynamite in a place where its accidental ignition will endanger the lives of his employees is the proximate cause of the death of a servant, through its explosion, though caused by lightning, or other unknown cause.

In *Ft. Worth & D. C. R. Co. v. Beauchamp* (1902) 95 Tex. 496, 58 L.R.A. 716, 93 Am. St. Rep. 864, 68 S. W. 502, it is held that negligence in leaving a car load of high explosives an unreasonable time in the vicinity of a dwelling is the proximate cause of injury to the dwelling by an explosion of the car caused by fire communicated from other cars near by.

In *Sahuck v. Main* (1902) 39 Misc. 251, 79 N. Y. Supp. 399, several firms, including one not a party to the action, had chemicals stored in a building which caught fire; three explosions followed. As the evidence failed to show which lot of chemicals produced the explosion from which the damage complained of resulted, the complaint was dismissed, but the case seems to hold that but for such lack of proof the owner of that lot of explosives would have been liable, provided it was found that they were stored in violation of a provision of the city charter.

Of course, the question under discussion presupposes that the explosion caused damages that would not have resulted from the fire itself.

And so, if a building is burned, and the jury finds that it would of necessity have caught fire and burned independently of the explosion, the defendant, who kept the explosives contrary to an ordinance and in a negligent manner, is not liable, for the reason that the explosion was not the proximate cause. *Kinney v. Hoopman* (1897) 116 Ala. 310, 37 L.R.A. 497, 67 Am. St. Rep. 119, 22 So. 593.

There are some cases in which the defendant who stored the explosives was held liable for injuries caused by an explosion following a fire of independent origin, without the question of proximate cause being raised, the court apparently assuming that the storing was a proximate cause, and making the decision turn upon the question as to whether or not the defendant was guilty of negli-

gence or was maintaining a nuisance. Among cases of this character are: *Rudder v. Hoopman* (1897) 116 Ala. 332, 37 L.R.A. 489, 22 So. 601; *Rathbun v. White* (1910) 157 Cal. 248, 107 Pac. 309 (see citation of this case, *infra*); *Chicago, W. & V. Coal Co. v. Glass* (1889) 34 Ill. App. 364 (explosion caused by lightning); *Myers v. Malcolm* (1844) 6 Hill (N. Y.) 292, 41 Am. Dec. 744; *Cheatham v. Shearon* (1851) 1 Swan (Tenn.) 213, 55 Am. Dec. 734 (explosion caused by lightning).

Rudder v. Hoopman (1897) 116 Ala. 332, 37 L.R.A. 489, 22 So. 601, and *Kinney v. Hoopman* (1897) 116 Ala. 310, 37 L.R.A. 497, 67 Am. St. Rep. 119, 22 So. 593, arose out of an explosion of gunpowder from a fire originating on the premises of a third party, and without the fault of the owner of the explosives. In both cases judgments in favor of the defendant were reversed, the courts holding that the negligence of the defendant in storing large quantities of gunpowder in a wooden building in a populous place in a city imposed a liability for the resulting damage. In the latter case the court says: "We are of opinion that if the defendant kept gunpowder in violation of this statute [making it a misdemeanor to keep more than fifty pounds of gunpowder for sale or use within a city] and the plaintiff, being a person intended to be protected by the statute, was damaged in consequence of such violation, the defendant would be liable to him."

In *Rathbun v. White* (1910) 157 Cal. 248, 107 Pac. 309, the decision turned upon a question of fact, i. e., whether or not defendants had any powder stored at the time of the accident.

In *Myers v. Malcolm* (1844) 6 Hill (N. Y.) 292, 41 Am. Dec. 744, it appeared that gunpowder was stored in a shop, which took fire in the night, causing the explosion. While the defendants were granted a new trial on other grounds, it was held that if the storage of the powder under the circumstances of the case constituted a nuisance the defendants were answerable to the plaintiff for the personal injury occasioned by the explosion.

Cheatham v. Shearon (1851) 1 Swan (Tenn.) 213, 55 Am. Dec. 734; *Chicago, W. & V. Coal Co. v. Glass* (1899) 34 Ill. App. 364; and *Prussak v. Hutton* (1898) 30 App. Div. 66, 51 N. Y. Supp. 761, were all cases where powder magazines were exploded by lightning, and all hold that if the maintenance of the magazine under the circumstances con-

stituted a nuisance the defendants were liable for the results of the explosion.

In *Henry v. Cleveland, C. C. & St. L. R. Co.* (1895) 67 Fed. 426, the plaintiff claimed that a collision had occurred on defendant's road, resulting in the breaking of tank cars containing petroleum; the escaping petroleum caught fire, and more than two hours afterwards this fire was communicated to other cars containing petroleum, causing them to explode, producing the injury in question. The court held that if the jury found the defendant negligent in failing to remove the cars it was liable for the damage resulting from the explosion.

For violation of statute or ordinance relating to explosives as ground for private action, see note in *Molin v. Wisconsin Land & Lumber Co.* 48 L.R.A. (N.S.) 876.

On proximate cause of injury to children resulting from explosion of explosives negligently left accessible to them, see cases cited in notes in 14 L.R.A. (N.S.) 586; 24 L.R.A. (N.S.) 1257; 42 L.R.A. (N.S.) 840; L.R.A. 1917A, 1295. The question of the child's actions as an intervening cause is shown incidentally in the cases, and is not the principal point of the note. J. W. M.

KANSAS SUPREME COURT.

T. M. JINNINGS

v.

W. A. AMEND et al., Appts.

(101 Kan. 130, 165 Pac. 845.)

Landlord and tenant — imprisonment of tenant — rescission.

Where a written contract in the form of a three-year lease of farm land provides that the lessee shall reside upon it and cultivate it in a good and careful manner, raising wheat and delivering one third of the crop to the lessor, and the lessee, after doing considerable work on the place, but before sowing any wheat, is arrested on a charge of having committed a felony, and on conviction imprisoned in the county jail for about six months, the lessor is entitled to rescind the contract and take and retain possession of the land, notwithstanding the contract contains no provision giving a right of forfeiture or re-entry for any fault of the lessee.

For other cases, see *Landlord and Tenant*, III. c, in *Dig. 1-52 N. 8.*

(June 9, 1917.)

APPEAL by defendants from a judgment of the District Court for Gray County in favor of plaintiff, and from an order denying a motion for new trial in an action of forcible entry and detainer. Reversed.

The facts are stated in the opinion.

Messrs. William Osmond, Elrick C. Cole, and John Harper, for appellants:

Imprisonment, even though wrongful, preventing a person from carrying out the terms of his contract, effects an abandonment thereof.

Headnote by MASON, J.

Note. — For imprisonment of one of the parties to a contract as affecting rights and obligations thereunder, see annotation following this case, post, 628. L.R.A. 1917F.

Leopold v. Salkey, 89 Ill. 412, 31 Am. Rep. 93; *Jerome v. Queen City Cycle Co.* 163 N. Y. 351, 57 N. E. 485; *Wyatt v. Brown*, — Tenn. —, 42 S. W. 478; *Bass Furnace Co. v. Glasscock*, 82 Ala. 452, 60 Am. Rep. 748, 2 So. 315.

An action of forcible entry and detainer will not lie under the circumstances of this case.

19 Cyc. 1115; *Fulta v. Monroe*, 202 N. Y. 34, 37 L.R.A. (N.S.) 600, 95 N. E. 23, Ann. Cas. 1912D, 870; *Mastin v. May*, 127 Minn. 93, 148 N. W. 893, Ann. Cas. 1916C, 493.

Mr. Edgar Foster for appellee.

Mason, J., delivered the opinion of the court:

W. A. and E. R. Amend, residents of Great Bend, were the owners of 960 acres of land in Gray county. In February, 1915, they entered into a written agreement with T. M. Jinnings, providing that he was to occupy and farm it for three years, one third of the crop (wheat) to go to the owners. The contract also provided for his breaking out 500 acres of new land the first year and raising a wheat crop thereon for the benefit of the owners, to be paid in cash for his services in this connection. By September 28, 1915, Jinnings had broken the 500 acres of sod and plowed 400 acres of cultivated land, but had not sowed any wheat. On that day he was arrested, charged with a felony. He was held in custody until the October term of the district court, when he was convicted and sentenced to serve six months in the county jail. He appears not to have attempted to make any arrangement for the carrying on of the work, and to have been out of funds and credit. He remained in jail until about March 1, 1916, when he was paroled. Within a day or two after the arrest the Amends took possession of the land, which they have ever since retained. Upon the parole of

Jinnings they told him that they would not permit him to return to the premises. On April 11, 1916, he brought an action of forcible entry and detainer against them, joining as a defendant John Ratzloff, to whom they had given a lease. By the consent of the parties the case was transferred to the district court under an agreement that all the matters in controversy should be determined in one action. A referee heard the evidence and made detailed findings covering all transactions connected with the land contract. Judgment was rendered, awarding the plaintiff possession of the land, and requiring him to pay \$1,859.10, the amount found due the Amends on an accounting. The defendants appeal.

The plaintiff invokes the rule that, in the absence of an express provision on the subject in the lease, a lessor cannot terminate the tenancy on account of a breach of covenants by the lessee. 18 Am. & Eng. Enc. Law, 369, 370; 24 Cyc. 1349, 1392; 16 R. C. L. 969, 1115. He contends that the written contract was a lease, creating the ordinary relation of landlord and tenant, and that, inasmuch as it contained no provision for a forfeiture, no failure to perform the agreements on his part could give the defendants a right of re-entry. The defendants maintain that, if the contract was a lease at all, it was not an ordinary one; that it was more in the nature of a "cropper's" agreement for the cultivation of land on shares, and that an essential part of it was the plaintiff's undertaking to perform personal services; that when, by his own misconduct, he was disabled from carrying out a material part of the agreement he had undertaken, they were at liberty to rescind the contract, settling with him on an equitable basis for what he had already done.

The contract used language appropriate to a lease; it purported to create a tenancy for three years. That consideration, however, is not necessarily controlling, as the effect of the instrument is to be determined from its real intent, as gathered from its entire contents, regardless of the technical words used. 16 R. C. L. 584. It included clauses reserving a right to the owners to go upon the place at all times, requiring the plaintiff to pay the defendants one third of any receipts for pasturing cattle on the wheat, and providing for a delivery of possession in case of a sale, compensation to be made for the growing crop. We do not consider it necessary to decide what expression most fitly describes the relationship into which the parties entered. There is nothing peculiar about a lease that takes it out of the operation of the rules of fair dealing that govern in other contractual relations. Here the essence of the arrangement was that the

defendants were to furnish the land and certain implements, material, and money, and the plaintiff was to furnish his care, skill, and labor, and the proceeds were to be divided. Although the contract may be said to have created an estate in the land it was essentially executory; its provisions were mutually dependent. The plaintiff was not in control of the land, to use it at his pleasure. He was bound to handle it in a stated way, and to perform certain acts with regard to it, and these obligations were as important as any other part of the contract. His personal services were engaged; his skill as a farmer was involved; he had no power of substitution or subletting. See, in this connection, *Randall v. Chubb*, 46 Mich. 311, 41 Am. Rep. 165, 9 N. W. 429, and *Myer v. Roberts*, 50 Or. 81, 12 L.R.A. (N.S.) 194, 126 Am. St. Rep. 733, 89 Pac. 1051, 15 Ann. Cas. 1031. Notwithstanding the absence of any reference in the contract to a right of re-entry, it cannot be doubted that if he had completely abandoned the place, or had utterly refused compliance with the agreement, the owners would not have been required to permit the land to remain idle for several years. A clause of the agreement gave them a right to furnish additional help in the management of the farm, at the charge of the plaintiff, if thought by them to be necessary. But this cannot be regarded as an exclusive remedy. It is not adapted to such a situation as that suggested; nor were the defendants bound to pursue it.

The matter to be determined is the effect upon the relations of the parties of the plaintiff having been arrested, convicted, and confined. There seems to be a dearth of cases bearing upon that question. In *Leopold v. Salkey*, 89 Ill. 412, annotated in 31 Am. Rep. 100, an employer was held to have the right to discharge an employee who had been hired for a fixed period, because of his being arrested and held in custody for two weeks. That contract was perhaps not closely analogous to the one now under consideration. Moreover, the loss of time was treated as one for which the person arrested was not to blame, so that the principle applied would not be particularly helpful here. The gravity of the charge of which the plaintiff was convicted indicates that it implied moral turpitude. While the doctrine of *res judicata* has no application, we must act upon the theory that the conviction was rightful. It cannot be assumed that a miscarriage of justice occurred, nor could an inquiry into that matter be permitted, where it is collaterally involved in civil litigation. *Burt v. Union Cent. L. Ins. Co.* 187 U. S. 362, 47 L. ed. 216, 23 Sup. Ct. Rep. 139. This situation is therefore

presented: The plaintiff, having obtained possession of the land under a three-year contract, a material part of the consideration being that he should put in a wheat crop in the fall of 1915, was disabled to perform his agreement in that respect (as well as in some others) by reason of his having committed a crime. The disability was self-imposed. He was entitled to no more favorable treatment than if he had purposely interposed an insurmountable obstacle to the carrying out of the contract, or had abandoned or repudiated it. "Where one of the parties to a contract, before the time for performance arrives, has placed himself, by his voluntary act or conduct, in such a situation that he is unable to fulfil his part of the agreement, it may be treated as an anticipatory breach of the contract, or as a case of impossibility of performance subsequently arising; and in either view the other party to the contract may thereupon rescind it, and recover whatever consideration he may have given under it, or treat it as abandoned, and sue at once for such damages as he may have sustained. The inability to perform need not relate to the whole and every part of the contract, but it must exist with reference to some substantial particular, going to the very essence of the contract and defeating its main purpose and object, or to a part so essential to the residue of the contract that it cannot reasonably be supposed that the other party would have made the contract without it." 1 Black, Rescission & Cancellation, § 210.

The right of the plaintiff to occupy the land for three years was expressly granted in consideration of his personal occupancy and services. By fair implication it was

conditioned upon his being able to comply with that requirement,—at least upon his not voluntarily divesting himself of such ability. His enforced withdrawal from active life was not within the contemplation of the parties to the contract. There was practically a destruction of an important part of the subject-matter of the contract. The fact that the defendants were willing to agree that the plaintiff should have the right to occupy the farm for three years, assuming that he was to remain a free agent, affords no presumption that they would have been willing to grant him that privilege if he was to be imprisoned for a considerable part of the time. No question of forfeiture, strictly so called, is involved. We think the defendants were entitled to rescind the contract by reason of the plaintiff having disabled himself from performing a material part of his agreement,—a part going to the very foundation of the contract, without which it presumably would not have been entered into; that their conduct amounted to an enforcement of this right; that they should be allowed to retain possession of the land; and that the plaintiff should be compensated on an equitable basis for the services performed and expenditures incurred by him prior to his arrest.

The findings of fact, made by the referee and approved by the court, need not be disturbed; but, as the accounting was made upon the theory that the plaintiff would be restored to possession, a readjustment will be necessary.

The judgment is reversed, and the cause remanded for further proceedings in accordance herewith.

Annotation—Imprisonment of one of the parties to a contract as affecting rights and obligations thereunder.

The only cases considering the effect upon a contract of imprisonment of one of the parties seem to be in relation to contracts for personal services, although some of the cases on bail bonds involve a somewhat similar situation. It will be observed that in *JINNINGS v. AMEND*, ante, 626, the court insisted that an essential part of the contract was the personal services of the plaintiff. The cases on the liability of bail where the principal fails to appear through arrest or from enforced military service are reviewed in the notes to *Hargis v. Begley*, 23 L.R.A.(N.S.) 136, and *State v. Funk*, 30 L.R.A.(N.S.) 211, and *Com. v. Allen*, 50 L.R.A.(N.S.) 252. For the general question of intervening impossibility of performance of contract as a defense, see L.R.A.1917F.

the note to *Runyan v. Culver*, L.R.A. 1916F, 10.

It is clear that if the contract is one in which the obligation continues, notwithstanding death or illness, imprisonment would be no excuse, whether the party imprisoned were innocent or guilty.

While it seems reasonable that one who is guilty of a prison offense cannot justly claim that his imprisonment excuses his nonperformance of his contract, it will be observed that it has been held that the arrest and imprisonment of a guilty party did not breach his agreement to give notice for a certain length of time before leaving his employment, as an involuntary leaving was not within the intent of the agreement. *Hughes v. Wamsutta Mills* (1865) 11 Allen (Mass.) 201, *infra*.

In *Leopold v. Salkey* (1878) 89 Ill. 412, 31 Am. Rep. 100, cited in *JINNINGS v. AMEND*, the plaintiff entered the employ of defendants as a superintendent and manager of the manufacturing department of their clothing business on a three years' contract, during which time he was to devote himself entirely to the business, giving his whole time, attention, and skill thereto, and at all times work for the best interests of defendants; about six weeks after beginning work, and in the defendants' busiest season of the year, he was arrested by the United States marshal, under an order of the United States district court, and put in jail; he remained in jail for thirteen days, when he was released on bail; the defendants, having obtained another foreman in his place whilst he was in jail, refused to receive him again into their employ. It was held that the plaintiff had substantially breached his covenant, and that the defendants were not liable for failure to continue him in their employ. The court said: "It may be conceded that appellee was put in jail without his fault; yet this would not relieve him of his covenant to give his whole time, attention, and skill to appellants' business. It is not claimed to have been through appellants' fault that he was put in jail, and there is no reason, therefore, why appellants' business should suffer in consequence of it. He might have guarded against this by an exception in his covenant, but he did not do so."

In *Hughes v. Wamsutta Mills* (Mass.) supra, it was held that a workman could recover wages for services rendered where he left his employers without notice, although he had contracted to give them two weeks' notice before leaving or else forfeit any wages due. It was shown that the cause of his leaving was that he was arrested by an officer on a warrant for adultery; that he was tried and convicted, and was in jail under sentence. The court held that the provision of the contract as to notice applied only to a case of voluntary abandonment, and said: "Any abandonment caused by unforeseen circumstances or events, and which, at the time of their occurrence, the person employed could not control or prevent from operating to terminate his employment, ought not to operate to cause a forfeiture of wages. It may be said that in the case at bar the commission of the offense for which the plaintiff was arrested was his voluntary act, and that the consequences which followed after it and led to his compulsory departure from the defend-

ants' service are therefore to be regarded as bringing this case within the category of a voluntary abandonment of his employment. But the difficulty with this argument is, that it confounds remote with proximate causes. The same argument might be used in case of inability to continue in service occasioned by sickness or severe bodily injury. It might be shown in such a case that some voluntary act of imprudence or carelessness led directly to the physical consequences which disabled a party from continuing his service under a contract. The true and reasonable rule of interpretation to be applied to such contracts is this: To work a forfeiture of wages, the abandonment of the employer's service must be the direct, voluntary act, or the natural and necessary consequence of some voluntary act, of the person employed, or the result of some act committed by him with a design to terminate the contract or employment, or render its further prosecution impossible. But a forfeiture of wages is not incurred where the abandonment is immediately caused by acts or occurrences not foreseen or anticipated, over which the person employed had no control, and the natural and necessary consequence of which was not to cause the termination of the employment of a party under a contract for services or labor."

Labatt on Master & Servant, vol. 1, § 227, has the following statement from 1 *Fraser on Master & Servant*, p. 322, which seems to be founded on a similar statement, also quoted, of *Pothier, Louage*, 172: "If a servant is put in prison for a crime of which he is found guilty, then, as the contract is broken through his own fault, he is liable in damages, and the master is free from the contract. But if, on the other hand, he is carried to prison on suspicion of being guilty of a crime of which he is ultimately acquitted, he is not liable in reparation to the master, because there was no fault on his part." It is further stated in 1 *Labatt on Master & Servant*, § 227, that where the servant's absence through imprisonment is not so prolonged as to be unreasonable in view of the requirements of his master's business, "the rights and liabilities of the parties would presumably be governed by the general rule that, where the law interposes to prevent the performance of a contract, but such prevention is only temporary, the parties are not excused from performance after the law has ceased to operate."

The cases of seamen, while constituting a separate and peculiar class, are of

interest in connection with the general subject.

A sailor impressed for the King's service during a voyage and taken off the ship cannot recover wages for the time after he was so impressed (*The Jack Park* (1802) 4 C. Rob. (Eng.) 308); but he shall have his wages to the time of imprisonment, if the ship reaches her port of delivery (*Wiggins v. Ingleton* (1705) 2 Ld. Raym. 1211, 92 Eng. Reprint, 300).

Where, under the statute, a sailor was sent home from the Pacific to attend as a witness on the trial of the captain, he was not entitled to any wages after he left the ship. *Melville v. De Wolfe* (1855) 4 El. & Bl. 844, 119 Eng. Reprint, 313, 24 L. J. Q. B. N. S. 200, 3 C. L. R. 960, 1 Jur. N. S. 758, 3 Week. Rep. 401.

But where a vessel completed her voyage after she and the crew had been several months detained abroad under a foreign embargo, and the owner collected his freight, it was held that he was liable for wages during such detention. *Beale v. Thompson* (1804) 4 East, 546, 102 Eng. Reprint, 940, 1 Smith, 153, affirmed in (1813) 1 Dow. P. C. 299, 3 Eng. Reprint, 707, 14 Revised Rep. 73; *Johnson v. Broderick* (1804) 4 East, 566, 102 Eng. Reprint, 947, 1 Smith, 144, 7 Revised Rep. 636; *Delamainer v. Wintringham* (1815) 4 Campb. (Eng.) 186; Lord Kenyon had expressed a similar opinion in *Pratt v. Cuffe* (1798), referred to in the argument in *Thompson v. Rowcroft* (1803) 4 East, 43, 102 Eng. Reprint, 742.

While it is not intended to include imprisonment of seamen for acts committed on board the vessel, it may be noted that in *Smith v. Treat* (1845) 2 Ware, 270, Fed. Cas. No. 13,117, it was held that a sailor who, after a fight on the ship at a foreign port, in which another sailor was killed, was arrested and sent home by the United States consul for trial, was not entitled to wages after his arrest, although he was acquitted upon his trial, the charge being that of stirring up the crew to resist the officers of the vessel. The court said: "It might have been safe for the master to have retained him on board, and to have left this matter to be settled at the termination of the voyage. As it was, certainly it was the duty of the master to call on the civil authority of the place, and put the affair in a train of judicial examina-

tion. The result of that inquiry was, that Smith was sent home as a prisoner, to answer for his conduct to the laws of his country. And, from the facts developed on the trial here, it appears to me that the civil authorities were perfectly justified in this course. The consequence was that the libellant was disabled from performing the service for which he was engaged, and from the whole facts in proof in the case, he may justly be considered as having disabled himself by his own voluntary act. On the principles of natural justice and universal law, he cannot claim a compensation for services which he has, by his own fault, disabled himself from performing."

There are several cases in which it has been held that imprisonment for acts on shore did not amount to desertion.

Thus, where a seaman went ashore at a foreign port, became intoxicated and was arrested by the police, and, while detained, his ship sailed, it was held that this was not a case of statutory desertion, and that he was entitled to his wages to the time of arrest. *Costello v. American S. S. Co.* (1874) 1 W. N. C. 204, Fed. Cas. No. 3,263.

So, where the libellant had been taken as seaman on a coasting voyage without signing articles, and, going ashore without intention to desert, was detained by the police as a witness until after the vessel had sailed, it was held that this was not a desertion, and that he was entitled to his wages up to the time he left the vessel. *The Lizzie M. Dun* (1887) 30 Fed. 927.

Where a seaman from a foreign vessel, going ashore, was locked up for four days by the local authorities for an alleged breach of the peace, and before his discharge the captain entered him as a deserter, and declined to receive him, to pay him his wages, or to give him his clothing, it was held that the sailor was entitled to his wages to the time of the decree. *Hayes v. The J. L. Wickwire* (1870) 7 Phila. 594, Fed. Cas. No. 6,262.

But it was held that the sailor's wages could not be recovered where a ship, two days out, between Newcastle and London, was captured by a French privateer and the sailor taken out and sent to France, although the vessel herself was later recaptured. *The Friends* (1801) 4 C. Rob. (Eng.) 143. B. B. B.

KANSAS SUPREME COURT.

ELIZABETH SLUDER et al.

v.

NATIONAL AMERICANS, Appt.

(— Kan. —, 166 Pac. 482.)

Insurance — change of beneficiary.

1. A member of a fraternal beneficiary association may ordinarily change the beneficiary or the terms of his contract regardless of the wishes or the consent of his beneficiary, but if a change is attempted when the member does not have mental capacity to transact business or make contracts, the original certificate and contract will remain in force.

For other cases, see Insurance, IV. b, in Dig. 1-52 N. S.

Same — mental incompetence.

2. Upon the death of a member the inchoate right of a beneficiary ripens into a contract right, and he may then raise the question that the member was mentally incompetent when he attempted to change or surrender the contract of insurance, and if that fact is established, the beneficiary is entitled to recover the benefit the same as if no attempt had been made to change the original contract.

For other cases, see Insurance, IV. b, in Dig. 1-52 N. S.

(July 7, 1917.)

APPPEAL by defendant from a judgment of the District Court for Reno County in plaintiff's favor in an action brought to recover instalments alleged to be due her as beneficiary under a benefit certificate. Affirmed.

The facts are stated in the opinion.

Messrs. W. G. Fairchild, H. S. Lewis, and Solon T. Gilmore, for appellant:

A beneficiary in a certificate of membership in a fraternal order has no vested interest therein, and cannot complain of any action by the member and the society affecting the certificate.

Alfsen v. Crouch, 115 Tenn. 352, 89 S. W. 329; *Brown v. Grand Lodge, A. O. U. W.* 80 Iowa, 287, 20 Am. St. Rep. 420, 45 N. W. 884; *Hoelt v. Supreme Lodge, K. H.* 113 Cal. 91, 33 L.R.A. 174, 45 Pac. 185; *Savage v. Modern Woodmen*, 84 Kan. 63, 33 L.R.A.(N.S.) 773, 113 Pac. 802.

The contract of an insane person is good

Headnotes by JOHNSTON, Ch. J.

Note. — The question of rights and remedies of prior beneficiary where insured was mentally incompetent when he made a change of beneficiaries, or the change was accomplished by fraud or undue influence, is covered in the annotation to *Ryan v. Boston Letter Carriers' Mut. Ben. Asso.* L.R.A. 1916C, 1130. L.R.A.1917F.

where it is to the interest of the insane person, and made without bad faith upon the part of the other contracting party.

Leavitt v. Files, 38 Kan. 26, 15 Pac. 891; *Gribben v. Maxwell*, 34 Kan. 8, 55 Am. Rep. 233, 7 Pac. 584; *New England Loan & T. Co. v. Spitler*, 54 Kan. 580, 38 Pac. 799; *Myers v. Knabe*, 51 Kan. 720, 33 Pac. 602; *Northwestern Mut. F. Ins. Co. v. Blankenship*, 94 Ind. 535, 48 Am. Rep. 185; *Tolson v. Garner*, 15 Mo. 494; *McAnaw v. Tiffin*, 143 Mo. 678, 45 S. W. 658; *Wilder v. Weakley*, 34 Ind. 181; *Chitty*, Contr. 11th ed. 191; *Addison*, Contr. p. 149; *Fay v. Burditt*, 81 Ind. 435, 43 Am. Rep. 142; *Wait v. Maxwell*, 5 Pick. 217, 16 Am. Dec. 391.

Alvena Craig being insane, her affairs, if she had lived, would necessarily have been handled by a guardian; and plaintiff's right to set aside this contract would depend upon the right of her guardian to set it aside.

McMillan v. Deering, 139 Ind. 70, 38 N. E. 398; *Hunt v. Weir*, 4 Dana, 347; *Hunt v. Rabitoay*, 125 Mich. 137, 84 Am. St. Rep. 563, 84 N. W. 59; *Ingram v. Baldwin*, 9 N. Y. 45; *Langley v. Langley*, 45 Ark. 392; *Re Salisbury*, 3 Johns. Ch. 347; *Key v. Davis*, 1 Md. 32; *Breckenridge v. Ormsby*, 1 J. J. Marsh. 236, 19 Am. Dec. 71.

The fact that Alvena Craig had delusions with reference to what was happening at the barn, or that there were snakes in the room, is not evidence that she was not competent to judge whether it was to her interest to surrender a liability and accept in lieu thereof an asset.

Re Forman, 54 Barb. 274; *Banks v. Goodfellow*, L. R. 5 Q. B. 549, 39 L. J. Q. B. N. S. 237, 22 L. T. N. S. 813, 16 Eng. Rul. Cas. 713; *Benoist v. Murrin*, 58 Mo. 307.

Messrs. C. M. Williams and D. C. Martindell, for appellee:

The surrender of the benefit certificate during the life of Alvena Craig could not be made without her consent, and, being incompetent to consent, it never was surrendered, and was in full force and effect at her death.

Sovereign Camp, W. W. v. Wood, 114 Mo. App. 471, 89 S. W. 801; *Grand Lodge, A. O. U. W. v. Frank*, 133 Mich. 232, 94 N. W. 731; *Owby v. Supreme Lodge, K. H.* 101 Tenn. 16, 46 S. W. 758; *Goyt v. National Council, K. L. S.* 178 Ill. App. 377; *Wherry v. Latimer*, 103 Miss. 524, 60 So. 563, 642; *Grand Lodge, A. O. U. W. v. McGrath*, 133 Mich. 626, 95 N. W. 739; 29 Cyc. 124; *Munroe v. Beggs*, 91 Kan. 701, 139 Pac. 422.

Johnston, Ch. J., delivered the opinion of the court:

This was an action by Elizabeth Sluder against the National Americans, a fraternal beneficiary association, to recover instal-

ments due her as beneficiary under a certificate issued to her sister, Alvena Craig. Plaintiff recovered judgment upon the verdict of a jury, and the defendant appeals.

The certificate provided that upon the death of Alvena Craig the beneficiary should receive an annuity of \$200 for a period of ten years, payable quarterly, beginning on the first month after the order was informed of the death of the insured. Shortly before her death Alvena Craig, who was then in the last stages of tuberculosis wrote to the defendant, asking that some arrangement be made whereby she might receive some benefit under the certificate if she would surrender it to the defendant. Accordingly a representative of the defendant called upon her, and a contract was drawn up and signed by her which provided that, in consideration of monthly payments of \$20, to be continued not to exceed twenty-four months, she should surrender her certificate to the defendant and release it from all further liability; and it was further agreed that, if her death should occur prior to the expiration of twenty-four months, all liability of the defendant should cease at that time. The certificate was accordingly surrendered, and one \$20 payment was made under the contract, and she died a month later. No further payments were made by the defendant under the certificate, and when plaintiff notified defendant of the death of Alvena Craig, it denied any liability to plaintiff. The only reason assigned for not recognizing its liability upon the certificate was the execution of the new contract and the payment made under it. In plaintiff's petition it was alleged that the contract was void because Alvena Craig was mentally incapable of understanding its terms at the time it was executed. There was also an allegation of fraud practised by the defendant's representative upon the deceased, but this issue was eliminated by the trial court in its instructions to the jury. Testimony was offered to the effect that the deceased was given morphine at certain intervals during the day for a considerable time before she died, which produced hallucinations and temporary mental derangement, and that her mind was also affected by her disease and general condition. Defendant introduced no evidence. The findings of the jury were to the effect that deceased had hallucinations on the day the contract was made, that her mental condition was such as to render her incapable of understanding the contract, and that the condition was caused partly by the morphine. In accordance with the prayer of plaintiff's petition the certificate was adjudged to be in full force and effect, and judgment was rendered in her favor for the amount then due under it. L.R.A.1917F.

It is insisted that the plaintiff had no such interest in the insurance as to warrant her in challenging the validity of the change in the contract, or the surrender of the original certificate. The general rule is that the insured has complete control of his contract, and may cancel it entirely regardless of the wishes or the consent of the beneficiary. If a change was actually effected and a new contract made, the plaintiff lost all right she had in the certificate. However, if the insured did not have the mental capacity to transact business or make a new contract, the original one remained in force, and it constituted the only contract existing between the parties. If the insured died without making an effectual change of contract, the rights of the plaintiff accrued, and she became entitled to the benefits specified in the certificate the same as if no attempt had been made to change or cancel the original contract. Until the insured died the plaintiff had only an inchoate interest in the benefit certificate, but if she died without making an effectual change of the contract, her inchoate interest became a contract right, and she became entitled to assert her rights under the certificate and to challenge the validity of any steps or action previously taken in opposition to her rights.

In *Grand Lodge, A. O. U. W. v. Frank*, 133 Mich. 232, 94 N. W. 731, a change of beneficiary was attempted by the insured when he was mentally incompetent, and in the litigation which arose over the insurance after his death the right of the original beneficiary to raise the question of mental capacity of the insured was challenged. It was held that, while the beneficiary had no vested interest at the time of the alleged transfer, he had a right after the death of the insured to raise the question the same as an heir at law has a right to intervene after the death of his ancestor to set aside a grant made by the ancestor while he was mentally incompetent.

The same question was raised in *Sovereign Camp, W. W. v. Wood*, 114 Mo. App. 471, 89 S. W. 891, and it was held that the insured, being mentally incompetent, could not change the beneficiary as against the one designated in the original certificate. The controlling question, it was held, was not whether the beneficiary had a vested interest in the benefit during the life of the insured, but whether in law a change had been effected, the court saying: "It could not be made without his initiative, and he could not act because of his infirmity. The original certificate expressed the only contract made with plaintiff by the insured, and as respondent is its beneficiary, the proceeds

thereof rightfully belong to her." 114 Mo. App. page 479.

See also *Goyt v. National Council*, K. L. S. 178 Ill. App. 377; *Grand Lodge, A. O. U. W. v. McGrath*, 133 Mich. 626, 95 N. W. 739; *Wherry v. Latimer*, 103 Miss. 524, 60 So. 563, 642; *Ownby v. Supreme Lodge, K. H.* 101 Tenn. 16, 46 S. W. 758; 29 Cyc. 124.

It is said that not all contracts made by insane persons can be annulled. There are rulings to the effect that, if a contract is made fairly and in good faith with one who is insane, but apparently of sound mind, before there is a finding of lunacy, the court will not set the contract aside on proof of mere incapacity without protecting the equitable rights of the other party. It has been ruled that it would be inequitable to allow an insane person who had sold property to recover the property and retain the price. His infirmity cannot be made an instrument of fraud, and so it has been held that the consideration received by an insane person

or his representative should be returned or tendered before a rescission of the contract is made. *Gribben v. Maxwell*, 34 Kan. 8, 55 Am. Rep. 233, 7 Pac. 584; *Leavitt v. Files*, 38 Kan. 26, 15 Pac. 891; *Myers v. Knabe*, 51 Kan. 720, 33 Pac. 602. However, this consideration was not overlooked at the trial of the present case, as the amount received by the insured under the new arrangement was credited upon the award made to the plaintiff.

The charge of fraud made against the representative of the defendant was not sustained, but there was proof sufficient to uphold the finding of the incapacity of the insured. We find nothing substantial in the objections to the instructions, nor do we find any grounds for setting aside the findings or verdict.

Judgment affirmed.

All the Justices concur.

MAINE SUPREME JUDICIAL COURT.

MILES F. BIXLER

v.

PERLEY A. WRIGHT.

(— Me. —, 100 Atl. 467.)

Estoppel — to show true nature of contract.

One who, after being solicited to take jewelry on consignment, signed, without reading, a contract of absolute purchase which is represented to be a consignment contract, is not estopped, in an action by the seller, to show the true nature of the transaction.

For other cases, see *Estoppel*, III. i, in *Dig.* 1-52 N. S.

(April 12, 1917.)

EXCEPTIONS by defendant to rulings of the Supreme Judicial Court for Somerset County, made during the trial of an action brought to recover the purchase price of certain goods alleged to have been sold to defendant in accordance with a written order signed by him, which resulted in a verdict for plaintiff. Sustained.

The facts are stated in the opinion.

Messrs. Manson & Coolidge, for defendant:

When, by clear and convincing proof, it is shown that the written contract, prepared

by the plaintiff and signed by defendant without reading it, is different from the previous conversation had with the plaintiff's agent, the writing is void in its inception and there can be no recovery.

Strout v. Lewis, 104 Me. 65, 71 Atl. 137.

The fruits of the agent's work cannot be accepted by the principal without taking it subject to its infirmities.

Western Mfg. Co. v. Cotton, 126 Ky. 749, 12 L.R.A.(N.S.) 427, 104 S. W. 758; *Dunston Lithograph Co. v. Borgo*, 84 N. J. L. 623, 87 Atl. 334; *Leavitt v. Seaney*, 113 Me. 119, 93 Atl. 46.

Whether the agent told the defendant the written order was in accordance with their talk is not material, for the presenting of it to him was an affirmation that it was so.

Trambly v. Ricard, 130 Mass. 259; *J. Weil & Co. v. Quidnick Mfg. Co.* 33 R. I. 58, 80 Atl. 447.

Defendant was justified in relying on what the agent had told him, and signing the paper without reading it.

Great Northern Mfg. Co. v. Brown, 113 Me. 51, 92 Atl. 993; *Freedley v. French*, 154 Mass. 339, 28 N. E. 272; *Carlisle & C. Bkg. Co. v. Bragg* [1911] 1 K. B. 489, 4 B. R. C. 653, 80 L. J. K. B. N. S. 472, 104 L. T. N. S. 121; *Dunston Lithograph Co. v. Borgo*, 84 N. J. L. 623, 87 Atl. 334; *J. Weil & Co. v. Quidnick Mfg. Co.* 33 R. I. 58, 80 Atl. 447; *Linington v. Strong*, 107 Ill. 295; *Eastern Trust & Bkg. Co. v. Cunningham*, 103 Me. 455, 70 Atl. 17; *Western Mfg. Co. v. Cotton*, 126 Ky. 749, 12 L.R.A.(N.S.) 427, 104 S. W. 758; *Colonial Jewelry Co. v. Jones*, 36 Okla. 788, 127 Pac. 405; *Provi-*

Note.—For failure to read contract, as affecting right to assert fraud in respect thereto, see annotation following this case, post, 637.
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dence *Jewelry Co. v. Crowe*, 113 Minn. 209, 129 N. W. 224.

Mr. O. H. Drake, for plaintiff:

Oral evidence of a contemporary nature is not admissible to add to or alter the terms of a written contract.

Stackpole v. Arnold, 11 Mass. 27, 6 Am. Dec. 150; *Small v. Quincy*, 4 Me. 497; *Cunningham v. Wardwell*, 12 Me. 466; *Osgood v. Davis*, 18 Me. 146, 36 Am. Dec. 708; *Millett v. Marston*, 62 Me. 477; *First Free-Will Baptist Parish v. Perham*, 84 Me. 563, 24 Atl. 958; *McLeod v. Johnson*, 96 Me. 271, 52 Atl. 760; *Chaplin v. Gerald*, 104 Me. 187, 71 Atl. 712; *Keeling-Easter Co. v. R. B. Dunning & Co.* 113 Me. 34, 92 Atl. 929.

Defendant is not entitled to relief, under the circumstances.

Maine Mut. M. Ins. Co. v. Hodgkins, 66 Me. 109; *Pratt v. Philbrook*, 33 Me. 17; *Palmer v. Bell*, 85 Me. 352, 27 Atl. 250; *Strout v. Lewis*, 104 Me. 65, 71 Atl. 137; *Parlin v. Small*, 68 Me. 289.

Savage, Ch. J., delivered the opinion of the court:

Action to recover the price of certain goods sold to the defendant in accordance with a written order signed by him. At the conclusion of the evidence, the presiding justice directed a verdict for the plaintiff, and the defendant excepted. It was stipulated by the parties that, if the exceptions are sustained, judgment shall be entered for the defendant.

It is evident that the action is misconceived. The goods were shipped to the defendant, but were never accepted by him. In such a case, the seller's remedy is not a suit for the price, but a special action for breach of the implied contract to receive and accept. To maintain an action for the price, actual acceptance must be shown. *Tufts v. Grewer*, 83 Me. 407, 22 Atl. 382; *Greenleaf v. Gallagher*, 93 Me. 549, 74 Am. St. Rep. 371, 45 Atl. 829. But this point does not appear to have been made at the trial, and is not made in argument before this court. It is well settled that a question not raised at the trial will not be considered on exceptions. *Stockwell v. Craig*, 20 Me. 378; *Withee v. Brooks*, 65 Me. 14; *Verona v. Bridges*, 98 Me. 491, 57 Atl. 797; *Coan v. Auburn Water Comrs.* 109 Me. 311, 84 Atl. 145.

The defense offered is that the defendant's signature to the order, under which the goods were shipped, was procured by fraud. The defendant says that he signed the order without reading it. He does not controvert the well-settled rule that, in the absence of fraud or misrepresentation, one who signs a contract or other written instru-

ment without reading it is presumed to know its contents. But he says that his signature to this order was procured by the fraud and misrepresentation of the agent.

A verdict having been directed for the plaintiff, the only question for this court to determine is whether there was any evidence that would have warranted the jury in finding that the defendant's signature was induced by fraud. *Johnson v. New York, N. H. & H. R. Co.* 111 Me. 263, 88 Atl. 988. Fraud is a mixed question of law and fact. It cannot be taken from the jury when there is evidence that warrants an affirmative finding.

It is true in a case like this one that the defendant is under the burden of substantiating the charge of fraud by clear and convincing proof. *Strout v. Lewis*, 104 Me. 65, 71 Atl. 137. In this case the facts are undisputed. No attempt was made to contradict the defendant's testimony, and we can discover no reason why the jury might not have been warranted in believing it.

The defendant's story is this: He is the proprietor of a country store in a small village. He was approached in his store by the plaintiff's agent, James, who introduced himself as a brother Odd Fellow, and said that he had been sent to the defendant by one Raynes, a near-by neighbor, which latter statement was not true. The agent said that he had some jewelry that he was putting in on consignment, and then showed the defendant his goods. Then, to use the defendant's language: The agent "told me on these goods that I would pay for the goods every two months, \$32, providing I had sold that amount of jewelry, and if not, if I had sold \$5 worth or \$10 worth of jewelry, that I could send that amount in to the company and tell them that that was all that was sold of jewelry at the present time, and that would be all right. And at that time, as I remember, it was growing a little dark, although I am not positive that I had my lights on, but there was a number of customers in my store, and, of course, I kept dodging out to wait on them, and then when I went to sign this contract, he was standing—well, as my office stands, I stood here, and this store is out like that (illustrating), and there is a little kind of a place here (indicating), to come into the office, rather narrow, and I, of course, stepped out like this to look through my store to see who was waiting for me. Mr. James stood on the further side here, then handed out this card, not a card, but a pad like, holds his hands like this, I takes the other end, takes the corner of it, and commenced to sign my name on it; didn't think no more of it; and that is about the way he got my signature on the contract."

The defendant further says that the agent had told him that at the end of the year they would take back all the goods not sold. The defendant did not read the contract before signing. James was a stranger to him. And the defendant before this time had never heard of the Continental Jewelry Company, under which name the plaintiff did business. These are all of the material facts concerning the signing.

The paper which the defendant signed was not an order for jewelry on consignment, but was an unconditional order for the purchase of jewelry, amounting to \$102. At the top of the paper in capital letters were the words: "Positively no goods consigned." "Read this order carefully." Then followed a price list of about 90 articles; then the terms of payment; then an agreement by the plaintiff to repurchase at the end of the year all goods paid for and remaining unsold, in case the purchaser had sold less than half during the year; then, just above the signature, the sentence, "We have read this order and find same complete and satisfactory."

That the conduct of the agent was deliberately, intentionally fraudulent a jury would be authorized to find. The agent's talk was all about the details of a consignment. The defendant had a right to understand that the written contract embodied the substance of the oral negotiation. But the plaintiff contends that, even so, it was such negligence and folly on the part of the defendant to sign without reading a paper which he had the opportunity to read that the law will not relieve him from the consequences of his foolishness.

Whether the negligence of the defrauded party will defeat the defense of fraud has been much debated, and courts have come to different conclusions. The question has arisen more frequently in actions for deceit. And many courts have held in effect that, when the party defrauded might, by the exercise of reasonable care, have ascertained the truth, he had no right to rely upon the representations of the other. But in the case of fraudulent misrepresentations the rule is settled otherwise in this state. In *Eastern Trust & Bkg. Co. v. Cunningham*, 103 Me. 455, 70 Atl. 17, we said: "If one intentionally misrepresents to another facts particularly within his own knowledge, with an intent that the other shall act upon them, and he does so act, he cannot afterwards excuse himself by saying, 'You were foolish to believe me.' It does not lie in his mouth to say that the one trusting him was negligent."

This rule was affirmed in *Harlow v. Perry*, 113 Me. 239, 93 Atl. 544. The rule is supported by numerous cases cited in note in 37 L.R.A. 593.

The more limited question whether one who signs a paper without reading it is so far concluded that he cannot set up that his signature was induced by a fraudulent misrepresentation as to its contents has also received varying answers. There is a general accord that a paper signed by one who cannot read or write may be defeated by proof of such misrepresentation. So, generally, when the paper is misread to the person who then signs without reading. It is also generally agreed that a negotiable promissory note in the hands of an innocent holder cannot be so defeated. And the courts in a few states, notably Indiana and Iowa, hold squarely that, even between the original parties, if one who can read and write signs a paper without reading it, it is such negligence that he cannot be permitted to say that its contents were misrepresented to him. But we think the weight of authority is to the contrary.

The plaintiff relies upon *Maine Mut. M. Ins. Co. v. Hodgkins*, 66 Me. 109, the language of which case certainly does support the principle for which he contends. But that case was a suit on a promissory note, given pursuant to a previous contract signed without reading. The misrepresentations relied upon to show fraud appear not to have been so much misstatements of the contents of the instrument, as of its legal effect. And the court said, it is not fraud "if one misapprehends, and, misapprehending, misstates the legal effect of an instrument." We have no occasion to criticize this conclusion.

In *Great Northern Mfg. Co. v. Brown*, 113 Me. 51, 92 Atl. 993, the defendant signed without reading a contract to purchase goods, when he had reason to suppose from the previous conduct of the seller and the seller's agent that he was to receive them free. He had an opportunity to read the paper before signing. He may have been negligent in that he did not read. The court held that his signature was procured by fraud, and sustained his defense. It is true that the fraudulent artifices in that case were more numerous and more elaborate than in this. But the principle established in that case applies to this one. It is that in a case between the original parties, when one is fraudulently misled as to the contents of a paper which he signs without reading, he is not estopped by his negligence from setting up the fraud, as he might be after third parties had acted upon it. *Carlisle & C. Bkg. Co. v. Bragg* [1911] 1 K. B. 489, 4 B. R. C. 653, 80 L. J. K. B. N. S. 472, 104 L. T. N. S. 121. This view is supported, we think, by the greater

weight of authority and by the better reason.

In the first place, it must be held that the presentation of the paper for the defendant's signature was itself a representation that its contents were the same as agreed upon in the oral negotiation. As was said in *Trambly v. Ricard*, 130 Mass. 259:

"The jury may well have found that the production of the writing at that time was in itself an affirmation on the part of the defendants [plaintiff here] that its terms did not differ from the terms of sale agreed upon. Fraud may be proved from the acts and conduct of a party quite as effectively as from his declarations. . . . And any act falsely intended to induce a party to believe in the existence of some other material fact, and having the effect of producing such belief to his injury, is a fraud."

"There is ample authority," said the court in *J. Well & Co. v. Quidnick Mfg. Co.* 33 R. I. 58, 80 Atl. 447, a case apparently on all fours with this one, "that, as between the parties to a written contract, where one party is induced by the false statements of the other to sign the same, he is not bound thereby, and may defend against the contract on the ground of fraud, even though he was negligent in signing without reading it. . . . When he undertook to write the order, he was bound to write it according to the agreement; and if it did not embody the agreement, and was signed by inadvertence or negligence, that would not preclude the defendant from avoiding it on the ground of fraud."

In *Freedley v. French*, 154 Mass. 339, 28 N. E. 272, it was said: It is true that she (the party signing without reading) "was required to use reasonable care in acquainting herself with the contents of the paper. . . . But this rule would be subject to the condition that no fraud was practised upon her for the purpose of procuring . . . her signature."

And holding that the question of negligence was for the jury, the court said: "It can hardly be said, as matter of law, that a party is guilty of negligence who signs a paper relying upon the representations as to its contents and effect, made by the party presenting it, and without himself examining it." It was concealment if he stated the contents as other than they really were.

In New Jersey it has been held that, while signing without reading generally binds, there is an exception to the rule, and that, when a signature to a contract has been procured by fraud or imposition practised upon the signer with intent to deceive him as to the import of the paper he signs, he may attack it for fraud, although he might L.R.A.1917F.

have discovered the fraud perpetrated upon him by reading the paper, and he was guilty of negligence in not doing so. *Dunston Lithograph Co. v. Borgo*, 84 N. J. L. 623, 87 Atl. 334; *Alexander v. Brogley*, 62 N. J. L. 584, 41 Atl. 691.

The case of *Western Mfg. Co. v. Cotton*, 126 Ky. 749, 12 L.R.A. (N.S.) 427, 104 S. W. 758, was in all essential respects like this one, even to the fact that the contract as signed was for the sale, instead of the consignment of jewelry. The court said that it was immaterial whether the contract was misread, or was written differently. In either case the act of obtaining the signature was a fraud, and that the agent's "base-ness is not offset in law by the mere negligence of the other party, who relied on what he had no reason to doubt," and that even gross negligence does "not preclude an inquiry into the truth as to whether he . . . was in fact misled by the stratagem of his adversary." The court, remarking that some of the earlier cases enforced a harsher doctrine, noted that the trend of the courts is to liberalize the defense in this class of cases.

In *Linington v. Strong*, 107 Ill. 295, the court said that "the doctrine is well settled that, as a rule, a party guilty of fraudulent conduct shall not be allowed to cry 'negligence,' as against his own deliberate fraud. . . . While the law does require of all parties the exercise of reasonable prudence, . . . there is a certain limitation to this rule, and, as between the original parties to the transaction, we consider that, where it appears that one party has been guilty of an intentional and deliberate fraud, . . . he cannot escape the legal consequences of his fraudulent conduct by saying that the fraud might have been discovered had the party whom he deceived exercised reasonable diligence and care."

To the same effect are *Eggleston v. Advance Thresher Co.* 96 Minn. 241, 104 N. W. 891; *Maxfield v. Schwartz*, 45 Minn. 150, 10 L.R.A. 606, 47 N. W. 448; *McBride v. Macon Teleg. Pub. Co.* 102 Ga. 422, 30 S. E. 999; *American Fine Art Co. v. Reeves Pulley Co.* 62 C. C. A. 488, 127 Fed. 808; *Albany City Sav. Inst. v. Burdick*, 87 N. Y. 40; *Wenzel v. Shulz*, 78 Cal. 221, 20 Pac. 404. We have limited our citations on the question of negligence to cases of signing writings without reading them.

The law dislikes negligence. It seeks properly to make the enforcement of men's rights depend in very considerable degree upon whether they have been negligent in conserving and protecting their rights. But the law abhors fraud. And when it comes to an issue whether fraud shall prevail or negligence, it would seem that a court of

justice is quite as much bound to stamp out fraud as it is to foster reasonable care.

We think the doctrine of the cases cited is sound, and we affirm it. The conclusion follows that it was error to take this case from the jury by directing a verdict for the

plaintiff, and the exceptions must be sustained.

In accordance with the stipulation of the parties, the mandate will be:

Judgment for the defendant.

Annotation—Failure to read contract as affecting right to assert fraud in respect thereto.

For other cases on this question see note to *Griffin v. Roanoke R. & Lumber Co.* 6 L.R.A.(N.S.) 463.

An examination of the cases which have considered the question under annotation discloses that where a signature to an instrument is procured by trick or artifice, as by false reading, or while the signer is laboring under some physical or mental disability, or where there is a relation of confidence, or in case of the substitution of an instrument of an entirely different character, the general rule is that failure to read the instrument will not estop one from setting up fraud in respect thereto.

The conflict, or apparent conflict, of authorities, arises where the instrument was signed in a mere reliance upon the other party's misrepresentations as to its contents, not amounting to a substitution, without any other trick or device to prevent the reading, and where there was no relation of trust or confidence between the parties, nor any mental or physical disability upon the part of the party signing. The variation of facts and circumstances, even among the cases which present this situation, renders it difficult to formulate any general rule, or even to affirm with certainty the possibility or impossibility of reconciling apparently conflicting results.

It will be observed that, in the classification, an attempt has been made to observe the distinction between a misrepresentation as to the contents, and a misrepresentation as to the character, of the instrument. The difference in the situations is obvious in some cases, as, for example, where a case in which an instrument which one knows to be an application is signed under a misrepresentation as to its provisions is contrasted with a case where one signs a note under a representation that it is an application. But the situation presented in some cases, as, for example, where one signs what is in fact an unconditional contract for the purchase of goods supposing it to be merely a consignment order, is close to the line, and there is consequently, of necessity, some uncertainty in the classification in this respect.
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Misrepresentations as to contents of instrument.

In *Colonial Jewelry Co. v. Bridges* (1914) 43 Okla. 813, 144 Pac. 577, it was held that one who is able to read and write, and fails to read a contract which he signs, is liable thereon although false representations were made as to its contents.

And to the same effect are *Ames v. Milam* (1915) — Okla. —, 157 Pac. 941; *Frizzell v. Milam* (1915) — Okla. —, 157 Pac. 944; *Ely-Walker Dry Goods Co. v. Smith* (1916) — Okla. —, 160 Pac. 898; *McNinch v. Northwest Thresher Co.* (1909) 23 Okla. 386, 138 Am. St. Rep. 803, 100 Pac. 524. See also *Kimmell v. Skelly* (1900) 130 Cal. 555, 62 Pac. 1067; *Alexander v. Ferguson* (1906) 73 N. J. L. 479, 63 Atl. 998; *Standard Mfg. Co. v. Slot* (1904) 121 Wis. 14, 105 Am. St. Rep. 1016, 98 N. W. 923 (cited in note in 6 L.R.A.(N.S.) p. 465).

So also has it been held that one cannot claim to have been defrauded by another as to the contents of an instrument which he had every opportunity to read and examine, where he neglected to avail himself of that opportunity, even though the opposite party may have made a false statement as to the contents of the instrument, if there was no reason why the one party should repose special trust and confidence in the other. *Branan v. Warfield* (1907) 3 Ga. App. 586, 60 S. E. 325; *Tracy & Co. v. Harris* (1908) 5 Ga. App. 392, 63 S. E. 233.

And in *Parker v. Parrish* (1916) 18 Ga. App. 258, 89 S. E. 381, one was held not to be relieved from reading a contract, he being able to read, by the statement of the other party that it was a duplicate of a former contract, no disability or emergency being shown.

In *Shores-Mueller Co. v. Lonning* (1913) 159 Iowa, 95, 140 N. W. 197, the court stated that, as a rule, if a party is able to read and has a chance to do so, but omits this precaution because of his adversary's statement as to the contents of the instrument, his negligence will estop him from claiming that the instrument is not binding. The court further

said that it did not overlook the fact that many cases hold a contrary rule upon the theory that it is no defense for one guilty of a fraud to say that the other party was negligent in believing him, but that it had so long adhered to the doctrine just stated that it was not justified in departing from it.

So, that a false statement that a contract agreed with the previous oral agreement between the parties induced one to sign such instrument without reading is insufficient to avoid liability in the absence of any fiduciary relation, where the party signing is able to read and write, and has the opportunity to read the paper. *Farlow v. Chambers* (1907) 21 S. D. 128, 110 N. W. 94. And see also *Reed v. Coughran* (1907) 21 S. D. 257, 111 N. W. 559, to same effect.

Also in *Rounsaville v. Leonard Mfg. Co.* (1906) 127 Ga. 735, 56 S. E. 1030, one who signed an order for 250 gross of buttons, believing it was for only the twelve gross which he had ordered, was held bound thereby where there was no representation whatever as to its contents made by the other party, and no trick or artifice was resorted to to induce him to sign without reading, but he did so in mere blind reliance upon both the integrity and accuracy of such other party.

And one who fails to show that he relied upon the alleged misrepresentations of another and was thereby prevented from reading a contract before he signed it does not sustain the defense that his signature to the contract was obtained by fraud. *United Talking Mach. Co. v. Metcalf* (1915) 164 Ky. 258, 175 S. W. 357.

If one is induced to sign a contract by no fraud other than the representation of the other party that it contains the contract agreed upon, his failing to read it and being mistaken and misled as to its contents give no right in equity to have it reformed. *Weaver v. Roberson* (1910) 134 Ga. 149, 67 S. E. 662. The justification for the view taken in the foregoing case is perhaps to be found in the reluctance of the courts to undertake the determination of a question so fraught with the danger of mistaken conclusion as is the question of fraud when the party alleging the fraud was concededly negligent in failing to read the instrument. Apart from this consideration, and accepting the finding of fraud as a verity, there seems to be no persuasive reason why mere negligence of one party should counteract the effect of the conscious fraud of the other. Logically, of course, if the court finds the fraud,

the amount or conclusiveness of the evidence upon which the finding rests ought not to affect the application of the rule it adopts as to the effect of the failure to read, but it is likely to influence somewhat its choice of rules.

In contrast with the cases previously cited, it has been held that when the execution of an instrument is secured by a misrepresentation as to its contents, and the party signing it does so without reading it or having it read, relying upon said misrepresentation and fraud, he can avoid the effect of his signature notwithstanding he was able to read and had the opportunity to read the instrument. *Prestwood v. Carlton* (1909) 162 Ala. 327, 50 So. 254 (action for breach of covenant of warranty contained in lease); *Southern Loan & T. Co. v. Gissendaner* (1912) 4 Ala. App. 523, 58 So. 737 (assumpsit to recover money paid on contract); *Leonard v. Roebuck* (1907) 152 Ala. 315, 44 So. 390 (bill for cancellation of deed, plaintiff illiterate); *Capital Security Co. v. Holland* (1912) 6 Ala. App. 197, 60 So. 498 (assumpsit for money had and received; recovery was denied, however, because of laches in asserting rights). See also *Alfred Shrimpton & Sons v. Philbrick* (1893) 53 Minn. 366, 55 N. W. 551 (cited in note in 6 L.R.A.(N.S.) 464).

In *Southern Loan & T. Co. v. Gissendaner* (Ala.) supra, the facts suggest a relation of confidence, but apparently the court did not rely on that circumstance, and cites as authority for its decision the above statement from the *Prestwood Case*, which embodies no such condition.

So, in *Granger v. Kishi* (1913) — Tex. Civ. App. —, 153 S. W. 1161, it was held that one who signs without reading a written contract, relying upon the fraudulent representations of the other party that it embodies the original oral agreement made between them, is not bound thereby.

And under the rule that one who perpetrates a fraud is not permitted to say to the party defrauded that he ought not to have believed or trusted, it was held in *Electrical Audit & Rebate Co. v. Greenberg* (1907) 56 Misc. 514, 107 N. Y. Supp. 110, that one who, without reading it, signed a written contract upon the false representation of the other party that it contained the oral agreements previously made, was entitled to set up fraud in the procurement of the signature. See also, in this connection, *Cole Bros. v. Williams*, 12 Neb. 440, 11 N. W. 875 (cited in note in 6 L.R.A.(N.S.) at p. 464).

One who undertakes to write out an order for a purchase is bound to write it according to the agreement; and if it does not embody the agreement and is signed by inadvertence or negligence, that will not preclude the purchaser from avoiding it on the ground of fraud by the agent in the procurement of the purchaser's signature to it.

So, one who signs a contract for purchase of merchandise on a false representation that certain terms have been written therein is not estopped to deny any deceit as to the contents, practised in the procurement of its execution, by the fact that he was able to read the contract and had the opportunity, but neglected to do so. *Moline Jewelry Co. v. Crew* (1911) 171 Ala. 415, 55 So. 144 (action for price of goods); *J. Weil & Co. v. Quidnick Mfg. Co.* (1911) 33 R. I. 58, 80 Atl. 447.

Also in *St. Louis Jewelry Co. v. Bennett* (1907) 75 Kan. 743, 90 Pac. 246; *Disney v. St. Louis Jewelry Co.* (1907) 76 Kan. 145, 90 Pac. 782; *Redfield v. Baird* (1907) 75 Kan. 837, 90 Pac. 782, contracts for the absolute sale of jewelry were held to be unenforceable as they were falsely represented by the dealer's agent to be contracts for sale on commission only, and the failure to read the contract in each case was induced by the fraudulent representations of the dealer's agent that it contained the terms previously agreed upon.

And the same is true of a contract for the purchase of goods, signed on the false representation that the assortment of goods purchased contained certain articles. *Commercial Finance Co. v. Cooper* (1916) — Ala. —, 71 So. 684.

And one who signed without reading, although having the opportunity to do so, an order for steel bars in which had been fraudulently written, without the knowledge of the signer, the word "feet" instead of the word "inches," as had been previously agreed between the parties, may set up such failure to read as a defense in an action for the purchase price, although it is admitted by the answer that the order has been executed and delivered. *Compagnie Des Metaux Unital v. Victoria Mfg. Co.* (1908) — Tex. Civ. App. —, 107 S. W. 651.

Also a written contract containing an order for the purchase of goods at a specified price may be avoided by one who signed it without reading it, where it was presented to him as embodying the oral contract previously entered into that certain goods were to be furnished without cost, for advertising purposes, L.R.A.1917F.

which were to be given away by the signer to his customers as premiums, the court stating that the presentation of the written contract for signature was a representation that it was the same in effect as their oral contract as to the advertising scheme. *Providence Jewelry Co. v. Crowe* (1911) 113 Minn. 209, 129 N. W. 224.

One may defend against the enforcement of a mortgage the signature to which was obtained by fraudulently representing that it embodied the contract previously entered into orally, and although there was negligence in failing to read the instrument. *Colorado Invest. Loan Co. v. Beuchat* (1910) 48 Colo. 494, 111 Pac. 61. The court stated: "While, in ordinary business transactions, men are expected to exercise reasonable business prudence, and not rely upon others with whom they deal to protect and care for their interest, that requirement is not to be carried so far as to ignore or protect positive, intentional fraud successfully practised by one upon the other. As between the original parties, one who has intentionally deceived the other, to his prejudice, is not to be heard to say in defense of the charge of fraud that the party defrauded ought not to have trusted him. A person cannot procure a contract in his favor by misrepresentations regarding its terms and conditions to the one signing it, which induces the latter not to read it, and then bar a defense to it on the ground that, had the defrauded party not been so negligent, the party committing the fraud could not have succeeded in deceiving him, when the negligence of the party deceived is caused by misrepresentations and false statements of the other. In brief, the negligence of a party to a contract, induced by the fraud of the other, cannot be taken advantage of by the latter."

In *Herreid v. Chicago, M. & St. P. R. Co.* (1916) — S. D. —, 159 N. W. 1064, it was held that failure to read a deed of right of way did not preclude grantor from avoiding a release-of-damage clause contained therein, where, previous to the signing of such instrument, there had been a specific oral agreement that conveyance of the right of way should in no way preclude grantor from recovering any damages that he might suffer by injury to or destruction of his spring, and, at the time of the signing, it was represented by the other party that the instrument was merely a conveyance of the right of way, and would not bar or preclude the grantor from recovering such damages as he might suffer by injury to

or destruction of the spring, and, in reliance upon such statements, and believing them to be true, his signature was procured. The court referred to *Farlow v. Chambers* (1907) 21 S. D. 128, 110 N. W. 94, and stated that the question before the court in that case was the sufficiency of the evidence to support the verdict; that while it was true that the court made some statement and cited some authorities that would tend to support the view that the instrument could not be avoided, yet such case might have been decided solely upon the ground that the burden was upon the party claiming the fraud to establish the same by clear and satisfactory evidence, and that the evidence in that case was not sufficiently clear and satisfactory. It is clear from the opinion in the *Herreid Case* that if the decision in the *Farlow Case* could be held to go to the extent that in no event could fraud in the procuring of a signature be set up where a party able to read, and having the opportunity, in signing relied on the false representations of the other party as to the contents, then it would be in effect overruled by the *Herreid Case*.

And it is a good defense to liability on a contract of guaranty without limit as to amount that the contract was signed without being read, upon the false representations of the other party that it contained a previous oral agreement that the liability should be limited to \$2,000. *Smith v. Kimble* (1913) 31 S. D. 18, 139 N. W. 348, Ann. Cas. 1916A, 497.

And again, in *Tanton v. Martin* (1909) 80 Kan. 22, 101 Pac. 461, one was held not precluded from contesting the validity of a lease by the fact that he failed to read it before attaching his signature, where it contained terms other than those orally agreed to, and he signed under the belief, induced by the false representation of the other party, that it embodied the terms previously agreed to. The court said: "It is contended that if parties who sign an instrument can read, they will not be heard to say that they did not read or know the contents of the writing, unless they were dissuaded from reading it by some fraudulent act, artifice, or trick. Was there no fraud, artifice, or trick in the act of plaintiff's agent in telling the defendants that the long, complicated writing of about seven printed pages contained only the provisions requiring them to pay two fifths of the grain and \$60 in cash, when he had placed in the body of the lease a provision requiring them to pay \$200 that had not been mentioned in the L.R.A.1917F.

oral negotiations? Was there no fraud, artifice, or trick in lulling inquiry as to the contents of such a writing by falsely and fraudulently representing that it contained only certain specific things, where there had been inserted another stipulation greatly enhancing defendants' liability? There is a well-recognized exception to the rule that a party is bound to know the contents of a paper which he signs; and that is where one party procures another to sign a writing by fraudulently representing that it contains the stipulations agreed upon when in fact it does not, and where the party signing relies upon the faith of these representations, and is thereby induced to omit the reading of the writing which he signs. It is well settled that a written contract which one party induces another to execute by false representations as to its contents is not enforceable, and the party so defrauded is not precluded from contesting the validity of the contract by the fact that he failed to read it before attaching his signature."

Misrepresentations as to character of instrument.

While, as above shown, there is considerable apparent conflict of opinion as to the effect of the failure to read the instrument on the right to rely upon fraudulent representations as to the contents of an instrument of the general nature of which the party signing was aware, the decided weight of authority is to the effect that, in the absence of the rights of innocent third persons, the failure to read the instrument before signing will not preclude one from relying on fraudulent representations that the instrument was of an entirely different nature and character, amounting, in effect, to a fraudulent substitution.

Thus, one is at liberty to show that by the artifice, deception, and fraud of the other party or his agent, he was induced to sign a written contract without having read it, and upon the assurance and under the belief superinduced by the other party that it was a paper wholly different in character from the one signed. *Acme Food Co. v. Older* (1908) 64 W. Va. 255, 17 L.R.A.(N.S.) 807, 61 S. E. 235.

And if one signs a promissory note relying upon the false representation that it is but an application for an insurance policy, his right to set up fraud as a defense is not affected by the question as to whether he could or could not read and write. *Gillespie v. Hester* (1909) 160 Ala. 444, 49 So. 580.

Also one who signed a promissory note under the belief, induced by misrepresentation, that it was a receipt for money just paid, was held not liable thereon in *Biddeford Nat. Bank v. Hill* (1907) 102 Me. 346, 120 Am. St. Rep. 499, 66 Atl. 721; *Ribner v. Kleinberg* (1910) 122 N. Y. Supp. 239.

And see also to same effect, *Birmingham R. Light & P. Co. v. Jordan* (1910) 170 Ala. 536, 54 So. 280, action by a passenger for injuries where the defense was release of claim, which had been signed on representation that it was a receipt merely. Also see *Houston & T. C. R. Co. v. Milam* (1900) — *Tex. Civ. App.* —, 58 S. W. 735 (cited in note in 6 L.R.A. (N.S.) at p. 465).

And a deed is invalid for fraud when it is signed by an ignorant person under the belief that it is a receipt for money then paid for damages to a crop, such belief being induced by the false representation of the agent of the other party; and this although the signer did not read the writing, but relied upon such representation. *Kemery v. Zeigler* (1912) 176 Ind. 660, 96 N. E. 950.

So, in *Togni v. Taminelli* (1909) 11 Cal. App. 7, 103 Pac. 899, one was held not to be precluded from having a deed set aside which he had signed without reading, where the grantee had previously shown grantor a release of a contract to purchase land, of which grantor had made a copy, and, at the time of signing, grantee fraudulently represented that the instrument which he offered for signature was the release of which the copy had been made, when in fact a clause had been added whereby the signor conveyed all his interest in the land. Nothing is more common, the court said, than for a party who has agreed to give a deed or other contract relating to some specific subject to sign it upon being told that it is the deed or contract which had been orally agreed to. The party who so signed has not exercised the greatest degree of care; but that will not excuse the party who intentionally misleads him. No one has a right, either in law or in morals, to complain because another has placed too great reliance upon the truth of what he himself has stated.

So, too, one who, at the solicitation of another, whose account at a bank had been overdrawn, signed, without reading, a contract of guaranty which the latter, after forging the signature of an attesting witness, took to the bank, was held in *Carlisle & C. Bkg. Co. v. Bragg* [1911] 1 K. B. (Eng.) 489, 4 B. R. C. L.R.A. 1917F.

653, 80 L. J. K. B. N. S. 472, 104 L. T. N. S. 121, not to be liable thereon as he was under no duty to the bank, and the proximate cause of the bank's loss was not his negligence, but the fraudulent act of the party who procured the signature upon the false statement that the paper was a duplicate of a paper referring to insurance matters, signed by him the day before.

A signor of an order for goods was not bound thereby where he supposed that he was only writing his name on a blank for the name and address of customers, so that it might be correctly spelled. *Loveland v. Jenkins-Boys Co.* (1908) 49 Wash. 369, 95 Pac. 490.

And one who signed a release of a claim for injuries upon false representations as to its contents was held, in *McDonald v. Central R. Co.* (1916) 89 N. J. L. 251, 98 Atl. 391, to have been improperly refused permission to set up the defense of fraud in its execution.

But, on the other hand, in *Toledo Computing Scale Co. v. Garrison* (1906) 28 App. D. C. 243, one was held bound by a contract for purchase of a set of scales although he signed the contract while busy upon the representation of the seller's agent that it was a receipt for the scales for thirty days' trial, the court taking the position that a false statement as to the purport of an instrument is insufficient to avoid it where there is no artifice employed to prevent a party from reading it.

And one able to read and familiar with business transactions generally, who signs without reading a promissory note, may not be relieved from liability thereon even as against the original holder on the ground of fraud or misrepresentation, where nothing more appears to have been done to mislead or trick him than the mere stating by the party presenting the note that it was a receipt. *O'Shea v. Lehr* (1914) 182 Mo. App. 676, 165 S. W. 837.

So it has been held that one able to read and write who signs without reading a contract for the absolute purchase of goods on the fraudulent misrepresentation of the other party's agent, a stranger, that it is but an acceptance of position as distributing agent and collector, is not entitled to relief. *United Breeders Co. v. Wright* (1909) 134 Mo. App. 717, 115 S. W. 470. The court stated that "the general rule is that parties to such contracts are not permitted to go behind the writing. Everything pertaining to the subject-matter that precedes the signing of the instrument

must be regarded as being merged into the instrument. The cases in which this rule does not obtain are exceptional and consist of those instances where one of the parties, while acting as an ordinarily careful and prudent man in his situation would act, nevertheless is misled to his detriment by some fraudulent trick or contrivance of the other party."

Relation of trust or confidence.

Where there is a relation of trust or confidence, failure to read is not fatal negligence.

Thus, in *Hale v. Hale* (1908) 62 W. Va. 609, 14 L.R.A.(N.S.) 221, 59 S. E. 1056, it was held that a tenant by the curtesy, who, for several years, had been in the habit of joining in deeds prepared by his son, conveying small town lots belonging to the wife, was entitled to have a deed so prepared and presented to him set aside as having been fraudulently procured where it conveyed to the son all his interest in his wife's real estate for the consideration of \$1 and natural love and affection, and was executed by him without reading it, on the son's representation that it conveyed only a town lot.

And a mortgage of her reversionary interest containing a personal covenant for payment, signed by a married woman, was held not binding upon her, in *Bagot v. Chapman* [1907] 2 Ch. (Eng.) 222, 76 L. J. Ch. N. S. 523, 23 Times L. R. 562, as her signature thereto was induced by the representations of her husband that it was a power of attorney which would enable him to raise money at some future time if he should require it.

So, failure of a grantee to read a deed which contained a clause fraudulently inserted, whereby he agreed to assume a certain mortgage, will not bar relief where the preparation of such deed and ten others was intrusted to the grantor, and, after reading one of them, which did not contain such a clause, the grantee was informed that all the other deeds were the same. *Bradshaw v. Provident Trust Co.* (1916) 81 Or. 55, 158 Pac. 274.

Effect of artifice or trick.

Failure to read an instrument will not preclude the defense of fraud in its procurement where one is induced to forego reading it before executing it by artifice or trick practised by the other party.

So, one who has been induced to sign a written contract by false and fraudulent representations as to its contents, made by the opposite party, with intention to deceive, and which did deceive him, may set up this fraud as a defense to a suit L.R.A.1917F.

on notes based upon the contract thus obtained, and especially where, in addition to the false and fraudulent representations as to the contents of the contract, the conduct and representations of the party who made them relieved the opposite party from the imputation of negligence in signing the contract without first reading it. *Thomason v. Goldman & Co.* (1911) 9 Ga. App. 349, 71 S. E. 596.

And in *Great Northern Mfg. Co. v. Brown* (1915) 113 Me. 51, 92 Atl. 993, it was held that one who signed a contract for purchase under the belief that he was signing a contract to receive and give away certain articles could avoid the same where he was led to sign the instrument by artifices, as to which the court said: "It is not exaggeration to say that it would be a rare discovery to find a device better designed to establish fraudulent intent and fraudulent methods than the scheme conceived and operated in this case. The plan was to thoroughly prepare the mind of the victim to expect the reverse of what he was to receive; to fix his attention upon a gift and divert it from a sale; to gain his confidence and allay suspicion; to misrepresent and avoid detection; to get his signature without inspection. When the way was prepared for the sacrifice, a priest appeared at the temple, and the omens augured success."

So, a vendor may obtain relief against fraud and misrepresentation although he signed a contract without reading it where the acts and representations of the other party tended to prevent vigilance on his part. *Kentland Coal & Coke Co. v. Elswick* (1916) 167 Ky. 593, 181 S. W. 181. And this is true although the relief sought is against a third party to whom his vendee conveyed, where such third party had notice of the facts attending the first conveyance.

One able to read, who signs a paper presented to her by a claim agent as, and represented as being, a receipt, the paper, while being signed, remaining in the hands of an agent, and so folded that its contents could not be seen, is not estopped to deny that she signed such paper as a release. *Roberts v. Colorado Springs & I. R. Co.* (1909) 45 Colo. 183, 101 Pac. 59.

And, in an action by a subsequent purchaser to enforce a sale of mortgaged land in a certain order, as required by the rights and equities of plaintiff as subsequent purchaser, an original grantor may show that he signed the deed without reading it, upon the fraudulent

representation of grantee, who prepared the deed, that it included only certain lands, and the grantee's further statement that he was in a hurry and the grantor need not read the deed, but could rely upon his statement as to its contents. *Gray v. Jenkins* (1909) 151 N. C. 80, 65 S. E. 644.

So, also, in *Shook v. Puritan Mfg. Co.* (1907) 75 Kan. 301, 8 L.R.A.(N.S.) 1043, 89 Pac. 653, an absolute-sale contract signed upon dealer's agent's representation that it was a commission contract only was held to be unenforceable although the party signed without reading it or having it read to him, he being very busy at the time and the agent urging haste, as he had to catch a train. And see *Eldorado Jewelry Co. v. Darnell* (1907) 135 Iowa, 555, 124 Am. St. Rep. 309, 113 N. W. 344.

And failure to read a written instrument will not preclude the defense of fraud in procuring a signature where one signs a contract of guaranty upon the false representation of the other party that it is but the acceptance of an order for goods, it further appearing that the party who procured the signature took the paper as soon as it was signed and hurried away, stating that he had to catch a train. *Dunston Lithograph Co. v. Borgo* (1913) 84 N. J. L. 623, 87 Atl. 334.

That the rule declared in the *Shores-Mueller Case* (1913) 169 Iowa, 95, 140 N. W. 197, supra, by the Iowa court, is not intended to make easy any scheme of fraud or deception, is evidenced from the statement in *Pictorial Review Co. v. Fitz Gibbon* (1914) 163 Iowa, 644, 145 N. W. 315, that if the evidence tends to show that the party who obtained the paper misrepresented its contents, and, by trick or artifice, induced the other party to sign it without reading it for himself, the wrongdoer will not be permitted to retain any advantage so gained if the person injured, acting within a reasonable time after the discovery of the fraud, rescinds the agreement and restores or offers to restore whatever he has received thereunder.

In that case, where the agent for a dealer in fashion sheets, by representing that the contract he sought was one for consignment, only the goods sold to be paid for, obtained a merchant's signature to a contract for absolute purchase, and avoided the reading of the paper on the plea that he must leave on a train then nearly due, it was held that the merchant was not estopped by his negligence from setting up the defense of fraud. L.R.A.1917F.

And to the same effect is *Providence Jewelry Co. v. Fessler* (1909) 145 Iowa, 74, 123 N. W. 957, where one was held not estopped by his negligence from setting up fraud in the procuring of a contract to which a dealer's agent had secured his signature upon the representation that it was a commission contract only, when in fact he had by a trick substituted an absolute-purchase contract, and hurried the signing of it without reading by an expressed desire to make haste to catch a train out of town, repeating his assertion that it was the contract agreed upon, and professing to read the material parts of it, using the language contained in the form first shown. See also *Angier v. Brewster* (1882) 69 Ga. 362 (cited in note in 6 L.R.A. (N.S.) p. 464).

But the statement of one urging the signing of an instrument that he had a telegram that compelled him to leave at once, and that the bus was waiting to take him to the train, was held in *United Breeders Co. v. Wright* (1909) 134 Mo. App. 717, 115 S. W. 470, to be insufficient to excuse the failure to read, before signing, the instrument, which was represented to be an acceptance of position as distributor and collector, but which in fact was an unconditional purchase order. The court stated that a trick or artifice sufficient to be set up as an excuse for failure to read would be "where a party cannot read, or whose sight is defective, finds himself in a position where he must rely on the other party correctly to read or state the contents of the instrument, and is deceived by a false reading or statement; or where he reads the contract and finds it to express the agreement, but the other party, by flim-flam or deft manipulation of some kind, obtains his signature to another and different contract."

Effect of fraudulent misreading.

(See also *infra*, under "Effect of disability.")

The actual misreading of a paper purporting to contain a contract, thereby inducing the signing of it, is a fraud which the signer may set up in defense even though he could have read the paper himself. *Tait v. Locke* (1908) 130 Mo. App. 273, 109 S. W. 105; *Birdsall v. Coon* (1911) 157 Mo. App. 439, 139 S. W. 243. Such a betrayal of confidence, the court stated in the *Tait Case*, is revolting and so infrequent that it is not likely to be anticipated. It perhaps may be distinguished from a mere misrepresentation of the contents of a paper, be-

cause a statement of the contents is apt to be condensed so as to misinterpret the meaning of the original or be misunderstood by the hearer.

So, also, in *Birdsall v. Coon* (Mo.) supra, it was held, following *Tait v. Locke* (Mo.) supra, as authority, that one who signs a contract without reading the same is entitled to relief therefrom where the other party has wilfully and fraudulently misread it to him.

So, also, in *Western Mfg. Co. v. Cotton* (1907) 126 Ky. 749, 12 L.R.A. (N.S.) 427, 104 S. W. 758, a contract of absolute sale of jewelry, containing an agreement on the part of the purchaser to execute negotiable notes in payment on receipt of the consignment, which was signed by the purchaser after the dealer's agent had read what purported to be an agreement to take goods and pay for those sold only, was held to be unenforceable although the purchaser failed to read the contract before it was signed. And the words "read this" and "I have read this contract and had delivered to me by your salesman a copy of same, and this is all the contract between us," conspicuously printed upon the face of the contract, did not prevent setting it aside for fraud in securing its execution, where the party sought to be charged did not read the contract, but relied on a false reading by the agent, who did not call attention to such words.

See also *Stamps v. Bracy* (1836) 1 How. (Miss.) 312 (cited in note in 6 L.R.A. (N.S.) at p. 465), and *New v. Wambach* (1873) 42 Ind. 456, cited in same note at p. 463.

Effect of disability — illiteracy.

An illiterate person unable to read, who signs a deed believing it to be a note, is not bound by such writing, although he does not request the opposite party or anyone else to read the paper to him before he signs it, where he is induced to do so by the misrepresentations of the other party, whose good faith he has no reasonable grounds to suspect, as to the nature or contents of such writing. *Grimsley v. Singletary* (1909) 133 Ga. 56, 134 Am. St. Rep. 196, 65 S. E. 92.

So, also, in *Dunker v. Calahan* (1916) — Ind. App. —, 113 N. E. 15, it was held that a warranty deed signed by an illiterate person under the belief that the instrument was a mortgage only is invalid where such signing was induced by the false representation of the other party as to the nature of the instrument.

And illiterate persons who conveyed L.R.A.1917F.

land by warranty deed to a son are entitled to relief where they signed such deed on the representation of the son, in whom they had full confidence, that it was but a trust deed. *Webb v. Webb* (1911) 99 Miss. 234, 54 So. 840.

The bona fide holder of a note and mortgage cannot enforce the note where the maker is an illiterate colored woman, over seventy years of age, who was induced by false and fraudulent representations to sign them, without negligence on her part, under the belief that she was signing her last will and testament and a power of attorney. *First Nat. Bank v. Wade* (1910) 27 Okla. 102, 35 L.R.A. (N.S.) 775, 111 Pac. 205.

And in an action for injuries by a servant unable to read or write, where the defense is a written instrument of full settlement and satisfaction, executed by the servant, it is a good reply to such defense that the signature was obtained by fraud and misrepresentation, although the instrument was signed by the servant without reading it or having it read to him. *Mardis v. Miller* (1917) 241 Fed. 470. The court stated that the rule that one will not be heard to say he was ignorant of the contents of a written instrument if he signs it without reading it or having it read to him has no application where an actual fraud has been committed and the signature obtained by misrepresentation.

And where the signature of one unable to read is procured to a contract of guaranty upon the false representations of the other party that it is but a mere recommendation, there is no liability. *Shores-Mueller Co. v. Knox* (1913) 160 Iowa, 340, 141 N. W. 948. See also *Warder, B. & G. Co. v. Whitish* (1890) 77 Wis. 430, 46 N. W. 540 (cited in note in 6 L.R.A. (N.S.) p. 464).

In *Broyles v. Absher* (1904) 107 Mo. App. 168, 80 S. W. 703, it was stated that while the legal presumption obtains that the party attaching his signature to the written embodiment of the contract has read it, as he is obligated to do, and is acquainted with its contents, yet, between the original parties to the instrument, defendant may plead and establish by proper proof that, through his illiteracy, by the misreading of the paper to him, or other fraudulent device, an instrument other than the one understood and intended by him to be executed was fraudulently substituted, and his signature thereto wrongfully secured.

See also *Wilson v. Moriarty* (1891) 88 Cal. 207, 26 Pac. 85 (cited in note in 6 L.R.A. (N.S.) p. 464).

And in *Baldwin v. Postal Teleg. Cable Co.* (1907) 78 S. C. 419, 59 S. E. 67, it was held that an illiterate person who signed a written instrument is not bound by it where his signature is induced in reliance upon the other party's representation, fraudulently made, as to its contents.

See also *Maxfield v. Schwartz* (1890) 45 Minn. 150, 10 L.R.A. 606, 47 N. W. 448 (cited in note in 6 L.R.A.(N.S.) p. 464).

So, a contract for the purchase of goods will be avoided where the agent of a jewelry company, in procuring a contract, while purporting to read the contract to the purchaser, takes advantage of his illiteracy in omitting important and material terms. *American Standard Jewelry Co. v. Witherington* (1906) 81 Ark. 134, 98 S. W. 695.

—blindness.

Where a vendee unable to read, being blind, signs a contract of sale upon the false representation of the vendor that he has correctly read the contract to him, it is no defense to an action brought by the vendee to recover damages alleged to have been sustained by him on account of the fraudulent misreading of the contract, that the vendee failed to have someone in whom he could repose confidence read the contract to him. *Miller v. Haney* (1917) — Ind. App. —, 116 N. E. 21.

And a grantee who is blind, and who, relying upon the honesty of grantor's agent, executes a purchase-money mortgage from which such agent, in reading, fraudulently omits a clause that, upon an attempted sale, the purchase-money mortgage shall become due immediately, may maintain an action to recover damages caused by his being put to the expense of raising money to pay off such purchase-money mortgage upon his desiring to sell the property. *Muller v. Rosenblath* (1913) 157 App. Div. 513, 142 N. Y. Supp. 602. The court added that "even if the plaintiff could have read the mortgage and did not, and that omission, with the other circumstances, constituted negligence in that he should not have relied upon [grantor's agent], . . . nevertheless his negligence would not have defeated his right to relief if the defendants were guilty of positive, wilful fraud."

—inability to read without glasses.

One is not precluded from setting up fraud by his failure to read a contract, where his failure to read it was due to his not having his glasses with him, and L.R.A.1917F.

the other party, in reading the contract to him, read it as though it contained a certain verbal agreement, and the signature was procured in reliance upon such fraudulent reading. *Robinson v. Roberts* (1908) 20 Okla. 787, 95 Pac. 246. See also *Cole Bros. v. Williams* (1882) 12 Neb. 440, 11 N. W. 875 (cited in note in 6 L.R.A.(N.S.) p. 464).

So, also, one who, unable to read because without his glasses, signs an application for insurance upon the false representations of the agent as to its contents, is not bound thereby. *Colley v. National Live Stock Ins. Co.* (1914) 185 Mo. App. 616, 171 S. W. 663. The court in this case distinguished cases where the party signing was not laboring under some infirmity or disability.

So, the grantor of an easement, who signed the same without reading it, is entitled to a cancellation where, being unable to read, because without her glasses, the grantee undertook to read it to her, but purposely misread it, and she signed the instrument relying upon its having been read correctly. *Bixler v. Heilman* (1910) 44 Pa. Super. Ct. 603.

Also in *Stewart v. Roberts* (1908) 33 Ky. L. Rep. 332, 110 S. W. 340, where one signed a contract without reading it, it was held error to refuse evidence that the party signing was able to read only a little, and then only with glasses, and, at the time, was without his glasses, and that the contract was read to him, but that its contents as stated were materially different from those of the instrument which he signed, and that he relied upon the contract being as read to him.

See also *Chapman v. Atlanta Guano Co.* (1893) 91 Ga. 821, 18 S. E. 41 (cited in note in 6 L.R.A.(N.S.) p. 465).

But in *Golle v. State Bank* (1909) 52 Wash. 437, 100 Pac. 984, one who signed a quitclaim deed without reading it, under the alleged belief that it was a mere guaranty of debt, was held to be precluded from procuring a cancellation of the instrument, where it appears that at the time of the signing he was able to read and write, and that his only excuse for not reading it was that he did not have his glasses with him, and he gave no excuse for not having had it read to him.

—inability to read English.

In *Stern v. Moneyweight Scale Co.* (1914) 42 App. D. C. 162, distinguishing *Toledo Computing Scale Co. v. Garrison* (1906) 28 App. D. C. 243, one who was unable to read or write English was held

not bound by a contract to purchase a set of scales, as he was induced to sign same on the false representation of seller's agent that it was merely an authorization to send the scales on approval.

Also in *Stimpson Computing Scales Co. v. Allen* (1913) 47 N. S. 90, it is held that one who could not read the English language should be permitted to show that his signature to a contract was obtained by fraudulently concealing from him the fact that it contained a provision that the full face amount of the contract should become due and payable if there should be a failure to pay any of the instalment when the same became due.

And in *Shores-Mueller Co. v. Lonning* (1913) 159 Iowa, 95, 140 N. W. 197, it was held to be a question for the jury to determine whether or not one who could not read or write the English language was negligent in signing, without asking to have it read, or taking some other precautions to ascertain its contents, a writing which was represented to be simply a statement as to the reputation or character of a certain person, but which was in reality a contract of guaranty.

See also *Adolph v. Minneapolis & P. R. Co.* (1894) 58 Minn. 178, 59 N. W. 959, and *Rosenberg v. Doe* (1889) 148 Mass. 560, 20 N. E. 176 (cited in note in 6 L.R.A.(N.S.) pp. 464, 465).

—suffering and pain.

One who, while unable to read because of suffering from pain and being under the influence of opiates, signed a release of claim for damages, is not bound by such writing, where he was induced to sign by one who knew of his condition and who falsely represented that the writing was a partial settlement only, and the writing was signed in the belief that the contents were as thus represented. *Dannelly v. Cuthbert Oil Co.* (1908) 131 Ga. 694, 63 S. E. 257.

So, also an aged woman who was suffering mentally and physically from injuries received while alighting from a street car will be relieved from a release of claim which she signed upon the fraudulent representation that it was merely a receipt for a small amount of money handed to her. *Porter v. United R. Co.* (1912) 165 Mo. App. 619, 148 S. W. 162. J. H. B.

COLORADO SUPREME COURT.
(In Banc.)

W. L. RYAN, Plff. in Err.,
v.

PEOPLE OF THE STATE OF COLORADO.

(60 Colo. 425, 153 Pac. 756.)

Criminal law — insane delusion as defense.

1. The guilt of one who relies on insane delusion as a defense cannot be made to depend upon whether or not the delusion was such that, if things were as he imagined them to be, he would be justified in the act springing from the delusion.

For other cases, see *Criminal Law*, I. b, in *Dig. 1-52 N. S.*

Evidence — relations between murderer and victim.

2. Upon trial of one for murdering an attorney employed by him evidence is admissible as to the relation between accused and deceased, if based on personal knowledge.

For other cases, see *Evidence*, XI. t, in *Dig. 1-52 N. S.*

Note. — As to criminal responsibility for act committed under influence of insane delusion as to facts, as affected by the question whether such facts would, if actually existing, excuse the act, see annotation following this case, post, 650.
L.R.A.1917F.

Appeal — misconduct of counsel — raising question.

3. Misconduct of prosecutor in his address to the jury cannot be brought before the appellate court by affidavit.

For other cases, see *Appeal and Error*, IV. o, I, in *Dig. 1-52 N. S.*

(Gabbert, Ch. J., and White and Garrigues, JJ., dissent.)

(November 1, 1915.)

ERROR to the District Court for Larimer County to review a judgment convicting defendant of murder. Reversed.

The facts are stated in the opinion.

Mr. L. R. Rhodes for plaintiff in error.

Messrs. Fred Farrar, Attorney General, and Norton Montgomery, Assistant Attorney General, for the People.

Bailey, J., delivered the opinion of the court:

The defendant, William L. Ryan, was convicted in the district court of Larimer county, of murder in the first degree, with penalty fixed at death. The victim, Newton Crose, was an attorney, with offices in the Avery Building in Fort Collins, where the tragedy occurred on the 14th day of August, 1914, and as such had for several years acted for the mother of the defendant and

also for the defendant himself. The defense was insanity.

That part of instruction No. 16, to the giving of which objection was made and exception reserved, reads as follows: "An insane delusion which will alone suffice to establish the defense of insanity must be of such a character that, if things were as the person possessed of such delusion imagined them to be, it would justify the act springing from such delusion." No objections are urged to the other instructions. They therefore need be neither considered nor discussed, and we express no opinion upon their sufficiency and correctness.

The rule embodied in the matter complained of was formulated in England in 1843, upon questions propounded to the judges by the House of Lords, in consequence of the acquittal of one McNaghten of murder on the ground of insanity, and has since been approved in some jurisdictions in this country, and disapproved in others.

Delusion is defined as "a false conception and persistent belief, unconquerable by reason, of what has no existence in fact." Webster's New Int. Dict. "Delusion," 3. All delusions which show or tend to show insanity are insane delusions. Insanity is a disease of the mind, and delusion a symptom of the disease. It would be as incorrect in law to say that all delusions are insanity as that all insanity is delusion.

The mind may be so impaired by disease as to lose all appreciation of duty to society in one or many particulars, or, realizing the duty, be incapable of performing it. Where the evidence of delusions shows that a person is so insane at the time of the commission of the act as to be incapable of entertaining criminal intent, it is, in point of law, insanity as to all acts resulting from such delusion, and in such circumstances the act is no more a crime than a like act would be in a person totally mad. In the trial of the present case the theory of the defense was that the deceased was killed by the defendant, acting under delusions showing an insane condition of the mind, compelling the act; and all the testimony introduced for the purpose of making out his defense was directed to the support of that contention.

The substance of the testimony adduced to show that the defendant was, at the time of the act, laboring under insane delusion, was that he believed the deceased, while acting as his attorney, had betrayed him in a suit in which his wife procured a divorce and the custody of their two children; also in another suit brought by one Dr. Norton against him; and that the deceased had ruined him financially by forcing him to

transfer his interest in a farm at a sacrifice, to pay debts, had induced the mother of defendant to withhold further assistance from him when in financial straits, and had denounced him to the world as a leper and drunkard.

The instruction could scarcely have failed to mislead the jury, as its practical effect was to nullify the testimony adduced as to delusions, since such testimony did not relate to the kind of delusions which, if based on true or actual facts, as stated in the instruction, would have justified the killing, and therefore the giving of it, under the facts of this case, because of the character of the testimony introduced, being only the delusions, was clearly prejudicial. We do not say that the giving of this instruction would necessarily be prejudicial error in all cases where insanity is the defense, but do say that in such cases it has no application, states a wrong principle of law, and should not be given.

By this instruction the jury were told that, in order to acquit the defendant on the ground of insane delusion, they must consider and determine whether the supposed state of facts with respect to which the delusion existed would, if real, have justified the commission of the act. This put the inquiry upon a basis of the criminality of a like act in a sane person, rather than upon the question of the sanity or insanity of the accused. The defense of insanity raises the question of mental accountability, and is purely a trial of the condition of the mind, whether it is so diseased as to render the accused incapable of crime; and has to do with the nature or character of the particular delusions which are relied upon to establish insanity only as they may, under some circumstances, in their very nature, throw light upon the mental condition. To apply the same test for the determination of the question of insanity as is applied to determine what is criminal in a sane person is obviously wrong. The effect of the instruction is to declare a person who may be insane because of delusions accountable to the law for all acts which would be criminal if he were sane. This manifestly cannot be a correct rule. A simple illustration discloses its vice. Suppose a man labors under a delusion that a countryman is involved in a traitorous scheme in the capacity of a foreign spy, such delusion so completely possessing his mind that it becomes a foremost and constant thought and actually renders him insane, and under it he kills that other in the belief that it was an act of civil duty. This instruction, if given in such a case, would preclude an acquittal on the ground of insanity, no matter how

firmly satisfied of the existence of that fact the jury might be, simply because the supposed facts of the delusion would not, if founded upon fact, justify the commission of the act. Thus punishment might be imposed upon the most unfortunate sufferer from mental disease, should his act chance to be the same or similar to acts that would be criminal in a sane person. The question involved is one of first impression in this jurisdiction, and notwithstanding the approval of the rule elsewhere, we deem it unsound.

In criminal trials, where proof of delusions has been offered in defense, some courts, in instructing the jury, have employed the term "partial insanity" as interchangeable with insane delusion, and have undertaken to lay down rules of law governing accountability under such circumstances differing from those applicable where the proof is of general insanity. In all such cases the controlling question is the sanity or insanity of the accused with respect to the act, and upon trial of this issue there is, in legal contemplation, no middle ground; the defendant is either sane or insane, and therefore culpable or inculpable, according as that question may be determined by the jury from the evidence.

In *Parsons v. State*, 81 Ala. 577, 60 Am. Rep. 193, 2 So. 854, 7 Am. Crim. Rep. 266, the court, discussing the propriety of an instruction like that under consideration, said: "The rule in *M'Naghten's Case*, 10 Clark & F. 200, 8 Eng. Reprint, 718, 8 Scott, N. R. 595, 1 Car. & K. 130, note, as decided by the English judges, and supposed to have been adopted by the court, is that the defense of insane delusion can be allowed to prevail in a criminal case only when the imaginary state of facts would, if real, justify or excuse the act; or, in the language of the English judges themselves, the defendant 'must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real.' *Boswell v. State*, 63 Ala. 307, 35 Am. Rep. 20. It is apparent from what we have said that this rule cannot be correct as applied to all cases of this nature, even limiting it as done by the English judges to cases where one 'labors under partial delusion, and is not in other respects insane.' *M'Naghten's Case*, 10 Clark & F. 200, 8 Eng. Reprint, 718, 8 Scott, N. R. 595, 1 Car. & K. 130, note, 4 State Tr. N. S. 847, 2 Lawson, *Defences to Crime*, 150. It holds a partially insane person as responsible as if he were entirely sane, and it ignores the possibility of crime being committed under the duress of an insane delusion, operating upon the human mind, the integrity of which is destroyed or impaired by disease, except, L.R.A.1917F.

perhaps, in cases where the imaginary state of facts, if real, would excuse or justify the act done under their influence. *Field Medico Legal Guide*, 101-104; *Guy & F. Forensic Medicine*, 220. If the rule declared by the English judges be correct, it necessarily follows that the only possible instance of excusable homicide in cases of delusional insanity would be where the delusion, if real, would have been such as to create, in the mind of a reasonable man, a just apprehension of imminent peril to life or limb. The personal fear, or timid cowardice of the insane man, although created by disease acting through a prostrated nervous organization, would not excuse undue precipitation of action on his part. Nothing would justify assailing his supposed adversary except an overt act or demonstration on the part of the latter such as, if the imaginary facts were real, would, under like circumstances, have justified a man perfectly sane in shooting or killing. If he dare fail to reason, on the supposed facts embodied in the delusion, as perfectly as a sane man could do on a like state of realities, he receives no mercy at the hands of the law. It exacts of him the last pound of flesh. It would follow also, under this rule, that the partially insane man, afflicted with delusions, would no more be excusable than a sane man would be, if, perchance, it was by his fault the difficulty was provoked, whether by word or deed; or, if, in fine, he may have been so negligent as not to have declined combat when he could do so safely without increasing his peril of life or limb. If this has been the law heretofore, it is time it should be so no longer. It is not only opposed to the known facts of modern medical science, but it is a hard and unjust rule to be applied to the unfortunate and providential victims of disease. It seems to be a little less than inhuman and its strict enforcement would probably transfer a large percentage of the inmates of our insane hospital from that institution to hard labor in the mines or the penitentiary. Its fallacy consists in the assumption that no other phase of delusion, proceeding from a diseased brain, can so destroy the violation of an insane person as to render him powerless to do what he knows to be right, or to avoid doing what he may know to be wrong. This inquiry, as we have said, and here repeat, is a question of fact for the determination of the jury in each particular case. It is not a matter of law to be decided by the courts. We think it sufficient if the insane delusion—by which we mean the delusion proceeding from a diseased mind—sincerely exists at the time of committing the alleged crime, and the defendant, believing it to be real, is so influenced by it as either to render

him incapable of perceiving the true nature and quality of the act done, by reason of the deprivation of the reasoning faculty, or so subverts his will as to destroy his free agency by rendering him powerless to resist by reason of the dures of disease."

And in *State v. Jones*, 50 N. H. 369, 9 Am. Rep. 242, with reference to this rule, it is said: "The doctrine thus promulgated as law has found its way into the textbooks, and has doubtless been largely received as the enunciation of a sound legal principle since that day. Yet it is probable that no ingenious student of the law ever read it for the first time without being shocked by its exquisite inhumanity. It practically holds a man, confessed to be insane, accountable for the exercise of the same reason, judgment, and controlling mental power that is required of a man in perfect mental health. It is, in effect, saying to the jury, 'The prisoner was mad when he committed the act, but he did not use sufficient reason in his madness. He killed a man, because, under an insane delusion, he falsely believed the man had done him a great wrong, which was giving rein to a motive of revenge, and the act is murder. If he had killed a man only because, under an insane delusion, he falsely believed the man would kill him if he did not do so, that would have been giving rein to an instinct of self-preservation, and would not be crime.' It is true, in words, the judges attempt to guard against a consequence so shocking, as that a man may be punished for an act which is purely the offspring and product of insanity, by introducing the qualifying phrase, 'and is not in other respects insane.' That is, if insanity produces the false belief, which is the prime cause of the act, but goes no further, then the accused is to be judged according to the character of motives which are presumed to spring up out of that part of the mind which has not been reached or affected by the delusion or disease. This is very refined. It may be that mental disease sometimes takes a shape to meet the provisions of this ingenious formula; or, if no such case has ever yet existed, it is doubtless within the scope of omnipotent power hereafter to strike with disease some human mind in such peculiar manner that the conditions will be fulfilled; and when that is done, when it is certainly known that such a case has arisen, the rule may be applied without punishing a man for disease. That is, when we can certainly know that, although the false belief on which the prisoner acted was the product of mental disease, still, that the mind was in no other way impaired or affected, and that the *motive* to the act did certainly take its rise in some portion of the mind that was yet in per-

fect health, the rule may be applied without any apparent wrong; but it is a rule which can be safely applied in practice that we are seeking; and to say that an act which grows wholly out of an insane belief that some great wrong has been inflicted is, at the same time, produced by a spirit of revenge springing from some portion or corner of the mind that has not been reached by the disease, is laying down a pathological and psychological fact which no human intelligence can ever know to be true, and which, if it were true, would not be *law*, but pure matter of fact. No such distinction ever can or ever will be drawn in practice; and the absurdity as well as inhumanity of the rule seems to me sufficiently apparent without further comment."

A person who is so diseased in mind at the time of the act as to be incapable of distinguishing right and wrong with respect to it, or, being able to so distinguish, has suffered such an impairment of mind by disease as to destroy the will power and render him incapable of choosing the right and refraining from doing the wrong, is not accountable. And this is true howsoever such insanity may be manifested, by insane delusions of whatever nature, by irresistible impulse, or otherwise. *Parsons v. State*, 81 Ala. 577, 60 Am. Rep. 193, 2 So. 354, 7 Am. Crim. Rep. 266; *State v. Jones*, supra; *Green v. State*, 64 Ark. 523, 43 S. W. 973; *State v. Johnson*, 40 Conn. 136; *Flanagan v. State*, 103 Ga. 619, 30 S. E. 550, 11 Am. Crim. Rep. 525; *Dacey v. People*, 116 Ill. 585, 6 N. E. 165, 6 Am. Crim. Rep. 461; *Lilly v. People*, 148 Ill. 467, 36 N. E. 95; *Meyer v. People*, 156 Ill. 126, 40 N. W. 490; *Plake v. State*, 121 Ind. 433, 16 Am. St. Rep. 408, 23 N. E. 273; *Bradley v. State*, 31 Ind. 492; *State v. Hockett*, 70 Iowa, 442, 30 N. W. 742; *Shannahan v. Com.* 8 Bush. (Ky.) 463, 8 Am. Rep. 465; *Banks v. Com.* 145 Ky. 800, 141 S. W. 380; *Com. v. Rogers*, 7 Met. 500, 41 Am. Dec. 458; *State v. Crowe*, 39 Mont. 174, 102 Pac. 579, 18 Ann. Cas. 643; *Dejarnette v. Com.* 75 Va. 867; *Bishop*, New Crim. Law, §§ 391-394; 1 Whart. Crim. Law, 10th ed. §§ 43-45; 1 McClain, Crim. Law, §§ 156-158; 12 Cyc. 169, note 50; 16 Am. & Eng. Enc. Law, 618.

However, the utmost care should be taken not to confuse such mental disease with moral obliquity, mental depravity, or passion arising from anger, hatred, revenge, and kindred evil conditions, for where the act is induced by any of these causes the perpetrator is accountable to the law. The question of the mental condition of a defendant at the time in respect to the act should go to the jury for its determination as matter of fact, upon all the evidence ad-

duced, under general instructions defining the scope of the inquiry.

Error is assigned to the admission, over objection, of testimony of three witnesses, Claude Coffin, E. D. Avery, and Louise Avery Crose, wife of deceased, which tended to show the relations existing between the deceased and the defendant. Counsel assert that this was an attempt to vindicate the character and conduct of the deceased and had no proper place in the trial as rebuttal, or at all. It may be said of some of this testimony that it was hearsay in character and should have been excluded, particularly that if Louise Avery Crose, the widow, as to certain remarks made by her deceased husband and the substance of certain telephonic messages between him and other persons, concerning the conduct of defendant, the admission of which was manifestly erroneous. So much of it as was given by those who testified from personal knowledge of the relations between the deceased and the defendant was competent, more properly admissible in chief than rebuttal, to be considered and weighed with all other evidence adduced in the case.

Complaint is also made of alleged remarks by the special prosecutor in his closing argument to the jury; among others, one that the defense of insanity is a disgrace to American jurisprudence, which, it is said, were permitted to go to the jury despite objection. The matter is not contained in the bill of exceptions, but is presented by affidavit of counsel, and is therefore not properly here for consideration. Had such statement been made to the jury, it would have been not only highly improper and reprehensible, but, if preserved with objections and exceptions, might constitute reversible error. This suggestion certainly ought to be sufficient to preclude the possibility of improper conduct of this character on the part of the district attorney at another trial.

The judgment is reversed and the cause remanded for a new trial according to the views herein expressed. .

Gabbert, Ch. J., and White and Garriques, JJ., dissent.

Petition for rehearing denied January 3, 1916.

Annotation—Criminal responsibility for act committed under influence of insane delusion as to facts as affected by question whether such facts would, if actually existing, excuse the act.

Generally as to what are insane delusions, see notes to *Kimberly's Appeal*, 37 L.R.A. 261, and in 27 L.R.A. (N.S.) 62 et seq.; as to weakness of mind as affecting responsibility for criminal act, see note to *Rogers v. State*, 10 L.R.A. (N.S.) 999; and as to irresistible impulse as an excuse for crime, see notes to *State v. Harrison*, 18 L.R.A. 224, and *Smith v. State*, 27 L.R.A. (N.S.) 461.

There is a decided conflict of authority upon the question presented in the present annotation, some courts maintaining that insane delusions or partial or illusional insanity, or, as it is sometimes called, hallucinations, monomania, or paranoia, will relieve from criminal responsibility only when the facts which in the delusion were believed to exist would excuse if true; and others laying down the more modern and humane rule that the nature of the facts is not necessarily controlling. The harshness of the first rule is illustrated by the fact that its application would, in many cases, establish rather than disprove criminal responsibility, for the reason that insane delusions with respect to alleged wrongs are often such that, if the supposed facts were real, the wrongs could not lawfully be avenged L.R.A.1917F.

in the manner employed. In fact, the delusions which will excuse the commission of a crime on the ground that the offender could justify if the facts believed by him to have been true actually had existed are comparatively few, being practically limited to delusions regarding the exercise of the right of defense, or the exercise of a vested legal authority or right to do what was done. On the other hand, the argument would seem to be that a dominating delusion, if it does not increase, at least does not diminish, a crime, and therefore cannot excuse unless the supposed facts, if true, would excuse; or unless, aside from the particular delusions, the deluded person was excusable because of other mental weakness or disease.

In treating the question under annotation the investigator should keep in mind the distinction between a mere erroneous opinion and an insane delusion, the product of a diseased mind or brain; for it is well settled that a mere erroneous conclusion as to facts and rights with respect thereto will not excuse from the criminal consequences of an act based thereon. This distinction is aptly illustrated by *Hotema v. United States* (1902) 186 U. S. 413, 46 L. ed.

1225, 22 Sup. Ct. Rep. 895, wherein it was held that a belief in witches and a right to kill them, which is the product of a diseased brain, renders one murdering a supposed witch irresponsible for the crime, but he is responsible if the belief was an erroneous conclusion of a sane mind, resulting from investigations and belief as to what the Scriptures taught, and if the act was committed with knowledge that it was in violation of law and punishable.

The English rule is as laid down in the leading case of *M'Naghten* (1843) 10 Clark & F. 200, 8 Eng. Reprint, 718; 2 Lawson, Defences to Crime, 150, in answering, at the request of the House of Lords, the question: "If a person, under an insane delusion as to existing facts, commits an offense in consequence thereof, is he thereby excused?"—that where one labors under a partial delusion only, and is not in other respects insane, he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. And the majority of the court, speaking through Lord Chief Justice Tindal, illustrated the operation of the rule by giving the following examples: "If, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defense, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment." And again, in *Reg. v. Pate* (1850) 8 State Tr. N. S. (Eng.) 1, Baron Alderson, in illustrating the rule that it is no justification for killing because one fancies merely that another has wronged him or is exercising over him some malign influence, said (as quoted in Ray, Med. Jur. 5th ed. § 309) that "if a man had the delusion that his head was made of glass, that would be no excuse for his killing a man; he would know very well that, although his head was made of glass, that was no reason why he should kill another man, and that it was a wrong act, and he would be properly subjected to punishment for that act."

And a considerable number of American cases have expressly adopted the rule that, in case of partial insanity, the existence of an insane delusion does not constitute a defense to crime except when the imaginary facts, if real, would justify or excuse the crime. Thus, in *L.R.A.1917F.*

the following cases it has been held that an insane delusion will not relieve one from criminal responsibility for his acts where the facts upon which it is based would not, if actually existing, excuse the act: *Bolling v. State* (1891) 54 Ark. 588, 16 S. W. 658 (accused believed that the person killed was trying to marry his mother, against her inclinations); *People v. Hubert* (1897) 119 Cal. 216, 63 Am. St. Rep. 72, 51 Pac. 329 (delusion that deceased was putting poison in defendant's food); *Humphreys v. State* (1872) 45 Ga. 190 (accused believed that his wife was unfaithful to him); *State v. Mewherter* (1877) 46 Iowa, 88 (accused believed that deceased, as a physician, had mistreated his wife, and had formed a conspiracy to injure him); *Thurman v. State* (1891) 32 Neb. 224, 49 N. W. 338 (holding that the delusion must be of such a character that, if the conditions and things were such as they were imagined to be by the deluded party, they would justify the act springing therefrom); *State v. Lewis* (1889) 20 Nev. 333, 22 Pac. 241, 8 Am. Crim. Rep. 574 (accused believed that deceased had been hired to kill him); *People v. Taylor* (1893) 138 N. Y. 398, 34 N. E. 275 (mistaken belief on the part of a convict in prison that a fellow convict had frustrated a plan for escape; the court said that "an insane delusion with reference to the conduct and attitude of another cannot excuse the criminal act of taking his life, unless it is of such a character that, if it had been true, it would have rendered the homicide excusable or justifiable"); *Com. v. Smith* (1858) 6 Am. L. Reg. 257 (a homicide case arising in Pennsylvania, holding that an insane delusion or monomania will not excuse a criminal act resulting therefrom unless the act was connected with the delusive sources of thought, and unless the delusion was of such a character that, if true, it would be a good and valid defense for the taking of life); *Com. v. Freeth* (1858) 5 Clark (Pa.) 455 (holding that, in case of a partial delusion, "the act charged against the prisoner must be the direct result of this delusion, and the delusion must have been directly connected with the act, driving him to its commission, and must have been such a delusion which, if it had been a reality instead of an imagination, would have justified him in taking life"); *Sayres v. Com.* (1879) 88 Pa. 291 (following next preceding case). And see *People v. Griffith* (1905) 146 Cal. 339, 80 Pac. 68 (wherein accused entertained the delusion that the assault-

ed person [defendant's wife] had attempted his death by poison, that she had been false to her marital vows, and that, in connection with the poison, his wife, who was of the Catholic faith, was the chosen instrument of the church for his destruction); and *State v. Hockett* (1886) 70 Iowa, 442, 30 N. W. 742 (wherein the accused believed that deceased had had improper relations with his sister). And in the following cases, which involve delusions, except as noted, of such a nature as to induce a person committing a crime to believe in the real existence of facts which were entirely imaginary, but which, if true, would have been a good defense, the courts laid down the rule that an insane delusion relieves a person from responsibility when and only when the fact or state of facts believed in would, if actually existing, have excused the act: *Smith v. State* (1891) 55 Ark. 259, 18 S. W. 237 (defendant labored under the delusion that a conspiracy had been formed to kill him, and that it was necessary to kill deceased to save his own life); *Fouts v. State* (1854) 4 G. Greene (Iowa) 500; *Cunningham v. State* (1879) 56 Miss. 269, 31 Am. Rep. 360 (accused killed in supposed self-defense); *Com. v. Smith* (1858) 6 Am. L. Reg. 257 (a homicide case arising in Pennsylvania, holding that, to apply the English rule to the present case, the following would be true: "If a belief had fastened itself upon the mind of the defendant which to him had become a firm and fixed reality, although in truth but a pure delusion, that Richard Carter [the deceased] entertained the design of taking his life upon the first favorable opportunity, that he had persons employed to watch his movements, to follow him as he passed along the streets and whilst attending to his business, seeking to accomplish his end by stealth and strategy, and that Carter was himself superintending these operations and was here directing the movements of his emissaries, and that it was absolutely necessary that he should destroy the life of Carter in order to save his own life, he would not be guilty"); *Com. v. Freeth* (Pa.) supra; *Com. v. Winnemore* (1867) 1 Brewst. (Pa.) 356; *Taylor v. Com.* (1885) 109 Pa. 262 (rule laid down in *Com. v. Freeth* (Pa.) supra, was restated with approval, but the alleged delusion in question was that the deceased, who was the keeper of the penitentiary in which the accused was a prisoner, was committing a supposed injury by putting medicine in his food); *Com. v. Wireback* (1899) 190 Pa. 138, 70 Am. St. Rep. 625, L.R.A.1917F.

42 Atl. 542 (same rule restated; alleged that defendant killed under the delusion that he was acting in defense of his life); *Com. v. Barner* (1901) 199 Pa. 335, 49 Atl. 60 (same rule restated; delusion was that deceased had had improper relations with defendant's wife). And see *Com. v. Rogers* (1844) 7 Met. (Mass.) 500, 41 Am. Dec. 458 (wherein it was held that a prisoner who killed the warden of the prison was entitled to an acquittal where he acted under a false but sincere belief that the warden had designed to shut him up, and under that pretext destroy his life, and did the killing to prevent it); *Boswell v. State* (1879) 63 Ala. 307, 35 Am. Rep. 20 (in which the rule laid down in *M'Naghten's Case* (1843) 10 Clark & F. 200, 8 Eng. Reprint, 718, 8 Scott, N. R. 595, 1 Car. & K. 130, note, 4 State Tr. N. S. 847, was discussed with seeming approval, but which rule, as announced in this case, was declared to be dicta and incorrect in *Parsons v. State* (1886) 81 Ala. 577, 60 Am. Rep. 193, 2 So. 854, 7 Am. Crim. Rep. 266, which is set out infra); and *People v. Pine* (1848) 2 Barb. (N. Y.) 566 (wherein the court in a homicide case stated the English rule and said: "Applying this principle to the present case: if the prisoner really believed that Mrs. Russell [the deceased] was in the act of committing a great personal injury to him, and supposed that he shot her in self-defense, he would be excusable. But it will be no defense that the supposed Russell or his wife had injured him to any extent, because if it were true, it would be no justification of the act;" but the court also said that "a simple and sound rule may be thus expressed: a man is not responsible for an act when, by reason of involuntary insanity or delusion, he is at the time incapable of perceiving that the act is either wrong or unlawful.") And the English rule has been held applicable although the accused may have appeared able to distinguish right from wrong. See *Boswell v. State* (Ala.) supra.

But the doctrine of *M'Naghten's Case* (Eng.) supra, has been expressly repudiated in a number of well-reasoned American cases. A case of this character is *RYAN v. PEOPLE*, ante, 646, wherein it will be remembered the court pointed out that the English test puts the inquiry upon the basis of the criminality of a like act in a sane person, rather than upon the question of the sanity or insanity of the accused;

it in effect declares a person who may be insane because of delusions accountable to the law for all acts which would be criminal if he were sane, and it would preclude an acquittal on the ground of insanity, no matter how firmly satisfied of the existence of that fact the jury might be, where the supposed facts of the delusion would not, if true, justify the commission of the act. This decision was followed in *Oldham v. People* (1916) 61 Colo. 413, 158 Pac. 148, wherein the accused entertained delusions that deceased was in a combination to persecute and injure him, and in which the giving of an instruction to the effect that an insane delusion, to be a defense, must be a mental delusion connected with the offense charged, and must be such a delusion as, if true, would excuse the crime committed, was held to constitute reversible error. And again in *Parsons v. State* (1886) 81 Ala. 577, 60 Am. Rep. 193, 2 So. 854, 7 Am. Crim. Rep. 266, quoted in *RYAN v. PEOPLE*, the court expressly rejected the rule that, in cases of delusion, the accused must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real, and declared the true rule to be that, in cases of delusional insanity, there is no legal responsibility either where there is no capacity to distinguish between right and wrong, as applied to the particular act, or where, even though there is such a capacity, if, by duress of mental disease, he has so far lost the power to choose between right and wrong as not to avoid doing the act in question, so that his free agency was at the time destroyed, and at the same time the alleged crime was so connected with the delusions in the relation of cause and effect as to have been the product of them solely. And applying the rules so announced, the court reversed a conviction of murder for a killing which was the result of an insane delusion that deceased possessed supernatural powers to inflict, and had inflicted, accused with disease, and had power to take her life, which conviction was based upon the charge to the jury that insane delusions constitute no justification or excuse for crime unless the perpetrator was insanely deluded into the belief of the existence of a fact or state of facts which, if true, would justify or excuse the homicide under the law applicable to sane persons. And in *State v. Keerl* (1904) 29 Mont. 508, 101 Am. St. Rep. 579, 75 Pac. 362, in L.R.A.1917F.

following and quoting with approval from *Parsons v. State* (Ala.) supra, it was expressly stated that instructions following the lines laid down in *M'Naghten's Case* "are radically wrong and should never be given." So, in *State v. Jones* (1871) 50 N. H. 369, 9 Am. Rep. 242, quoted at length in *RYAN v. PEOPLE*, the court, in an extended discussion of the rule as laid down in the *M'Naghten Case*, pointed out "the absurdity as well as the inhumanity of it, and said that the question in each case was whether or not the accused was insane with respect to the act in question, and incapable of entertaining a criminal intent, and that such question was one of fact for the jury. In this case the defense was that the defendant entertained insane delusions as to the marital fidelity of his wife, whom he killed. And in *Merritt v. State* (1898) 39 Tex. Crim. Rep. 70, 45 S. W. 21, 11 Am. Crim. Rep. 518, it was held that a delusion, to relieve from criminal responsibility, need not be confined to the delusive belief of a fact which, if true, would afford a justification, but that, if the delusion was of such a character as to impair the mind of the person possessed thereof to such an extent that he was not able to discern the right or wrong of the particular act he was doing, and was induced to commit such act by the delusion, he would not be a criminal. Here the delusion was that the deceased was the leader of a mob which was seeking defendant's life.

And in *Guiteau's Case* (1882) 10 Fed. 161, affirmed in (1882) 1 Mackey (D. C.) 498, 47 Am. Rep. 247, after expressly referring to the rule established by the *M'Naghten Case* (Eng.) supra, to the effect that a party laboring under a partial delusion, and not in other respects insane, must be considered in the same situation as to criminal responsibility as if the facts in respect to which the delusion exists were real,—questioned same and in effect repudiated it, the trial judge, in addressing the jury, having stated that the rule laid down by the English judges had not been deemed entirely satisfactory, and having directed that the true test of criminal responsibility, where the defense of insanity was interposed, is whether the accused had sufficient use of his reason to understand the nature of the act at the time of its commission, and that it was wrong to commit it, or was deprived of that capacity by mental disease; the question of insane delu-

sion being declared to be important only as it throws light upon the question of knowledge of or capacity to know the right or wrong. In this case the alleged delusion was that President Garfield's death was a "political necessity."

And that a vice exists in the rule that insane delusions can be allowed to prevail in a criminal case only when the imaginary state of facts would, if real, justify or excuse the act, which, as has been pointed out, is that it puts the inquiry upon the basis of the criminality of a like act in a sane person, rather than upon the question of the sanity or insanity of the accused, with exclusive reference to the specific act with which he is charged,—is illustrated by the decisions in a number of cases which, while not expressly referring to the rule, lay down other rules which are incompatible therewith. Thus, the Supreme Court of the United States in *Hotema v. United States* (1902) 186 U. S. 413, 46 L. ed. 1225, 22 Sup. Ct. Rep. 895, has held that a charge that a defendant's belief in witches and in his right to kill them, if the product of a diseased brain, relieves from responsibility for murder, provided his diseased condition was such as to prevent an understanding that the particular act was wrong and in violation of law, and such as to render him amenable to punishment. In reaching this conclusion the court adopted the test of insanity rendering the defendant incapable of forming a criminal intent at the time of the commission of the act, with exclusive reference to such act.

And the same test was applied in *State v. Huting* (1855) 21 Mo. 464, where the accused killed deceased, who had refused to marry him. And so in *State v. Danby* (1864) Houst. Crim. Rep. (Del.) 166, the court charged the jury in a homicide case where the defense was insane delusion, in that defendant believed deceased had been unduly intimate with defendant's wife, that insane delusions consisting in the belief in the existence of imaginary things as facts will exempt a person from responsibility for criminal acts where they utterly deprived the party of his reason in regard to the acts charged, and prevented him from distinguishing between right and wrong in regard to such particular acts; and the defendant was found not guilty, by reason of insanity. Likewise in *State v. Lawrence* (1870) 57 Me. 574, where the defense to a homicide charge was that the accused entertained insane delusions as to the deceased "going back upon him" and refusing to marry him, it was held that the question was whether the delusions were such as to cause the loss of all ability to distinguish between right and wrong and all sense of responsibility for the act in question. And again in *Holland v. State* (1917) — Tex. Crim. Rep. —, 192 S. W. 1070, it was held that one accused of homicide is entitled to a submission to the jury of the issue of insanity where it is alleged and there is an offer to prove that his act was the result of an insane delusion to the effect that deceased had applied to him an opprobrious name. G. J. C.

LOUISIANA SUPREME COURT.

J. H. BARR et al., Trustees, etc., of Payne & Joubert Machine & Foundry Company,
Plffs. in Certiorari,

v.

YOUNGSVILLE SUGAR FACTORY, LIMITED.

(— La. —, 75 So. 805.)

Bankruptcy — contracts — right of trustee.

1. Trustees in bankruptcy may either assume or renounce executory contracts of the

bankrupt, as they deem best for the interest of the estate.

For other cases, see Bankruptcy, III. in Dig. 1-52 N. S.

Same — duty to replace parts of machinery.

2. The contract obligation of a foundry company to replace broken plates of presses sold by it to a sugar planting company cannot be enforced against trustees of the bankrupt estate of the foundry company, when they have not assumed such obligation, and its execution by them would amount to a preferential payment contrary to law.

For other cases, see Bankruptcy, III. in Dig. 1-52 N. S.

Headnotes by LAND, J.

Note. — As to rights of trustee with respect to executory contracts of bankrupt, see annotation following this case, post, 657.
L.R.A.1917F.

(May 14, 1917.)

CERTIORARI to the Court of Appeals for the Parish of Lafayette to review a judgment affirming a judgment of the Dis-

strict Court in favor of defendant in an action brought to recover the purchase price of certain filter press plates sold and delivered by plaintiffs to defendant. Reversed.

The facts are stated in the opinion.

Messrs. Borah, Himel, Bloch, & Borah, for plaintiffs in certiorari:

Trustees in bankruptcy or receivers are not bound to accept property or contracts of the bankrupt that would burden rather than benefit the estate; hence they do not become bound by said contracts merely as a result of being authorized to operate the business.

Collier, Bankr. 10th ed. 1083; 7 C. J. 226, and notes; Dushane v. Beall, 161 U. S. 515, 40 L. ed. 791, 16 Sup. Ct. Rep. 637; Re Scruggs, 205 Fed. 673; Sparhawk v. Yerkes, 142 U. S. 1, 35 L. ed. 915, 12 Sup. Ct. Rep. 104; Re Wisconsin Engine Co. 148 C. C. A. 183, 234 Fed. 281; Re Chambers, 98 Fed. 865; General Electric Co. v. Whitney, 20 C. C. A. 674, 41 U. S. App. 165, 74 Fed. 664; United States Electric Securities Co. v. Louisiana Electric Light Co. 71 Fed. 615; Re Frazin, 33 L.R.A. (N.S.) 745, 105 C. C. A. 320, 183 Fed. 28; United States Trust Co. v. Wabash Western R. Co. 150 U. S. 287, 37 L. ed. 1085, 14 Sup. Ct. Rep. 86; 34 Cyc. 258; Peck v. Southwestern Lumber & Exporting Co. 131 La. 178, 59 So. 113.

Under the Bankruptcy Act, only mutual debts and those actually due and owing at the time of bankruptcy can be set off.

Dunbar v. Dunbar, 190 U. S. 340, 47 L. ed. 1085, 23 Sup. Ct. Rep. 757; Zavalo v. Reeves, 227 U. S. 625, 57 L. ed. 676, 33 Sup. Ct. Rep. 365, Ann. Cas. 1914D, 664.

Before a claim for damages can be proved or allowed in bankruptcy, it must be reduced to judgment.

Dunbar v. Dunbar, supra; Re Pindel, 137 C. C. A. 158, 221 Fed. 343; Re Erie Lumber Co. 150 Fed. 829.

If acquired after bankruptcy, or if against the trustee, debts cannot be compensated or set off.

Kennedy v. New Orleans Sav. Inst. 36 La. Ann. 14.

Compensation rests essentially in good faith; and where a sale is made for cash, the purchaser, after getting possession, will not be permitted to compensate the price against the bankrupt's estate.

Ibid.; Guilbeau Bros. v. Melancon, 28 La. Ann. 629; Mutual Nat. Bank v. Keenan, 35 La. Ann. 1129.

Any obligation incurred with the trustees cannot be considered as an obligation contracted with the bankrupt estate, and cannot be used as an offset of obligations between the same creditor and the bankrupt.

Farmers' Loan & T. Co. v. Northern P. L.R.A. 1917F.

R. Co. 58 Fed. 257; 7 C. J. p. 144; 5 Thomp. Corp. § 6371.

One who urges a special defense to avoid an obligation otherwise admittedly due assumes the burden of proving that defense with legal certainty.

Patton v. Pickles, 50 La. Ann. 857, 24 So. 290.

Messrs. Burke & Smith, for defendant in certiorari:

Where the trustees lay claim to property, they are bound by the terms of the bankrupt's sale or conveyance of it, and all covenants, contracts, or acts in relation thereto, as construed by state law, no matter how onerous, unprofitable, or otherwise they may be, save and except always as may be in fraud of creditor's rights or in contravention of the statutes.

Remington, Bankr. ¶ 1145.

The right of offset and counterclaim is as valid against the trustee as it would have been against the debtor had it not gone into bankruptcy, and the trustee takes choses in action and other property subject thereto.

Remington, Bankr. ¶ 1170.

If the claim which the receivers raise against the defendant is one which flows directly out of the claim which the defendant had against the bankrupt for making good defects in machinery sold, his claim against the bankrupt passes on to the receiver and stands as a counterclaim.

Peck v. Southwestern Lumber & Exporting Co. 131 La. 177, 59 So. 113.

While it may be true that trustees have the right to accept or reject contracts, this does not apply to contracts which are being executed.

Remington, Bankr. ¶¶ 451, 1145, 1147.

Land, J., delivered the opinion of the court:

The plaintiffs, trustees in bankruptcy of Payne & Joubert Machine & Foundry Company, sued the defendant to recover the sum of \$1,054.86, representing the purchase price of certain filter press plates sold and delivered to the defendant, who in its answer admitted that it ordered and received the plates from the plaintiff trustees, but averred that the same were furnished to take the place of certain broken plates, purchased by the defendant from said foundry company before it went into bankruptcy, in compliance with the agreement between the parties.

Defendant further averred that the temporary receivers of the bankrupt estate were authorized and empowered to continue and carry on the business as conducted by the bankrupt firm herein until the further orders of the court, if in their judgment it was in the interest of the estate to do so, and,

in the conduct of said business, to make such contracts and incur such expenses as in their discretion may be necessary.

The original petition of the plaintiffs alleges that the temporary receivers were ordered to continue the business as a going concern, and that plaintiffs as trustees were also ordered by the court to continue to operate the business as a going concern, and, in the usual course of business, manufactured, sold, and delivered the said plates to the defendant.

The petition for the appointment of the temporary receivers represented to the court that the bankrupt had on hand a large number of contracts aggregating about \$200,000, and that it was advisable that said contracts be carried to completion, not only for the large profit to be earned, but to utilize the large stock of material on hand. Defendant avers that, prior to the bankruptcy proceedings, the foundry company agreed, as part of the contract for the purchase of an entire filtering press, to replace all defective plates with sound plates, without cost to the defendant, and that, after the foundry company had gone into bankruptcy, the same trouble occurring, the defendant made requisition for the necessary plates, which were furnished.

The court of appeal held that said agreement was proven, and that the evidence made it "reasonably certain" that the obligation to replace the defective plates was "in effect assumed by the trustees." The opinion of the court of appeal concludes as follows: "The obligation so contracted was certainly not destroyed by the appointment of the receivers, and remained a valid obligation of the bankrupt estate, as interpreted under the state laws. *Peck v. Southwestern Lumber & Exporting Co.* 131 La. 177, 59 So. 113. In this case the trustees merely carried out the obligation of the original contract which they assumed to discharge under the conditions primarily imposed on the bankrupt. The agreement between the parties shows very clearly that the defendant company was not to be charged for the new plates, the price of which is demanded in these proceedings, and the demand of the trustees was therefore properly rejected."

The first assignment of error made by the plaintiffs is to the effect that the averments of the answer were insufficient to warrant the introduction of evidence that the trustees had in fact assumed the alleged contract. We think that the averments of the answer, and especially the one that the plates were furnished "in accordance with the contract," sufficiently specific to warrant the introduction of the evidence.

Another error of law assigned is the alleged ruling of the court of appeal to the L.R.A.1917F.

effect that the authorization given the receivers and trustees to conduct the business as a going concern, "if in their judgment it is to the interest of the estate to do so," bound them to assume all the contracts, defaults, and obligations of the bankrupt. The court of appeal found from the evidence that the contract in question "was in effect assumed by the trustees," and, as we read the opinion, did not hold that the permit *per se* to continue the business bound the trustees to assume all the contracts and obligations of the bankrupt. The decision of the case therefore hinges on the question of fact whether the trustees assumed the obligation of the bankrupt to replace all broken press plates previously furnished to the defendant. There is no evidence that the trustees ever agreed to do so; but, on the contrary, the invoice and correspondence show that they sold for cash and insisted on payment of the price of plates manufactured by them. The trustees found at their New Orleans plant two valves which had been returned by the defendant before the bankruptcy, and they took these valves and gave the defendant credit on his account with the estate.

In March, 1910, the defendant purchased from the foundry company two Johnson filter presses, and a large quantity of other sugar house machinery, for the price of \$12,683, payable part cash and balance on terms of credit; the last note maturing on December 15, 1910. Subsequently there was a parol agreement between the parties that the foundry company would replace all broken plates free of cost to the defendant. Before the defendant became a bankrupt in June, 1913, a considerable number of broken plates were replaced by the foundry company.

In the latter part of the year 1913, the defendant ordered seventy-six filter press plates from the trustees' factory, which were furnished and delivered, with a bill for \$1,054.96, payable in cash or within thirty days. It was not until November 26, 1914, that the defendant notified the plaintiffs by letter that it would not pay the account, as it considered the trustees bound to carry out the contracts of the bankrupt. There is not a word in the letter indicating that the trustees had agreed to furnish said plates free of charge. The receivers were authorized to make such contracts and incur such expenses as in their discretion might be necessary. The purpose of the authorization was to complete contracts "on hand" promising a large profit, and to utilize the large stock of materials "on hand." It is obvious that the furnishing of plates worth \$1,054.96 to the defendant, free of cost, was never contemplated by the court, receivers, or trustees, and would have been clearly contrary to the

laws governing the administration of bankrupt estates. The defendant was at best an ordinary creditor holding a claim in the nature of warranty against the bankrupt estate, and as such had no legal right to be paid by preference.

The petition of the receivers for authorization to carry on the business of the bankrupt shows that they intended (to use their words) "to complete the contracts on hand and such as may be secured, pending their administration." The order of court granting the authorization left the continuing and carrying on of the business and the making of contracts to the discretion of the receivers. Defendant's contention that this order of court bound the receivers to assume and discharge the obligations of the bankrupt created before the adjudication in bankruptcy is without legal merit.

The rule is that "the trustee may either assume or renounce executory contracts of the bankrupt as he deems best for the in-

terest of the estate." 7 C. J. p. 226; Collier, Bankr. 10th ed. p. 1033.

Defendant's claim grew out of a contract made and executed in 1910, and was a demand in warranty. The satisfaction of that demand by the trustees would have been merely the payment of an obligation of the bankrupt out of the assets of the estate to the prejudice of creditors.

It is therefore ordered, adjudged, and decreed that the judgment of the Court of Appeal and the judgment of the District Court herein rendered be and are annulled, avoided, and reversed; and it is now ordered and decreed that the plaintiffs J. H. Barr et al., trustees, do have and recover of the defendant, the Youngsville Sugar Company, Limited, the full sum of \$1,054.96, with 5 per cent per annum interest thereon from January 1, 1914, until paid, and for all costs of suit in the three courts.

Petition for rehearing denied June 11, 1917.

Annotation—Rights of trustee with respect to executory contracts of bankrupt.

It is the purpose of the present annotation to treat the question of the general rights of a trustee in bankruptcy with respect to the executory contracts of the bankrupt. Many specific phases of the general question of the effect of bankruptcy on contracts have already been covered in previous notes, among the more analogous of which are the following: Vesting of title to leasehold in lessee's trustee in bankruptcy as dependent upon acceptance by trustee—*Re Frazin*, 33 L.R.A.(N.S.) 745; Liability for rent of premises occupied by receiver or assignee for creditors—*Link Belt Mach. Co. v. Hughes*, 59 L.R.A. 673; Effect of re-entry by landlord after bankruptcy of tenant upon latter's liability for subsequent rent—*Louis K. Liggett Co. v. Wilson*, L.R.A.1917A, 205; Provability in bankruptcy of claim under a covenant indemnifying against loss of rent in event of default—*Re Roth*, 31 L.R.A.(N.S.) 270; Damages for anticipatory breach of contract as provable claim—*Central Trust Co. v. Chicago Auditorium Asso.* L.R.A.1917B, 580; Promise by bankrupt to pay a fixed sum conditional upon exercise of an option by promisee, the time for which had not expired at the time of bankruptcy, as basis of provable claim—*Re Neff*, 28 L.R.A.(N.S.) 349; Effect of bankruptcy of contractor on right of laborer or materialman to enforce L.R.A.1917F.

mechanics' lien against the property improved—*Pike Bros. Lumber Co. v. Mitchell*, 26 L.R.A.(N.S.) 409; Effect of bankruptcy of principal contractor upon lien rights of subcontractors and materialmen—*Eberle v. Drennan*, 51 L.R.A.(N.S.) 68, supplemented in L.R.A.1916F, 113; Voidability of transfers under executory contracts antedating the four months period—*Godwin v. Murchison Nat. Bank*, 17 L.R.A.(N.S.) 935; and *Sexton v. Kessler & Co.* 40 L.R.A.(N.S.) 639; Delivery of property on eve of bankruptcy to one holding executory contract therefor made within the four months period, as a preference—*Mills v. Virginia-Carolina Lumber Co.* 21 L.R.A.(N.S.) 901.

Taking up the general question of the rights of a trustee in executory contracts of the bankrupt, the rule is that a trustee in bankruptcy is not bound to carry out an executory contract of the bankrupt which in his judgment is of an onerous and unprofitable character and would burden instead of benefit the estate, and that he can elect whether he will reject any such contract.¹ And this even though the trustees are au-

¹ *Re Sterne & Levi* (1911) 26 Am. Bankr. Rep. (Fed.) 535; *Watson v. Merrill* (1905) 69 L.R.A. 719, 89 C. C. A. 185, 136 Fed. 359, 14 Am. Bankr. Rep. 453; *Re Imperial Brewing Co.* (1906) 143 Fed. 579, 16 Am. Bankr. Rep. 110, quoting *Watson v. Merrill* (Fed.)

thorized to conduct the bankrupt's business as a going concern "if in their judgment it is to the interest of the estate to do so," as such authorization does not bind them to assume all the contracts and obligations of the bankrupt.² In England, by express provision of § 55 of the Bankruptcy Act of 1883 (46 & 47 Vict. chap. 52), as amended by § 13 of the Act of 1890 (53 & 54 Vict. chap. 71), a trustee may disclaim by written statement "unprofitable contracts" which have been entered into by the bankrupt.³

And, conversely, where the contract appears to be to the advantage of the estate, the trustee may elect to assume

the same and thereby secure any benefit which might accrue therefrom,⁴ especially by and with the consent of the court appointing him,⁵ unless the contract was invalid,⁶ or depended upon the future personal services or conduct of the bankrupt, which the trustee could not control.⁷

And the rule is that the election must be made by the trustee within a reasonable time after he assumes office,⁸ although under the English Act of 1883, § 55, as amended by Act of 1890, § 13, the trustee by express provision has twelve months in which to disclaim by written statement unprofitable contracts,⁹ which period of twelve months

supra; *Atchison, T. & S. F. R. Co. v. Hurley* (1907) 82 C. C. A. 453, 153 Fed. 503, 18 Am. Bankr. Rep. 396, affirmed in (1909) 213 U. S. 126, 53 L. ed. 729, 29 Sup. Ct. Rep. 466; *Re Grainger* (1908) 87 C. C. A. 225, 160 Fed. 69, 20 Am. Bankr. Rep. 166; *Re Big Cahaba Coal Co.* (1911) 190 Fed. 900, 26 Am. Bankr. Rep. 910; *Re Wisconsin Engine Co.* (1916) 148 C. C. A. 183, 234 Fed. 281; *White v. Griffing* (1877) 44 Conn. 437; *BARR v. YOUNGVILLE SUGAR FACTORY*, ante, 654; *Streeter v. Sumner* (1855) 31 N. H. 542; *Gibson v. Carruthers* (1841) 8 Mees. & W. 321, 151 Eng. Reprint, 1061, 11 L. J. Exch. N. S. 138. But in connection with the foregoing cases, see *Re Stewart* (1912) 193 Fed. 791, 27 Am. Bankr. Rep. 529, wherein it was said that the trustee in bankruptcy "is bound to carry out the valid contracts of the bankrupt made in good faith and not in fraud of creditors."

² *BARR v. YOUNGVILLE SUGAR FACTORY*.

³ See *Re Bastable* [1901] 2 K. B. (Eng.) 518, 70 L. J. K. B. N. S. 784, 84 L. T. N. S. 825, 49 Week. Rep. 561, 17 Times L. R. 560, 8 Manson, 239, wherein the pertinent provisions of the statute are set out in full, holding that, while the provisions were intended to enable the trustee to get rid of an onerous or burdensome contract, they did not enable him to disclaim a contract merely because the bankrupt's estate, according to the trustee's statement, would be "better off" if the contract were not carried out; and *Re Cohen* [1905] 2 K. B. (Eng.) 704, 74 L. J. K. B. N. S. 864, 54 Week. Rep. 83, 21 Times L. R. 725, 12 Manson, 358. And see also *Re Page* (1884) L. R. 14 Q. B. Div. (Eng.) 401, 33 Week. Rep. 825, 1 Morrell, 287; and *Re Maughan* (1885) L. R. 14 Q. B. Div. (Eng.) 956, 54 L. J. Q. B. N. S. 128, 33 Week. Rep. 308, 2 Morrell, 25.

⁴ *Hurley v. Atchison, T. & S. F. R. Co.* (1909) 213 U. S. 126, 53 L. ed. 729, 29 Sup. Ct. Rep. 466, affirming (1907) 82 C. C. A. 453, 153 Fed. 503, 18 Am. Bankr. Rep. 396; *Re Swift* (1901) 50 C. C. A. 264, 112 Fed. 315, 7 Am. Bankr. Rep. 374; *Watson v. Merrill* (1905) 69 L.R.A. 719, 69 C. C. A. 185, 136 Fed. 359, 14 Am. Bankr. Rep. 453; *Re Imperial Brewing Co.* (1906) 143 Fed. 579, L.R.A.1917F.

16 Am. Bankr. Rep. 110; *Re Neff* (1907) 28 L.R.A.(N.S.) 349, 84 C. C. A. 561, 157 Fed. 57; *Corbett v. Riddle* (1913) 126 C. C. A. 535, 209 Fed. 811, 31 Am. Bankr. Rep. 330; *Rea v. Richards* (1876) 56 Ala. 396; *Duffield v. Dosh* (1904) 124 Iowa, 286, 99 N. W. 1074; *Wilkins v. Tourtellott* (1882) 28 Kan. 825 (contract affecting bankrupt's property made after the adjudication in bankruptcy); *BARR v. YOUNGVILLE SUGAR FACTORY*; *Ford v. State Bd. of Edu.* (1911) 166 Mich. 658, 132 N. W. 467, 27 Am. Bankr. Rep. 236; *Gibson v. Carruthers* (1841) 8 Mees. & W. 321, 151 Eng. Reprint, 1061, 11 L. J. Exch. N. S. 138; *Whitmore v. Gilmore* (1844) 12 Mees. & W. 808, 152 Eng. Reprint, 1426, 13 L. J. Exch. N. S. 201, 8 Jur. 673; *Valpy v. Oakeley* (1851) 16 Q. B. 941, 117 Eng. Reprint, 1142, 20 L. J. Q. B. N. S. 380, 16 Jur. 38, 21 Eng. Rul. Cas. 39; *Butler v. Carver* (1818) 2 Starkie (Eng.) 433.

⁵ *Re Niagara Radiator Co.* (1908) 164 Fed. 102, 21 Am. Bankr. Rep. 55; *Davis v. New York* (1902) 75 App. Div. 518, 78 N. Y. Supp. 336.

⁶ See *Thomas v. Birmingham R. Light & P. Co.* (1912) 195 Fed. 340.

⁷ *Streeter v. Sumner* (1855) 31 N. H. 542; *Gibson v. Carruthers* (1841) 8 Mees. & W. 321, 151 Eng. Reprint, 1061, 11 L. J. Exch. N. S. 138, per Parke, B.

⁸ *Re Sterne & Levi* (1911) 26 Am. Bankr. Rep. (Fed.) 535; *Re Swift* (1901) 50 C. C. A. 264, 112 Fed. 315, 7 Am. Bankr. Rep. 374; *Brown v. Rushton* (1916) 223 Mass. 80, 111 N. E. 884, holding that a delay from March until November, or even from July until November, was unreasonable.

⁹ See *Re Bastable* [1901] 2 K. B. (Eng.) 518, 70 L. J. K. B. N. S. 784, 84 L. T. N. S. 825, 49 Week. Rep. 561, 17 Times L. R. 560, 8 Manson, 239, where the provisions of the act are set out; *Re Cohen* [1905] 2 K. B. (Eng.) 704, 74 L. J. K. B. N. S. 864, 54 Week. Rep. 83, 21 Times L. R. 725, 12 Manson, 358; *Re Maughan* (1885) L. R. 14 Q. B. Div. (Eng.) 956, 54 L. J. Q. B. N. S. 128, 33 Week. Rep. 308, 2 Morrell, 25.

And see *Re Price* (1884) L. R. 13 Q. B. Div. (Eng.) 466, 1 Morrell, 153, 33 Week. Rep. 139, wherein it was held that, although

for disclaimer runs from the date of the certificate of appointment of the trustee, and not from the date of the adjudication in bankruptcy.¹⁰ But before election the trustees are in duty bound to make inquiry and ascertain the true nature, character, and conditions of the contract.¹¹ However, in order to assume an executory contract of the bankrupt, it is not necessary to give notice of an election to adopt within a reasonable time, as it is sufficient merely to fulfil the bankrupt's part of the engagement when the proper time arrives.¹²

If a trustee does elect to assume an executory contract of his bankrupt, he is entitled to all the rights thereunder that the bankrupt would have been,¹³

and also is required to take it cum onere as the bankrupt enjoyed it, subject to all its provisions and conditions.¹⁴ In fact, a trustee cannot claim the beneficial provisions of a contract and reject the onerous ones, and if he fails to perform its obligations his rights are the same as those of the bankrupt.¹⁵ Of course, the trustee is not liable on an executory contract unless it is assumed by him.¹⁶ However, the injured party is entitled to such legal remedies for the breach as the case affords.¹⁷ And where the trustee has rejected a contract as burdensome, he may reclaim property which has already been furnished under the contract, but the title to which under the terms of the contract has not yet passed.¹⁸

§ 55 of the Act of 1883 gave the trustee three months (period extended by amendment of 1890 to twelve months) in which to elect, the court, after the expiration thereof and upon the furnishing of good reasons for the indulgence, could extend the time, provided the rights of other parties would not be prejudiced thereby. *Re Baker* (1891) 8 *Morrell* (Eng.) 116, as set out in 2 *Laws of England* (Halsbury) 192, is to the same effect.

¹⁰ *Re Cohen* [1905] 2 K. B. (Eng.) 704, 74 L. J. K. B. N. S. 864, 54 *Week. Rep.* 83, 21 *Times L. R.* 725, 12 *Manson*, 358.

¹¹ *Atchison, T. & S. F. R. Co. v. Hurley* (1907) 82 C. C. A. 453, 153 *Fed.* 510, 18 *Am. Bankr. Rep.* 396, affirmed in (1909) 213 U. S. 126, 53 L. ed. 729, 29 *Sup. Ct. Rep.* 466. And see *White v. Griffing* (1877) 44 *Conn.* 437.

¹² *Gibson v. Carruthers* (Eng.) *supra*.

¹³ *Ford v. State Bd. of Edu.* (1911) 166 *Mich.* 658, 132 N. W. 467, 27 *Am. Bankr. Rep.* 236; *Davis v. New York* (1902) 75 *App. Div.* 518, 78 N. Y. *Supp.* 336; *Valpy v. Oakeley* (1851) 16 Q. B. 941, 117 *Eng. Rep.* 1142, 20 L. J. Q. B. N. S. 380, 16 *Jur.* 38, 21 *Eng. Rul. Cas.* 39.

¹⁴ *Atchison, T. & S. F. R. Co. v. Hurley* (Fed.) *supra*, holding that where trustees in bankruptcy assumed an executory contract of the bankrupt, they took it subject to all the equities between the original parties, so that they were bound by any valid modifications of the original contract made before adjudication, whether known or unknown to them; *Mankins v. Forward Movement Syndicate* (1915) 28 *Cal. App.* 285, 152 *Pac.* 313, holding that no principle. L.R.A.1917F.

ciple of law or equity clothes a trustee with any greater right than the bankrupt himself had. And see *Valpy v. Oakeley* (Eng.) *supra*.

¹⁵ In *Re Nicholas* (1903) 122 *Fed.* 299, 10 *Am. Bankr. Rep.* 291, where the contract contained a provision for termination by a specified mode, "but it was not terminated in this way," but by bankruptcy and the neglect and failure of both the bankrupt and the trustee to perform the obligations, it was held that the trustee was not entitled to the benefits of any provisions therein operating in the bankrupt's favor without assuming the obligations imposed by the same, the court saying that "the trustee in bankruptcy, on his appointment, took title to all the property on hand, subject to any rights of the appellant; but he took that title charged with all the liens, encumbrances, and obligations existing against it, as they would have existed had the property remained in the hands of the bankrupt, and he took no other or greater interest in the property, and no other or greater rights under the contract, than the bankrupt himself had."

¹⁶ *Re Sterne & Levi* (1911) 26 *Am. Bankr. Rep.* (Fed.) 535; *BARR v. YOUNGSVILLE SUGAR FACTORY*, ante, 654.

¹⁷ See *Atchison, T. & S. F. R. Co. v. Hurley* (1907) 82 C. C. A. 453, 153 *Fed.* 503, 18 *Am. Bankr. Rep.* 396, affirmed in (1909) 213 U. S. 126, 53 L. ed. 729, 29 *Sup. Ct. Rep.* 466.

¹⁸ *Re Big Cahaba Coal Co.* (1911) 190 *Fed.* 900, 26 *Am. Bankr. Rep.* 910.

G. J. C.

MISSOURI SUPREME COURT.
(Division No. 2.)

W. ZOLLIE JONES, Respt.,
v.
CLIFFORD PATTERSON, Appt.

(— Mo. —, 195 S. W. 1004.)

Charity — for missionary purposes — validity.

1. A trust for missionary purposes to be applied in the name of the Saviour for the salvation of souls cannot be enforced because of indefiniteness.

For other cases, see Charities, I. d., in Dig. 1-52 N. S.

Descent and distribution — invalid trust.

2. If a devise in trust is invalid because of indefiniteness the property descends to the heirs at law.

For other cases, see Wills, III. f., in Dig. 1-52 N. S.

(May 29, 1917.)

APPEAL by defendant from a judgment of the Circuit Court for Platte County in plaintiff's favor in an action brought to quiet title to certain land. Affirmed.

The facts are stated in the opinion.

Messrs. Minor Moore, Norton B. Anderson, and George W. Day, for appellant:

Charitable trusts are recognized, enforced, and protected by the courts of chancery of this state as a part of the general jurisdiction, not based upon—nor does it need the support of—the statute 43d Elizabeth; nor is it dependent upon any prerogative power, but it is inherent in a court of chancery.

Chambers v. St. Louis, 29 Mo. 543; Academy of Visitation v. Clemens, 50 Mo. 167; Howe v. Wilson, 91 Mo. 45, 60 Am. Rep. 226, 3 S. W. 390; Powell v. Hatch, 100 Mo. 592, 14 S. W. 49; Women's Christian Assn. v. Kansas City, 147 Mo. 103, 48 S. W. 960; Goode v. McPherson, 51 Mo. 126; Schmidt v. Hess, 60 Mo. 591; Missouri Historical Soc. v. Academy of Science, 94 Mo. 459, 8 S. W. 346; Barkley v. Donnelly, 112 Mo. 561, 19 S. W. 305; Lackland v. Walker, 151 Mo. 242, 52 S. W. 414.

Where the general objects of the bequest are pointed out, or if the testator has fixed the means of doing so by the appointment of trustees with the power in them, then the gift must be treated as sufficiently def-

inite for judicial cognizance, and will be carried into effect.

Howe v. Wilson, 91 Mo. 52, 60 Am. Rep. 226, 3 S. W. 390.

A charity is a gift for a public use, as a gift in aid of the poor, of learning, of religion, or of a humane object.

Kain v. Gibboney, 101 U. S. 362, 25 L. ed. 813.

In general, a gift of property to be lawfully applied for an indefinite number of persons, by bringing them under the influence of religion, is prima facie charitable in the legal sense.

Turner v. Ogden, 1 Cox, Ch. Cas. 316, 20 Eng. Reprint, 1183.

No object is more clearly charitable in the sense of the law than the advancement of religion and education.

6 Cyc. 913; Fairbanks v. Lamson, 99 Mass. 533.

The provisions of the will in the case at bar being sufficiently clear according to the accepted meaning of the words used, such a charitable use as is therein created has always received favorable consideration from our courts.

Chambers v. St. Louis, 29 Mo. 543; Academy of Visitation v. Clemens, 50 Mo. 167; Schmidt v. Hess, 60 Mo. 591; Howe v. Wilson, 91 Mo. 45, 60 Am. Rep. 226, 3 S. W. 390; Missouri Historical Soc. v. Academy of Science, 94 Mo. 459, 8 S. W. 346; Powell v. Hatch, 100 Mo. 592, 14 S. W. 49; Barkley v. Donnelly, 112 Mo. 561, 19 S. W. 305; Sappington Case, 123 Mo. 32, 27 S. W. 356; Lackland v. Walker, 151 Mo. 210, 52 S. W. 414; Hadley v. Forsee, 203 Mo. 426, 14 L.R.A.(N.S.) 49, 101 S. W. 59; Strother v. Barrow, 246 Mo. 250, 151 S. W. 960.

Messrs. Francis M. Wilson and Roy D. Williams, for respondent:

The language, "for missionary purposes in whatever field he [defendant] thinks best, so it is done in the name of my dear Saviour, and for the salvation of souls," is too indefinite in its purposes and objects to be enforceable as a legal and valid trust.

Dulany v. Middleton, 72 Md. 67, 19 Atl. 146; Reeves v. Reeves, 5 Lea, 650; Carpenter v. Miller, 3 W. Va. 174, 100 Am. Dec. 744; Bridges v. Pleasants, 39 N. C. (4 Ired. Eq.) 26, 44 Am. Dec. 94; White v. Fisk, 22 Conn. 31; Owens v. Missionary Soc. 14 N. Y. 380, 67 Am. Dec. 160; Fifield v. Van Wyck, 94 Va. 557, 64 Am. St. Rep. 756, 27 S. E. 446; Schmucker v. Reel, 61 Mo. 596; Jones v.

Note.—The enforcement of a general bequest for charity or religion is treated in the notes to Hadley v. Forsee, 14 L.R.A.(N.S.) 49, and Buchanan v. Kennard, 37 L.R.A.(N.S.) 993; and see later cases in this series, Re MacDowell, L.R.A.1916E, 1246; American Colonization Soc. v. Soule, L.R.A.1917F.

by, L.R.A.1917C, 937; Bills v. Pease, L.R.A. 1917D, 1060; and Gibson v. Frye Institute, L.R.A.1917D, 1062. The certainty of purpose required in such a bequest is treated specifically at pages 84 et seq. of the earlier note and pages 1001 et seq. of the later note.

Jones, 223 Mo. 450, 25 L.R.A.(N.S.) 424, 123 S. W. 29; 2 Perry, Trusts, § 719; Howe v. Wilson, 91 Mo. 50, 60 Am. Rep. 226, 3 S. W. 390; Hadley v. Forsee, 203 Mo. 418, 14 L.R.A.(N.S.) 49, 101 S. W. 59; Methodist Episcopal Church, South v. May, 201 Mo. 360, 99 S. W. 1093; Moran v. Moran, 104 Iowa, 216, 39 L.R.A. 204, 65 Am. St. Rep. 443, 73 N. W. 620; Lepage v. McNamara, 5 Iowa, 124; Grimes v. Harmon, 35 Ind. 198, 9 Am. Rep. 691; Coleman v. O'Leary, 114 Ky. 388, 70 S. W. 1068; Spalding v. St. Joseph's Industrial School, 107 Ky. 382, 54 S. W. 200; McHugh v. McCole, 97 Wis. 166, 40 L.R.A. 724, 65 Am. St. Rep. 106, 72 N. W. 631; Re Seymour, 67 Misc. 347, 124 N. Y. Supp. 637; Stoepel v. Satterthwaite, 162 Mich. 457, 127 N. W. 673; Re Robinson, 203 N. Y. 380, 37 L.R.A.(N.S.) 1023, 96 N. E. 925; Re Compton, 72 Misc. 289, 131 N. Y. Supp. 183; Arnett v. Fairmont Trust Co. 70 W. Va. 296, 73 S. E. 930.

Walker, P. J., delivered the opinion of the court:

This is an action to quiet title under § 2535, Rev. Stat. 1909. The property in controversy consists of 160 acres of land in Platte county. A trial before the circuit court of that county resulted in a judgment for the plaintiff, from which the defendant has appealed.

The plaintiff is the sole heir at law of Fannie R. Lytle, who died testate in Los Angeles, California, in June, 1911, seised in fee of the land in question. The defendant is the nephew and coexecutor with the husband of testatrix. The terms of the will of Mrs. Lytle, so far as concerns the matter at issue, are as follows: "I, Fannie R. Lytle, hereby make my last will and testament. I give all my property which I now possess (both real and personal) in the state of California, Los Angeles county, and also the rent of my farm, consisting of 160 acres of land in Platte county, Missouri, to my husband during his lifetime; he is to use the income off of his property for his own use and benefit, and at his death I want it placed in the hands of Clifford Patterson (my nephew) to be used for missionary purposes in whatever field he thinks best to use it, so it is done in the name of my dear Saviour and for the salvation of souls."

The defendant claims title to the land under the will in trust for the purpose therein set forth. The plaintiff, on the contrary, contends on account of the indefinite nature of the language employed that no valid trust was created, and as a consequence that he is entitled to the land by descent as the heir of his mother. The determination of the title to his land, so far as the parties L.R.A.1917F.

hereto are concerned, is of course subject to the life estate of testatrix's husband, concerning the validity of which devise no question is raised. The validity of that portion of the will declaratory of the desire of the testatrix as to the disposition of her land in Missouri at the death of her husband is therefore the matter in issue.

On account of the frequency of the creation of charitable trusts, there is no dearth of legal literature here and elsewhere on this subject. The philanthropic spirit manifested in this disposition of property prompts the courts to sustain same wherever the devise or bequest is of such a nature as to conform to well-established precedents liberally construed. Hadley v. Forsee, 203 Mo. loc. cit. 426, 14 L.R.A.(N.S.) 49, 101 S. W. 59. An essential requisite to the validity of such a trust as is here under consideration is that it be clear, definite, and certain, by which is meant that the words of creation announce a definite subject and a certain object, and that the terms of the trust be sufficiently declared. Jones v. Jones, 223 Mo. loc. cit. 450, 25 L.R.A.(N.S.) 424, 123 S. W. 29. These measures of sufficiency appearing in the terms of the instrument, courts will not concern themselves with the wisdom or propriety of the trust, or the character of the beneficiary.

The words, "missionary purposes" employed by the testatrix in the creation of this trust constitute the subject of same, the object, as the context discloses, being the propagation of religion, limited in this instance to the Christian religion by a familiar reference to its founder, and the generally accepted doctrine as to his mission. But by missionary purposes nothing more is meant than the propagation of religion. Hence the subject and the object of the trust are synonymous and the definition of one necessarily includes that of the other. This fact, however, need not militate against the validity of the trust if the creator's purpose may from the language employed be definitely determined, or in other words, if the trust has been sufficiently declared. By this sufficiency of declaration is meant the use of such words as will enable a court of equity to enforce the performance of the duty imposed on the trustee. The reason for this limitation was clearly expressed by the English high court of chancery in the beginning of the last century in the case of Morice v. Durham, 9 Ves. Jr. l. c. 404, 32 Eng. Reprint, 658, where the master of the rolls, speaking for the court, said: "There can be no trust over the exercise of which this court will not assume a control, for an uncontrollable power of disposition would be ownership, and not trust."

The fact that the interest may be generally expressed will not necessarily cause the trust to fail on account of the uncertainty of the object (*Sappington v. Sappington School Fund Trustees*, 123 Mo. 32, 27 S. W. 356; *First Baptist Church v. Roberson*, 71 Mo. 326), if the particular mode of application may be rendered susceptible of direction by a court of equity (*Morice v. Durham*, supra; *Brennan v. Winkler*, 37 S. C. 457, 16 S. E. 190; *Webster v. Morris*, 66 Wis. 366, 57 Am. Rep. 278, 28 N. W. 353). Notwithstanding the permissibility of a general declaration, if the charity does not by its own terms fix itself on a well-defined object or is not susceptible of such interpretation by the courts, but is general and indefinite, it must fail. *Hadley v. Forsee*, supra; *Howe v. Wilson*, 91 Mo. 45, 60 Am. Rep. 226, 3 S. W. 390; *Fairfield v. Lawson*, 50 Conn. 501, 47 Am. Rep. 669; *Hunt v. Fowler*, 121 Ill. 269, 12 N. E. 331, 17 N. E. 491; *Gumble v. Pfugger*, 62 How. Pr. 118.

If a trust was created, therefore, in the instant case, the language of the testatrix will, under the rule above announced, enable it to be so determined. Without repeating her language, it may be said that the purpose sought to be effected was the propagation of the Christian religion, the resultant effect, as declared by the testatrix, being the salvation of souls. Certainly no more comprehensive words could have been used. It is true when we speak of the Christian religion we mean usually that particular form of belief to which we have given our allegiance, just as when we say, "All the people have gone to the seashore," or, "Everybody obeys the law," we mean, and are so understood, indifferent as we may be intellectually to caste or class distinctions, to include only our associates, or those with whom we come in daily contact. This limitation, however, will not be permitted in the interpretation of an instrument of the solemnity of a will. When the testatrix attempted to confer the power on the trustee to use the income of her property, we should be enabled from the terms employed to determine what particular form of the Christian religion was intended to be propagated or advanced. It is in no wise intimated whether one or the other of the most general classifications that have been made is meant, to wit, the Arminian or Calvinistic, or if under the more limited classification the activities of the trustee were to be exercised in behalf of the Catholic or Protestant faith or one of the multiform other subdivisions of the followers of Christ. The scope of the field in which the trustee is intended to exercise this charity is as unlimited as human

thought when applied to the determination of what constitutes a belief in the Christian religion. Thus given free reign in the exercise of his powers, no court could determine whether or not he was abusing his trust, or, in other words, he would be free from judicial supervision. Under such circumstances it cannot be reasonably concluded that the trust created is of such a nature as to enable it to be controlled by the courts; or, in other words, the trustee, on account of the absolute power attempted to be conferred, may, from the words used, not inappropriately be classified as an owner of the property, rather than one charged with the execution of a trust.

Further than this, the generality of the words employed is such that it cannot be known what class of persons is entitled to the benefit sought to be conferred, or what that benefit will consist in. The entire matter is, in fact, left to the wisdom, or, it may be, the whim or caprice of the trustee. Strong and far-reaching as is the arm of equity in upholding a charity, the one here sought to be created is beyond its grasp.

We are not left to the terms of this trust in determining its validity. Many well-reasoned cases containing similar words to those here employed have upon judicial analysis been held insufficient to create valid trusts. In *Methodist Episcopal Church, South v. May*, 201 Mo. 360, 99 S. W. 1093, where a testatrix gave to a person named in her will a portion of her estate "to use as he may desire in the Master's work," it was construed as an ineffectual attempt to create a trust, because the objects of the testatrix were so indefinite that a court could not direct the manner in which her intention should be carried out. In *Schmucker v. Reel*, 61 Mo. 592, it was held that a trust to be applied according to the best discretion of the trustees must fail for uncertainty of purpose. Likewise, in *Carpenter v. Miller*, 3 W. Va. 174, 100 Am. Dec. 744, it was held that a trust for the propagation of the Gospel in foreign lands was too indefinite to be upheld. And in *Bridges v. Pleasants*, 39 N. C. (4 Ired. Eq.) 26, 44 Am. Dec. 94, a bequest to foreign missions and the poor saints was held not to create a trust because of uncertainty. In *Owens v. Missionary Soc.* 14 N. Y. 380, 67 Am. Dec. 160, a bequest to preach the Gospel to the poor was held ineffectual for its generality. In *Reeves v. Reeves*, 5 Lea, 653, a bequest to be held by the testator's wife as agent for the Christian Church of the United States, to be used in a manner best to promote the interests of said church in the cause of God, was declared not to be a definite trust, and hence could

not be upheld. In *Fifield v. Van Wyck*, 94 Va. 57, 64 Am. St. Rep. 745, 27 S. E. 446, a bequest was made to certain trustees for the benefit of the New Jerusalem Church as they deemed best. The court held the purpose to be wholly indefinite, the discretion of the trustees being unlimited, except that the fund must be for the benefit of the church named, and hence unenforceable in equity, and void.

The *Tilden Will Trust Case*, 130 N. Y. 29, 14 L.R.A. 33, 27 Am. St. Rep. 487, 28 N. E. 880, is a leading authority on this subject. It involved the validity of the will of Samuel J. Tilden. Among other powers, he sought to give his trustees authority to promote such scientific and educational objects as they should designate. The court in construing this will said, among other things: "As the selection of the objects of the trust was delegated absolutely to the trustees, there is no person or corporation who could demand any part of the estate, or maintain an action to compel the trustees to execute the power in their favor. This is the fatal defect in the

will. The will of the trustees is made controlling, and not the will of the testator."

Terms of like import appear in testatrix's will. There is no limit upon the trustee's authority except his discretion. If therefore follows that so far as the will attempts to create a trust in the lands in question it is void.

Where a devise in trust is invalid in not being fully expressed or clearly defined the property descends to the heirs at law. *Stonestreet v. Doyle*, 75 Va. 356, 40 Am. Rep. 731; *Ruth v. Oberbrunner*, 40 Wis. 238; *Brewster v. McCall*, 15 Conn. 274; *Columbian University v. Taylor*, 25 App. D. C. 124; *New Orleans v. Hardie*, 43 La. Ann. 261, 9 So. 12; *Maught v. Getzendanner*, 65 Md. 527, 57 Am. Rep. 352, 5 Atl. 471; *Nichols v. Allen*, 130 Mass. 211, 39 Am. Rep. 445.

From this it follows that the judgment of the trial court should be affirmed, and it is so ordered.

All concur.

OKLAHOMA SUPREME COURT.

STATE MUTUAL INSURANCE COMPANY, Plff. in Err.,
v.

M. O. GREEN.

(— Okla. —, 166 Pac. 105.)

Insurance — imputed knowledge of agent.

1. In the absence of fraud on the part of the insured, disclosures as to actual status

Headnotes by Crow, C.

Note. — The note appended to *Gish v. Insurance Co. of N. A.* 13 L.R.A.(N.S.) 827, as to the effect of a nonwaiver agreement on conditions existing at the inception of the policy, includes many cases in which the alleged waiver was predicated on the proposition that the agent's knowledge of the breach of a condition of the policy was chargeable to the insurer, and the same is true of the note to *Haapa v. Metropolitan L. Ins. Co.* 16 L.R.A.(N.S.) 1165, on "The parol evidence rule as to varying or contradicting written contracts as affected by the doctrine of waiver or estoppel as applied to policies of insurance."

Obviously, cases within the scope of either of those notes which, in circumstances otherwise the same, hold that the agent's knowledge of the breach of condition amounts to waiver or estoppel are a fortiori authority for that position in the absence of any objection upon the nonwaiver agreement or parol evidence rule.

And even when the court in cases falling L.R.A.1917F.

of title to insured property made by the insured or the agent of the insured to a soliciting agent of a fire insurance company at the time of the taking of the application for a policy, said insurance agent filling out date of said application blank, presenting the same to insured and procuring her signature thereto, collecting the premium for said insurance policy, and acting at all times within the scope of his authority, is knowledge which by law will be imputed to the fire insurance company issuing the policy.

For other cases, see *Insurance, V. b, 2, in Dig. 1-52 N. S.*

within the scope of either of these notes decides in favor of the insurer and against the insured, on the ground that the effect of the notice to the agent was defeated by such agreement or rule, the implication or assumption would seem to be that in the absence thereof the notice to the agent would have been chargeable to the insurer, so as to sustain a plea of waiver or estoppel.

A somewhat different question, also suggested in *STATE MUT. INS. CO. v. GREEN*, supra, which arises when an agent inserts in the application false answers to questions correctly answered by the insured, is treated in the notes to *Deming Invest. Co. v. Shawnee F. Ins. Co.* 4 L.R.A.(N.S.) 607, and *Suravitz v. Prudential Ins. Co.* L.R.A. 1915A, 273; and see later case, *French v. State Farmers' Hail Ins. Co.* L.R.A.1915D, 766.

For other notes and cases on estoppel or waiver of insurer, see L.R.A. Indexes and Digests under the title, "Insurance," subtitle, "Estoppel; waiver."

Same — estoppel — statement as to title.

2. Where a soliciting agent of a fire insurance company is fully informed of the status of title to lots upon which the property to be insured stands, and in the usual course of his duties as such agent prepares an application for a policy of insurance upon such property in the name of the wife, the record title thereto being in the husband, the said property being the homestead of the insured and her husband, and the agent of the insurance company being fully informed of all these facts prior to and at the time of the taking of the application, held, that the insurance company is estopped to defend, in an action on the policy, on the ground that said application, in stating that the title to said property was in the wife, contained a material misrepresentation.

For other cases, see Insurance, V. b, 2, in Dig. 1-52 N. S.

Same — homestead — interest of wife.

3. Where the record title to the homestead is in the husband, the wife residing with him and occupying the property as the homestead of them both, the wife has an insurable interest in the buildings situated thereon.

For other cases, see Insurance, II. a, in Dig. 1-52 N. S.

Same — retention of premium — waiver.

4. A fire insurance company by retaining the unearned premium on the policy, with knowledge of the irregularities and misrepresentations in the application for insurance, thereby waived such irregularities and misrepresentations.

For other cases, see Insurance, V. b, 5, d, in Dig. 1-52 N. S.

Same — notice of loss — waiver.

5. Insured property having been destroyed by fire, and the company receiving notice thereof by telegram from the insured the same day the fire occurred and promptly sending its agents to investigate the extent of the loss, and such agents performing that duty, held, the company thereby waived notice of loss required under the terms of said policy.

For other cases, see Insurance, V. b, 5, h, in Dig. 1-52 N. S.

Same — effect of nonwaiver agreement.

6. Where the insured property was destroyed by fire, the company being notified thereof by the insured on the day the fire occurred and within three days thereafter sending its agent to investigate the extent of the loss and the circumstances thereof, the insured notifying the company by letter within three days after such fire that the property was "a total loss," "cause unknown," giving the number of the policy, and thereafter the agents of said company, after investigating the circumstances of the fire and the extent of loss, reported the same to the company, and the said company agrees with the insured as to the amount of loss under the policy, and makes no objection to the sufficiency of the proofs of

loss so rendered by the insured, but retains the statements and agreements so furnished without objection until after the 60-day limitation for filing proofs of loss as provided in the policy has expired, no demand for additional proof of loss having been made by said company, held, that the company waived the proof of loss requirement in the policy notwithstanding the execution of the general nonwaiver agreement.

For other cases, see Insurance, V. b, 5, g, in Dig. 1-52 N. S.

Witness — husband — obtaining insurance for wife.

7. Where the record shows that the husband was acting for the wife's interest and for the protection of her interest in the homestead, and, with knowledge of his acts in her behalf, the wife ratifies the same and accepts the benefits thereof, the trial court properly held that the husband was acting as agent for the wife in such transaction, and he was competent to testify in regard thereto.

For other cases, see Witnesses, I. b, in Dig. 1-52 N. S.

Reformation — mistake.

8. Where the proof shows conclusively that there was a mutual mistake of fact, in that the insurance policy sued on contained a misdescription of the insured property by giving its location on block 5, while in truth and in fact it was situated on block 51, the court committed no error in reforming the policy to express the real intention of the parties.

For other cases, see Insurance, III. b, in Dig. 1-52 N. S.

Action — joinder — reformation and recovery.

9. Where the proof conclusively shows a mutual mistake of fact regarding the description of the block upon which the insured property stands, the cause of action for reformation of said policy was properly joined with an action to recover the amount due under the terms of said policy, the property mentioned having been totally destroyed by fire.

For other cases, see Action or Suit, II. d, in Dig. 1-52 N. S.

Insurance — waiver — nonwaiver agreement.

10. Where the insurance company sends its agent or agents to investigate the circumstances and extent of loss by fire under their policy of insurance, and such agent or agents enter into a nonwaiver agreement with the insured before entering upon the discharge of their duties, held, that the actions and conduct of such agent or agents while acting under the authority of the nonwaiver agreement do not constitute a waiver of a compliance with the requirements of the insurance policy on the part of the insured.

For other cases, see Insurance, V. b, in Dig. 1-52 N. S.

(December 21, 1915.)

ERROR to the District Court for Alfalfa County to review a judgment in plaintiff's favor in an action brought to recover the amount alleged to be due on a fire insurance policy. Affirmed.

The facts are stated in the opinion.

Messrs. Parker & Simons for plaintiff in error.

Mr. George W. Partridge for defendant in error.

Crow, C., filed the following opinion:

This is an action on a fire insurance policy commenced in the court below by the defendant in error, M. O. Green, herein after referred to as plaintiff, against plaintiff in error, State Mutual Insurance Company, a corporation, hereinafter referred to as defendant, according to their respective positions in the trial court.

In the month of February, 1911, the plaintiff and her husband, Antonio Green, were occupying as a home a dwelling house situated upon lots 10, 11, 12, 13, 14, and 15 in block 51 in the town of Jet, Alfalfa county, Oklahoma. On or about the 25th day of February of said year, one L. F. Labrue, a soliciting agent for the defendant insurance company, came to the home of the plaintiff and made inquiries as to whether or not said property was insured against fire. After conversation with the husband of the plaintiff it developed that a policy of insurance upon the property had recently expired, and that there was none covering the property at that time. The said Labrue then solicited the plaintiff's husband to take out a policy in the company which he was representing, and after some further conversation between the husband and the said agent it was agreed that the property should be insured with the State Mutual Insurance Company. Thereupon the plaintiff's husband, Antonio Green, informed the said agent that the record title to the property about to be insured was in him, but he asked the agent, "Why cannot I have this policy made to my wife?" "Why," he (the agent) says, "You can." Plaintiff's husband then stated to the said agent: "She (the plaintiff) has paid part for the lots and bought the furniture in it, and she paid part of the money; she has paid most of the expenses, and I think she is entitled to the policy. I will have the insurance made to her provided it doesn't make any difference to you;" and he (Labrue) said, "It doesn't make one bit of difference." The record then shows that the insurance agent proceeded to prepare the application for a policy of fire insurance on the property above described, filling in the answers to questions therein contained, and presenting the same to the plaintiff, Mrs. Green, for her signature. Antonio Green L.R.A.1917F.

then called in his wife, the plaintiff, and her signature was affixed to the application for insurance. The agent then collected from Antonio Green the premium on the policy applied for, amounting to \$15 in cash and his note for \$25, due August 1, 1911. In due time the policy here sued on was issued, by the terms of which the defendant insured the house and its contents against loss by fire or lightning for the term of five years commencing February 25, 1911. Thereafter, on July 4, 1911, the insured property was totally destroyed by fire, of which fact the defendant was notified by telegram from the insured on the day the fire occurred. The following letter was also mailed to the defendant company on the day of the fire and duly received by them, reading as follows:

Gentlemen:

I have to-day sustained the total loss of dwelling and contents. Policy No. 42988. Amount, \$1,000. Cause unknown. Kindly give this your attention as soon as possible, and oblige,

Yours truly,
M. O. Green.

Three days later one E. E. Flounders appeared at the scene of the fire, "having been detailed by said insurance company as its special agent to investigate the facts and circumstances of said claim loss and the amount thereof, and report the same to the company's general officers for their action thereon." We quote from the nonwaiver agreement signed by the insured and the defendant insurance company by W. H. Sweatt, who was secretary of said company at that time. The said nonwaiver agreement further provides: "The said special agent shall proceed to investigate the facts and circumstances of said claim loss and the amount thereof, and to agree with said assured upon such amount in accordance with the policy provisions if such agreement can be reached; and such agreement is to be without reference to any other question which has arisen or may hereafter arise under said policy. The assured hereby acknowledges that he understands and agrees that the undersigned special agent has no authority to waive, modify, or strike from said policy any of its conditions, nor to revive the same should it have become void from any cause."

And it further contains the following agreement: "In accordance with the foregoing we have this ——— day of ———, A. D. 1911, agreed that the loss on said policy is as follows: Value at time of fire on house, \$735; on furniture and contents, \$500; on carpenter tools, \$65.45; on telephone and fixtures, \$72.55—total, \$1,373.

And the insured hereby agrees that the value of the respective items immediately preceeding said fire did not exceed the respective amounts stated above."

A few days thereafter, on July 15, 1911, another agent of said company was sent to the scene of the fire, one J. V. Sweatt, acting under another nonwaiver agreement, of which the following is a copy:

Exhibit D.

Nonwaiver agreement—In re Claim No.
21145.

Whereas, since the making of the agreement setting forth the amount of loss under policy No. 42988, issued by the State Mutual Insurance Company to M. O. Green, the said company has been informed and verily believes that prior to the time of the fire one or more of the rooms of the dwelling house covered by the policy was occupied as a carpenter shop and general repair shop, and contained various combustible material not usually contained in a dwelling house; and

Whereas, J. V. Sweatt, the special agent of said company, desires to ascertain from M. O. Green, or her agent or representative, any information that she may have in explanation of the information received by said company, and whereas the parties hereto desire to otherwise discuss the matter:

Now, therefore, it is agreed and understood that the said J. V. Sweatt has no power to waive any provision, condition, or stipulation of said policy, or any breach thereof, and that anything that may be said between him and said M. O. Green, or her representative or agent, shall not be construed as an admission that said company is liable to the said M. O. Green for any amount, and shall not be construed as an admission that said company is not liable to said M. O. Green for any amount, nor shall it be deemed a waiver of any condition, provision, or stipulation of the policy, or any breach thereof.

Witness our hands this 15th day of July, 1911.

Mary O. Green.
T. A. Green.
J. V. Sweatt.

There is nothing further in the record regarding communications or negotiations between the parties hereto which would have any bearing upon the issues. The premium on the policy was retained by the company until some time in November, and, although the company was requested a number of times prior to the bringing of this action to pay the amount named in the policy, they did not comply with the requests, nor did they enter into any agreement that they

would pay any specified amount to the insured at any time. So far as the record shows, no demand that the insured furnish the proof of loss mentioned in the policy was ever made within the sixty days after the fire.

The plaintiff in her petition also prayed for a reformation of the policy of insurance here sued upon, in order that the same might correctly set forth the number of the block in which the lots were situated upon which the insured property stood. The policy gave the number of the block as 5, whereas the uncontradicted testimony was that it should have been block 51. The identity of the property which was intended to be insured is beyond question. The record shows a clear mistake of fact, which was mutual, and could properly be remedied by a reformation of the policy. However, the defendant contends that even though a reformation might properly be granted under the proof, yet it was not proper to unite the action for reformation with the action on the contract of insurance. We think that the trial court committed no error in allowing the reformation of the policy. Cause was tried to a jury, and a verdict returned for the plaintiff upon all the issues submitted, in accordance with which the court rendered its judgment. The defendant's motion for a new trial having been overruled, it has duly perfected its appeal to this court from said order and judgment.

Upon an examination of the excellent brief herein filed by the learned counsel for the insurance company, we are of the opinion that all of the assignments of error therein set out may be grouped and discussed under the following enumerated propositions:

1. Did the trial court err in admitting the testimony of Antonio Green, husband of the plaintiff herein?
2. Was the defendant insurance company charged with the knowledge of its soliciting agent as to the actual status of the title to the insured property?
3. Did the wife have an insurable interest in the property insured?
4. Did the defendant waive compliance with the requirements of said policy relative to giving notice of loss and furnishing proof of loss?

We shall discuss these propositions in the order above given.

The competency of the husband to testify in behalf of the plaintiff in this action seems to depend entirely upon whether or not he was acting as agent for the wife in the transactions concerning which he testified. There can be no doubt in all these matters the husband was acting for the best interests of the wife. The record shows

that the wife, with full knowledge of all that he had done regarding negotiating with the soliciting agent of the defendant company for a policy of insurance on their home and its contents, signed the application for insurance upon his suggestion, and evidently depended upon him throughout the transactions. She is the beneficiary under the terms of the policy issued as the result of these negotiations with full knowledge of all his acts in her behalf. Her testimony clearly indicates both her intention to ratify the acts of her husband as well as an actual ratification. We conclude that the husband in so acting was the agent of the wife in all matters pertaining to the obtaining of the insurance policy, and was competent to testify regarding all such matters. *Armstrong B. & Co. v. Crump*, 25 Okla. 452, 106 Pac. 855; *Smith v. Travel*, 20 Okla. 512, 94 Pac. 529; *Bland v. Peters*, 30 Okla. 798, 120 Pac. 631.

The next question we have to determine is, Was the insurance company charged with knowledge acquired by the soliciting agent at the time of obtaining the application regarding title to the insured property? It is conceded that the record title to the property was in the husband, and the proof is conclusive that it was the homestead of plaintiff and her husband. When the agent was negotiating with plaintiff's husband for the insurance, he informed the agent of the status of the title and asked the agent if he could have the policy made payable to the plaintiff, saying to the agent (and this testimony is uncontradicted): "She has paid part for the lots and bought the furniture in it, and she has paid part of the money; she has paid most of the expenses, and I think she is entitled to the policy. Of course, I own the lots; they are deeded to me. But, I said, she is as much interested as I am."

The agent said, "Why, you can." And again, in the same conversation, regarding having policy made to the plaintiff, the agent said, "It doesn't make a bit of difference." Thereupon the agent filled out the application blank with answers to the questions therein, one of said questions and answers being: "Have you title to the above land by warranty deed? Ans. Yes." This answer was written down by the agent without the knowledge, consent, or direction of either plaintiff or her husband. The soliciting agent of the insurance company, with full knowledge of the falsity of this answer, inserted same in the application. Whether his act in this respect was intentional or otherwise has nothing to do with the proposition. The defendant company contends, and is not contradicted, that the real status of the title was not communicated to it by

said agent, and that it depended upon the correctness of the answers in the application. Was the insurance company charged with the knowledge of its soliciting agent so acquired? In *Vance on Insurance*, p. 304, it is said: "Any information material to the transaction, either possessed by the agent at the time of the transaction or acquired by him before its completion, is deemed to be the knowledge of the principal, at least as far as that transaction is concerned, even though in fact the knowledge is not communicated to the principal at all. . . . The insurer is charged with the knowledge acquired by his agent in making or negotiating a contract of insurance. . . . It therefore follows that this incident, created by the law, in response to the demands of public policy, irrespective of agreement, cannot be destroyed or altered by the agreement of the parties."

The case of *Phipps v. Union Mut. Ins. Co.* — Okla. —, 150 Pac. 1083, was a case where the plaintiff in error made application through a soliciting agent for a policy to protect his crop from loss by hail. The application contained the following provision: "In case of failure of crops, necessitating replanting, or for any other cause deemed good and sufficient to the company, this policy will be canceled without charge and notes or cash returned, provided a request of the owner in writing . . . is received at the company's office prior to April 1st of current year."

On the same paper follows a heavy perforated line, below which is printed a form of receipt and memorandum to be detached and given to the applicant, and which in said case was alleged to have contained the following provision, after acknowledging receipt of the premium: "Subject to cancellation on or before April 23, 1911,"—that being the year the policy was taken out. The plaintiff in error notified the company by registered mail April 7, 1911, to cancel the policy, and demanded return of his premium note. "Ordinarily," the opinion says, "a mere soliciting agent . . . has no power to bind the company to a contract of insurance, nor has he, after the policy is issued, any authority to waive any of the terms or provisions therein,"—citing *Dorman v. Connecticut F. Ins. Co.* 41 Okla. 509, 51 L.R.A. (N.S.) 873, 139 Pac. 262; *Shawnee Mut. F. Ins. Co. v. McClure*, 39 Okla. 535, 49 L.R.A. (N.S.) 1054, 135 Pac. 1150; *Merchants' & Planters' Ins. Co. v. Marsh*, 34 Okla. 453, 42 L.R.A. (N.S.) 996, 125 Pac. 1100.

"In this case the soliciting agent was clothed by the company with the visible power and authority, manifested through the blanks he carried and the conduct he pursued in taking applications and procur-

ing the company to issue policies thereon, to do anything necessary in the taking of this application. He had the right to fill it out, and it was his duty to do so honestly, and just as as he had agreed with the applicant to do; and when the applicant received his part of the contract, showing that he had the right to cancel, up to a certain date, he had the right to assume that the agent had so filled in the application. Not having done so, the agent's failure must be attributed to one of two causes: (1) That of oversight; and (2) that of fraud. And in either event, if one of the parties must suffer loss, such loss should fall on the company, whose agent, with authority in this particular matter, caused it."

And in the case of *Allen v. Phoenix Assur. Co.* 12 Idaho, 653, 8 L.R.A.(N.S.) 903, 88 Pac. 245, 10 Ann. Cas. 328, the court says if "the insured truthfully and correctly stated the nature and condition of his title in making his application for insurance he will not be precluded from recovering in case of loss on account of a contrary statement as to title inserted in the policy."

We therefore conclude that the defendant was charged with knowledge of the real status of the title to said property as disclosed to its agent. *Glens Falls Ins. Co. v. Michael*, 167 Ind. 659, 8 L.R.A.(N.S.) 708, 74 N. E. 964, 79 N. E. 905. See also *Arkansas Ins. Co. v. Cox*, 21 Okla. 873, 20 L.R.A.(N.S.) 775, 129 Am. St. Rep. 808, 98 Pac. 552; *Roe v. National Life Ins. Assn.* 137 Iowa, 696, 17 L.R.A.(N.S.) 1144, 115 N. W. 500; *Leisen v. St. Paul F. & M. Ins. Co.* 20 N. D. 316, 30 L.R.A.(N.S.) 542, 127 N. W. 837.

In further discussing these principles in the case of *Phipps v. Union Mut. Ins. Co.* supra, Judge Brewer, delivering the opinion of the court therein, says: "But we think it is equally well settled that even a mere soliciting agent may bind the company as to matters within the scope of his authority."

The supreme court of Iowa, in the case of *Stone v. Hawkeye Ins. Co.* 68 Iowa, 737, 56 Am. Rep. 870, 28 N. W. 47, regarding the authority of the soliciting agent of a fire insurance company, uses the following language: "He was empowered by it [the company] to prepare such applications for persons desiring insurance, and to forward the same to it. He wrote the application in question in the performance of the duties of his agency; and if the company was deceived or misled by the statement in the application that the building was insured, this was in consequence of the negligent or wrongful manner in which he performed the duties of his employment, and it is consistent with justice, as well as the settled principles of the law, that the consequence of

his wrong should be visited upon his principal, rather than upon plaintiff, who was guilty of no bad faith in the transaction."

See *Wood, Ins. § 384*; *Malleable Iron Works v. Phoenix Ins. Co.* 25 Conn. 465.

And in *Ostrander on Fire Insurance*, p. 132, it is said: "The agent appointed to solicit insurance and take applications will bind his company, when acting within the scope of his authority, as firmly as could the president of the company acting in the same relation. His knowledge in respect to any material fact affecting the condition or character of the risk is imputed to the company employing him, and will create an estoppel as to defenses that would otherwise be available under the policy."

The supreme court of Arkansas, in the case of *People's F. Ins. Assn. v. Goynes*, 79 Ark. 315, 16 L.R.A.(N.S.) 1180, 96 S. W. 365, 9 Ann. Cas. 373, uses the following language: "An insurance company is estopped from disputing the truth of answers in an application . . . or policy to the effect that the company would not be bound by such representations of its agent."

And the courts of Colorado and Minnesota have held to the same general effect, and also have specifically held that disclosures relating to title to insured property made to the agent taking the application are knowledge which will by law be imputed to the insurance company issuing the policy. *Parsons v. Lane (Re Millers' & Mfrs.' Ins. Co.)* 97 Minn. 98, 4 L.R.A.(N.S.) 231, 106 N. W. 487, 7 Ann. Cas. 1144; *National Mut. F. Ins. Co. v. Duncan*, 44 Colo. 472, 20 L.R.A.(N.S.) 340, 98 Pac. 634; and this principle is also adhered to and fully discussed in the case of *Leisen v. St. Paul F. & M. Ins. Co.* 20 N. D. 316, 30 L.R.A.(N.S.) 539, 127 N. W. 632.

Having concluded that under the facts in this case the company was charged with knowledge of the status of the title to the insured property as disclosed to the soliciting agent at the time he obtained the application for insurance, it logically follows that the insurance company is estopped from defending this action upon the ground that the application contains the representation that the plaintiff was the holder of the record title thereto, when, as a matter of fact, it was in the husband. However, although the policy appears to be regular on its face, the suggestion arises that, if the wife, who is named as the insured in said policy, had no insurable interest in said property, then the whole transaction might be regarded as a mere wager, and void as a contract of insurance. Did the wife, the plaintiff herein, have an insurable interest in the insured property, the record title thereto being in her husband, the said property being the

homestead of herself and husband at all times mentioned herein?

In the case of *Scott v. Dixie Ins. Co.* 70 W. Va. 533, 40 L.R.A.(N.S.) 152, 74 S. E. 659, it was held that an equitable title to real estate carries with it an insurable interest in the buildings situated thereon, and this principle is now beyond question, and has been followed by the courts of this state in numerous instances. In the case of *Home Ins. Co. v. Coker*, 43 Okla. 331, 142 Pac. 1195, Ann. Cas. 1917C, 950, it was held that a leasehold interest gave the holder thereof an insurable interest in buildings situated on the premises. Certainly the wife has an interest in the homestead of which she cannot be deprived without her consent in writing. *Bunn's Const.* 305. The wife has an estate for life in the homestead where the record title thereto is in her husband. *Rev. Laws* 1910, § 6328. And in the case of *Holmes v. Holmes*, 27 Okla. 140, 30 L.R.A.(N.S.) 920, 111 Pac. 220, it was held that the widow was entitled to occupy and possess the homestead as against the husband's heirs, and that an action for partition would not lie.

The supreme court of Mississippi, in the recent case of *Bacot v. Phoenix Ins. Co.* 96 Miss. 223, 25 L.R.A.(N.S.) 1226, 50 So. 729, Ann. Cas. 1912B, 262, holds that either husband or wife has an insurable interest in the homestead, the record title thereto being in the other. And the Wisconsin supreme court in a more recent case, that of *Kludt v. German Mut. F. Ins. Co.* 152 Wis. 637, 45 L.R.A.(N.S.) 1131, 140 N. W. 321, Ann. Cas. 1914C, 609, holds that a man has an insurable interest in a house the title to which is in his wife, but which with her consent he occupies as a dwelling for himself and family.

We deem it unnecessary to cite further authorities along this line, as the overwhelming weight of authority upholds the principle that the wife has an insurable interest in the homestead, notwithstanding the record title thereto is in the husband.

In the discussion of the foregoing propositions it has been demonstrated that the plaintiff was the holder of a valid policy of insurance at the time of the fire. But the defendant contends that, even if this be true, nevertheless the trial court should have directed the jury to return a verdict in its favor at the close of the evidence, for the reason that the proof failed to show a compliance by the plaintiff with the requirements of the policy as to notice of loss and proof of loss, and for the further reason that, according to the contentions of the defendant, the plaintiff neither pleaded nor proved a waiver by the company of those requirements.

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We agree with the defendant in his contention that a waiver of forfeiture must be both pleaded and proved. *Palatine Ins. Co. v. Lynn*, 42 Okla. 486, 141 Pac. 1167. While the plaintiff's pleadings may be subject to some criticism regarding the pleading of facts constituting waiver or estoppel, yet we do not think it fatally defective in this respect. The acts and conduct of the defendant company upon which the plaintiff relies to establish a waiver of the notice of loss and proof of loss provisions are sufficiently set out in the petition. Did the proof sustain the allegations of waiver? In our summary of the evidence in this case at the beginning of this opinion it will be noted that on the very day of the fire the insurance company received notice from the insured by telegram informing them of the loss of the insured property, giving the number of the policy, stating that the loss was total on both dwelling and contents, and signed by the plaintiff. On the same day the insured also wrote the letter to the company the contents of which have been heretofore given, which sets out more of the details relating to the fire and consequent loss. In response to this the company sent its agent, Flounders, three days after the fire, who proceeded to investigate the same, acting under the first nonwaiver agreement hereinbefore set out. It will be observed that this nonwaiver agreement is between the insurance company itself, acting through W. H. Sweatt, secretary, and M. O. Green, the insured. The amount of the loss and agreed valuation thereof as shown by this instrument was between the insurance company and the insured, and no agreement was made, so far as the record shows, between E. E. Flounders, the agent of the company, acting under said nonwaiver agreement, and the plaintiff, M. O. Green, as to the value of the property destroyed by fire. It therefore appears on the records that on the same date that the said Flounders made this investigation the defendant company entered into a stipulation with the insured as to the amount of loss "under said policy."

There can be no question as to the effect of this nonwaiver agreement. Such agreements are generally used by insurance companies when sending an agent to investigate a fire, particularly where they have reason to believe that they may be able to show such a breach of conditions contained in the policy as to amount to a forfeiture thereof. Such agreements protect the company against a waiver of forfeiture of the policy or fraud on the part of the insured by acts or conduct of the agent acting under such agreement, but do not prevent a waiver by the company itself, where it accepts and ratifies the acts of its agent, or where it en-

ters into a stipulation with the insured based upon the report of such an agent. *Frank v. Switchmen's Union*, 87 Wash. 634, 152 Pac. 512.

On July 15th, about a week after the first nonwaiver agreement above discussed, the second investigating agent was sent by the defendant company, and another nonwaiver agreement was presented to the insured and signed by her. This second agreement, which is hereinbefore set out in full, gave the reasons for this second investigation as being that the company had received information that certain "rooms of the house were occupied as a carpenter shop and general repair shop, and contained various combustible materials," etc. This investigation was made, and, so far as the record shows, the plaintiff and her husband furnished all the information requested by both this agent, whose name was Sweatt, and also the man Flounders, previously mentioned. During all this time, it will be remembered, the company was retaining the premium paid by the plaintiff, and there is no evidence that any demand was made for additional proof of loss during that period. There is no testimony that any request was made for additional proof of loss prior to the time the premium was returned, which, according to the defendant's testimony, was some time in November, about four months after the fire occurred. Were all these acts and such conduct as has been hereinbefore indicated on the part of the defendant company sufficient to constitute a waiver of compliance of the notice of loss and proof of loss requirements in the policy?

It is the well-settled law in this state that an insurance company cannot exact a strict compliance with warranties contained in the policy such as the "iron safe clause," or, as it is sometimes called, "book warranty clause," and other similar provisions. It is sufficient if there is a substantial compliance with such requirements. It was held in the *Scottish Union & Nat. Ins. Co. v. Moore Mill & Gin Co.* 43 Okla. 370, 143 Pac. 12, that "the purpose of said clause is accomplished when the assured produces data from which the amount and value of the cotton insured and destroyed at the time of the fire can be reasonably ascertained; a substantial compliance with the warranty therein contained is sufficient." Whether it be considered that in the case at bar there was a substantial compliance or not, certainly there was a partial compliance with the requirements for furnishing notice of loss and proof of loss. The insured was certainly under no obligation to notify the company by registered mail of the occurrence of the fire when its agents were upon the scene of the fire in response to a telegram and let-

ter from the insured sent on the very day the fire occurred. Then, if the notice of loss provision was thus dispensed with by the acts and conducts of the defendant itself, is it not also true that the plaintiff was in like manner relieved from making further efforts to comply with the proof of loss provision?

In the case of *National F. Ins. Co. v. United States Bldg. & L. Asso.* 21 Ky. L. Rep. 1207, 54 S. W. 714, the court of appeals of Kentucky uses the following language: It is not necessary that waiver of notice or proofs be in writing. It is sufficient that the company has acted in such a manner as to authorize a person of ordinary prudence to believe that such requirement has been waived.

See also 19 Cyc. 857.

And the principle is also announced that notice of proofs may be waived by acts or conduct of authorized officers or agents inconsistent with the requirements. 19 Cyc. 861, and authorities. And it was held by the supreme court of this state, the opinion of the court being delivered by Judge Matthews this year, that "a provision in an insurance policy requiring proof of loss to be furnished the insurance company within sixty days from the fire is waived should the company within said sixty days deny liability upon other grounds than failure to furnish proof of loss." *Continental Ins. Co. v. Chance*, — Okla. —, 150 Pac. 114; *Scott v. Dixie Ins. Co.* 70 W. Va. 533, 40 L.R.A. (N.S.) 152, 74 S. E. 659; *Oklahoma F. Ins. Co. v. Wagester*, 38 Okla. 291, 132 Pac. 1071.

Although the act of the defendant company in the case at bar in sending the second investigating agent with written authority which set forth the only ground mentioned to the plaintiff upon which the company might deny liability would probably not amount to a waiver in itself, it is a circumstance which may be considered in connection with other acts and conduct on the part of the defendant which might reasonably have led the plaintiff to conclude that the defendant waived the furnishing of any further proofs of loss.

It was held by the supreme court of this state in the case of *Arkansas Ins. Co. v. Cox*, 21 Okla. 873, 20 L.R.A. (N.S.) 775, 129 Am. St. Rep. 808, 98 Pac. 552, that failure to notify an insured within a reasonable time after the filing of proofs of loss which are defective of the defect therein estops the insurer from afterwards objecting thereto.

This principle is also announced by the supreme court of New York in the case of *Keeney v. Home Ins. Co.* 71 N. Y. 396, 27 Am. Rep. 60. And in the case of *St. Paul F. & M. Ins. Co. v. Griffin*, 33 Okla. 178, 124

Pac. 300, the court says: That the receiving and retaining defective proof of loss without specific objection thereto is a waiver of any objection thereto is too well settled to merit citation. In such cases good faith would require that the association give notice indicating the defect; and a failure to give such notice, or refusal to object on other grounds, is regarded as an acceptance of such defective proofs and a waiver of defects.

See 19 Cyc. 862, and authorities there cited.

It has been held in several states that the retention of unearned premium by the company after knowledge of failure to comply with terms of the policy is evidence of waiver. *Alabama State Mut. Assur. Co. v. Long Clothing & Shoe Co.* 123 Ala. 667, 26 So. 655; *Law v. Hand in Hand Ins. Co.* 29 U. C. C. P. 1. And in the case of *Therhault v. California Ins. Co.* 27 Idaho, 476, 149 Pac. 719, decided this year, the supreme court of Idaho says: "Regardless of the clause in a policy that no officer, agent, or other representative of the insurance company shall have power to waive any of its provisions or conditions, where other proofs than those required in the policy are accepted by an agent authorized to adjust a loss the company will be deemed to have waived the provisions of the policy fixing the manner of making proof of loss."

Certainly the same principle would apply where, as in the case at bar, the proofs were submitted to the company itself without objection or suggestion of their insufficiency. In the case of *Queen of Arkansas Ins. Co. v. Laster*, 108 Ark. 261, 156 S. W. 848, it was said: "When appellant's adjuster, in response to appellee's inquiry, said that he had 'all the proof he wanted,' this was a waiver of any further proof of loss on the part of appellant, notwithstanding the non-waiver agreement. It was equivalent to saying to the appellee that appellant was satisfied as to his loss, and had all the information pertaining thereto that appellant desired."

In the case of *McMaster v. Insurance Co. of N. A.* the supreme court of New York said: "Proofs of loss are no part of the contract; they only serve to fix the time when the loss becomes payable." 55 N. Y. 222, 14 Am. Rep. 230.

And in the case of *Ohio Farmers Ins. Co. v. Glaze*, 55 Ind. App. 147, 101 N. E. 734, it is said: "A stipulation in a policy that 'no agent has power to waive any condition of this contract unless by written indorsement thereon' refers to conditions essential to make the contract obligatory and binding upon the parties in the first instance, and to its continuing force and obligation till loss occurs, but does not refer to stipula-

tions requiring the assured to make proof of loss in a special manner, and such stipulations may be waived by an agent without indorsement. . . . Although an insurance policy on its face prohibits any agent from waiving any of its conditions, where other proofs than those required in the policy are accepted by an agent of the company, duly authorized to act with reference to that subject, the company will be deemed to have waived the proof required by the policy."

See also *Stevens v. Citizens' Ins. Co.* 69 Iowa, 658, 29 N. W. 769; *Prussian Nat. Ins. Co. v. Peterson*, 30 Ind. App. 289, 64 N. E. 102; *Germania F. Ins. Co. v. Pitcher*, 160 Ind. 392, 64 N. E. 921, 66 N. E. 1003; *Brock v. Des Moines Ins. Co.* 106 Iowa, 30, 75 N. W. 683; *Minneapolis F. & M. Mut. Ins. Co. v. Fultz*, 72 Ark. 365, 80 S. W. 576; *Hanover F. Ins. Co. v. Gustin*, 40 Neb. 828, 59 N. W. 375.

We therefore conclude that there was competent evidence tending to sustain the allegations of waiver in plaintiff's petition as to the requirements for notice of loss and proof of loss, and the trial court therefore properly overruled the defendant's motion for a directed verdict. There being evidence in the record reasonably tending to support the verdict of the jury, the defendant's motion for a new trial was properly overruled.

We therefore recommend that the judgment be affirmed.

Per Curiam:
Adopted in whole.

Petition for rehearing denied January 23, 1917.

WASHINGTON SUPREME COURT.
(Department No. 1.)

AXEL LARSON, Resp.,

ALASKA STEAMSHIP COMPANY, Appt.

(— Wash. —, 165 Pac. 880.)

Master and servant — safe place to work — movable object near ladder to hold of ship.

1. A shipowner is liable for injury to a seaman by the act of the boatswain having charge of the unloading of cargo in leaving a movable chair near the ladder leading to the hold when chairs were customarily fastened to the deck and it was necessary for seamen to have a handhold to reach the ladder in safety, so that the seaman in at-

Note. — As to whether the substantive law of a state may be invoked in an action for personal injuries, not resulting in death,

tempting to descend the ladder grasped the chair for support and was precipitated into the hold by its failure to support him. *For other cases, see Seamen, in Dig. 1-52 N. S.*

Same — vice-principal — boatswain.

2. A boatswain supervising the unloading of the cargo of a ship and executing the will of the master is a vice-principal with respect to the seamen under his control.

For other cases, see Master and Servant, II. c, 5, b, (1), in Dig. 1-52 N. S.

Trial — jury — safe appliances.

3. The jury must determine whether or not the pedestal of a chair fastened to the deck near the ladder leading to the hold of a ship, which is set back from the edge of the hatch so that access to it cannot be gained from the deck without assistance, is a safe appliance for furnishing the assistance necessary.

For other cases, see Trial, II. c, 8, d, in Dig. 1-52 N. S.

Courts — injury on high seas — jurisdiction.

4. The common-law courts of a state have, under the provision of the Judiciary Act conferring admiralty jurisdiction on Federal courts but saving to suitors the right of a common-law remedy where the common law is competent to give it, jurisdiction of a suit in personam against a shipowner by a seaman to recover for injuries caused by a defective condition of the vessel, making it unseaworthy.

For other cases, see Courts, IV. d, 1, in Dig. 1-52 N. S.

Conflict of laws — common law and admiralty — which applicable.

5. When a common-law court of a state takes jurisdiction, under the provision of the Judiciary Act conferring admiralty jurisdiction on the Federal courts but saving to suitors a common-law remedy if the common law is competent to give it, of a suit in personam by a seaman against the shipowner for injuries due to a defective condition of the vessel, it will grant all the relief that a common-law court would have granted had the cause been originally triable in such court, and is not limited to the remedy afforded by the maritime law.

For other cases, see Conflict of Laws, I. a, in Dig. 1-52 N. S.

(June 15, 1917.)

APPEAL by defendant from a judgment of the Superior Court for King County in plaintiff's favor in an action brought to recover damages for personal injuries al-

leged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Bogle, Graves, Merritt, & Bogle, for appellant:

Defendant furnished plaintiff with a reasonably safe appliance to use in entering the hold.

26 Cyc. 1102; *Armour & Co. v. Russell*, 6 L.R.A.(N.S.) 602, 75 C. C. A. 416, 144 Fed. 614; *Imhoof v. Northwestern Lumber Co.* 43 Wash. 387, 86 Pac. 650; 22 Cyc. 1107; *Hoffman v. American Foundry Co.* 18 Wash. 287, 51 Pac. 385; *Bullivant v. Spokane*, 14 Wash. 577, 45 Pac. 42.

Plaintiff was not injured by reason of using the appliance furnished by defendant for use in connection with this work, but was injured by catching hold of a loose pedestal, which had been placed in close proximity to the stationary pedestal furnished by defendant.

Hoffman v. American Foundry Co. 18 Wash. 289, 51 Pac. 385.

The rights and liabilities of the parties hereto should be governed solely by the principles of the maritime law.

The Moses Taylor, 4 Wall. 431, 18 L. ed. 402; *The Glide*, 167 U. S. 606, 42 L. ed. 296, 17 Sup. Ct. Rep. 930.

But for the saving clause of the Act of 1789, allowing suitors recourse to a competent common-law remedy, the jurisdiction of admiralty courts over maritime causes would be exclusive.

Schuede v. Zenith S. S. Co. 216 Fed. 566.

The saving clause, however, only saves to suitors the right of a common-law remedy where the common law is competent to give it. It is not a remedy in the common law which is saved, but a common-law remedy.

The Moses Taylor and *The Glide*, supra; *The Belfast*, 7 Wall. 624, 19 L. ed. 266; *Ashbrook v. The Golden Gate*, Newberry, Adm. 296, Fed. Cas. No. 574; *The Isabella*, Brown, Adm. 96, Fed. Cas. No. 7,100; *Knapp, S. & Co. v. McCaffrey*, 177 U. S. 638, 44 L. ed. 921, 20 Sup. Ct. Rep. 824; *Cornell S. B. Co. v. Fallon*, 102 C. C. A. 345, 179 Fed. 293; *Gabrielson v. Waydell*, 135 N. Y. 1, 17 L.R.A. 223, 31 Am. St. Rep. 793, 31 N. E. 969; *Sanders v. Stimson Mill Co.* 32 Wash. 627, 73 Pac. 688.

The master's duty to furnish his servants a safe place in which to work is not applicable where the place becomes dangerous

on waters within the maritime jurisdiction, see annotation following this case, post, 678.

The question whether members of a ship's crew are fellows servants is considered at page 438 of the note to *Sofield v. Guggenheim Smelting Co.* 50 L.R.A. 417, on the question, "What servants are deemed to be L.R.A.1917F.

in the same common employment, apart from statutes, where no questions as to vice principalship arise." Many phases of the question of fellow servants and vice principalship are considered in notes that may be found by consulting the L.R.A. Indexes under the title, "Master and Servant," subtitle, "Fellow servants."

in the progress of the work either necessarily or from negligence of coservants in the details thereof.

3 Labatt, Mast. & S. p. 2685; Cleveland, C. C. & St. L. R. Co. v. Brown, 20 C. C. A. 147, 34 U. S. App. 759, 73 Fed. 970; Citron v. O'Rourke Engineering Constr. Co. 19 L.R.A.(N.S.) 340, and note, 188 N. Y. 339, 80 N. E. 1092; Fortin v. Manville Co. 128 Fed. 642; Durst v. Carnegie Steel Co. 173 Pa. 162, 33 Atl. 1102; Baird v. Reilly, 35 C. C. A. 78, 63 U. S. App. 157, 92 Fed. 884; O'Connell v. Clark, 22 App. Div. 466, 48 N. Y. Supp. 74; Petaja v. Aurora Iron Min. Co. 106 Mich. 463, 32 L.R.A. 435, 58 Am. St. Rep. 505, 64 N. W. 335, 66 N. W. 951; St. Louis, I. M. & S. R. Co. v. Needham, 25 L.R.A. 833, 11 C. C. A. 56, 27 U. S. App. 227, 63 Fed. 107; 2 Labatt, Mast. & S. § 558; United States Cement Co. v. Koch, 42 Ind. App. 251, 85 N. E. 490; Bedford Quarries Co. v. Bough, 168 Ind. 671, 14 L.R.A.(N.S.) 418, 80 N. E. 529; American Bridge Co. v. Seeds, 11 L.R.A.(N.S.) 1041, 75 C. C. A. 407, 144 Fed. 605; Miller v. Moran Bros. Co. 39 Wash. 636, 1 L.R.A.(N.S.) 283, 109 Am. St. Rep. 917, 81 Pac. 1089.

Plaintiff, who was working with the seamen who committed this negligent act in the same employment with such seamen, could by the exercise of the slightest care and observation have ascertained the danger.

Tham v. J. T. Steeb Shipping Co. 30 Wash. 271, 81 Pac. 711, 18 Am. Neg. Rep. 659; Griffiths v. Craney, 38 Wash. 90, 80 Pac. 274; Steeples v. Panel & Folding Box Co. 33 Wash. 359, 74 Pac. 475, 15 Am. Neg. Rep. 543; Desjardins v. St. Paul & T. Lumber Co. 54 Wash. 278, 102 Pac. 1034; Swanson v. Gordon, 64 Wash. 27, 116 Pac. 470.

The master is under no obligation to provide against any special risks incident to the peculiar manner in which the servant may perform the contract of service, nor is he required to guard the servant against dangers of which the servant himself is equally or more competent to take notice.

3 Labatt, Mast. & S. p. 2488; Pleasants v. Raleigh & A. Air Line R. Co. 96 N. C. 195.

A servant assumes the risk of all dangers, however they may arise, against which he may protect himself by the exercise of ordinary observation and care.

3 Labatt, Mast. & S. p. 2490; Pittsburgh & C. R. Co. v. Sentmeyer, 92 Pa. 276, 37 Am. Rep. 634.

Mr. Walter S. Fulton, for respondent:

The duty to provide a reasonably safe place for the servant to work in, and reasonably safe appliances, is personal to the master, and upon failure to perform such duty there is no question of fellow servant. L.R.A.1917F.

Benson v. English Lumber Co. 71 Wash. 621, 129 Pac. 403; Ralph v. American Bridge Co. 30 Wash. 605, 70 Pac. 1098.

Where the negligence of the master and a fellow servant concur, the master is not relieved from liability.

Norman v. Alaska Coast Co. 81 Wash. 64, 142 Pac. 434; Hanson v. Columbia & P. S. R. Co. 75 Wash. 342, 134 Pac. 1058; Benson v. English Lumber Co. supra.

A danger that is not known to and appreciated by the foreman cannot be said to be so plain and obvious as to be within the knowledge of the ordinary employee.

Elanious v. Rothschild, 72 Wash. 152, 129 Pac. 1091.

It is a foreman's duty to look after an employee's safety, and if he fails in the performance of this duty the employee does not assume the risk; nor can he be held guilty of contributory negligence as a matter of law.

Magnuson v. MacAdam, 77 Wash. 292, 137 Pac. 485; Anderson v. Globe Nav. Co. 57 Wash. 502, 107 Pac. 376; Christiansen v. McLellan, 74 Wash. 321, 133 Pac. 434; Olson v. Seldovia Salmon Co. 88 Wash. 225, 152 Pac. 1033; Parr v. Spokane, 67 Wash. 164, 121 Pac. 453; Olson v. Carlson, 74 Wash. 39, 132 Pac. 721; Dumas v. Walville Lumber Co. 64 Wash. 381, 116 Pac. 1091; Knudsen v. Moe Bros. 66 Wash. 121, 119 Pac. 27; Nelson v. Ballard Lumber Co. 60 Wash. 693, 111 Pac. 882; Withiam v. Tenino Stone Quarries, 48 Wash. 128, 92 Pac. 900.

Obedience to orders on the part of a seaman while on board ship at sea is not negligence, even though the seaman knew of the danger.

Keating v. Pacific Steam Whaling Co. 21 Wash. 421, 58 Pac. 224; 1 Labatt, Mast. & S. pp. 289 b, 302 a; Woods v. Globe Nav. Co. 40 Wash. 376, 82 Pac. 401, 19 Am. Neg. Rep. 571.

The right of recovery is not governed by the maritime law.

The Osceola, 189 U. S. 159, 47 L. ed. 760, 23 Sup. Ct. Rep. 483; The Argo, 127 C. C. A. 456, 210 Fed. 872; Henry, Admiralty Jurisdiction & Procedure, p. 3; Rounds v. Cloverport Foundry & Mach. Co. 237 U. S. 306, 59 L. ed. 967, 35 Sup. Ct. Rep. 596; Ransberry v. North American Transp. & Trading Co. 22 Wash. 476, 61 Pac. 154; Keating v. Pacific Steam Whaling Co. 21 Wash. 415, 58 Pac. 224; Woods v. Globe Nav. Co. 40 Wash. 376, 82 Pac. 401, 19 Am. Neg. Rep. 571; The Atlas, 93 U. S. 302, 23 L. ed. 863; Leon v. Galceran, 11 Wall. 185, 20 L. ed. 74; Wildman v. Wildman, 70 Conn. 700, 41 Atl. 2; Atlantic & P. R. Co. v. Laird, 164 U. S. 393, 399, 41 L. ed. 485, 487, 17 Sup. Ct. Rep. 120; Doremus v. Root,

94 Fed. 760; *Kansas City, Ft. S. & M. R. Co. v. Becker*, 67 Ark. 1, 46 L.R.A. 814, 77 Am. St. Rep. 78, 53 S. W. 406.

The law of the place of the accident will be conclusively presumed to be the same as the *lex fori*.

Marston v. Rue, 92 Wash. 129, 159 Pac. 111; *Sheppard v. Cœur d'Alene Lumber Co.* 62 Wash. 12, 44 L.R.A. (N.S.) 267, 112 Pac. 932, Ann. Cas. 1912C, 909; *Pitt v. Little*, 58 Wash. 355, 108 Pac. 941.

Chadwick, J., delivered the opinion of the court:

Alex Larson brought this action to recover damages for personal injuries sustained while working as a seaman on the steamship *Victoria*. The ship was anchored off the shore in Alaska on the 14th day of June, 1915. Larson was ordered by the boatswain to go down into the hold preparatory to working cargo. No. 4 lower hold is covered by a hatch which is 12 by 14 feet. When in place it makes a part of the dining saloon floor. It has no combing, and, as described by one of the witnesses, is "as smooth as a table." A dining room table and a row of chairs on iron pedestals are built directly over, and screwed to the doors of, the hatch. When the hatch is opened the chairs and table are removed, and the doors are folded back on either side by means of a line from a winch. The hold is about 25 feet deep. It is reached by means of a perpendicular ladder placed some 7 or 8 inches back of and under the hatch opening. Directly forward of the hatch opening is another table, and a row of chairs. The pedestals supporting the chairs for this second table are screwed into the deck or the floor of the dining saloon about 2 or 3 feet from the edge of No. 4 hatch. It was the custom of the seamen to hold on to one of the forward stationary pedestals while securing a foothold and handhold on the ladder when descending into the hold of the ship. The testimony shows that when the pedestals supporting the chairs over the hatch doors were removed, one of them was left standing loose near the fixed pedestals of the forward table. When respondent started to descend the ladder, he took hold of the unfastened pedestal with his right hand and a fastened pedestal with his left hand. To secure a hold with his hand on the ladder, he released his left hand, thus throwing his weight on the unfastened pedestal, which, giving way, caused him to fall into the hold below. The jury found that Larson had received permanent injuries, and returned damages in the sum of \$2,800. The facts will be further noticed in the course of the opinion.

From a judgment upon the verdict, de-
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fendant has appealed. Respondent predicates his right to recover upon appellant's alleged failure to furnish respondent with a safe place to work, and lack of proper appliances to enable him to safely carry out the boatswain's order to go down into the hold, as well as its negligence in placing the loose pedestal in front of the hatch ladder. The manner of descending into the hold may be more particularly described. One doing so must lie flat on the floor, with his feet and legs over the opening. The ladder cannot be safely reached with the feet without some secure hold for the hands, or for one hand after a foothold has been secured. One hand must be released and reached under the edge of the hatch and gripped upon the uppermost rung of the ladder, when the act of descending can be finished without inconvenience or danger.

While the act of descending is, under any circumstances, attended with some danger, and puts a seaman to the exercise of great care for his own safety, and while it may be, as the testimony tends to show most strongly, that toggles, a ring bolt, or a rope to be thrown around the stationary pedestal should have been provided, we think it unnecessary to follow counsel in their rather elaborate discussion of this phase of the case, for, whatever may have been necessary under ordinary conditions, we have here to deal with an extraordinary condition. That is the placing of a loose pedestal at a place where one of experience, in the proper course of his employment, might throw his weight upon it to his own hurt or injury. Indeed the experienced man, the one most accustomed to do the thing required, would be the one most apt to reach for the pedestal without conscious thought of the possible insecurity of the thing.

Passing then to the ultimate fact, we have no hesitation in saying that the jury was justified in finding that the proximate cause of the injury was the placing of the loose pedestal at a place where a man in the exercise of ordinary care for his own safety might take hold of it. It is not charged that respondent put the pedestal where it was, and surely there is no principle that would hold him to the rule of contributory negligence for acting upon appearances, and without a particular examination as to the security of the pedestals immediately in front of the place where he was compelled to descend. But if respondent is not to be exculpated from the charge of contributory negligence as a matter of law, the facts are clearly sufficient to carry the case to a jury, and appellant is concluded by the verdict.

Appellant's first hope must necessarily lie in the contention that the loose pedestal was placed in a position to invite disaster

by a fellow servant; that the negligence, if any, was that of a fellow servant, and not of appellant, and hence no recovery can be had. We think the doctrine of fellow servant, cannot apply for two reasons, equally obvious. The clearing of the hatch for removing cargo from the hold was done under the immediate direction of the boatswain, who was in the exercise of all the authority possessed by the master or mate. He was a vice principal. The duty of care for the safety of the workman was upon the ship. The work being under the personal direction of one of higher authority than any of the seamen, the principal was bound to answer for the negligence of men as well as the insecurity of methods or means. For it would be the ultimate of illogic to hold that a principal could be held when directing, or for failure to direct, and could not be held for a thing when done under his direction. The principal must act through an instrumentality of his own choosing, which is but another way of saying that it is the duty of the principal to furnish a reasonably safe place to work, and to keep that place reasonably safe during the progress of the work. Such duty is not performed by offering a safe place to work, but extends to "all the instrumentalities, machinery, and appliances which from the nature of the work directly affected the safety of the place." *Westerlund v. Rothschild*, 53 Wash. 626, 102 Pac. 765.

That the boatswain, supervising the work and executing the will of the master of the ship, was a vice principal we have no doubt. Respondent being hurt while following the directions of the boatswain, the question of contributory negligence and assumption of risk were for the jury.

The second reason which finds response in our minds, although we do not bottom our decision upon it for reasons hereinbefore assigned, is that before the question of fellow servant can be considered by the court we must find as a matter of law that the fixed pedestal was itself a safe appliance, and that the accident would not have happened if the loose pedestal had not been left where it was. Whether the fixed pedestal was a safe appliance was clearly a question for the jury. Many witnesses testified that there should have been a ring bolt, or toggles, or a rope to aid the seaman. One of appellant's own witnesses says that there should have been a rope to throw around the fixed pedestal to relieve the reach between the pedestal and the ladder below.

Appellant finally contends that respondent cannot recover because the obligations of the parties are governed by the maritime law; that under the maritime law all mem-

bers of the crew, with the possible exception of the master, are fellow servants; that the liability of the master or owner exists whether the accident is attributable to negligence or accident, but the remedy in all cases is limited to a recovery for maintenance and care. *The Osceola*, 189 U. S. 159, 47 L. ed. 760, 23 Sup. Ct. Rep. 483. The right to maintain an action in the state courts depends upon a proper construction of § 9 of the Federal Judiciary Act (1 Stat. at L. 77, chap. 20, Rev. Stat. § 563, re-enacted March 3, 1911, § 24, 36 Stat. at L. 1091, chap. 231, Comp. Stat. 1916, § 991 (3)): "The district courts shall have original jurisdiction as follows: . . . Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it."

We understand counsel aright, it is contended that there is no such thing as a common-law action under the maritime law; that there is a definite distinction between a common-law action, or right of action at common law, and a common-law remedy; that it is not a remedy in the common law which is saved, but "a common-law remedy;" that the right to recover for maintenance and cure irrespective of negligence was in no case allowable at common law, and that therefore the remedy lies in the statute, and so resting, a right at common law cannot be asserted, for "surely a vessel and its owners are not to be subjected to all the liabilities of both the common law and the admiralty law, in an action brought in a common-law court, without being entitled to the corresponding benefits (as far as its defenses are concerned) of such laws. Either the admiralty law in its entirety is enforceable in such courts, or it is not enforceable to any extent."

Appellant cites *The Moses Taylor*, 4 Wall. 431, 18 L. ed. 402; *The Glide*, 167 U. S. 606, 42 L. ed. 296, 17 Sup. Ct. Rep. 930; *The Belfast*, 7 Wall. 624, 19 L. ed. 266; *Ashbrook v. The Golden Gate*, Newberry Adm. 296, Fed. Cas. No. 574; *The Isabella*, Brown, Adm. 96, Fed. Cas. No. 7,100; *Knapp S. & Co. v. McCaffrey*, 177 U. S. 638, 44 L. ed. 921, 20 Sup. Ct. Rep. 824; *Schuede v. Zenith S. S. Co. (D. C.)* 216 Fed. 566. In *Schuede v. Zenith S. S. Co.* supra, which is asserted to be a case directly in point, it is said: "But for the exception in the Act of 1879 Rev. Stat. § 711, Comp. Stat. 1916, § 1233, carried into the present Judicial Code, allowing suitors recourse to a competent common-law remedy, it would seem that the citations above, asserting the controlling force of general and statutory maritime law, indicate the necessity to overrule the motion before the court. To advance that sav-

ing clause as a reason why the plaintiff may escape what he may assume to be the disadvantages incident to his maritime contract and seek the advantages of the state law in his suit in a state court upon such a contract is, in our judgment, to misapprehend what is meant in this provision by the word 'remedy.' It must be observed, as suggested by Justice Field, in *The Moses Taylor*, 4 Wall. 431, 18 L. ed. 402, quoted approvingly in *The Glide*, 167 U. S. 606, 617, 42 L. ed. 296, 299, 17 Sup. Ct. Rep. 930, that what is saved to a suitor 'is not a remedy in the common-law courts, but a common-law remedy;' that is, as we paraphrase it, the suitor who has a right of action growing out of a maritime contract may not go into a law court to find a new remedy, but he may employ a common-law forum, if one is found competent to work out the rights involved in his contract. In the case before us, the maritime law is not so favorable to the plaintiff touching the range of defense to his action as would be the Ohio law; but those defenses which he seeks to avoid are incidents to, and, as against him, liabilities of, his contract. They help define his contract of employment, and hence, although employable against him in defense, are no part of the remedy, as that term is used in the saving clause of the Code. The clause 'leaves open the common-law jurisdiction of the state courts over torts committed at sea' (*The Hamilton (Old Dominion S. S. Co. v. Gilmore)* 207 U. S. 398-404, 52 L. ed. 264-269, 28 Sup. Ct. Rep. 133), and in our judgment does nothing else. The extent of liability for such a tort to be enforced in a common-law jurisdiction is to be restrained by the law which created the relation in which it was committed. . . . In the case of a cause of action for an injury incurred in the course of a maritime employment, to avoid the manifest inconveniences and inequalities involved in plaintiff's interpretation of the saving clause in question, it is not only reasonable, but well within the language of the law, to require whichever court, state or Federal, is entered to work out a remedy, to enforce the general and uniform law maritime under which the contract of employment was made."

In *Cornell S. B. Co. v. Fallon*, 102 C. C. A. 345, 346, 179 Fed. 293, 294, it was held: "The contract between the defendant and the deceased is a maritime contract, and establishes their relation as well in courts of law as in courts of admiralty. A seaman injured in the service of the vessel has a right to recover against the vessel and her owners for his wages and the expenses of his maintenance and cure to the end of the voyage, or as long as he has a right to wages, whether he is or they are guilty of L.R.A.1917F.

negligence or not. And this is the extent of his right to recover. There is an exception, apparently a departure from the maritime law, but established by so many decisions that the Supreme Court has declined to disturb it, viz., that if the seaman's injury is due to the personal negligence or default of the shipowners, as, for instance, to the unseaworthiness of the vessel or her tackle, or failure to supply proper medical treatment and attendance, he may recover full indemnity. *The Iroquois*, 194 U. S. 240, 48 L. ed. 955, 24 Sup. Ct. Rep. 640, 16 Am. Neg. Rep. 638; *The Osceola*, supra; *The Troop*, 63 C. C. A. 584, 128 Fed. 856. As no personal negligence or default is imputed to the defendant, the decedent would not have had a right to full indemnity if he had lived, but only to his wages and the expense of his maintenance and cure."

It is asserted that this court has inferentially held that the remedy afforded by the maritime law is exclusive. *Sanders v. Stimson Mill Co.* 32 Wash. 627, 73 Pac. 688. On the other hand, respondent contends that this case falls within the exception noted in the case cited in the *Cornell S. B. Co. Case*. That is, any defect in the ship, its tackle, or appliances for working its cargo is enough to render the ship unseaworthy within the meaning of that term as employed in the case of *The Osceola*, 189 U. S. 159, 47 L. ed. 760, 23 Sup. Ct. Rep. 483, and to permit a recovery of full indemnity to the extent of the injury. That such a defect brings the case within the rule of unseaworthiness is held in the case of *The Argo*, 127 C. C. A. 456, 210 Fed. 872, where a recovery was allowed for failure to guard machinery. That confusion should follow the Federal statute is evident from its terms. To avoid what would often operate as a denial of justice, the courts, without confessing the motive, as it seems to us, have injected a saving clause in the term "unseaworthiness." *The Osceola*, supra.

The Federal act "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it . . . leaves open," as is said by Justice Holmes in the case of *The Hamilton (Old Dominion S. S. Co. v. Gilmore)* 207 U. S. 398, 52 L. ed. 264, 28 Sup. Ct. Rep. 133, "the common-law jurisdiction of the state courts over torts committed at sea." "This, we believe, always has been admitted." The question was, Congress having remained silent, whether a state could legislate so as to extend the jurisdiction of its courts over questions maritime. The court reasoned, inasmuch as the state courts had power to follow their own notions about the law in such cases, that the power of a state to speak through its other mouthpiece, the

legislature, could not be denied; and while it may be, as is said in the *Schuede Case*, that the case of *The Hamilton* does not, in its terms, go beyond a holding that the Federal statute extends jurisdiction to the state courts over torts committed at sea, yet in its spirit and its logic it must be taken at a greater worth, for the power to exercise a common-law jurisdiction, without the right to give such remedy as the common law would afford if the case were between ordinary litigants, would be to grant a right and deny the very remedy named in the act, that is, a common-law remedy. To hold with the *Schuede Case* that a grant of jurisdiction to the state courts means no more than a power to give the same remedies as are allowable under the maritime law would be to deny the primer definition of jurisdiction; that is, the power to hear and determine. To determine must, of necessity, mean the power to enter a judgment consistent with the common law if the court hearing the case has common-law jurisdiction, and the case falls within the exception noted.

The right to maintain an action in personam even to the extent of aid by attachment is recognized in *Rounds v. Cloverport Foundry & Mach. Co.* 237 U. S. 303, 59 L. ed. 966, 35 Sup. Ct. Rep. 596. There the question whether a contract for repairs was a maritime contract, a breach of which could be determined only in the Federal courts, was squarely put. The court considered the same saving statute which is now relied on. It was held that the exclusive jurisdiction of the Federal courts extended to cases in rem; and that no controversy might arise as to the meaning of the term, "in rem," as it is used in our discussions of the maritime law, it was defined: "The proceeding in rem which is within the exclusive jurisdiction of admiralty is one essentially against the vessel itself as the debtor or offending thing,—in which the vessel is itself seized and impleaded as the defendant, and is judged and sentenced accordingly."

And further, in discussing the question of concurrent jurisdiction: "As this court said in *Johnson v. Chicago & P. Elevator Co.* 119 U. S. 388, 30 L. ed. 447, 7 Sup. Ct. Rep. 254, in reviewing *Leon v. Galceran*, 11 Wall. 185, 20 L. ed. 74, it was held that 'the action in personam in the state court was a proper one, because it was a common-law remedy, which the common law was competent to give, although the state law gave a lien on the vessel in the case, similar to a lien under the maritime law, and it

was made enforceable by a writ of sequestration in advance, to hold the vessel as a security to respond to a judgment, if recovered against her owner, as a defendant; that the suit was not a proceeding in rem, nor was the writ of sequestration; that the bond given on the release of the vessel became the substitute for her; that the common law is as competent as the admiralty to give a remedy in all cases where the suit is in personam against the owner of the property; and that these views were not inconsistent with any expressed in *The Moses Taylor*, 4 Wall. 411, 18 L. ed. 402; in *The Hine v. Trevor*, 4 Wall. 555, 18 L. ed. 451, or in *The Belfast*, 7 Wall. 624, 19 L. ed. 266.'"

As thus understood, we find nothing in the Federal cases inconsistent with a former decision of this court (*Ransberry v. North American Transp. & Trading Co.* 22 Wash. 476, 61 Pac. 154). *Sanders v. Stimson Mill Co.* supra, in no way trenches upon the doctrine of this case. There a recovery was properly limited, for the injury was the result of an accident. There was no testimony showing, or tending to show, a breach of duty or of obligation on the part of the owner, or the unseaworthiness of his ship. Our conclusion is that an action in personam may be maintained for a tort committed on the high seas if the accident is attributable to the "unseaworthiness" of the vessel; that the common-law courts of a state have jurisdiction concurrent with the Federal courts when proceeding in personam; and that the state court will grant the relief that a common-law court would have granted had the case been originally triable in such court.

Objection is made that the accident having occurred on the high seas, and not within the territorial jurisdiction of the courts of Washington, respondent must seek his remedy in the Federal courts, or take his remedy in the state court under the maritime law. It may be that the *Schuede Case* so holds. Counsel insists that it does. But we prefer to hold what we conceive to be the better rule. Having held that the action is one in personam, it follows that it is transitory, and appellant is subject to suit in any court having jurisdiction of the person. Jurisdiction over the person is not questioned in this case. Moreover, if actions arising out of the unseaworthiness of a ship are not within the Federal statute, it follows that a want of jurisdiction cannot be urged when the action is brought in the state courts. Objection is made to one of the instructions, but, with this view of the law, we think it was not prejudicial.

While the recovery in this case is substantial, and is probably more than any one of us would have been willing to return if we were sitting as jurors, we think it is not so far out of proportion to the injuries received by the respondent as to bear inherent

evidence of the passion and prejudice of the jury.

The judgment is affirmed.

ELLIS, Ch. J., and MORRIS, MAIN, and WEBSTER, JJ., concur.

Annotation—May substantive law of state be invoked in an action for personal injuries, not resulting in death, on waters within the maritime jurisdiction.

The question under consideration presupposes that the tort in question was a maritime tort, and so within admiralty jurisdiction, and the note therefore is not concerned with cases like *Gordon v. Drake* (1916) — Mich. —, 159 N. W. 340, apparently applying the common-law rule of the state with reference to acts in an emergency, in which the position was taken that the tort was not of admiralty cognizance, for the reason that, while it may have originated on the water, the injuries were received on shore.

The decision in *LARSON v. ALASKA S. S. Co.* ante, 671, that in an action at common law based upon a maritime tort a seaman may recover the full indemnity allowed by the common law, and is not bound by the admiralty rule limiting the allowance to wages to the end of the voyage and the expenses of maintenance and cure for a reasonable time thereafter, is directly opposed by a subsequently reported decision of the Circuit Court of Appeals for the Second Circuit of *Chelentis v. Luckenbach S. S. Co.* (1917) L.R.A. —, —, — C. C. A. —, 243 Fed. 536. The action in this case, though commenced in the Federal district court, was brought as a common-law action.

The court said in effect that the contract of a seaman is maritime and has written into it the peculiar features of the maritime law, and must be the same in every court, maritime or common-law, the only difference between a proceeding in one court or the other being that the remedy would be regulated by the *lex fori*.

As shown in the opinion in the *LARSON CASE*, the decision in that case is also opposed by the decision of the District Court for the Northern District of Ohio in *Schuede v. Zenith S. S. Co.* (1914) 216 Fed. 566. That court adopts a broad view which confines the substantive rights and liabilities of the parties to a maritime tort to those given or imposed by the maritime law, and in consequence denies the right to invoke

either the law of the state to which the vessel belongs, or that of the state within whose territorial waters the maritime tort occurred, for the purpose of enlarging the rights or extending the liabilities fixed by the maritime law. The view is that the saving clause of the Judiciary Act, which confers upon the District Court jurisdiction of all civil cases of admiralty and maritime jurisdiction," saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it," merely has the effect to enable a suitor to invoke a common-law remedy, if any such is available, to enforce a substantive right derived from the maritime law. The position taken by the court is made plain by the statement in the opinion, that "it is precisely the distinction drawn in cases dealing with conflicts between the *lex loci contractus* and the *lex fori*, well illustrated in the case of *Heaton v. Eldridge* (1897) 56 Ohio St. 87, 36 L.R.A. 817, 60 Am. St. Rep. 737, 46 N. E. 638, enforcing the principle that 'contracts receive their sanction from the law of the place where they are executed and to be performed, and their interpretation is controlled by that law; but the remedy upon the contract will be administered according to the law of the place where the remedy is sought.'"

The principle illustrated by the case cited in the quotation, that the law of the forum can only be invoked so far as it furnishes a remedy for the enforcement of the substantive rights and liabilities fixed by the law of the situs of the contract or other transaction, is of course well established as regards cases where an action is brought in one state or country upon contracts or transactions made or occurring in another. The application of the principle, however, to the interpretation of the saving clause in the Judiciary Act very materially restricts the scope and effect of that clause, and if adopted and applied in the *LARSON CASE* would apparently have defeated any right of recovery by

the plaintiff in the state court beyond that which the maritime law would allow in the circumstances.

In the *Schuede Case* the plaintiff, a wheelman on a vessel owned by a Minnesota corporation, was injured as the result of a maritime tort while the vessel was within the territorial waters of Ohio; defendant pleaded that plaintiff's employment, in the course of which he was injured, was under a maritime contract, and the right of recovery was determinable by the incidents of such a contract; averments of the answer in this behalf were made the subject of a motion to strike out, and therefore, as the court said, the question was raised whether in the trial of the action the defendant might demand the application of the maritime law respecting the rights, duties, and liabilities of the master to seamen, and the relation of fellow servant and the force to be given to the principle of contributory negligence, or whether the action was to be controlled by the Ohio Employers' Liability Act. The court suggested incidentally that if the maritime law did not apply there would be some doubt whether the law of Minnesota, as the home port of the vessel, rather than the law of Ohio, would not control; but the decision of that question was rendered unnecessary by the conclusion that the maritime law governed, so far as the substantive rights and liabilities of the parties were concerned.

As already indicated, the court in the *Chelentis Case* places its decision upon the ground that the characteristic features of the maritime law enter into and become a part of the seamen's contract. There may therefore, perhaps, be some question whether that court would go as far as did the court in the *Chelentis Case* when it declared in effect that the state law cannot, in any case of personal injuries, not resulting in death, from a maritime tort, be regarded for the purpose of determining the substantive rights and liabilities of the parties. As the *Schuede Case*, like the *Chelentis Case*, involved an injury to a seaman, it would seem that the decision on its facts might have been put upon the narrower ground taken in the latter case.

The view taken in the *Schuede Case* seems to be supported by the decision of the Federal district court for the western district of New York in *The Henry B. Smith* (1912) 195 Fed. 312, where Hazel, D. J., said he was constrained to hold that in an action for

personal injuries the Employers' Liability Act of the state has no application; that rights of action in admiralty are *sui generis*, and controlled by the maritime law, "save in case of death, wherein the states, by legislative enactments, have created liens and rights of action which are not inconsistent with the maritime law."

The decisions in the *Chelentis* and *Schuede Cases*, however, are opposed not only by the *LARSON CASE*, ante, 671, but also by the decision of the Federal district court for the district of Oregon in *Keithley v. Northern P. S. S. Co.* (1916) 232 Fed. 255, where the court sustained a demurrer to an answer setting up the defenses of the act of a fellow servant, assumption of risk, and contributory negligence in an action brought specifically under the Oregon Employers' Liability Act for injuries to a longshoreman sustained on board a vessel within the territorial waters of Oregon. Wolverson, D. J., remarked at the close of the opinion that, with all due deference to the able and exhaustive opinion of Judge Killits in the *Schuede Case*, he was unable to agree with the latter's conclusions.

Although admiralty follows the common law in denying an action for death, it is now settled that an action under a state death statute for death from a maritime tort may be maintained either in a state court or an admiralty court. (See note to *Rainey v. W. R. Grace & Co.* L.R.A.1916A, 1157.) This was recognized in the *Schuede Case*, but the court there said that in all the cases sustaining that principle, from one of the earliest (*American S. B. Co. v. Chase* (1873) 16 Wall. (U. S.) 532, 21 L. ed. 369) to the latest (*The Hamilton* (Old Dominion S. S. Co. v. *Gilmore*) (1907) 207 U. S. 398-404, 52 L. ed. 264-269, 28 Sup. Ct. Rep. 133, and *Thompson Towing & Wrecking Asso. v. McGregor* (1913) 124 C. C. A. 479, 207 Fed. 209), the application of state laws is sustained, not because such laws can be utilized in all cases when a suitor prefers to enter a state court, but because "where no remedy exists for an injury in the admiralty courts, the fact that such courts exist and exercise jurisdiction in other causes of action leaves the state courts as free to exercise jurisdiction in respect to an injury not cognizable in the admiralty as if the admiralty courts were unknown to the Constitution and had no existence in our jurisprudence." Again the court said: "In admiralty no remedy exists

for a death resulting from a marine tort. In *Cornell S. B. Co. v. Fallon* (1909) 102 C. C. A. 345, 179 Fed. 293, Circuit Court of Appeals, Second Circuit, a death case, action at law under the New York modification of Lord Campbell's Act, it was pointed out that decedent, a seaman injured in the service of his vessel, had he lived to sue either at law or in admiralty, would have had his rights determined by the law maritime affecting his contract of employment, whereas his administratrix was privileged to use the state law." The court in the *Schuede* Case added that a careful reading of *Murray v. Pacific Coast S. S. Co.* (1913) 207 Fed. 688, discloses that while the question before the court in the case at bar there arose, it was not found necessary to decide it.

As shown in the note in L.R.A.1917D, 88, on Workmen's Compensation Acts, it has been held by the United States Supreme Court that a state workmen's compensation act is not applicable to injuries occurring on vessels in waters within the admiralty jurisdiction of the United States, or at least that such an act cannot apply to a maritime tort oc-

curing on a foreign vessel while within the territorial waters of the state. This decision, however, does not rest upon the broad ground taken in the *Schuede* Case. Indeed, the opinion in *Southern P. Co. v. Jenson* (1917) 244 U. S. 205, 61 L. ed. 1086, 37 Sup. Ct. Rep. 524, concedes that the general maritime law may be changed, modified, or affected to some extent by state legislation; and the decision is put upon the ground that "the remedy which the Compensation Statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and is not saved to suitors from the grant of exclusive jurisdiction." The injuries in the *Jenson* Case resulted in death, but the decision is of course applicable to injuries not resulting in death. The decision does not affect the rule previously referred to, that an action may be maintained under a state death statute for death resulting from a maritime tort, except as it excludes the principles upon which the Compensation Acts are founded, in determining the defendant's liability. G. H. P.

CONNECTICUT SUPREME COURT OF ERRORS.

MARY R. LYONS, Appt.,

v.

MARIANNE WALSH.

(— Conn. —, 101 Atl. 488.)

Adjoining owners — duty to maintain retaining wall.

1. A successor in title of one who upon removing the lateral support of an adjoining lot erects a retaining wall upon such adjoining lot is under no obligation to keep the wall in repair where no such obligation is imposed by contract.

For other cases, see Adjoining Owners, in Dig. 1-52 N. S.

Injunction — to compel restoration of retaining wall — when granted.

2. Injunction will not lie to compel one to repair a retaining wall on his property to prevent its falling onto the adjoining property, in the absence of anything to show that irreparable injury will result therefrom.

For other cases, see Injunction, I. c, in Dig. 1-52 N. S.

Note. — For duty as to maintenance and repair of retaining wall, see annotation following this case, post, 683. L.R.A.1917F.

Adjoining owners — fall of retaining wall — damages.

3. One upon whose property portions of a retaining wall fall from adjoining property is entitled to such damages as will compensate him for the injury done.

For other cases, see Adjoining Owners, in Dig. 1-52 N. S.

(July 6, 1917.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas for New London County in favor of defendant on her counterclaim, in an action brought to compel her to repair a retaining wall, and for damages for injury already incurred. Reversed.

Statement by Case, J.:

The parties own adjoining city house lots on a street in Norwich running north and south. Both lots were originally in one tract, and in its natural condition the land sloped unbrokenly and at a steep pitch from the north. Long before either of the present owners acquired title to her lot, the then owner of the lower lot, who had purchased from the original owner of the tract, leveled a part of his land for building upon it, and in so doing excavated and removed the soil from this portion up to and along a section

of his northern boundary line. This destroyed for a corresponding distance the natural lateral support of the adjoining land of the north lot, and to replace it he built into the bank a retaining wall 10 feet high along this portion of the east and west line. This was set wholly upon the upper, or what is now the Walsh, lot, and the dividing line of the two properties lies along its exposed southern face. Some years afterwards, in 1895, and after the defendant had become the owner of the north lot, a later owner of the south lot made another excavation in preparation for further building, and removed more soil up to the line as extended from the eastern end of the wall. This operation removed the lateral support of the Walsh land along the continued line, and in substitution for this support he extended the wall at the same height of 10 feet still further along the line, continuing it wholly on the Walsh land, so that the dividing line of the two lots follows the southern face of the wall throughout its length. The height of the wall measures the depth of the excavations at the line, and no additional burden requiring more than the natural lateral support of the soil has ever been added to the Walsh lot. The parties are ignorant of the circumstances under which the first section of the wall was placed on the Walsh lot, save that its purpose and the person erecting it were as already stated, and, although the remaining part of the wall was built after the defendant had acquired her present ownership, the record is silent as to why this part of the wall was also placed wholly upon her land. No deed dealing with any of the property involved mentions the wall. The plaintiff bought the south lot in 1913, and through neglect and the work of the elements the wall has been disintegrating for several years, there being no evidence of any effort by anyone to maintain it or keep it in repair. It is now out of plumb in parts, and stones from it have become loosened and dislodged, and have fallen upon the plaintiff's land. Damage to the plaintiff from this cause during the two years next before this action was brought amounts to \$25. More trouble of this character is likely to occur, and the wall is in danger of further collapse, unless it is strengthened or restored.

There was apparently no dispute between the parties as to these essential facts, and upon them the plaintiff claimed, by way of equitable relief, a mandatory injunction directing the proper repair or rebuilding of the wall by the defendant, and legal relief in damages for the injury already incurred. The defendant, in pursuance of a counterclaim which rehearsed the more important L.R.A.1917F.

of the facts and supplemented them with further allegations in the nature of assumed legal deductions from them, claimed a mandatory injunction compelling the restoration of the wall by the plaintiff to a condition of efficiency, or the furnishing of other adequate support for the defendant's land. The trial court rendered judgment for the defendant for a mandatory injunction as prayed for, and for nominal damages, and the plaintiff's claim of error, alternatively stated in its several assignments upon the appeal, is based upon the court's holding that the duty of maintaining the wall rested upon the plaintiff, and in not holding that it rested upon the defendant.

Messrs. William H. Shields, Thomas M. Shields, and William H. Shields, Jr.,
for appellant:

The right of lateral support is the right of every landowner to have his land in its natural state preserved unbroken. It is a natural right, and not an easement in adjoining land.

Rutkoski v. Zalaski, 90 Conn. 108, 96 Atl. 365; Bigelow, Torts, 8th ed. chap. 15, p. 428; Washburn, Easements & Servitudes, 4th ed. pp. 580-582; Gilmore v. Driscoll, 122 Mass. 199, 23 Am. Rep. 312, 14 Mor. Min. Rep. 37; Backhouse v. Bonomi, 9 H. L. Cas. 503, 11 Eng. Reprint, 825, 34 L. J. Q. B. N. S. 181, 7 Jur. N. S. 809, 4 L. T. N. S. 754, 9 Week. Rep. 769, 16 Eng. Rul. Cas. 216, 13 Mor. Min. Rep. 677; Kansas City Northwestern R. Co. v. Schwake, 68 L.R.A. 683 and note, 70 Kan. 141, 78 Pac. 431, 3 Ann. Cas. 118; Jones, Easements, §§ 585, 590, 627.

Plaintiff is not responsible to defendant for acts of plaintiff's predecessors in title.

Hall v. Norfolk [1900] 2 Ch. 493, 69 L. J. Ch. N. S. 571, 64 J. P. 710, 48 Week. Rep. 565, 82 L. T. N. S. 836, 16 Times L. R. 443, 20 Mor. Min. Rep. 636; Greenwell v. Low Beechburn Coal Co. [1897] 2 Q. B. 165, 66 L. J. Q. B. N. S. 643, 76 L. T. N. S. 759; Kansas City Northwestern R. Co. v. Schwake, 68 L.R.A. 695 and note, 70 Kan. 141, 78 Pac. 431, 3 Ann. Cas. 118; Secongost v. Missouri P. R. Co. 53 Mo. App. 369.

Plaintiff after becoming owner of the adjoining property owed no duty to the wall.

Washburn, Easements & Servitudes, 4th ed. *6; Whiting v. Gaylord, 66 Conn. 337, 50 Am. St. Rep. 87, 34 Atl. 85; Ward v. Ives, 91 Conn. 12, 98 Atl. 337; Ockerhausen v. Tyson, 71 Conn. 31, 40 Atl. 1041; Ainsworth v. Lakin, 180 Mass. 397, 57 L.R.A. 132, 91 Am. St. Rep. 314, 62 N. E. 746; Perley v. Cambridge, 220 Mass. 507, L.R.A.1915F, 432, 108 N. E. 494.

It was the defendant's duty to maintain and safeguard the wall.

3 Shearm. & Redf. Neg. 1913, § 702; Ainsworth v. Lakin, 180 Mass. 397, 57 L.R.A. 132, 91 Am. St. Rep. 314, 62 N. E. 746.

Mr. J. J. Desmond, for appellee:

The right to lateral support is regarded as an incident to the ownership of land, and its infringement has been considered as a nuisance which equity may enjoin.

Trowbridge v. True, 52 Conn. 190, 52 Am. Rep. 579; Gilmore v. Driscoll, 122 Mass. 199, 23 Am. Rep. 312, 14 Mor. Min. Rep. 37; Ceffarelli v. Landino, 82 Conn. 126, 72 Atl. 564; Thomp. Neg. § 1101; Pettit v. Jamestown & F. R. Co. 222 Pa. 490, 21 L.R.A. (N.S.) 318, 71 Atl. 1048.

Case, J., delivered the opinion of the court:

When a former owner of the Lyons land first disturbed its surface, he did so at the peril of answering in damages if his act should destroy the lateral support which was his neighbor's by natural right. The law as to that situation is universally settled: "The right of an owner of land to the support of the land adjoining is *jure naturæ*, like the right in a flowing stream. Every owner of land is entitled, as against his neighbor, to have the earth stand and the water flow in its natural condition." Gilmore v. Driscoll, 122 Mass. 199, 201, 23 Am. Rep. 312, 14 Mor. Min. Rep. 37; Trowbridge v. True, 52 Conn. 190, 52 Am. Rep. 579; Ceffarelli v. Landino, 82 Conn. 126, 72 Atl. 564.

He apparently recognized this, and sought to forestall the probable result to the higher ground of the upper lot by substituting an artificial support to safeguard it. In every effective sense he accomplished this purpose, but what he actually did was to take away a portion of his neighbor's land and replace it with a solid stone wall. Whether he invaded the adjoining lot by mistake or with its owner's consent is of no consequence, so far as his successors in title are concerned. It was in any event so done as to leave no charge upon his own land. The wall became as much a part of the realty upon which it was built as the earth had been which it replaced, and with the same incidents and burdens of ownership as attach to every part of the land on which it stands. Ward v. Ives, 91 Conn. 12, 21, 22, 98 Atl. 337.

The accepted law with relation to lateral support is therefore without direct significance here, and of only an incidental interest in its possible bearing upon the equities which the case discloses. Such right arising from it as the defendant's predecessors in L.R.A.1917F.

title had in relation to the adjoining land was by way of relief in damages, once a wrongful invasion had been followed by an actual injury to the land. There is, of course, no natural right to equitable interference for the prevention of such an anticipated wrong, though it may very well be that in cases presenting situations peculiar to themselves and disclosing the essential elements of irreparable injury a court of equity will interpose its aid. But the redress contemplated by the law is that which comes from an infringement of the right that works actual damage. The violator is then answerable for his tort, whether he be the owner of the premises on which the initial mischief is committed, or the merest stranger to the title. Gilmore v. Driscoll, 122 Mass. 199, 208, 23 Am. Rep. 312, 14 Mor. Min. Rep. 37. The action is a purely personal one. The wrong which gives rise to it binds the land to nothing,—charges the title with nothing. But if the owner, in anticipation of such an injury arising out of his acts, sets an artificial structure on his own land to prevent it, and to replace what he has removed, he assumes an obligation which equity will recognize, and charges the land with its maintenance, so far, at least, as that maintenance is necessary to preserve his neighbor's rights.

The defendant seems to assume that in some way the situation presented here is controlled by this principle, and relies chiefly upon the earnestly urged unfairness of saddling the maintenance of the wall upon her, when it was confessedly erected by a former owner of the adjoining land to protect what later became hers from the consequences of his invasion. However persuasive her statement of the equities may appear in this limited view of the situation, the claim is not tenable. It ignores the entire absence of the link vitally necessary here to fasten any liability upon the plaintiff,—a burden upon the land itself which attaches to her as its owner. She is obviously only reachable through this, and it is not even seriously suggested that under the positive and well-understood law of real property the land came to her charged with any duty to this wall. As to any supposable personal agreement by the builders of the wall to maintain it, if we were at liberty on the record before us to assume that such an agreement ever existed, there is no conceivable theory of law or equity which could transfer the obligations of such a personal undertaking to the plaintiff upon her mere acquirement of a title in no way affected by it.

But, while these considerations are de-

cisive of the case, it is apparent that something might be said for the plaintiff's equitable position here, if there were occasion to treat the matter in that aspect. She succeeded to her present ownership as recently as 1913, and took the land as she found it. The wall was no part of her purchase, but was an open and visible part of the adjoining property. We may properly assume from the facts found that it was then in an advancing condition of decay. Whatever the original purpose of its erection had been, it became, after her ownership began, a source of annoyance, if not a menace, to her occupation. Even had she taken title with knowledge that the structure had been voluntarily put there by some former owner of the land she was buying, to avoid a personal liability for a tort of his own, this could not weaken her position from the standpoint of equity. She was in no sense equitably, any more than legally, answerable for any act of her predecessor in title, to which she was not a party, and which did not result in a charge upon the land. We are unable to sustain the judgment of the trial court, charging the plain-

tiff, as it does, with the duty of maintaining the wall, but the finding is comprehensive enough to warrant a final disposition of the case without a retrial.

The plaintiff is entitled to recover for the damage already done to her land by falling parts of the wall; but as to her claim for equitable relief by way of a mandatory injunction directing the rebuilding or restoration of the wall to its original condition, we are not satisfied that irreparable injury is clearly enough disclosed to warrant the exercise of so drastic a power. Equitable relief of this character is, and for the most obvious reasons should be, granted only in situations which so clearly call for it as to make its refusal work real and serious hardship and injustice. The facts of the case before us hardly bring it within this requirement.

There is error, the judgment is reversed, and the cause is remanded, with directions to the Court of Common Pleas to enter a judgment for the plaintiff to recover damages, assessed at \$25.

The other Judges concur.

Annotation—Duty as to maintenance and repair of retaining wall.

The question as to the duty of maintenance and repair of a retaining wall under the circumstances existing in *LYONS v. WALSH*, ante, 680, appears to be a novel one. Indeed, the question generally as to the duty of maintenance and repair of such walls seems to have received little judicial discussion. There are cases, such as *Abrey v. Detroit* (1901) 127 Mich. 374, 86 N. W. 785, involving the question of the duty to construct a retaining wall. And in actions for personal injuries the question has arisen as to whether a landowner was negligent with respect to a retaining wall. Thus, it was held in *Schimberg v. Cutler* (1906) 74 C. C. A. 33, 142 Fed. 701, that the owner of a lot who, with the consent of the county commissioners, built a retaining wall beside an ordinary county highway, which was about 8 feet higher than the lot, was not obliged to place a railing on the top of the wall to prevent people from falling off the highway upon his lot.

And in an action for damages for the fall of a retaining wall built at the intersection in the rear of plaintiff's and defendant's lots, which abutted on different streets, it was held in *Steenek v. O'Leary Realty & Constr. Co.* (1913) 80 L.R.A.1917F.

Misc. 507, 141 N. Y. Supp. 572, that there could be no recovery, where it appeared that the plaintiff's lot was several feet higher than that of the defendant, that the wall was a dry wall resting upon the top soil, and that the space between the wall and the side of a slope on plaintiff's premises had been filled in with rock and earth, and that the defendant had notified the plaintiff of its intention to excavate on its lot for building purposes, and had excavated to a depth of about 2 feet, and within from 18 inches or 2 feet of the wall, when it gave way. It was held that the case was not within the provisions of the building code, and that, although nothing was done to strengthen the wall, negligence, which was essential to the plaintiff's recovery, was not shown on the part of the defendant.

As to liability for removal of lateral or subjacent support of land in its natural condition, see note to *Kansas City Northwestern R. Co. v. Schwake*, 68 L.R.A. 673.

As to express agreements or covenants for lateral support, see note to *Orr v. Dayton & M. Traction Co.* 48 L.R.A. (N.S.) 474.

R. E. H.

MICHIGAN SUPREME COURT.

GUSTAVE A. SCHENK

v.

CITY OF ANN ARBOR.

(— Mich. —, 163 N. W. 109.)

Water — percolating — right of municipality to use.

A municipal corporation cannot pump percolating water from land owned by it for distribution to its inhabitants at a distance from the land, where the water is secured in such quantities as are unreasonable with respect to the owner of adjoining property.

For other cases, see Waters, II. h, in Dig. 1-52 N. S.

(Kuhn, Ch. J., and Brooke and Steere, JJ., dissent.)

(May 31, 1917.)

CROSS APPEALS from a decree of the Circuit Court for Washtenaw County in an action brought to restrain defendant from pumping percolating water from land owned by it, defendant appealing from so much of the decree as allowed plaintiff any damages, and plaintiff appealing from so much as dissolved the injunction. Modified and affirmed.

The facts are stated in the opinion.

Messrs. Frank B. De Vine, A. F. Freeman, and John P. Kirk for appellant.

Mr. Arthur Brown, for appellee:

A municipality has no more right to deprive an adjoining property owner of the use of water for domestic and agricultural purposes than has a private individual, and if a municipality wishes to provide its people with water it may do so by employing the right of eminent domain where it cannot be secured otherwise.

Forbell v. New York, 164 N. Y. 522, 51 L.R.A. 695, 79 Am. St. Rep. 666, 58 N. E. 644; People v. New York Carbonic Acid Gas Co. 196 N. Y. 421, 90 N. E. 441; Smith v. Brooklyn, 18 App. Div. 348, 46 N. Y. Supp. 141; Meeker v. East Orange, 77 N. J. L. 623, 25 L.R.A.(N.S.) 465, 134 Am. St. Rep. 798, 74 Atl. 379; Katz v. Walkinshaw, 141 Cal. 116, 64 L.R.A. 236, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766; Miller v. Bay Cities Water Co. 157 Cal. 256, 27 L.R.A.(N.S.) 772, 107 Pac. 115; Willis v. Perry, 92 Iowa, 297, 26 L.R.A. 124, 60 N. W. 727; Gams v. Rollins, 41 Utah, 260, 125 Pac. 867, Ann. Cas. 1915C, 1159; 2 Wiel, Water Rights, 3d ed. 970-1009; Patrick v. Smith, 75 Wash. 407, 48 L.R.A.(N.S.) 740,

Note. — As to right of municipal corporation in respect of percolating waters, see annotation following this case, post, 691. L.R.A.1917F.

134 Pac. 1076, 6 N. C. C. A. 108; Gagnon v. French Lick Springs Hotel Co. 163 Ind. 687, 72 N. E. 849; Stillwater Water Co. v. Farmer, 89 Minn. 58, 60 L.R.A. 875, 99 Am. St. Rep. 541, 93 N. W. 907; Barclay v. Abraham, 121 Iowa, 619, 64 L.R.A. 255, 100 Am. St. Rep. 365, 96 N. W. 1080; P. Ballantine & Sons v. Public Service Corp. 86 N. J. L. 331, L.R.A.1915A, 369, 91 Atl. 95.

The owner of real estate is entitled to the aid of an enjoining order to prevent permanent and continually recurring injuries to the enjoyment of his property. To deprive him of such enjoyment is to deprive him of the property itself.

Gagnon v. French Lick Springs Hotel Co. 163 Ind. 687, 72 N. E. 849; Miller v. Bay Cities Water Co. 157 Cal. 256, 27 L.R.A.(N.S.) 772, 107 Pac. 115; Stillwater Water Co. v. Farmer, 89 Minn. 58, 60 L.R.A. 875, 99 Am. St. Rep. 541, 93 N. W. 907; Barclay v. Abraham, 121 Iowa, 619, 64 L.R.A. 255, 100 Am. St. Rep. 365, 96 N. W. 1080; Burroughs v. Saterlee, 67 Iowa, 397, 56 Am. Rep. 350, 25 N. W. 808; Ross Common Water Co. v. Blue Mountain Consol. Water Co. 228 Pa. 235, 77 Atl. 446.

Ostrander, J., delivered the opinion of the court:

The demand of the inhabitants of the city of Ann Arbor for water for domestic and other purposes exceeds 3,000,000 gallons daily. The municipality owns and operates the water plant supplying water to the inhabitants. Its present used sources of supply are wells, some springs, and the Huron river, which flows through the city. It is dissatisfied with the quantity and the quality of water thus available for the use of the city and its citizens. The charter of the city in terms grants the power to purchase, erect, and maintain grounds and buildings, within or not exceeding 3 miles outside of the limits of the city, for waterworks. Act No. 331, Local Acts of 1889, as amended by Act No. 658, Local Acts of 1907. South, and some 3 miles distant from the city, is a considerable tract of marsh land, underlying which is a large bed of water-bearing gravel, within easy reach of the surface of the ground; and there are also two other beds of gravel lower down, one 80 and the other 140 feet below the surface, each of them containing water. Underlying this region the formations are so distributed,—to use the language of a witness,—“that there is a slope for the underground water from the western part of Washtenaw towards Lake Erie: and what is true of this region is true all the way from Hillsdale county northerly to the headwaters of the Huron river up in Oakland

county, so that the area that lies between the western part of Washtenaw county and Steere farm has a slope to the southeast, a general slope to the southeast, and a general drainage to the southeast, and a general underground flowage to the southeast. This is the natural result of the conditions prior to the deposition of the glacial deposits.

. . . The gravel deposits are very homogeneous. There is a great deal of fine marl, with clay in it. Traversing this are beds of gravel and sand that we find exposed, and these are found at various levels. These gravel deposits are in the neighborhood of 200 feet thick; in Lodi township they exceed 250 feet; and in the vicinity of the Steere farm they exceed 1,350 feet. Because of the great thickness of the gravel deposits there are running through these deposits at various levels various channels, so that in sinking wells it is not a difficult matter in this region to obtain a considerable supply of water, so that there are hardly any farmers in this neighborhood, I gather, who were unsuccessful in obtaining water; if not within a few feet of the surface, they could by going deeper. . . . The contributing area would come in through these western townships of the county,—from Dexter, Lima, and Freedom townships, and part of Sylvan and the townships to the west. They would contribute to this underground water, the natural flow of this area in this way, and this is demonstrable from the records of the wells I have obtained through the intervening area."

As early as the year 1910 attention was directed to this possible source of a water supply for the city, and in the year 1912 and thereafter tests were made to determine the quantity of water procurable. There were a number of small wells upon the marsh from which water was flowing. Other wells were driven, five 8-inch wells, and later another 8-inch and a 12-inch well, being put down by the city, to an average depth of about 30 feet. As many as 715,000 gallons of water flowed freely from the first five 8-inch wells, and from seven wells the daily flow was 866,200 gallons, a quantity which was materially increased by the use of a pump. In the year 1915 the city constructed upon the land a well 16 feet in diameter, from which it pumped water from May 12th until July 5th, the pumping being fairly continuous, day and night, although, for various reasons, pumping was for short periods of time interrupted. The result was from 3,700,000 to 3,800,000 gallons of water daily. The pumping lowered the water in the well from a point above the level of the ground to within 3 feet of the bottom of the well. At some time before or after the tests were begun, the city bought

and owns 130 acres of the land, including that upon which the test wells were constructed. Upon this land it desires to erect a costly pumping station, pump the water therefrom, force it to the city, and distribute it to the inhabitants.

It is the theory of the city, which its testimony, and especially its opinion evidence, tend to support, that it can for an indefinite period take from the wells upon this land a quantity of water, approximately 4,000,000 gallons daily, without lowering the head of the underground water, or the water table, more than it was lowered during the tests it has conducted. It is its theory, also supported by its opinion evidence, that the water in the water-bearing gravel reached by its wells does not by its presence in the earth, by seepage or percolation, affect agriculture upon or over or near to the particular tract of land; that it is from rains, and not from percolation or seepage from the subterranean body of water, that agriculture is supplied with required moisture.

The plaintiff, and, it appears, other land-owners upon the marsh and on higher land contend, and offer testimony to support the contention, that as a result of the pumping operations wells in the vicinity have gone dry, flowing wells upon the marsh have ceased to flow, or flow a diminished quantity of water, and that the agricultural productiveness and value of land for a half mile in every direction from the large well of the city will be unfavorably affected by continued pumping of water from the city's property. The testimony for the plaintiff tends to prove that when the city began to pump water from the large well the water in plaintiff's well, 200 rods north and west from the city well, was 4 feet deep, and lowered at the rate of about a foot a week during the first two weeks, and thereafter an inch a day for a week, and then one-half inch a day, until there was no water left in the well. When the pumping ceased, the water returned at the rate of one-half inch a day, and at the time of the hearing there were 40 inches of water in the well. While the pumping was continued, plaintiff was obliged to get water from a neighbor and to draw water in a tank from the county ditch for his stock. Upon another farm of 234 acres, east and across the road from the plaintiff's farm, were two wells, one dug at the house and one at the barn, and two flowing wells in the field for the use of stock. The well at the house had been dug more than fifteen years, and had always furnished sufficient water for domestic use. The water in this well was lowered during the pumping, so that no water could be pumped from it, and after the pumping ceased the

water in the well did not return. The well at the barn was affected in a similar way. The flowing wells upon this farm were about three quarters of a mile north and west of the large well put down by the city. From one of them the water ceased to flow at all, and from the other only a small quantity ran away, and at the time of the hearing the flow of water had returned, in one well not at all, and in the other only in reduced quantity. Upon another farm, south of plaintiff's land, and west of the land owned by the city, was a flowing well, a mile from the large well owned by the city. It was a 3-inch well, and before the pumping began had flowed a stream of water two thirds the size of the pipe. The flow was almost entirely cut off while the pumping was carried on, and after it ceased about one half of the original flow returned.

In various directions, and at various distances from the test wells, wells and property, it is claimed, were affected by the pumping operations, and a number of the owners of property began actions against the city, seeking to restrain the further taking of water from the wells, charging various resulting injuries temporary and permanent, to the land, occasioned by the taking of this large quantity of water from the earth. One of these cases was heard in the court below on demurrer to the bill of complaint, and from the decree which was entered an appeal was taken. *Osborn v. Ann Arbor*, 189 Mich. 96, 155 N. W. 1102. We declined to determine, upon demurrer, the questions which were presented. In the case at bar the plaintiff dug his well deeper, and secured a supply of water. The learned trial judge concluded that an injunction ought not to be continued, and that plaintiff should be satisfied with a decree for such damages as had resulted from his apparent ascertainable injury. From a decree granting such relief both parties have appealed.

If the court might accept as final what the parties decline to so accept and act upon, the opinions of gentlemen having special extra knowledge of the subject that the taking of 3,000,000 gallons and more of water from the city wells for an indefinite period will produce no other or greater injury to other owners of land than was produced by the test which were made, the question whether such use was a reasonable use would be, perhaps, presented for decision. It is obvious, however, that no judicial guaranty can be given that experience will sustain the contentions of either party respecting the results of continued pumping of the water. Under the circumstances, the important question which is involved, namely, whether the court will enjoin the city from further contemplated use of the water, can

be answered only by considering what are the rights of the parties. There are some ascertainable controlling facts, and upon them and applicable rules of law a conclusion must be based.

The controlling ascertainable facts may be briefly stated. The parties do not occupy the position of riparian owners. If there was (I think there is not) occasion to aid the testimony by presumption, the presumption necessarily employed would be that the waters in the particular gravel deposit are percolating waters, and not subterranean waters flowing in a defined channel, or contained in an underground lake or pond. Defendant city does not propose to use only the volume of water flowing naturally from its wells; it has augmented, and proposes to augment, that flow by artificial means,—by pumps,—by which means it will draw to its lands waters out of the surrounding lands, lowering over a considerable area the head of water naturally carried in the gravel. Existing flowing wells, the waters from which are used for the irrigation of crops suitable to be grown in the marsh, will cease to flow, and agriculture be thus, to some extent, directly affected. It proposes to use none, or at most only an inconsiderable, part of the water upon, or for the benefit of, the land from which it takes it, or for its own benefit as landowner; on the contrary, its purpose is to pipe the water away from the land, to sell some of it, to use some of it for municipal purposes, not to return any of it to the land. It cannot be now ascertained whether in time agriculture—surface conditions of land in the vicinity of the well or wells—will be affected injuriously by the continued drawing off of the underground water.

Under such circumstances, the right of the landowner, to the injury or detriment of other landowners, to take from his own land such percolating waters as he may thus be able to collect, is not an unqualified, but is a qualified, right. The letter of the law, as it has been expounded in many cases in England and America, affirms the right of the owner of land to sink wells thereon, and use the water therefrom, supplied by percolation, in any way he chooses to use it, to allow it to flow away, even though he thereby diminishes the water in his neighbor's wells or dries them entirely, and even though in so doing he is actuated by malice. Such a right has been held a property right, which cannot be taken away or impaired by legislation, unless by the exercise of the right of eminent domain, or the police power. *Huber v. Merkel*, 117 Wis. 355, 62 L.R.A. 589, 98 Am. St. Rep. 933, 94 N. W. 354. See *Acton v. Blundell*, 12 Mees. & W. 324, 152 Eng. Reprint, 1223, 13 L.

J. Exch. N. S. 289, 15 Mor. Min. Rep. 168; Chasemore v. Richards, 7 H. L. Cas. 349, 11 Eng. Reprint, 140, 29 L. J. Exch. N. S. 81, 5 Jur. N. S. 873, 7 Week. Rep. 685, 1 Eng. Rul. Cas. 729; Houston & T. C. R. Co. v. East, 98 Tex. 146, 66 L.R.A. 738, 107 Am. St. Rep. 620, 81 S. W. 279, 4 Ann. Cas. 827; Frazier v. Brown, 12 Ohio St. 294. In Pixley v. Clark, 35 N. Y. 520, 91 Am. Dec. 72, the common-law doctrine was accepted in this language: "An owner of the soil may divert percolating water, consume, or cut it off, with impunity. It is the same as land, and cannot be distinguished in law from land. So the owner of the land is the absolute owner of the soil, and of percolating water, which is a part of, and not different from, the soil. No action lies against the owner for interfering with or destroying percolating or circulating water under the earth's surface."

While this is the rule applied, and to be applied, in respect to most of the ordinary uses of land, and the ordinary operations carried upon and in land, there is other doctrine, apparently, but not strictly, a modification of the early common-law doctrine referred to, which is sometimes called the doctrine of reasonable user, and which was introduced by equity to the law. The distinction between the rules and the reasoning upon which each is based is stated, very much to my own satisfaction, by Chancellor Pitney in *Meeker v. East Orange*, 77 N. J. L. 623, 25 L.R.A.(N.S.) 465, 134 Am. St. Rep. 798, 74 Atl. 379, in an opinion approved by each of the members of the court of errors, from which opinion I take the following: "The English rule seems to be rested at bottom upon the maxim, '*Cujus est solum, ejus est usque ad cælum et ad inferos.*' Thus, in *Acton v. Blundell*, 12 Mees. & W. 354, 152 Eng. Reprint, 1235, 15 Mor. Min. Rep. 168, Chief Justice Tindal said that the case fell within 'that principle which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure.' Here the impracticability of applying the rule of absolute ownership to the fluid, water, which by reason of its nature is incapable of being subjected to such ownership, is apparently overlooked. If the owner of Whiteacre is the absolute proprietor of all the percolating water found beneath the soil, the owner of the neighboring Blackacre must, by the same rule, have the like proprietorship in his own percolating water. How, then, can it be con-

sistent with the declared principle to allow the owner of Whiteacre to withdraw, by pumping or otherwise, not only all the percolating water that is normally subjacent to his own soil, but also, and at the same time, the whole or a part of that which is normally subjacent to Blackacre? Where percolating water exists in a state of nature generally throughout a tract of land, whose parcels are held in several ownership by different proprietors, it is in the nature of things impossible to accord to each of these proprietors the absolute right to withdraw ad libitum all percolating water which may be reached by a well or pump upon any one of the several lots, for such withdrawal by one owner necessarily interferes to some extent with the enjoyment of the like privilege and opportunity by the other owners. Again, the denial of the applicability to underground waters of the general principles of law that obtain with respect to waters upon the surface of the earth is in part placed upon the mere difficulty of proving the facts respecting water that is concealed from view. But experience has demonstrated in a multitude of cases that this difficulty is often readily solved. When it is solved in a given case, by the production of satisfactory proof, this reason for the rule at once vanishes. . . . Upon the whole we are convinced, not only that the authority of the English cases is greatly weakened by the trend of modern decisions in this country, but that the reasoning upon which the doctrine of 'reasonable user' rests is better supported upon general principles of law, and more in consonance with natural justice and equity. We therefore adopt the latter doctrine. This does not prevent the proper user by any landowner of the percolating waters subjacent to his soil in agriculture, manufacturing, irrigation, or otherwise, nor does it prevent any reasonable development of his land by mining or the like, although the underground water of neighboring proprietors may thus be interfered with or diverted; but it does prevent the withdrawal of underground waters for distribution or sale for uses not connected with any beneficial ownership or enjoyment of the land whence they are taken if it results therefrom that the owner of adjacent or neighboring land is interfered with in his right to the reasonable user of subsurface water upon his land, or if his wells, springs, or streams are thereby materially diminished in flow, or his land is rendered so arid as to be less valuable for agriculture, pasturage, or other legitimate uses."

The earlier cases in New York repeatedly approved the rule laid down in *Acton v. Blundell* and *Chasemore v. Richards*, but in

Smith v. Brooklyn, 32 App. Div. 257, 52 N. Y. Supp. 983, affirmed in 160 N. Y. 357, 45 L.R.A. 664, 54 N. E. 787, 6 Am. Neg. Rep. 663, it was held, that, whatever may be the rule with respect to the right of a landowner to use the water percolating through the earth, and thereby to affect the sources of wells or springs upon his neighbor's land, he may not divert and diminish the natural flow of a surface stream by preventing its usual and natural supply, thereby causing, through suction or other methods, a subsidence of its waters. In that case, the action was brought to recover damages for the draining of a stream and pond upon plaintiff's premises. For many years the plaintiff had, by means of a dam, made a pond, and made use of it in connection with his farming operations, for the collection and sale of ice, and for boat-building purposes. The defendant, at a distance of some 2,400 feet from the pond, had constructed an aqueduct for the purpose of conducting water for its municipal purposes, which it did by wells and pumps upon its own land. The complaint was that the defendant drained the plaintiff's water-course and pond, and evidence was offered tending to prove that the direct cause of the stream running dry was the draining of the territory by defendant's construction of its system of conduits, wells, and pumps, and the use of suction. The verdict of the jury sustained the contention of the plaintiff, and a judgment upon the verdict was sustained, upon the ground that the water of a natural surface stream is for the benefit of all the riparian owners, and that to divert or to diminish its flow in any way is an interference with a natural right, which gives rise to an action for the injury.

In *Forbell v. New York*, 164 N. Y. 522, 51 L.R.A. 695, 79 Am. St. Rep. 666, 58 N. E. 644, determined in November, 1900, a perpetual injunction was granted, restraining the city of New York from operating its engines, driven wells, and pumping stations, known as the "Spring Creek pumping station," in the borough of Queens, and past damages awarded to the plaintiff in the sum of \$6,000. The plaintiff was the lessee of certain farm lands situated near Spring creek, and he used a portion of the lands for the purpose of growing celery and water cresses. The city of Brooklyn constructed a pumping station in the place in question in 1885, and in 1894 sunk additional wells and made an additional pumping station. The effect of pumping at this station was to lower the underground water table on this land, and thus make it unfit for the cultivation of celery and water cresses, and the crops failed for several years prior to the commencement of the action. In affirming L.R.A.1917F.

the judgment the court of appeals said: "It may be conceded that the letter of the law, as expounded in many cases in this state, denies liability [citing numerous cases]. The earlier cases followed the law as stated in *Acton v. Blundell*, 12 Mees. & W. 324, 152 Eng. Reprint, 1223, 13 L. J. Exch. N. S. 289, 15 Mor. Min. Rep. 168, and *Greenleaf v. Francis*, 18 Pick. 117. So far as the extraction or diversion of underground water upon the land of one proprietor affects no surface stream or pond upon the neighboring land, but simply the underground water therein, the rule is still adhered to."

But in argument, after stating the reason for the English rule, the court used the following language: "In the cases in which the lawfulness of interference with percolating waters has been upheld, either the reasonableness of the acts resulting in the interference, or the unreasonableness of imposing an unnecessary restriction upon the owner's dominion of his own land, has been recognized."

In *Hathorn v. Natural Carbonic Gas Co.* 194 N. Y. 326, 23 L.R.A.(N.S.) 436, 128 Am. St. Rep. 555, 87 N. E. 504, 16 Ann. Cas. 989, the object of the suit was to restrain the appellant, the gas company, from using pumps and other apparatus for the purpose of accelerating and increasing the flow of subterranean percolating water and gas through deep wells which it had sunk upon its premises in the town of Saratoga Springs; the plaintiffs contending that in their complaint they set forth a cause of action both at common law, and under the provisions of the statute of New York for the protection of the natural mineral springs of the state and to prevent waste and impairment of its natural mineral waters. It was heard and determined upon demurrer to the complaint. From the prevailing opinion delivered by Hiscock, J., I take the following: "I shall endeavor first to apply to the pleading thus attacked the test of common-law principles, and the question whether, measured by them, it does set forth a cause of action may be stated in a more concrete form applicable to the specific facts involved in this action. Thus stated, it will be whether a landowner has the right by the use of pumps and other apparatus greatly to accelerate and increase the natural flow of subterranean percolating mineral waters and gas through deep wells bored into a widely extended common supply of such substances, not for any purpose connected with the enjoyment of his lands, but for the purpose of procuring from the waters a supply of gas to be marketed throughout the country, and with the result of wasting great quantities of mineral waters, and of destroying or impairing the nat-

ural flow of such waters and gas in and through the springs of other landowners throughout a large area, and of destroying or impairing the valuable character of such waters for the purposes for which they have been habitually used. The earlier decisions in this and other states laid down the general rule that a landowner might not be enjoined from doing an act on his own premises which resulted in diverting or even wholly destroying the flow of percolating waters from or upon his neighbor's land. *Ellis v. Duncan*, 21 Barb. 230; *Pixley v. Clark*, 35 N. Y. 520, 91 Am. Dec. 72; *Delhi v. Youmans*, 45 N. Y. 362, 6 Am. Rep. 100; *Bloodgood v. Ayers*, 108 N. Y. 400, 2 Am. St. Rep. 443, 15 N. E. 433; *Haldeman v. Bruckhart*, 45 Pa. 514, 84 Am. Dec. 511, 5 Mor. Min. Rep. 108; *Greenleaf v. Francis*, 18 Pick. 117; *Frazier v. Brown*, 12 Ohio St. 294. In thus holding they but followed the rule laid down in the leading case of *Acton v. Blundell*, 12 Mees. & W. 324, 354, 152 Eng. Reprint, 1223, 15 Mor. Min. Rep. 168, wherein was approved the principle 'which gives to the owner of the soil all that lies beneath his surface; . . . that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if in the exercise of such right he intercepts or drains off the water collected from underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of *damnum absque injuria*, which cannot become the ground of an action.' It will hardly be profitable to consider all of the different reasons which led the courts to adopt these principles, but it is important to bear in mind that they were invariably applying them to cases in each of which the party complained of had interfered with the enjoyment by another of percolating waters by some act which was directly and naturally connected with the improvement or enjoyment of his own land. Thus, in the *Acton Case*, the act which resulted in the interference complained of consisted in mining operations on a man's own land. In the case of *Ellis v. Duncan*, the person intercepting the flow of percolating waters on his neighbor's land had done so by digging a trench or ditch and opening a quarry on his premises. No question was presented in these cases of a landowner depleting or exhausting a common supply of underground waters by artificial methods for purposes not in any way connected with the enjoyment or use of his own lands. But with the increased demands upon natural resources, such as water, this question did begin to arise. It seems to have been first suggested in England in the case of *Chesmore v. Richards*, 7 H. L. Cas. 349, 11 Eng. L.R.A.1917F.

Reprint, 140, 29 L. J. Exch. N. S. 81, 5 Jur. N. S. 873, 7 Week. Rep. 685, 1 Eng. Rul. Cas. 720. There the question arose whether the flow of percolating waters on another's land might be diverted or destroyed by pumping for purposes of supplying a municipality with water, and while it was finally held that this might be done, it was only after the right had been seriously questioned. In this state it was first discussed, though not actually involved, in *Smith v. Brooklyn*, 18 App. Div. 340, 46 N. Y. Supp. 141; and it was there stated by Judge Hatch that the right in this state had never 'been upheld in the owner of land to destroy a stream, a spring, or well upon his neighbor's land by cutting off the source of its supply, except it was done in the exercise of a legal right to improve the land, or make some use of the same in connection with the enjoyment of the land itself, for purposes of domestic use, agriculture, or mining, or by structures for business carried on upon the premises.' Finally, in the case of *Forbell v. New York*, 164 N. Y. 522, 526, 51 L.R.A. 695, 79 Am. St. Rep. 666, 58 N. E. 644, the question reached this court, and the necessity was recognized, not for an alteration of the rules which had been applied by earlier cases to the facts then presented, but rather for an enlargement and extension of such rules, so that they would be applicable to new conditions. That case for the first time, in this state at least, laid down the rule of the reasonable use of percolating waters which I think is applicable to and controlling of the facts in this case. There the city of New York tapped waters percolating under some lands purchased by it, and which were part of a connected system or supply extending over a large area, and then by powerful apparatus so forced the flow of this water as to exhaust the supply which had formerly supplied plaintiff's land, and this was done for the purpose of furnishing a supply of water for the defendant. The court, reviewing many earlier cases passing upon the right of a landowner to enjoy the subsurface waters under his premises, said: 'In the cases in which the lawfulness of interference with percolating waters has been upheld, either the reasonableness of the acts resulting in the interference or the unreasonableness of imposing an unnecessary restriction upon the owner's dominion of his own land has been recognized. In the absence of contract or enactment whatever it is reasonable for the owner to do with his subsurface water, regard being had to the definite rights of others, he may do. He may make the most of it that he reasonably can. It is not unreasonable, so far as it is now apparent to us, that he should dig wells and take therefrom all the

water that he needs in order to the fullest enjoyment and usefulness of his land as land, either for purposes of pleasure, abode, productiveness of soil, trade, manufacture, or for whatever else the land as land may serve. He may consume it, but must not discharge it to the injury of others. But to fit it up with wells and pumps of such pervasive and potential reach that from their base the defendant can tap the water stored in the plaintiff's land, and in all the region thereabout, and lead it to his own land, and by merchandising it prevent its return, is, however reasonable it may appear to the defendant and its customers, unreasonable as to the plaintiff and the others whose lands are thus clandestinely sapped, and their value impaired.' The principles thus adopted in the Forbell Case have been fairly upheld in the courts of other states. *Gagnon v. French Lick Springs Hotel Co.* 163 Ind. 687, 68 L.R.A. 175, 72 N. E. 849; *Richmond Natural Gas Co. v. Enterprise Natural Gas Co.* 31 Ind. App. 222, 66 N. E. 782; *Willis v. Perry*, 92 Iowa, 297, 26 L.R.A. 124, 60 N. W. 727; *Katz v. Walkinshaw*, 141 Cal. 116, 64 L.R.A. 236, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766. The situation described by the complaint in this action is relatively of the same general character as that with which the court dealt in the case cited. One proprietor by artificial and unusual methods has so increased the flow of percolating waters and gas upon its lands that it is obtaining a greatly increased proportion of a common supply at the expense of its neighbors, and it is doing this in order to supply a public market for a portion of these products while the others are wasted. The only important feature distinguishing the cases is this element of waste present in this one and absent in the earlier one. If these facts, resting now merely on the allegations of a pleading, shall be established by evidence, the trial court will in my opinion be fully authorized to draw the conclusion that they disclose a case of unreasonable and improper conduct by the appellant in the premises, and make out in favor of respondents a sufficient cause for appeal to, and relief by, a court of equity."

See *People v. New York Carbonic Acid Gas Co.* 196 N. Y. 421, 90 N. E. 441.

In *Katz v. Walkinshaw*, *supra*, the maxim, "*Sic utere tuo ut alienum non lēdas*," is held applicable as between adjoining users of percolating waters whenever justice requires its application, a headnote which fairly states the conclusion arrived at by the court being: "Each owner of soil lying in a belt which becomes saturated with percolating water is entitled to a reasonable use thereof on his own land, notwithstanding such reasonable use may interfere with water percolation in his neighbors' soil; but L.R.A.1917F.

he has no right to injure his neighbors by an unreasonable diversion of the water percolating in the belt for the purpose of sale or carriage to distant lands."

One reason given by the court, it is true, for the ruling, is that the common-law rule that percolating water belongs unqualifiedly to the owner of the soil, and that he has the absolute right to extract and sell it, is not applicable to the conditions existing in a state where artificial irrigation is essential to agriculture, and artesian wells in percolating belts are necessarily used for that purpose. Upon the general subject see 30 Am. & Eng. Enc. Law, 308 et seq. See also *Hart v. Jamaica Pond Aqueduct Corp.* 133 Mass. 488; *Bassett v. Salisbury Mfg. Co.* 43 N. H. 569, 82 Am. Dec. 179; *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276.

I have said that, in view of the circumstances, the right of defendant to make use of the water is a qualified right. It is qualified by this rule of reasonable user, a rule quite in harmony with the provisions of Act No. 190, Public Acts of 1889, and Act No. 107, Public Acts of 1905. There is no apparent reason for saying that because defendant is a municipal corporation, seeking water for the inhabitants of the city, it may therefore do what a private owner of the land may not do. The city is a private owner of this land, and the furnishing of water to its inhabitants is its private business. It is imperative that the people of the city have water; it is not imperative that they secure it at the expense of those owning lands adjoining lands owned by the city.

It does not follow that the city may not reasonably make use, for the purpose intended, of a large volume of water from this land. I have stated the rule by which the rights of the city and other landowners must be determined. Manifestly the city must take the chances of experience. The decree will not be reversed and an injunction granted to plaintiff, although it should be so modified as to permit plaintiff hereafter to apply to the court, upon the footing of the decree and upon new matter, for equitable relief. The court cannot know what action the defendant city will take in the premises. It is not now harming the plaintiff, and the decree secures to him compensation for such actual injury as he is shown to have suffered.

The decree, modified as indicated, will be affirmed, and no costs of this appeal will be awarded to either party.

Stone, Bird, and Moore, JJ., concur with Ostrander, J.

Brooke, J., dissenting:

I am unable to agree with the conclusion

reached by my Brother Ostrander in this case. The final paragraph of his opinion leaves the door open to the defendant, the city of Ann Arbor, to proceed with the erection upon its property of an expensive pumping plant, use of which may thereafter at any time be enjoined by the court upon a showing that continuing damage results to plaintiff through such use. I think that the defendant should either be permanently enjoined from proceeding with the contemplated enterprise, at this time and upon the testimony in this record, or that injunctive relief should be denied, and the decree of the court below affirmed, by the terms of which plaintiff was awarded damages for such injury as has already occurred and his right to recover for future damages preserved.

Inasmuch as the right of the public to an adequate supply of pure drinking water is paramount to private property rights, I am of opinion that the law in this state should be clearly enunciated as follows:

That any municipality requiring water for domestic or municipal purposes may, under the authority granted by the legislature, procure such water from lands acquired by it for that purpose, and that the resulting damage, if any, to adjacent landowners, must be borne by such municipality; such damages to be ascertained in gross and in a single action at law by the injured landowner. These views are not out of harmony with those expressed by the writer in the case of *Loranger v. Flint*, 185 Mich. 454, 152 N. W. 251, where the municipality was taking its water from a navigable stream upon which it was a riparian owner.

The decree of the court below should be amended, to provide for the bringing of a single action at law against defendant by plaintiff for the recovery of his damages in gross.

Kuhn, Ch. J., and Steere, J., concur with Brooke, J.

Annotation—Right of municipal corporation in respect of percolating waters.

The general question of correlative rights in percolating waters is treated in the notes to *Southern P. R. Co. v. Dufour*, 19 L.R.A. 92; *Katz v. Walkinshaw*, 64 L.R.A. 236; *Erickson v. Crookston Waterworks Power & Light Co.* 17 L.R.A.(N.S.) 650; *Barton v. Riverside Water Co.* 23 L.R.A.(N.S.) 331; *Meeker v. East Orange*, 25 L.R.A.(N.S.) 465; *New York Continental Jewell Filtration Co. v. Jones*, 37 L.R.A.(N.S.) 193; and *P. Ballantine & Sons v. Public Service Corp.* L.R.A.1915A, 369. The present annotation is concerned merely with the question whether the rules applicable to private persons apply with equal force to municipal corporations. Upon this question there would seem to be no doubt, at least if the municipality in interfering with a landowner's supply of percolating water acts in a proprietary capacity, as was the case in *SCHENK v. ANN ARBOR*, ante, 684, where the city was seeking a water supply for its inhabitants. In fact, as is said in that case, there is no apparent reason for saying that a municipal corporation seeking water for the inhabitants of a city may do what a private owner of land may not do; namely, make an unreasonable use of percolating water to the damage of such private landowner. And although no other case seems to have expressly passed upon the point, the conclusion above stated finds support in the L.R.A.1917F.

fact itself that the point was not made in any of the following cases, each of which involved the question of the correlative rights of a municipal corporation and a private owner in percolating waters: *Los Angeles v. Hunter* (1909) 156 Cal. 603, 105 Pac. 755, cited in note in 25 L.R.A.(N.S.) 466 (applying rule of reasonable user); *De Freitas v. Suisun City* (1915) 170 Cal. 263, 149 Pac. 553 (liability of town for diversion of underground waters supplying springs assumed upon the facts in suit); *Willis v. Perry* (1894) 92 Iowa, 297, 26 L.R.A. 124, 60 N. W. 727, cited in note in 64 L.R.A. 238 (applying rule of reasonable user); *Thomas v. Grinnell* (1915) 171 Iowa, 571, 153 N. W. 91 (correlative rights discussed without emphasizing fact that one of the parties was a municipal corporation); *Wilson v. New Bedford* (1871) 108 Mass. 261, 11 Am. Rep. 352, cited in note in 64 L.R.A. 239 (dictum supporting doctrine of absolute right); *Trowbridge v. Brookline* (1887) 144 Mass. 139, 10 N. E. 796 (town held liable under the particular facts of the case for destruction of a well by interception of percolating waters which fed same); *Meeker v. East Orange* (1909) 77 N. J. L. 623, 25 L.R.A.(N.S.) 465, 134 Am. St. Rep. 798, 74 Atl. 379, cited in note in 23 L.R.A.(N.S.) 331, and quoted in *SCHENK v. ANN ARBOR* (adhering to the doctrine of reasonable user and

reversing (1908) 76 N. J. L. 435, 70 Atl. 360, which is cited in 17 L.R.A.(N.S.) 653, and in which the court had approved the rule of absolute right to appropriate percolating waters); *Smith v. Brooklyn* (1899) 160 N. Y. 357, 45 L.R.A. 664, 54 N. E. 787, 6 Am. Neg. Rep. 663, affirming (1898) 32 App. Div. 257, 52 N. Y. Supp. 983 (see case as set out in *SCHENK v. ANN ARBOR*); *Forbell v. New York* (1900) 164 N. Y. 522, 51 L.R.A. 695, 79 Am. St. Rep. 666, 58 N. E. 644, affirming (1900) 47 App. Div. 371, 61 N. Y. Supp. 1005, which affirmed (1899) 27 Misc. 12, 56 N. Y. Supp. 790 (see case as cited in note in 64 L.R.A. 238, and as set out and quoted in *SCHENK v. ANN ARBOR*); *Reisert v. New York* (1901) 35 Misc. 413, 71 N. Y. Supp. 965, affirmed in (1902) 69 App. Div. 302, 74 N. Y. Supp. 673, reversed in (1903) 174 N. Y. 196, 66 N. E. 731, and, after a subsequent trial (1903) 42 Misc. 275, 86 N. Y. Supp. 576, reversed in (1905) 101 App. Div. 93, 91 N. Y. Supp. 780, cited in note

in 17 L.R.A.(N.S.) 651 (rule that city is liable for loss of crops caused by pumping away of percolating water recognized); *Westphal v. New York* (1904) 177 N. Y. 140, 69 N. E. 369, 15 Am. Neg. Rep. 399, affirming (1902) 75 App. Div. 252, 78 N. Y. Supp. 56, which affirmed (1901) 34 Misc. 684, 70 N. Y. Supp. 1021, cited in notes in 64 L.R.A. 238, and 17 L.R.A.(N.S.) 650 (same as the next preceding case); *Jager v. New York* (1901) 35 Misc. 622, 72 N. Y. Supp. 131, affirmed in (1902) 75 App. Div. 258, 78 N. Y. Supp. 49, cited in note in 17 L.R.A.(N.S.) 651 (follows *Forbell* and *Reisert Cases* (N. Y.) supra); *Dinger v. New York* (1903) 42 Misc. 319, 86 N. Y. Supp. 577, affirmed in (1905) 101 App. Div. 202, 92 N. Y. Supp. 1120, and in (1905) 182 N. Y. 542, 75 N. E. 1129, cited in note in 17 L.R.A.(N.S.) 651 (follows *Reisert Case* (N. Y.) supra); *Willis v. New York* (1910) 69 Misc. 510, 127 N. Y. Supp. 699 (follows *Reisert Case* (N. Y.) supra). G. J. C.

MISSOURI SUPREME COURT. (Division No. 1.)

CLARA DAVIDSON FISHER, Appt.,
v.

AUGUSTA DAVIDSON, Admr., etc., of
Thomas Davidson, Deceased, et al.,
Respts.

(— Mo. —, 195 S. W. 1024.)

Conflict of laws — adoption — failure to comply with statute — effect in other state.

1. Failure of persons undertaking to adopt a child to comply with the statute of the state where the parties lived at the time, so that the adoption is not legal there, does not prevent another state to which the parties moved and where they maintained the relation of parent and child from decreeing specific performance of the contract of adoption in the absence of natural descendants and enforcing the rights of the adopted child according to its laws to property there located.

For other cases, see Conflict of Laws, I. o, in Dig. 1-52 N. S.

Pleading — character of action.

2. A complaint seeking to establish complainant's status as the adopted child of a

deceased property owner and his rights as such to the property is a proceeding in equity.

For other cases, see Action or Suit, II. a, in Dig. 1-52 N. S.

(June 1, 1917.)

APPEAL by plaintiff from a decree of the Circuit Court for Jackson County in defendants' favor in a suit to compel specific performance of a contract of adoption. Reversed.

Statement by Railey, C.:

This suit was commenced by plaintiff in the circuit court of Jackson county, Missouri, on May 8, 1913, in two counts. The petition first alleges that plaintiff, whose name was originally Wilson, was born in Minnesota on April 16, 1882; that her mother died in 1883, and left plaintiff in charge of her maternal grandparents, Truman Finch and wife; that on the — day of April, 1886, Thomas Davidson and wife, who were childless, adopted plaintiff as their child, although no formal deed of adoption was executed; that said Davidson and wife

Note. — The enforceability of a contract to give a child a share in an estate in consideration of the surrender of the child to the promisor, as affected by noncompliance with the statute prescribing the mode of adoption, is the subject of notes appended to *Chehak v. Battles*, 8 L.R.A.(N.S.) 1130, and *Milligan v. McLaughlin*, 46 L.R.A.(N.S.) 1134.

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Generally as to the right of child adopted in one state to take under local statute of descent and distribution in another, see notes to *Brown v. Finley*, 21 L.R.A.(N.S.) 679; *Finley v. Brown*, 25 L.R.A.(N.S.) 1285; *Anderson v. French*, L.R.A.1916A, 666; and later case, *Brewer v. Browning*, L.R.A.—, —.

took charge of plaintiff, changed her name from Wilson to Davidson, and that she was thereafter treated as the child and adopted daughter of said Davidson; that the said Thomas Davidson died intestate as a resident of Kansas City, Missouri, while the owner of certain real and personal property, located in Missouri and Arkansas; that defendant Augusta Davidson is his widow, was appointed administratrix of his estate at Kansas City, Missouri, and duly qualified as such; that the other defendants are the collateral kin of said decedent; that plaintiff is the only heir and child of said decedent; that she is the owner of all the real and personal property owned by decedent, subject to the statutory interests of said Augusta Davidson, in Missouri and Arkansas. A decree is prayed for, declaring that plaintiff is the adopted child of said decedent, Thomas Davidson, and that she is the absolute owner of all the real and personal property owned by decedent at the time of his death, subject to the statutory interests of said widow, etc. The second count of said petition practically covers the same matters contained in the first count, and seeks to compel defendants to specifically perform said contract of adoption, etc. Both counts allege that plaintiff married Charles Fisher in 1904.

The separate answer of Augusta Davidson individually and as administratrix admits that she is the widow of Thomas Davidson, deceased, and administratrix of his estate; that she is entitled to the personal property of decedent and to all her marital interests and estates therein, as well as in his realty. She denies every other allegation in the petition. She likewise pleads the statute of Kansas and two decisions of said state, in bar of plaintiff's right to maintain this action on account of the alleged adoption not being in conformity to the laws of said state. The remaining defendants joined in a separate answer; admitted that Thomas Davidson died January 16, 1913, leaving as his widow the defendant Augusta Davidson; that she was appointed administratrix by the probate court of Jackson county, Missouri, and duly qualified as such; that decedent at the time of his death was seized of the real estate and personal property described in petition; that they are the collateral heirs of said decedent, and claim therein an inheritable interest in the property aforesaid as his only heirs, subject to the rights of said widow. The answer denied all the other allegations of plaintiff's petition, and set up the Kansas statute and decisions as a bar to plaintiff's right of recovery.

The reply alleges that plaintiff's father abandoned and turned her over to her grand-

parents, Truman Finch and wife, who had authority to make the contract of adoption set out in petition; that decedent had full knowledge of said facts at the time of said adoption; that said agreement was made in the state of Kansas.

The following facts were admitted by counsel during the trial: That Dr. Davidson died in Arkansas January 16, 1913; that he left no descendants; that Augusta Davidson was appointed administratrix of his estate by the probate court of Jackson county, Missouri, and qualified as such in respect to the Missouri property; that the other defendants are the brother and sisters, nephew and niece of decedent; that plaintiff, Clara Fisher, married on November 24, 1904.

It appears from the evidence that plaintiff, who was the daughter of Arthur Wilson and wife, was born in Minnesota about 1882, and that her mother died some time in 1883. Plaintiff was the youngest of five children. After the mother's death the plaintiff's father took her to her maternal grandparents. The latter came with plaintiff and a brother or sister to the home of John Hallock and wife in Phillips county, Kansas. Plaintiff was about three years of age at that time. Her grandparents were poor, and they tried to find a home or place for her to live. There were eleven in the Hallock family after plaintiff's arrival, and all were occupying a single room, when the grandparents went to see Thomas Davidson about taking plaintiff. This brings us to the main issue in the case, as to what occurred between the grandparents, Truman Finch and wife, and the Davidsons, when plaintiff was taken by the latter.

Mrs. Hallock in her deposition read in evidence by plaintiff testified, among other things, as follows:

Q. Did you hear Dr. Davidson or his wife say anything about how they were going to take the child?

A. The understanding was that they should take her as their own child and that they would adopt her. . . .

Q. Was anything said by Dr. Davidson indicating that he simply wanted to take Clara to raise, or was he to take her as his own child?

A. Why, he was to take her as his own child.

Q. Were you there when they took her away?

A. Yes, sir; I was there. My mother went part of the way with her because she did not care to go with strangers. The Davidsons lived 2 miles away. Clara remained with them after that. They changed

her name as soon as they took her. We visited back and forth with the Davidsons.

Q. Do you know whether or not the Davidsons spoke of Clara as their own child, and told other people that she was their own child?

A. Yes; they always did that.

On cross-examination this witness testified as follows:

Q. When you speak of Mr. and Mrs. Davidson adopting Clara, or taking her to live with them, you mean one of them in particular, or both of them?

A. Both of them.

Q. Mrs. Hallock, you have always merely supposed and understood only that the Davidsons had adopted Clara; that is, it's been your understanding?

A. Yes, sir.

Q. You stated that Clara had told you that she always supposed that she was adopted until after her marriage?

A. Yes; she told me that. She said it to me in a letter.

Q. How did Clara happen to tell you that?

A. She wrote to me to find out what I knew about it, and she said that in that letter.

Q. That was just after her marriage?

A. No; that was this spring, after Mr. Davidson died.

John T. Hallock was asked to state what Dr. Davidson said in reference to taking plaintiff to raise or adopting her, and he said: "I don't remember there was anything said about adopting her. I don't think there was."

He further testified on cross-examination:

Q. Was anything said by those parties as to whether he took Clara as his own child?

A. Yes; I don't remember anything about the adoption.

Q. Your recollection is that they were to take Clara and treat her and provide for her as their own child?

A. Yes; and that she should be called after their own name and be treated as their own child. They would not take her unless they could call her and take her as their own child; that import, anyway.

Q. What did Dr. Davidson say about taking Clara and wanting to give her his name and having it understood that he was to keep her always as his own child, and that her kinfolks should not interfere and try to take her away from them?

A. That's it, as near as I can state it.

Q. This all occurred at your house in Phillips county, Kansas, did it not?

A. At my house or my dugout.

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He further testified on cross-examination: "I think Clara was about four years old at that time. My father-in-law and mother-in-law, Truman Finch and wife, brought her to my house. They are both dead now."

The above is substantially all the testimony as to what occurred in the state of Kansas at the time of the alleged adoption. When plaintiff was about twelve years old, the Davidsons moved with her to Kansas City, Missouri, and she continued to live with them up to the time of her marriage in 1904. During all the time she lived with them, after they took her in Kansas, she went by the name of Clara Davidson. She was introduced to their friends, acquaintances, and those with whom they did business, as their daughter. They always spoke of her as their daughter or adopted daughter, and never mentioned her in any other manner. She went to school while at Kansas City, and performed such services around the house as any child would perform in behalf of her parents. They were kind and affectionate to her, and she was always a kind and dutiful child toward her adopting parents. In fact, the community where they lived at the time of her marriage universally understood that she was the natural or adopted child of the Davidsons. The plaintiff understood up to the time of her marriage that she was their adopted child. These facts were so strongly proven by the numerous witnesses that defendant's counsel, during the examination of Dr. Frank S. Arnold, who was pastor of the Presbyterian Church, said: "There is no question but that she had Dr. Davidson's name, and he consented to the use of the name and treated her ordinarily as a member of the household."

Thereupon the following occurred:

Mr. Hill: We offer it [church bulletin] to show that she was generally known as the daughter of Dr. Davidson.

Mr. Gossett: There is no question but what he treated her familiarly as a member of his household, and she took his name, and he may have referred to her as his daughter, and may have wanted people to think she was his daughter."

During the progress of the trial Mr. Gossett said: "It seems to me we are wasting time. He treated her with affection and called her daughter. There is no question about that."

Without pursuing this inquiry further, it is manifest that on the facts disclosed in the record the Davidsons agreed, without doubt, to take the plaintiff and raise her as their own child, with the understanding that they should have the privilege of

changing her name; that the grandparents were to have no further control over her. Her name was changed by the Davidsons in 1886, when they first received her, and she thereafter went by the name of Clara Davidson. It is likewise true that neither the grandparents nor any of plaintiff's kin ever attempted to exercise any further control over her.

Upon the foregoing facts the trial court found the issues for defendants. Plaintiff filed her motion for a new trial, which was overruled, and the cause appealed to this court.

Messrs. E. C. Hall and George C. Hill, for appellant:

The oral contract by which Dr. Davidson agreed to take, adopt, and care for plaintiff as his own child, and by which Dr. Davidson and his wife received from plaintiff full consideration though not in conformity with the requirements of the law, was fully performed and fully executed, and will be enforced against the estate and heirs of the adoptive parents in equity.

Lynn v. Hockaday, 162 Mo. 111, 85 Am. St. Rep. 480, 61 S. W. 885, 200 Mo. 456, 8 L.R.A.(N.S.) 117, 118 Am. St. Rep. 672, 98 S. W. 585, 9 Ann. Cas. 775; Healey v. Simpson, 113 Mo. 340, 20 S. W. 881; Thomas v. Maloney, 142 Mo. App. 193, 126 S. W. 522; Sharkey v. McDermott, 91 Mo. 647, 60 Am. Rep. 270, 4 S. W. 107; 1 Story, Eq. Jur. 12th ed. 648; Martin v. Martin, 250 Mo. 539, 157 S. W. 575.

When, and after, a child is adopted, it becomes and is, for all the purposes of inheriting from the foster parents, the lawful child of such adoptive parents.

Moran v. Stewart, 122 Mo. 295, 26 S. W. 962, 132 Mo. 73, 33 S. W. 443; Hockaday v. Lynn, 200 Mo. 464, 8 L.R.A.(N.S.) 117, 118 Am. St. Rep. 672, 98 S. W. 585, 9 Ann. Cas. 775; Thomas v. Maloney, 142 Mo. App. 193, 126 S. W. 522; Fosburgh v. Rogers, 114 Mo. 133, 19 L.R.A. 201, 21 S. W. 82; Westerman v. Schmidt, 80 Mo. App. 348.

This is a proceeding in equity, and it will be presumed that the equity doctrine in the state of Kansas, where a part of the contract was performed, is the same as in this state.

Johnston v. Gawtry, 83 Mo. 339; Monroe v. Douglass, 5 N. Y. 452; Chapin v. Dobson, 78 N. Y. 79, 34 Am. Rep. 512; Anderson v. Anderson, 75 Kan. 129, 9 L.R.A.(N.S.) 229, 88 Pac. 743.

And a contract good according to the law, of either the place of contract or of performance, will be presumed to have been made in view of the law of the place where it would be good.

9 Cyc. 674; Minor, Conf. L. § 151. L.R.A.1917F.

The implied covenant arising from a contract to adopt not legally executed, when the child has fulfilled its part of the contract, is that the infant should receive a child's share of the estate of the foster parents.

1 Cyc. 936; Fosburgh v. Rogers, 114 Mo. 133, 19 L.R.A. 201, 21 S. W. 82; Moran v. Stewart, 122 Mo. 299, 26 S. W. 962.

Equity will decree an adoption and its resultant rights in cases where no statutory adoption exists, when to do otherwise would result in palpable injustice.

Thomas v. Maloney, 142 Mo. App. 193, 126 S. W. 522; Lynn v. Hockaday, 162 Mo. 111, 85 Am. St. Rep. 480, 61 S. W. 885; Horton v. Troll, 183 Mo. App. 677, 167 S. W. 1081; Healey v. Simpson, 113 Mo. 340, 20 S. W. 881; Martin v. Martin, 250 Mo. 539, 157 S. W. 575.

Dr. Davidson, having failed to execute the adoption while a resident of the state of Kansas, was under obligation to execute the same in Missouri, and had the opportunity to execute a deed of adoption in favor of plaintiff, after his removal to Missouri, and will be presumed in equity to have done so.

Lindsley v. Patterson, — Mo. —, L.R.A. 1915F, 680, 177 S. W. 826; Roberts v. Roberts, 138 C. C. A. 102, 223 Fed. 775; Buck v. Meyer, — Mo. App. —, 190 S. W. 997; Horton v. Troll, 183 Mo. App. 677, 167 S. W. 1081.

The contract to adopt, having been fully performed by the plaintiff, carries the incidental right of heirship, which, as in the case of a natural child, may be cut off only by the will of the adoptive parent in which the adopted child is mentioned.

Thomas v. Maloney, 142 Mo. App. 193, 126 S. W. 522; Lynn v. Hockaday, 162 Mo. 111, 85 Am. St. Rep. 480, 61 S. W. 885; Martin v. Martin, 250 Mo. 539, 157 S. W. 575; Lindsley v. Patterson, — Mo. —, L.R.A.1915F, 680, 177 S. W. 826.

Messrs. Cook & Gossett and George N. Elliott, for respondents:

If there was any oral agreement at all to adopt, it was a Kansas contract, of which the Kansas statute law and the decisions of the Kansas supreme court on the subject of adoption of children were of the terms of the alleged contract.

Tremain v. Dyott, 161 Mo. App. 221, 142 S. W. 760.

Parents must consent to adoption of child. If dead, proof of death must be made, and consent of guardian given.

Cubitt v. Cubitt, 74 Kan. 353, 86 Pac. 475; Renz v. Drury, 57 Kan. 89, 45 Pac. 71.

The status of plaintiff in the family at the time of the death of Thomas Davidson was the same as if they had continued to

live in Kansas until his death without complying with the Kansas laws of adoption.

Steele v. Steele, 161 Mo. 574, 61 S. W. 815; *Kinney v. Murray*, 170 Mo. 691, 71 S. W. 197.

Comity between the states of this Union gives credit only to status acquired under laws of a sister state.

Finley v. Brown, 122 Tenn. 338, 25 L.R.A. (N.S.) 1285, 123 S. W. 359; *Ross v. Ross*, 129 Mass. 246, 37 Am. Rep. 321.

Comity does not enlarge rights in state of domicile, except when status is complete.

Finley v. Brown, supra; *Sunderland's Estate*, 60 Iowa, 732, 13 N. W. 655; *Calhoun v. Bryant*, 28 S. D. 275, 133 N. W. 266; *Boaz v. Swinney*, 79 Kan. 332, 99 Pac. 621; *Re Bewley*, 167 Cal. 8, 138 Pac. 689; *Re Wella*, 60 Wash. 520, 111 Pac. 778.

There is no fact or circumstance to show that the Missouri or Arkansas law of adoption of children ever became a part of any agreement between the parties on the subject.

Kinney v. Murray, 170 Mo. 691, 71 S. W. 197.

The adoption of a child is an act of the state itself, and not a contract between the natural parents and the adoptive parents.

Burnes v. Burnes, 70 C. C. A. 357, 137 Fed. 797; *Re Zeigler*, 82 Misc. 346, 143 N. Y. Supp. 562, affirmed in 161 App. Div. 589, 146 N. Y. Supp. 881.

Plaintiff, not having the status of adopted child under the law of either Kansas, Missouri, or Arkansas, does not take title to the property in either Missouri or Arkansas by right of inheritance from Thomas Davidson.

Sharkey v. McDermott, 91 Mo. 654, 60 Am. Rep. 270, 4 S. W. 107; *Healey v. Simpson*, 113 Mo. 340, 20 S. W. 881; *Chehak v. Battles*, 133 Iowa, 116, 8 L.R.A. (N.S.) 1130, 110 N. W. 330, 12 Ann. Cas. 140; *Anderson v. Blakesley*, 155 Iowa, 435, 136 N. W. 210.

The adoption of children in Kansas being a matter of proceeding in court, and the decision within the court's discretion, no contract between private parties could be made to control the court's decision.

Re Carter, 77 Kan. 765, 93 Pac. 584; *Re Bewley*, 167 Cal. 8, 138 Pac. 689; *Beach v. Bryan*, 155 Mo. App. 33, 133 S. W. 635.

Before equity will specifically enforce an oral contract to adopt a child the proof must be clear and convincing in its probative force, leaving no room for reasonable doubt.

Martin v. Martin, 250 Mo. 546, 157 S. W. 575; *Wales v. Holden*, 209 Mo. 552, 108 S. W. 89; *Hockaday v. Lynn*, 200 Mo. 456, 8 L.R.A. (N.S.) 117, 118 Am. St. Rep. 672, 98 S. W. 585, 9 Ann. Cas. 775; *McElvain v. McElvain*, 171 Mo. 244, 71 S. W. 142. L.R.A.1917F.

The words, "I agree to take her and care for her as my own child," without the use of the term "adopt," or without the additional agreement, "and make her my heir," do not constitute a contract to adopt.

Lynn v. Hockaday, 162 Mo. 116, 85 Am. St. Rep. 480, 61 S. W. 885, 200 Mo. 471, 8 L.R.A. (N.S.) 117, 118 Am. St. Rep. 672, 98 S. W. 585, 9 Ann. Cas. 775; *Healey v. Simpson*, 113 Mo. 340, 20 S. W. 881; *Thomas v. Maloney*, 142 Mo. App. 198, 126 S. W. 522; *Sharkey v. McDermott*, 91 Mo. 654, 60 Am. Rep. 270, 4 S. W. 107; *Martin v. Martin*, 250 Mo. 539, 157 S. W. 575; *Fosburgh v. Rogers*, 114 Mo. 131, 19 L.R.A. 201, 21 S. W. 82; *Moran v. Stewart*, 122 Mo. 209, 26 S. W. 962.

Ralley, C., filed the following opinion:

I. We are thoroughly satisfied from the evidence that Thomas Davidson and his wife, who lived in Phillips county, Kansas, in 1886, had no children of their own; that they agreed with Truman Finch and wife, grandparents of plaintiff, to take and raise the latter as their own child; that the grandparents were to have no further control over plaintiff, and she was to assume the name of "Clara Davidson." The evidence is undisputed that the Davidsons took plaintiff to their home, changed her name from "Wilson" to "Clara Davidson;" that neither the grandparents nor any of plaintiff's relatives ever thereafter attempted to exercise any control over her; that she went into the family of the Davidsons when about four years of age, and thereafter was treated by them as their own child, to the date of her marriage in 1904; that she continued thereafter, to the death of both Davidsons, to be considered as their own child or adopted child. She was kind and affectionate toward the Davidsons, and treated them as a dutiful child would her natural parents. The entire community which knew the Davidsons understood that plaintiff was their child or adopted child. The Davidsons never spoke of her in any other manner, and frequently stated to their friends and acquaintances that she was their adopted daughter.

The grandparents performed their part of the Kansas agreement by delivering plaintiff to the Davidsons, and exercising no control over her thereafter. The Davidsons performed a part of their agreement, at least, by changing plaintiff's name to that of Davidson, and by introducing her to all their acquaintances as their daughter or adopted daughter, and treating her accordingly. The plaintiff carried out her part of the agreement made in her behalf by living with the Davidsons as their child until her marriage in 1904, and performing

such services as a natural child would have performed under the circumstances. She continued to treat them as her father and mother until their respective deaths. Had the Davidsons and plaintiff been residents of Missouri when the former took possession of plaintiff as their child, a court of equity, on the facts before us, would undoubtedly have decreed that she was an adopted child and inherited the property in controversy, subject to the statutory interests of defendant Augusta Davidson. *Signaigo v. Signaigo*, — S. W. —, decided by this division at the April term, 1917; *Lindsley v. Patterson*, — Mo. —, L.R.A.1915F, 680, 177 S. W. 826; *Martin v. Martin*, 250 Mo. loc. cit. 547, 157 S. W. 575, and following; *McElvain v. McElvain*, 171 Mo. loc. cit. 254, 71 S. W. 142; *Lynn v. Hockaday*, 162 Mo. 111, 85 Am. St. Rep. 480, 61 S. W. 885; *Buck v. Meyer*, — Mo. App. —, 190 S. W. loc. cit. 997.

The law is so well settled in this state by the foregoing authorities that we do not deem it necessary to refer to others.

II. Does the Kansas statute (Rev. Stat. 1909, § 5065) providing for adoption by petition and order of the probate court, preclude the maintenance of an equitable proceeding in Missouri on the facts before us, where no property is sought to be reached in Kansas, and where the Kansas statute is not relied upon by plaintiff as the basis for her action? We think this inquiry should be answered in the negative. We are not concerned with proceedings under the Kansas statute cited, but with the question as to whether said statute was intended to preclude the maintenance of an equitable proceeding like this, even in that state.

In *Anderson v. Anderson*, 75 Kan. 120, 130, 9 L.R.A.(N.S.) 229, 88 Pac. 748, it is said: "We do not regard *Renz v. Drury*, 57 Kan. 84, 45 Pac. 71, as laying down the hard and fast rule that a court of equity should never compel the specific performance of a parol contract of this character, but rather as an illustration of the doctrine, recognized almost universally, that each case depends upon its own particular facts and circumstances, and the granting or denying of the remedy rests in judicial discretion."

The recent case of *Malaney v. Cameron*, 98 Kan. 620, 159 Pac. loc. cit. 21, clearly recognizes the doctrine that a written contract to adopt might be enforced in equity in that state if the facts warranted it, although the Kansas statute was not followed. In other words, both Kansas and Missouri have specific statutes providing for the adoption of children, yet in neither state is it provided by law that a court of chancery cannot enforce a contract like the one at L.R.A.1917F.

bar where it has been specifically performed by the child and grandparents. The plaintiff is not relying upon any Kansas statute, nor is she seeking to reach any property in that state. On the contrary, she seeks to enforce here an agreement in equity which has already been performed by herself and grandparents, and which has been performed by the adopting parents, except as to the statutory formality required by law in the execution of deeds of adoption. The authorities heretofore cited, as well as those referred to therein, clearly sustain the right to maintain such an action. A distinction is made by many of the authorities between a case where the decedent has made a valid contract to provide in his will a specific sum for a child, where strict proof is required as to the facts, and one where he simply agrees to adopt the child as his own. In the latter case the minor occupies the same position as a natural-born child, and may, like the latter, be cut off with a nominal sum, but in the former case the heirs of decedent must carry out his agreement, notwithstanding the will may contain provisions to the contrary.

In the case before us there are no natural descendants of Thomas Davidson, and plaintiff is seeking to have her status established as his adopted child. We have before us all the parties interested in the estate of Thomas Davidson, deceased, and rule that plaintiff is entitled to recover herein.

III. It is insisted that the first count of plaintiff's petition should be treated as an action at law, and as the case was tried without instructions, the finding of the trial court is conclusive against plaintiff. This contention is not well founded for two reasons: First, because the case was tried in the court below as an equity case throughout; and second, because a court of equity alone has jurisdiction to enforce this class of agreements. The plaintiff in the first count set out the facts which entitle her to have a court of equity decree that she is an adopted child. The court must find that the facts exist which entitle her to the equitable relief prayed for, and if this is done, it follows that she is entitled to a decree accordingly. After setting out the facts, she asks the court to declare upon a consideration of same, in connection with the evidence, that she is the adopted child of the decedent, and is entitled to his property, subject to the widow's interest therein. She thus calls for equitable relief, and the first count should accordingly be considered as a proceeding in equity.

IV. We have given careful consideration to all the questions raised and discussed by counsel in their respective briefs, and, without prolonging this opinion, have reached

the conclusion that plaintiff is entitled to a decree on the facts before us declaring that she is the adopted child of Thomas Davidson, deceased, and as such is the legal owner of the property in controversy, subject to the statutory interests therein of the defendant Augusta Davidson, as the widow of decedent.

The cause is accordingly reversed and remanded, with directions to the trial court

to set aside its judgment, to enter a decree in favor of plaintiff, and to otherwise dispose of the case in conformity to the views herein expressed.

Per Curiam:

The foregoing opinion of Railey, C., is hereby adopted as the opinion of the court.

All concur.

KANSAS SUPREME COURT.

CHARLES W. SMITH, Appt.,

v.

JOHN PARMAN et al.

(101 Kan. 115, 165 Pac. 603.)

Prosecuting attorney — liability for acts.

1. A city attorney, while engaged in the prosecution of a person charged with the violation of an ordinance, is entitled to the same immunity from civil liability with respect thereto as ordinarily attaches to the office of a public prosecutor.

For other cases, see District and Prosecuting Attorneys, in Dig. 1-52 N. S.

Same — institution of proceeding.

2. Irrespective of his motives, a public prosecutor cannot be held liable in a civil action on account of having instituted or maintained a prosecution in that capacity for an alleged violation of the criminal law.

For other cases, see District and Prosecuting Attorneys, in Dig. 1-52 N. S.

(June 9, 1917.)

APPEAL by plaintiff from a judgment of the District Court for Cowley County dismissing the case as to defendant Parman in an action brought to recover damages for alleged malicious prosecution. Affirmed.

The facts are stated in the opinion.

Mr. C. T. Atkinson, for appellant:

A city attorney and deputy county attorney cannot commit a crime and then plead the occupancy of his office as a defense.

Stewart v. Cooley, 23 Minn. 347, 23 Am. Rep. 690; *Stone v. Johnson*, 30 Minn. 18, 13 N. W. 920; *Coolbaugh v. Roemer*, 32 Minn. 449, 21 N. W. 472; *Stewart v. Case*, 53 Minn. 66, 39 Am. St. Rep. 575, 54 N. W. 938; *Root v. Rose*, 6 N. D. 583, 72 N. W. 1022; *Cooke v. Bangs*, 31 Fed. 643; *Elmore*

Headnotes by MASON, J.

Note. — As liability of public prosecutor to action for malicious prosecution, see annotation following this case, post, 699, and annotation on related questions there referred to.

L.R.A.1917F.

v. Overton, 104 Ind. 548, 54 Am. Rep. 343, 4 N. E. 197; *State ex rel. Mt. Mora Cemetery Asso. v. Casey*, 210 Mo. 246, 109 S. W. 1; *State ex rel. Coleman v. Trinkle*, 70 Kan. 396, 78 Pac. 854.

Mr. John Parman, in propria persona:

A prosecuting attorney is a judicial officer, and as such is not liable in a civil action for malicious prosecution.

Griffith v. Slinkard, 146 Ind. 117, 44 N. E. 1001; *Hunter v. Mathis*, 40 Ind. 356; *State v. Henning*, 33 Ind. 191; *Parker v. Huntington*, 2 Gray, 124; 23 Cyc. 717.

Mason, J., delivered the opinion of the court:

Charles W. Smith brought an action against John Parman and others, charging them in several counts with having brought malicious prosecutions against him under the ordinances of a city of the second class. Parman filed a plea in abatement alleging that, at the time of the conduct on his part of which the plaintiff complained, he was the city attorney and was acting in that capacity. The trial court held the plea to be good and dismissed the case as to Parman. The plaintiff appeals. It is conceded that Parman was the city attorney at the time the prosecutions complained of were brought. The method by which that circumstance is brought to the consideration of the court is not important. The case involves the question whether a city attorney is liable in damages to the person injured if he maliciously and without probable cause institutes a prosecution against him under an ordinance.

1. The statute provides for the appointment of a city attorney, but does not define his duties. Gen. Stat. 1915, § 1684. Doubtless, from the practice in this state the duty of prosecuting violators of the city ordinances is implied from the mere name of the office. In the brief of the appellee a copy of an ordinance is set out giving the city attorney control of such prosecutions. While this is not formally in the record, the accuracy of the copy is not questioned. We regard the city attorney, while engaged in the prosecution of persons charged with

offenses against the ordinances, as entitled to the same privileges and immunities that ordinarily attach to the office of a public prosecutor. A proceeding of that kind is essentially a criminal action. *Neitzel v. Concordia*, 14 Kan. 447.

2. In one of the few discussions by text-writers of the liability of a public prosecutor to an action for malicious prosecution, it is said: "A prosecuting attorney, being a judicial officer of the state, is not liable in damages for acts done in the course of his duty, although wilful, malicious, or libelous." 32 Cyc. 717.

This text is obviously based upon *Griffith v. Slinkard*, 146 Ind. 117, 44 N. E. 1001, the other cases cited in connection with it not bearing directly upon the matter. The reference to the prosecutor as a judicial officer might seem open to question. Much of his work is advocacy. But the important matter of determining what prosecutions shall be instituted is committed in a considerable degree to his sound judgment, and in the exercise of that function he acts at least in a quasi judicial capacity. Judges are exempt from civil liability for official acts even if corruptly done; the reason being that the independence of their conduct is thereby promoted, to the benefit of the public. 15 R. C. L. 543; 23 Cyc. 567, 568; 17 Am. & Eng. Enc. Law, 725. Grand jurors are given the same immunity with respect to indictments returned by them, for a similar reason. 20 Cyc. 1356; 17 Am.

& Eng. Enc. Law, 1302. The public prosecutor, in deciding whether a particular prosecution shall be instituted or followed up, performs much the same function as a grand jury. If, while he has a question of that kind under advisement, he is charged with notice that he may have to defend an action for malicious prosecution in case of a failure to convict, his course may be influenced by that consideration, to the disadvantage of the public. Communications made to a public prosecutor relating to offenses against the law are treated as privileged, because "persons having knowledge regarding the commission of a crime ought to be encouraged to reveal to the prosecuting attorney fully, freely, and unreservedly the source and extent of their information." *Michael v. Matson*, 81 Kan. 360, 366, L.R.A.1915D, 1, 105 Pac. 537. We think the reason for granting immunity to judges and grand jurors applies with practically equal force to a public prosecutor in his relations to actions to punish infractions of the law. There is no great danger that abuse of power will be fostered by this exemption from civil liability, for the prosecutor is at all times under the wholesome restraint imposed by the risk of being called to account criminally for official misconduct (Gen. Stat. 1915, § 3588), or of being ousted from office on that account (Gen. Stat. 1915, § 7603).

The judgment is affirmed.

Annotation—Liability of public prosecutor to action for malicious prosecution.

There is very little in the books on the subject of this note.

For liability of prosecuting officer for false arrest or imprisonment, see the note to *Schneider v. Shepherd*, L.R.A. 1916F, 403.

The decision in *SMITH v. PARMAN*, ante, 698, that a public prosecutor is not liable in a civil action for having instituted or maintained a criminal prosecution, is supported by what seems to be the only case directly in point.

In *Griffith v. Slinkard* (1896) 146 Ind. 117, 44 N. E. 1001, cited in *SMITH v. PARMAN*, it was held that an allegation that a prosecuting attorney maliciously and without probable cause procured an indictment by the grand jury was demurrable. The court considered that the prosecuting attorney was a judicial officer, but not in the sense of a judge of a court.

In *Stephen on Malicious Prosecution*, § 85, it is said: "I know of no instance in which any person has been sued for a

prosecution ordered by any officer of state, and I doubt if such an action would lie. Prosecutions may be directed by a secretary of state, the attorney general, or the director of public prosecutions, and I know of no direct authority as to whether or not an action for malicious prosecution would lie against any of these officers for what they had done in their official capacities."

In an action to recover damages for defendant's having, as city attorney, advised and procured an alleged void judgment in the police court of the city, convicting the plaintiff of the violation of an ordinance, a judgment for the defendant was affirmed, where the petition failed to state facts showing that the police judge was not acting within the scope of his authority and "there was a failure to allege that the defendant was acting by malicious or corrupt motives." *Arnold v. Hubble* (1897) 18 Ky. L. Rep. 947, 38 S. W. 1041.

In *Oatman v. Bemere* (1909) 141 Mo.

App. 240, 124 S. W. 1059, it was held that an action would not lie against a district attorney on the ground that he maliciously overdid his part in procuring a conviction. The charge was that the defendant browbeat and assaulted the plaintiff with an intemperate, vulgar, and unnecessarily severe cross-examination, and it was said that the plaintiff had her only remedy by objection, etc., in the criminal case, and could not bring an independent suit upon the matter. The conviction had not been reversed or set aside.

In *Parker v. Huntington* (1854) 2 Gray (Mass.) 124, it was held that, in an

action against a district attorney and another person for malicious prosecution, where it was alleged that they maliciously contrived to draw from the plaintiff evidence which could be used to have him indicted for perjury, and maliciously contrived to have him indicted for perjury, it was not necessary for the plaintiff to aver and prove a conspiracy on the part of the defendants.

For liability of officer for making an arrest, see the notes to *Leger v. Warren*, 51 L.R.A. 193; *Lawton v. Harkins*, 42 L.R.A.(N.S.) 69; and *Brown v. Hadwin*, L.R.A.1915B, 505. B. B. B.

LOUISIANA SUPREME COURT.

JEAN M. GORDON, Appt.,

v.

BUSINESS MEN'S RACING ASSOCIATION.

(— La. —, 75 So. 735.)

Corporation — suit to enjoin business — estoppel.

1. A stockholder who, suing for the appointment of a receiver of a corporation on the ground that the character and method of the business conducted by it is contrary to law, admits that he or she bought stock in the corporation with full knowledge of the character and method of the business carried on by the defendant company, and with the belief that it was contrary to law, and for the sole purpose of bringing the suit to appoint a receiver, has no cause of complaint or right of action to demand the appointment of a receiver.

For other cases, see *Estoppel*, III. c, in Dig. 1-52 N. S.

Receiver — suit by stockholder — statute.

2. In the statute (Act No. 159 of 1898) empowering the courts to appoint a receiver of a corporation under certain circumstances, "at the instance of any stockholder or creditor," the expression "any stockholder or creditor," is construed to mean "a stockholder or creditor," and not to be so comprehensive as to abolish all pleas or defenses to the capacity or right of action of any stockholder or creditor to maintain an action for the appointment of a receiver. For other cases, see *Receivers*, I. b, in Dig. 1-52 N. S.

(May 14, 1917.)

Headnotes by O'NIELL, J.

Note. — For right of stockholder to sue for appointment of receiver on account of transactions occurring prior to his acquisition of stock, see annotation following this case post, 704. L.R.A.1917F.

A PPEAL by plaintiff from a judgment of the Civil District Court for the Parish of Orleans, Division C, in defendant's favor, in a suit for the appointment of a receiver to take charge of its property and business, which was alleged to have been conducted contrary to law. Affirmed.

The facts are stated in the opinion.

Messrs. Solomon Wolff, St. Clair Adams, Robert H. Marr, F. S. Wels, Thomas E. Furlow, and Donelson Caffery, for appellant:

Plaintiff is not estopped from bringing this suit.

Tillou v. Britton, 9 N. J. L. 128; *Elmira Sav. Bank v. Davis*, 142 N. Y. 590, 25 L.R.A. 546, 37 N. E. 646; *State v. Haug*, 95 Iowa, 413, 20 L.R.A. 390, 64 N. W. 398; *Leonard v. Com.* 112 Pa. 607, 4 Atl. 742; *Purdy v. People*, 4 Hill, 384; *Wilson v. Taylor*, 89 Ala. 368, 8 So. 149; *Jones v. Whitworth*, 94 Tenn. 602, 30 S. W. 736; *Gordon v. Business Men's Racing Asso.* 140 La. 674, 73 So. 768; 2 *Pomeroy*, *Estoppel*, 1st ed. § 819.

A corporation so conducting its business as to violate a law of public order—a criminal statute—cannot, in a suit by a stockholder to prevent the continuance of that conduct, plead that the stockholder is estopped by alleged acquiescence in the illegal acts of the corporation in the past.

2 *Pom. Eq. Jur.* ¶ 819; *Re Eastman Oil Co.* 238 Fed. 416; *George v. Central R. & Bkg. Co.* 101 Ala. 607, 14 So. 752.

A stockholder is not estopped by his acquiescence from preventing the continuance of illegal conduct.

Seovill v. Thayer, 105 U. S. 143, 26 L. ed. 968; *George v. Central R. & Bkg. Co.* 101 Ala. 607, 14 So. 752; *Shepaug Voting Trust Cases*, 60 Conn. 553, 24 Atl. 32; *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, 24 L. ed. 693; *Thomas v. Brownville, Ft. K.* & *P. R. Co.* 1 *McCrory*, 392, 2 Fed. 877; *Laredo Improv. Co. v. Stevenson*, 13 C. C. A. 601, 32 U. S. App. 97, 66 Fed. 633;

Waterloo Organ Co. 67 C. C. A. 255, 134 Fed. 341; Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478.

The doctrine of estoppel is not favored in law.

Abbot v. Wilbur, 22 La. Ann. 368; Herber v. Thompson, 46 La. Ann. 186, 14 So. 504.

Messrs. John P. Sullivan and John J. Reilley, for appellee:

Where it appears that plaintiff acquired two shares of stock in a private corporation, and immediately thereafter attempted to place the corporation in the hands of a receiver for the purpose of bringing about a dissolution, an exception or plea of estoppel is well founded, particularly where the evidence shows that plaintiff acquired her stock with full knowledge of the conditions of which she complains.

Von Schlemmer v. Keystone L. Ins. Co. 121 La. 990, 46 So. 991; Hawes v. Oakland, 104 U. S. 450, 26 L. ed. 827; Dimpfell v. Ohio & M. R. Co. 110 U. S. 209, 28 L. ed. 121, 3 Sup. Ct. Rep. 573; Sparhawk v. Union Pass. R. Co. 54 Pa. 454; Ranger v. Champion Cotton Press Co. 52 Fed. 610; United Electric Securities Co. v. Louisiana Electric Light Co. 68 Fed. 673.

O'Niell, J., delivered the opinion of the court:

This is a suit by a stockholder of the defendant company to have a receiver appointed to take charge of the property and business of the corporation, on the ground that its business is being conducted contrary to law. The plaintiff describes in her petition, with minute detail, the method and manner in which, she alleges, the defendant corporation is conducting its business, and she complains that the alleged method of conducting the business is in violation of a criminal statute, the Act No. 57 of 1908, commonly called the Locke Law. That statute denounces as a misdemeanor the promoting or encouraging of the operation of a betting book on horse races, or promoting or encouraging, by any device, any person or persons to bet or wager on a horse race.

In answer to the rule to show cause why a receiver should not be appointed, the defendant filed an exception of no cause of action, and a plea of estoppel, alleging that the plaintiff acquired stock in the corporation with full knowledge of the conditions and facts upon which her suit was based, and for the sole purpose of fomenting discord and litigation.

The exception of no cause of action was sustained by the district court, and the plaintiff appealed. On appeal, the judgment on the exception of no cause of action was reversed, and the case was remanded to the L.R.A.1917F.

district court, that the plea of estoppel might be decided and the case proceeded with according to law. See Gordon v. Business Men's Racing Asso. 140 La. 674, 73 So. 768.

The only evidence heard on the trial of the plea of estoppel was the testimony of the plaintiff herself, who was called to the witness stand by the defendant's counsel for cross-examination. Having testified that she owned two shares of stock in the defendant corporation, she was asked when she purchased the stock. Her attorney objected to the question and the evidence to be obtained on the ground that it was irrelevant and immaterial. The objection being overruled, the defendant's counsel asked her whether she had purchased the stock as an investment, and, if not, what was her purpose in buying the two shares of stock. Her answer was that she certainly did not buy the stock for an investment.

The cross-examination then proceeded and concluded as follows:

Q. What was your motive in buying the stock?

A. To show that, in my opinion, the Locke Law was being openly and flagrantly violated.

Q. To show it to whom, Miss Gordon?

A. To this community.

Q. How about this court?

A. Well, this court is part of the community, I think.

Q. Then, you were familiar with the facts existing at the time of the purchase of the stock?

A. Yes, sir; in my opinion the law was being violated, from all I heard from people who were out there. Dozens and hundreds of people came to me and asked me why something was not being done.

It is therefore admitted by the plaintiff that she was aware of the character and method of the business carried on by the defendant company before she purchased stock in the corporation, that she believed that method of conducting the business was contrary to law, and that, with that knowledge and belief, she bought stock in the corporation for the sole purpose of acquiring a cause for complaint or right of action to demand the appointment of a receiver to take charge of the property and business of the corporation.

Among the instances in which the courts are empowered, by the Act No. 159 of 1898, to appoint a receiver to take charge of the property and business of a corporation domiciled in this state, is the following: "(7) At the instance of any stockholder or creditor when the corporation has been adjudged not organized according to law, or

pursuing any business, calling or avocation contrary to law."

It is conceded or assumed by the learned counsel in this case that the last clause in the paragraph of the statute quoted is to be read: "or is pursuing any business, calling or avocation contrary to law." It is not contended by the learned counsel for the defendant that the corporation must be first "adjudged" to be pursuing any business, calling, or avocation contrary to law, before a stockholder or creditor can sue for the appointment of a receiver.

The defendant relies upon the doctrine announced in the case of *Von Schlemmer v. Keystone L. Ins. Co.* 121 La. 987, 46 So. 991, viz.: "Courts are reluctant to interfere with the affairs of a corporation on behalf of a minority of the stockholders, and will not do so at the suit of a stockholder who acquired his stock with full knowledge of the conditions of which he complains."

In the opinion, of which the above quotation is the syllabus, the decisions by the Supreme Court of the United States in the following cases were cited, viz.: *Hawes v. Oakland* (*Hawes v. Contra Costa Water Co.*) 104 U. S. 450, 26 L. ed. 827, and *Dimpfell v. Ohio & M. R. Co.* 110 U. S. 209, 28 L. ed. 121, 3 Sup. Ct. Rep. 573, where it was held that, to sustain a bill in equity against a corporation by a shareholder, he had to allege that he was the owner of the stock on which he claimed the right to sue, at the time of the transactions of which he complains, or that the stock devolved upon him by operation of law. That doctrine has since been adopted by the Supreme Court of the United States as a part of equity rule No. 94. The rule itself is, of course, not applicable here; but it declares a principle that is very appropriate, notwithstanding; in the appointment of receivers, our courts are governed by statute.

The learned counsel for the plaintiff argue that the plea of estoppel cannot apply to a case like this, where the complaint against which the plea is urged is that the party pleading the estoppel is violating a penal statute. They quote from *Rawle's Revision of Bouvier's Law Dictionary*, vol. 1, p. 694, the definition of "estoppel," by Gould, Chancery Pleading; that is, a plea which neither admits nor denies the facts alleged by the plaintiff, but denies his right to allege them.

The defendant, in pleading the estoppel in this case, neither admits nor denies the facts alleged by the plaintiff, but denies her right to allege them, because she has no other cause for complaint than that which she knowingly and intentionally purchased.

The learned counsel for the plaintiff also quote from *Pomeroy's Equity Jurisprudence*, 3d ed. vol. 2, § 819, the doctrine that stock-

holders may be estopped, by their acquiescence, from objecting to the acts of the corporation which are not illegal nor mala prohibita, but ultra vires, when the rights of innocent third persons have intervened. Conversely, and manifestly, stockholders cannot be estopped, by their acquiescence, from objecting to acts of the corporation that are illegal or mala prohibita. A number of decisions are referred to in the plaintiff's brief in support of the doctrine that a stockholder cannot, by acquiescence, ratify, or be estopped to complain of, the acts of the corporation that are contrary to law or to any provision of the charter of the corporation. See *Scovill v. Thayer*, 105 U. S. 143, 26 L. ed. 968; *Shepaug Voting Trust Cases*, 60 Conn. 553, 24 Atl. 32; *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, 24 L. ed. 693; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478.

But the defendant's plea in this case is not that the plaintiff has condoned or acquiesced in any act of the corporation that was illegal or malum prohibitum. The plea or defense is that the plaintiff, in her capacity of stockholder, is not injured or aggrieved by the character and method of the business conducted by the defendant corporation, but, if injured at all, is injured solely by and in consequence of her own voluntary act of becoming a stockholder in the corporation.

If the plaintiff had a real cause for complaint, in her capacity of stockholder of the corporation,—that is, a complaint which she had not voluntarily brought upon herself,—she would undoubtedly have a right of action, and no one could question her motive in asserting that right. If the corporation should be adjudged, by any court of competent jurisdiction, to be pursuing a business contrary to law, in the precise language of the seventh paragraph of § 1 of the Act No. 159 of 1898, undoubtedly the plaintiff would have a right of action to demand the appointment of a receiver, whatever might have been her motive in purchasing stock in the corporation. But the corporation has not been adjudged to be pursuing a business contrary to law. The plaintiff, as a stockholder, sues to have the company so adjudged and outlawed, for a cause which she admits would not be of any financial interest or concern to her if she had not voluntarily, and with full knowledge of the conditions, become a stockholder.

The learned counsel for the plaintiff argue that the word "any" has such a comprehensive meaning, in the seventh paragraph of § 1 of Act No. 159 of 1898, "at the instance of any stockholder or creditor," that it forbids any plea to the capacity of the

plaintiff so long as he or she is a stockholder of the corporation. In support of that argument, a number of decisions are cited, where the word "any" was held to be synonymous with "all" or "every;" e. g., "any special matter" was held to mean every special matter; "any bank" was held to include a national bank; "any of the waters of the state" was held to mean all the waters within the state; "any election law" was held to include, not only the election laws in force when the statute in which the expression was used was adopted, but applied to election laws thereafter enacted; "any election" was held to mean a primary election, as well as a general election; and "any contract" was held to mean an implied contract as well as an express contract. Twenty pages, containing hundreds of illustrations of the various judicial interpretations put upon the word "any," according to the context or subject-matter of the phrase or sentence in which it is used, are to be found in 3 C. J. pp. 230-249, inclusive. For example, in a statute of Quebec, the expression, "this section does not extend or apply to any action or prosecution for the recovery of any penalty imposed by any act respecting the sale of intoxicating liquors," was held to mean any act of the legislature of Quebec, and not to include an act of any other parliament, either Imperial or Canadian. The words "any attempt," in a testament in which the testator declared that his will should be inoperative if any attempt was made to withdraw his grandson from the custody of his executors, was held to mean any successful attempt, not an unsuccessful attempt. The words "any bank" were taken to mean any bank in the place where the promissory note in which the expression was used was made payable, and not to include any bank elsewhere in the world. The expression "any benefit," in a statute providing that, in assessing the damages resulting from the expropriation of property, due allowance should be made for "any benefit" that the owners might derive, was held to mean only any benefit resulting specially to the landowner, and not a benefit shared by the community in common with him. The expression "any creditors" was held to have the same meaning as "the creditors." The expression "any one creditor," in a statute limiting the jurisdiction of a justice of the peace to cases where the amount claimed by any one creditor did not exceed \$100, was held to mean anyone claiming under the same bond and affidavit, but not a creditor who had acquired three separate claims, none of which exceeded \$100. A statute providing that a witness should not be disqualified by his conviction of any crime was construed to mean only such crime as, at

common law, worked a disability to testify; that is, conviction of an infamous offense. The supreme court of Maine, in *Cummings v. Everett*, 82 Me. 280, 19 Atl. 456, construing a statute providing that the contracts of any married woman, made for any lawful purpose, should be valid and binding and might be enforced in the same manner as if she were sole, held that the statute did not include a married woman under the age of majority, although it was admitted in the opinion that literally the words "any married woman" included married female minors.

It would serve no useful purpose to encumber the report of the decision in this case with more of the illustrations, given in the reference books, of the various meanings of the word "any," as judicially interpreted according to the context of the phrase or sentence in which it is used. It is sufficient to say that, in our opinion, the expression, "at the instance of any stockholder or creditor," as used in the Act No. 159 of 1898, was not intended to abolish all defenses or pleas to the capacity or right of a stockholder or creditor to sue for the appointment of a receiver of a corporation. To give the word a more comprehensive meaning than the context of the statute warrants, or the legislature intended, would lead to an absurdity. It might as well be contended that a plea to the capacity of any stockholder or creditor, suing for the appointment of a receiver of a corporation, could not be maintained even though the plaintiff, being a stockholder or creditor, be an unauthorized married woman or a minor or an interdicted person. It is not likely that the legislature had any idea, in using the expression "any stockholder or creditor," instead of "a stockholder or creditor," of abolishing all defenses or pleas to the capacity of a stockholder or creditor to maintain an action for the appointment of a receiver. Our opinion is that, if the legislature had any special object or purpose in using the word "any," instead of the article "a," in the expression, "at the instance of any stockholder or creditor," the purpose was to include any stockholder or stockholders regardless of the number or the amount of stock owned by him or them, and to include any creditor, whether an unsecured creditor, a mortgage creditor, a lien creditor, or a judgment creditor.

The learned counsel for the plaintiff contend that the doctrine announced in the *Von Schlemmer Case*, 121 La. 987, 46 So. 991, is not applicable here, because the complaint is that the defendant is violating a penal statute. That difference in the two cases would render the decision cited inapplicable here if the defendant were pleading

that the plaintiff is estopped by acquiescence. But that is not the plea at all. The plea is that the plaintiff has no cause for complaint, in so far as her interest as a stockholder in the corporation is concerned, because she acquired that interest with full knowledge of the facts and with the deliberate purpose of complaining. Her interest in complaining, and right to complain, of the commission of a crime or misdemeanor, is only such as is shared by the entire community or commonwealth. The criminal court, not the civil court, is the tribunal to which she or any other citizen must go for redress, to prevent a violation of the penal laws.

In *Marks v. American Brewing Co.* 126 La. 666, 52 So. 983, one of the complaints made by the plaintiff, as a stockholder, in asking for the appointment of a receiver of the defendant corporation, was that the corporation was violating the Gay-Shattuck Law, Act No. 176 of 1908, which prohibits a brewing company from being interested financially in, or from owning or leasing any premises for, a barroom. With regard to that complaint, the then Chief Justice, for the court, said: "If the defendant has violated the provisions of a police regulation, it is not for plaintiff to invoke this law, as the state has her remedy, either civilly or criminally."

Our conclusion, from the plaintiff's admission, is that she has no more right or cause to complain of the character and method of the business conducted by the defendant corporation than she had when she, knowing the conditions and character and method of the business, bought stock in the corpora-

tion; and that she has no more right to demand the appointment of a receiver to take charge of the property and business of the corporation than if she had not bought the stock. Her right to insist upon an enforcement of the criminal laws, when she bought the stock, was no greater than that of any other citizen, and she did not, by buying the stock, acquire any greater right in that respect. It would not be in the interest of public policy, but would be a grave reflection upon other departments in our government, to hold that a private citizen can acquire, by purchasing stock in a corporation, a right—or that every citizen does not enjoy the right—to demand that the corporation shall not violate a penal statute.

We have no doubt of the lofty motive of the plaintiff in buying stock in the defendant corporation; but she was mistaken in the remedy she adopted, as a private citizen, to redress what she believed to be a wrong. To permit her to redress a grievance that she acquired for the sole purpose of redressing it, by having a receiver appointed to take charge of the property and business of this corporation, would permit any person, not now financially interested in the affairs of the defendant company, to resort to the same method for a selfish or sinister motive or to redress an imagined grievance. Our conclusion is that the judgment appealed from is correct.

The judgment appealed from is affirmed, at the cost of the appellant.

Petition for rehearing denied June 11, 1917.

Annotation—Right of stockholder to sue for appointment of receiver on account of transactions occurring prior to his acquisition of stock.

The difference in opinion among the courts as to the right of a stockholder to attack transactions occurring prior to his acquisition of stock is shown in the discussion in the note to *Pollitz v. Gould*, 38 L.R.A.(N.S.) 988.

The United States Supreme Court "equity rule No. 94," referred to in the opinion in *GORDON v. BUSINESS MEN'S RACING ASSO.* ante, 700, came in force in 1882. That rule is now known as No. 27, and, as amended 1912-1913, by the addition of the final clause in brackets, reads as follows: "27. Stockholder's Bill.—Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that

the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action [or the reasons for not making such effort]".

In *Robinson v. West Virginia Loan Co.* (1898) 90 Fed. 770, in discharging on other grounds a receiver appointed in a stockholder's suit, the court said: "Nor does it appear from the bill that

the complainant was the owner of the stock now claimed by him at the time the matters complained of occurred. The allegation that he was the owner of the same at the time the suit was instituted is not sufficient."

But it has been held that the United States equity rule (94) does not apply where the stockholder, at the time of the acts complained of, is the owner of a fully paid subscription to the stock. *Citizens' Sav. & T. Co. v. Illinois C. R. Co.* (1910) 105 C. C. A. 145, 182 Fed. 607, reversing (1909) 173 Fed. 556, a case where the complainant asked for the appointment of a receiver and other relief. The court said: "The claim that the suit is violative of equity rule 94, in that the bill does not show that complainants were stockholders at the time of the transactions complained of, or that the stock devolved upon them by operation of law since that time, is, in our opinion, utterly unwarranted. . . . The owner of a paid stock subscription is the full beneficial owner of the stock. A stock certificate is merely evidence of ownership; and, during the time in which a company fails or refuses to issue a certificate to a subscriber who has paid in full, the company is at most only the holder of the naked legal title in trust for the beneficial owner."

In *Alexander v. Searcy* (1888) 81 Ga. 536, 12 Am. St. Rep. 337, 8 S. E. 630, in reversing a decision granting an injunction and appointing a receiver, where there were other sufficient grounds for the result, the court said: "The weight of authority seems to be that a person who did not own stock at the time of the transactions complained of cannot complain or bring a suit to have them declared illegal." (This opinion is disapproved in *Forrester v. Boston & M. Consol. Copper & S. Min. Co.* (1898) 21 Mont. 567, 55 Pac. 229, 353,—a case without the scope of this note.)

In *Von Schlemmer v. Keystone L. Ins. Co.* (1908) 121 La. 987, 46 So. 991, referred to and followed in *GORDON v. BUSINESS MEN'S RACING ASSO.* ante, 700, there was judgment for the defendant in a suit by a stockholder against a corporation for the appointment of a receiver, the plaintiff having acquired his stock with full knowledge of the facts upon which he based his suit. It was held that one will not be permitted to acquire an interest in a corporation for the sole purpose of fomenting discord and litigation, and the presumption is that such is his purpose when he acquires stock from his son, who had made an un-

successful attempt to have a receiver appointed, and follows it immediately by bringing suit for a similar purpose.

It may be noted that in *Hoopes v. Basic Co.* (1905) 69 N. J. Eq. 679, 61 Atl. 979, affirmed in (1907) 72 N. J. Eq. 426, 65 Atl. 1118, it was held that the complainant was not a stockholder within the act providing that whenever any corporation shall become insolvent or shall suspend its ordinary business for want of funds to carry on the same, any creditor or stockholder may, by petition or bill setting forth the facts, invoke the jurisdiction of the court of chancery, and, upon proof of the facts upon summary hearing, have a decree placing the corporation under disabilities by an injunction in respect to the exercise of its franchises, and also, if necessary, the appointment of a receiver. It appeared that the complainant had sold his stock to another company, receiving in exchange some of its stock, and at the same time the vendee transferred back to him one share of his former stock in order that he might be qualified as director of the first corporation, and that he had indorsed in blank the certificate for the one share and handed it back to the second corporation.

(In *Reinhardt v. Inter-State Teleph. Co.* (1906) 71 N. J. Eq. 70, 63 Atl. 1097, where a statutory suit by a stockholder and creditor for the appointment of a receiver, etc., was sustained on the ground that the complainant was a creditor, it was admitted that the complainant had purchased stock after he knew of defendant's embarrassment, and that it was so purchased for the purpose of giving him the standing of a stockholder in a suit to be brought against the company.)

On a bill for an account and a receiver, it was held that the plaintiff could not complain of the dismissal of his bill where the mismanagement he alleged had been approved and acquiesced in or ratified by all the stockholders of the company at the time the acts occurred, and he purchased his stock after the alleged mismanagement had been acquiesced in by the company for nearly two years, especially since his predecessor in title participated in such acts. *Erny v. G. W. Schmidt Co.* (1901) 197 Pa. 475, 47 Atl. 877.

On the other hand, in *Winsor v. Bailey* (1875) 55 N. H. 218, where a bill asking, among other things, for the appointment of a receiver, was held demurrable on other grounds, the court said: "The plaintiffs allege that they are stock-

holders, . . . and specify the number of shares owned by each, but do not allege that they were stockholders at the time the dividend was paid the defendants. But that is not necessary, and it is immaterial whether they were or not. The transfer of the stock conveyed to them not only the ownership of the shares and the right to the future dividends thereon, but also placed them on an equal footing with the other stockholders in respect to the right to call the officers and agents of the corporation to an account for their fraudulent conduct."

So, in an action for redress for the fraud of officers, and asking for the appointment of a receiver, the court, in

overruling a demurrer to the complaint, said: "It is enough that the plaintiff was a stockholder when the action was brought. If he purchased his stock after the alleged fraud was committed, that did not condone the fraud. The plaintiff acquired all the rights of the person of whom he purchased." *Young v. Drake* (1876) 8 Hun (N. Y.) 61.

As to inherent jurisdiction of equity, independently of statute, at the instance of stockholders, to appoint a receiver to wind up a corporation because of mismanagement or fraud of its officers, see the notes to *Exchange Bank v. Bailey*, 39 L.R.A.(N.S.) 1032, and *Fees v. Mechanics' State Bank*, L.R.A.1915A, 606. B. B. B.

LOUISIANA SUPREME COURT.

STATE OF LOUISIANA, Appt.,

v.

H. WEINSTEIN.

(— La. —, 76 So. 208.)

Constitutional law — liability for receiving stolen property.

Act No. 250 of 1916, p. 523, providing that one who purchases or receives for sale, or in pledge, or on storage, or for safe-keeping, any article of iron, brass, or other metal, belonging to a railroad company, and which was manufactured exclusively for railroad purposes, without the written consent of the officers of the railroad company owning same, is guilty of a misdemeanor, is not class legislation. It is an exercise of the police power of the state, passed in the general interest of the public and for its safety, as well as to discourage the pilfering of such articles from a public corporation.

For other cases, see Constitutional Law, II. o, 5, in Dig. 1-52 N. S.

(June 11, 1917.)

APPEAL by the State from a judgment of the Judicial District Court for the Parish of Washington quashing an indictment charging violation of a statute making it a misdemeanor to receive metal manufactured and used exclusively for railroad purposes. Reversed.

The facts are stated in the opinion.

Messrs. A. V. Coco, Attorney General, J. Vol Brock, and Vernon A. Coco, for the State:

The statute is constitutional.

Headnote by SOMMERVILLE, J.

Note.—As to constitutionality of statute making the receiving of certain kinds of property a criminal offense, see annotation following this case, post, 709. L.R.A.1917F.

Rosenthal v. New York, 226 U. S. 260, 57 L. ed. 212, 33 Sup. Ct. Rep. 27, Ann. Cas. 1914B, 71.

Mr. C. Ellis Ott, for appellee:

The act is unconstitutional.

State v. Legendre, 138 La. 154, L.R.A. 1916B, 1270, 70 So. 70; *Butchers Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Coppage v. Kansas*, 236 U. S. 1, 59 L. ed. 441, L.R.A.1915A, 960, 35 Sup. Ct. Rep. 240; *Wright v. Hart*, 182 N. Y. 330, 2 L.R.A.(N.S.) 338, 75 N. E. 404, 3 Ann. Cas. 263; *Off v. Morehead*, 235 Ill. 40, 20 L.R.A.(N.S.) 167, 126 Am. St. Rep. 184, 85 N. E. 264, 14 Ann. Cas. 434; *Young v. Lemieux*, 79 Conn. 434, 20 L.R.A.(N.S.) 160, 129 Am. St. Rep. 193, 65 Atl. 436, 600, 8 Ann. Cas. 452; *State v. Schmuck*, 77 Ohio St. 438, 14 L.R.A.(N.S.) 1128, 122 Am. St. Rep. 527, 83 N. E. 797; *Rosenthal v. New York*, 226 U. S. 260, 57 L. ed. 212, 33 Sup. Ct. Rep. 27, Ann. Cas. 1914B, 71, 197 N. Y. 394, 46 L.R.A.(N.S.) 31, 90 N. E. 991; *Horwich v. Walker-Gordon Laboratory Co.* 205 Ill. 497, 98 Am. St. Rep. 254, 68 N. E. 938.

Sommerville, J., delivered the opinion of the court:

The state appeals from a judgment in this case ordering that the indictment, drawn under Act No. 250 of 1916, p. 523, be quashed, on motion of defendant to that effect; on the ground that the act is class legislation, and deprives him of property without due process of law, and therefore is in violation of the Constitutions of the United States and of this state.

The act is in the following language:

"Section 1. Be it enacted by the general assembly of the state of Louisiana, that any

person who shall, without written authority from the railroad company owning the same, purchase or receive for sale, or in pledge, or on storage, or for safe-keeping from any other person, any link, pin, bearing, journal, or other article of iron, brass, or other metal, which has been manufactured and is used exclusively for railroad purposes, without the consent in writing of the president, vice president, general manager, superintendent, or purchasing agent of such railroad company, shall be held guilty of a misdemeanor, and upon conviction be fined in a sum not less than \$100 nor more than \$500, or be imprisoned not less than six months or more than one year, or both, at the discretion of the court, and proof of possession of any of said articles shall be prima facie evidence of violation of this act."

Section 812, Rev. Stat., provides for the punishment of larceny; and Act 249 of 1916, p. 522, provides for the punishment of the larceny of journal brasses, fixtures, or attachments from locomotives, tenders, freight or passenger cars, by imprisonment for not less than one year or more than two years, with the proviso: "That if the stealing or removal of such journal bearings or brasses, or any parts or attachments of any locomotive, tender, or car, or any fixture or attachment belonging to, connected with, or used on any locomotive, tender, or car as aforesaid, shall be the cause of wrecking any train, locomotive, or other car in this state whereby the life of any person or persons shall be lost as a result of the felonious or malicious stealing, nothing in this act shall be construed as preventing prosecution for such crime."

Section 832, Rev. Stat., provides for punishment for receiving stolen goods by imprisonment not exceeding one year, and the receiver of said stolen goods must restore the goods so received, or pay double the value thereof, or suffer further imprisonment and hard labor for a period not exceeding one year. Act 250 of 1916, p. 523, makes the receiving or purchasing of any link, pin, bearing, journal, or other article of iron, brass, or other metal, which has been manufactured and is used exclusively for railroad purposes, without the consent of the railroad company owning such article, for the purpose of sale or pledge, or on storage, or for safe-keeping, a crime; and that upon conviction the purchaser or receiver shall be fined in a sum not less than \$100 or more than \$500, or be imprisoned not less than six months or more than one year, or both, at the discretion of the court; L.R.A.1917F.

and the act further provides that the proof of possession of any such article shall be prima facie evidence of the violation of the act.

The legislature has at various times adopted definite and separate provisions for the stealing of horses, cattle, automobiles, diverting electricity and gas, etc.; and these several acts have not been attacked as class legislation. And we are of the opinion that the act which makes purchasing or receiving for sale, or in pledge, or on storage, or for safe-keeping, from any other person than "the railroad company owning the same," certain named articles which have been manufactured and are used exclusively for railroad purposes, without the written consent of the officers of the railroad company, a misdemeanor, and which provides that "the proof of possession of any of said articles shall be prima facie evidence of violation of this act," is not class legislation.

The Congress of the United States have legislated in the same way, and have made separate provisions for the punishment of stealing from the public property of the government, and stealing from ships and other vessels, and the stealing of freight which is in interstate commerce. The states of New York and Illinois have passed similar statutes with reference to railroad companies, very like the statute under consideration in this case.

It will be presumed that the legislature had knowledge of the railroad business, or rather how it is conducted, and the everyday practical operation of railroads, and that brass journals, etc., are the objects of frequent thefts. Railroad cars cannot be operated without these appliances, and there is no practical method of preventing their exposure to theft. Railroad brasses are easily stolen from trains, and the parts from which the brasses are extracted are quickly heated and break; and derailments, with consequent injuries to person and loss of property; must be the inevitable result. In such case, where the business is affected with a public use, or certain articles are used as accessories in carrying on such business, the disposition of that property may always be limited or regulated where public interests will require it to be; and the legislature had the right to prevent the pilfering of the property under consideration on account of the exposed position of the same, and in some respects to regulate the sale and use thereof. By such legislation the state aids in securing safety to the traveling public, and to the patrons of rail-

roads in their business with the railroads as common carriers.

The object and spirit of the law are to so restrict the use to which certain private property of railroads may be put as to prevent pilfering and the receiving of stolen goods belonging to railroads, and to promote the safety of the traveling public at the same time. When it is borne in mind that the safety of thousands of individuals and the care of much freight are daily intrusted to railroad companies of the state, it must be conceded that it is not only the right, but the duty, of the state, in the exercise of its police power, to use every precaution for the safety of the traveling public and property engaged in commerce, the preservation of property of railroad companies, and for the discouragement of the larceny of and crime of receiving stolen property of the kind in question, and it was within the police power of the state to pass such a statute.

Under the act, and under the indictment charging defendant with having violated same, the state must prove that the articles mentioned in the indictment were owned by the New Orleans & Great Northern Railroad Company; and that defendant purchased or received same from persons unknown to the grand jury, and that these articles had been manufactured for and were exclusively used for railroad purposes, without the consent in writing of the railroad company owning same, or any of the officers thereof.

The act further makes the possession of said articles *prima facie* evidence of a violation of the act. Such possession is not conclusive evidence, and the defendant has the right to rebut it with competent proof.

Reference has been made to a decision of the Ohio supreme court, entitled *State v. Schmuck*, 77 Ohio St. 438, 14 L.R.A. (N.S.) 1128, 122 Am. St. Rep. 527, 83 N. E. 797, involving an act which referred to bottles and vessels, and their contents, mostly various kinds of beverages and food, and which gave to the owner the right to invoke the power of the state, through the criminal court, to save the owners from the loss of bottles and vessels belonging to them. This was declared to be class legislation by a court of that state in giving to such dealers an extraordinary right over other dealers in reclaiming their property by punishing the offenders who had possession of said property. The act referred to contains more drastic provisions than the one under consideration. It provides for search warrants and seizure of property in such cir-

cumstances, and in many respects the provisions of the act are rigid and severe. On conviction, the property taken on the search warrant was to be restored to the rightful owner.

It was held by the Ohio court: "That the general public has not been offended by the commission of the acts alleged in the indictment, nor does the statute in question make criminal any act in which the general public is concerned."

And further that "the possession of such articles by anyone, or the using or buying and selling the same without the written consent of the owner or owners, shall be *prima facie* evidence of the unlawful use and receiving prohibited by the act. . . . Its sole purpose seems to be the protection of the owners of certain described articles of personal property, who are engaged in a limited line of business, and the act might well be entitled 'An act to protect persons engaged in the selling of any merchandise, food, or beverages in bottles or other vessels from the loss of their bottles or other vessels.' This purpose pervades every line of the statute, including the provision for search and seizure, and it is given criminal caste in order to secure to such owners a better protection than is or perhaps can be afforded to owners of any other class of property. As to the recovery of other kinds of property by the lawful owner, he must rely on proceedings in a civil action; but here the state of Ohio is to become the plaintiff, and in a drastic criminal procedure not only 'get at' the property for the owner and restore it, but to punish by fine or imprisonment, or both, the person who has trespassed upon the title or possession of the owner."

The Ohio statute is different in many ways from that under consideration; and the reasons and the objections stated above have no application to the statute of this state, making it a misdemeanor to purchase or receive certain property belonging to a railroad company. The act is a valid process of law against offenders of its provisions.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that this suit be remanded to be proceeded with in accordance with law.

O'Niell, J., takes no part.

Petition for rehearing denied June 30, 1917.

Annotation—Constitutionality of statute making the receiving of certain kinds of property a criminal offense.

As to statutes defining the act of receiving stolen property, which make failure to inquire as to possessor's right equivalent to guilty knowledge, see note in 46 L.R.A.(N.S.) 31. And generally as to power to regulate traffic in rags, secondhand articles, and junk, see notes to *Grand Rapids v. Braudy*, 32 L.R.A. 116, and *Com. v. Malatsky*, 24 L.R.A. (N.S.) 1168. And as to legislation to protect manufacturers or dealers against loss of receptacles in which their products are put up, see note to *State v. Schmuck*, 14 L.R.A.(N.S.) 1128, and annotation in L.R.A.1915C, 734.

Statutes and ordinances regulating pawnbrokers are not treated herein. See notes in 32 L.R.A. 117, and 38 L.R.A. 657.

The decision in *STATE v. WEINSTEIN*, ante, 706, to the effect that a statute making it a crime for a person to receive or purchase any link, pin, bearing, journal, or other article of iron, brass, or other metal, which has been manufactured and is used exclusively for railroad purposes, without the written consent of the railroad company owning such article or articles, is not void as class legislation, and is a valid police regulation because it works to the general interest and safety of the public and tends to discourage the pilfering of such articles from public service corporations, the protection of which is a public duty,—finds direct support in *Levi v. Anniston* (1908) 155 Ala. 149, 46 So. 237, where it was held that a municipal ordinance prohibiting any dealer in junk or secondhand goods from purchasing any brass goods, tools, belting, mining cars, scrap iron, brass, or copper, pig iron, or cast-iron pipe, from anyone not having a certificate to sell the same from the chief of police, excepting only persons or corporations engaged in the manufacture of brass goods, pig iron, cast-iron pipe, belting, mining cars, or other cars, is not so discriminatory, because of the exemption of the named manufacturers, as to render it void as class legislation, but rather is valid as a police regulation, it having been adopted pursuant to legislative authority. And the same is true of *People v. Rosenthal* (1910) 197 N. Y. 394, 46 L.R.A.(N.S.) 31, 90 N. E. 991, a judgment entered pursuant to the mandate, which was affirmed in (1912) 226 U. S. 260, 57 L. ed. 212, 33 Sup. Ct. Rep. 27, Ann. Cas. 1914B, 71, wherein the New York court of appeals held that a statute making it

a criminal offense for a dealer in or a collector of junk, metals, or secondhand materials, to buy or receive any stolen wire, cable, copper, lead, solder, iron, or brass used by or belonging to a railroad, telephone, telegraph, gas, or electric light company, without making diligent inquiry for the purpose of ascertaining whether the person selling or delivering it has a legal right to do so, did not deny junk dealers the equal protection of the law. And the Supreme Court of the United States, in affirming a judgment entered pursuant to the mandate of the court of appeals, not only decreed that the statute in question did not constitute class legislation, but also ruled that it neither abridged the privileges and immunities of citizens of the United States, nor was so arbitrary and groundless an interference with the liberty of contract as to bring it within the denunciation of the due process of law clause of the Constitution, but that such legislation was well within the legitimate bounds of the police power of the state. And again in *Com. v. Baxter* (1899) 23 Pa. Co. Ct. 270, an act making it a crime for any person in certain counties to receive or buy from minors or unknown or irresponsible persons any scrap iron, brass, lead, copper, or other metals, was held to be a lawful exercise of the police powers, and not to be unconstitutional. This ruling was in answer to contentions that the statute unconstitutionally interfered with the acquiring and possession of property, and in effect deprived the defendant of his property without due process of law, and that it interfered with his property rights and personal liberty by destroying property without compensation, and was not a constitutional exercise of the police power, the court relying upon a dictum in *Harrison v. Com.* (1889) 123 Pa. 508, 16 Atl. 611, to the effect that the statute in question was within the police powers of the state. So, in *Com. v. Mintz* (1902) 19 Pa. Super. Ct. 283, a statute making it a crime for any junk or secondhand dealer to purchase or accept from any person whatsoever, except licensed plumbers or the owner or owners of buildings from which the material is taken, any pipe, faucet, boilers, spigots, coils, or any other like material whatever without performing certain acts provided by the act, was held to be within the police powers of the state, and constitutional. G. J. C.

MASSACHUSETTS SUPREME JUDICIAL COURT.

ELLEN KELLEHER, Admr., etc., of
Michael J. Kelleher, Deceased,
v.

CITY OF NEWBURYPORT.

(Two Cases.)

(— Mass. —, 116 N. E. 806.)

Highway — unsafe condition — oil on surface.

1. A municipal corporation is liable for injury to a bystander by the skidding of a carefully driven automobile due to the unreasonably slippery condition of the pavement because of oil placed thereon by the municipality.

For other cases, see Highways, IV. a, 5, in Dig. 1-52 N. S.

Same — intervening rain — effect.

2. The jury may find that rain which rendered a newly oiled street dangerous for travel should have been anticipated by the municipality and its effect guarded against by warning, sanding, or otherwise.

For other cases, see Highways, IV. a, 5, in Dig. 1-52 N. S.

Evidence — cause of death — sufficiency.

3. Testimony by a physician that an accident was the cause of death, accompanied by evidence of the steadily deteriorating condition of the victim after the injury, is sufficient to support a finding that the accident was the cause of death, although the victim was afflicted with heart disease at the time of the accident.

For other cases, see Evidence, XII. b, in Dig. 1-52 N. S.

(June 28, 1917.)

EXCEPTIONS by defendant of the Superior Court for Essex County made during the trial of consolidated actions brought to recover damages for personal injuries to and death of plaintiff's intestate, which resulted in verdicts for plaintiff. Overruled.

The facts are stated in the opinion.

Mr. Horace I. Bartlett, for defendant:

All that a municipality is required to do is to make a street reasonably safe for travel.

Note. — As to liability for injury due to oiling street, see annotation following this case, post, 712.

For weather conditions as an independent, intervening, efficient cause, see note to *Benedict Pineapple Co. v. Atlantic Coast Line R. Co.* 20 L.R.A. (N.S.) 92.

Pre-existing disease or condition of person injured as affecting recovery from one negligently causing the injury is treated in the note to *Jones v. Caldwell*, 48 L.R.A. (N.S.) 119.
L.R.A. 1917F.

Baker v. Fall River, 187 Mass. 53, 72 N. E. 336; *Doherty v. Ayer*, 197 Mass. 241, 14 L.R.A. (N.S.) 816, 125 Am. St. Rep. 355, 83 N. E. 677; *Sutphen v. North Hempstead*, 80 Hun, 409, 30 N. Y. Supp. 128.

A city is not required to take different or greater precautions for automobiles than for other vehicles.

Berry, Automobiles, § 524.

A road reasonably safe for ordinary travel is not defective because not fit for use with bicycles.

Rust v. Essex, 182 Mass. 313, 65 N. E. 397; *Hendry v. North Hampton*, 72 N. H. 351, 64 L.R.A. 70, 101 Am. St. Rep. 681, 56 Atl. 922, 15 Am. Neg. Rep. 605.

A street is not defective because it is slippery from snow, ice, or rain.

Stanton v. Springfield, 12 Allen, 566; *Nason v. Boston*, 14 Allen, 510; *Pinkham v. Topsfield*, 104 Mass. 83; *Vaccarini v. New York*, 54 Misc. 600, 104 N. Y. Supp. 928; *McGuinness v. Worcester*, 160 Mass. 276, 35 N. E. 1068; *O'Reilly v. Syracuse*, 49 App. Div. 538, 63 N. Y. Supp. 520, 7 Am. Neg. Rep. 487.

One having to do with a powerful machine like an automobile must be held to a comparatively high degree of care to be exercising due care. The driver's own evidence and that of the dealer were to the effect that what he did was what the ordinarily prudent driver should not do.

Williams v. Holbrook, 216 Mass. 239, 103 N. E. 633.

A medical witness may assign what he deems the proximate cause or which is the probable one.

Chamberlayne, Ev. §§ 1995, 2425; *Com. v. Thompson*, 159 Mass. 58, 33 N. E. 1111.

Mr. Oscar H. Nelson also for defendant.

Messrs. Robert E. Burke and Edward E. Crawshaw, for plaintiff:

While streets need not be made or kept safe and convenient, especially for automobiles, persons may lawfully ride on automobiles as they may lawfully ride on bicycles, and cities and towns are bound to keep their ways reasonably safe and convenient for travel generally, including that properly undertaken upon such vehicles.

Doherty v. Ayer, 197 Mass. 246, 14 L.R.A. (N.S.) 816, 125 Am. St. Rep. 355, 83 N. E. 677; *Baker v. Fall River*, 187 Mass. 53, 72 N. E. 336.

The defective condition was the sole and proximate cause of the accident to Kelleher. Unless the driver of the machine was a wrongdoer, the fact that he intervened would not relieve the city. The jury under proper instructions have answered this question, and the evidence certainly warranted the finding that the driver of the car was

not to blame for the skidding of the car and for the resulting damage.

McMahon v. Harvard, 213 Mass. 20, 99 N. E. 458; *Hayes v. Hyde Park*, 153 Mass. 514, 12 L.R.A. 249, 27 N. E. 522; *Clinton v. Revere*, 195 Mass. 151, 80 N. E. 813; *Feeley v. Melrose*, 205 Mass. 329, 27 L.R.A. (N.S.) 1156, 137 Am. St. Rep. 445, 91 N. E. 306.

Rugg, Ch. J., delivered the opinion of the court:

These two actions are brought to recover for the conscious suffering and death of the plaintiff's intestate, hereafter termed the plaintiff, alleged to have been caused by a defective condition of a highway. There was evidence tending to show that the accident occurred in this way: The plaintiff, a milkman, was watering his horse at a fountain in the street between 8 and 9 o'clock of a misty morning, when an automobile carefully driven came upon the street and, by reason of the extremely slippery condition of its surface due to oiling on the preceding afternoon by those in charge of the defendant's streets, began to skid, could not be controlled, and collided with the plaintiff's milk wagon, whereby the plaintiff was injured and subsequently died.

1. There was evidence that the defendant failed in the performance of its statutory duty to maintain the way reasonably safe for travel, and permitted to exist a defect consisting of extraordinary slipperiness in the surface of the street. Mere smoothness and slipperiness of a sidewalk may be a defect. *Comarty v. Boston*, 127 Mass. 329, 34 Am. Rep. 381; *Moynihah v. Holyoke*, 193 Mass. 26, 78 N. E. 742. Oil spread upon the surface of the street, thus rendering it unreasonably slippery, is in no wise distinguishable, so far as concerns the legal principles involved, from the Hyatt lights in issue in these cases. *Zegeer v. Barrett Mfg. Co.* 226 Mass. 146, 115 N. E. 291.

2. Cities and towns are not required by the law to make special provisions in order to keep all their public ways at all times in condition for the safe passage of automobiles, bicycles, and other mechanisms for travel newly devised and unthought of at the time when the statute imposing the general duty as to repairs of ways and liability for defects therein was enacted. But they are obliged to keep their ways reasonably safe and convenient for travel generally, having regard to all the circumstances. Automobiles are recognized by the law as a legal method of travel. Elaborate statutory provisions are made for their registration, for the licensing of those who operate them, and for their management upon public ways. It is common knowledge that at pres-

ent in this commonwealth a vastly larger number of people travel upon the highways in automobiles than in horse-drawn vehicles. The care as to the repair of ways cast upon municipalities by the statutes has reference to all kinds of legitimate travel, including that rightly undertaken in automobiles. Although special provisions for their safety are not demanded, their presence cannot be ignored. The subject is considered fully in *Doherty v. Ayer*, 197 Mass. 241, 14 L.R.A. (N.S.) 816, 125 Am. St. Rep. 355, 83 N. E. 677, and need not here be discussed again.

3. There was ample evidence of the due care of the one driving the automobile which struck the plaintiff's wagon. The mere fact that it skidded does not show negligence. *Williams v. Holbrook*, 216 Mass. 239, 103 N. E. 633; *Loftus v. Pelletier*, 223 Mass. 63, 111 N. E. 712.

4. If the conduct of the driver of the automobile was cautious, then his intervention between the defect and the injury would not as matter of law break the direct causal connection between the injury to the plaintiff and the failure of duty on the part of the defendant. *Hayes v. Hyde Park*, 153 Mass. 514, 12 L.R.A. 249, 27 N. E. 522; *McMahon v. Harvard*, 213 Mass. 20, 99 N. E. 458.

5. The fact that the oil was spread upon the street under the direction of the defendant's superintendent of streets was important chiefly on the question of reasonable notice to the defendant of the existence of the defect. It was of no consequence whether the defendant was responsible for his negligence or not. The liability of the defendant is founded on its failure to keep its streets reasonably safe for travel and to remedy a condition likely to be dangerous. That might be found to exist quite independent of its liability for negligence of its superintendent of streets. *Burditt v. Winchester*, 205 Mass. 493, 91 N. E. 880; *Pratt v. Cohasset*, 177 Mass. 488, 59 N. E. 79.

6. If the rain of the night intervening between the oiling and the accident was the factor which created the danger, then it might have been found that the rain should have been anticipated or its effects guarded against by warning, sanding, or otherwise. *Johnson v. Worcester*, 172 Mass. 122, 124, 51 N. E. 519.

7. There was categorical testimony from the attending physician to the effect that the injury received by the plaintiff was a sufficient cause for his death. This, in connection with evidence as to his steadily deteriorating physical condition after the injury, was sufficient to warrant a finding that the death resulted from the injury. The pre-existing heart disease may have been found to have been a condition, and not a cause.

Larson v. Boston Elev. R. Co. 212 Mass. 262, 98 N. E. 1048; Weimert v. Boston Elev. R. Co. 216 Mass. 598, 104 N. E. 360; Madden's Case, 222 Mass. 487, 493, 111 N. E. 379, L.R.A.1916D, 1000. If the testimony

of the physician was in some respects contradictory, its weight was for the jury. The requests for instructions were refused rightly.

Exceptions overruled.

Annotation—Liability for injury due to oiling street.

Generally, as to liability of municipal corporation for defects or obstructions in streets, see annotation to *Elam v. Mt. Sterling*, 20 L.R.A.(N.S.) 513.

The general rule that cities and towns are obliged to keep their ways reasonably safe and convenient for travel is once more announced in *KELLEHER v. NEWBURYPORT*, ante, 710, and the municipality was there held liable for an injury to a bystander by the skidding of a carefully driven automobile due to the unreasonably slippery condition of the pavement, caused by oil placed thereon by the municipality. This appears to be the first action of the kind brought against a municipality.

A similar suit was brought against a company which had contracted to oil the highways, in *Zegeer v. Barrett Mfg. Co.* (1917) 226 Mass. 146, 115 N. E. 291. There was testimony in that case that the defendant company on the morning of the day of the accident had put a thick coat of oil or tarvia on a stretch of road and had only placed a small sign about 2 feet from the ground and somewhat back from the roadway as a warning, and that this sign was not seen by the plaintiff, whose automobile skidded when it reached the oiled portion of the road, and overturned. The evidence here was held sufficient to take the case to the jury, and a verdict for the plaintiff was sustained. The court said: "Assuming, without deciding, that the driver of the truck was acting under the control of the highway commission in distributing the tarvia on the road, and that the defendant would not be liable for his alleged negligence in spreading too thick a layer (see *Cain v. Hugh Nawn Contracting Co.* (1909) 202 Mass. 237, 88 N. E. 842), nevertheless there was evidence for the jury of negligence on its part in failing to properly warn travelers on the highway. The thick and slippery layer of tarvia covered the entire width of the road, and came to an end at the top of a hill, where it could not be seen from approaching vehicles. The road was left open for travel, with a stretch of half a mile unsanded and unguarded. It could be found that the duty of warning the traveling public of

this dangerous condition rested upon and was assumed by the defendant. The warning signs belonged to the defendant corporation; and its employees on the truck attended to the placing of them, according to testimony of the chairman of the commission, and of the man in charge of the sanding. The only sign at the York end of the work was one 14 inches square, and about 2 feet from the ground; and it was placed in the grass 2 feet outside the road at a point 3,000 feet from the place of the accident. It was not seen by the plaintiffs, and the jury could find that it was unsuitable, or improperly located, for the purpose of warning travelers."

Two cases in which it has been sought to hold street railway companies liable on account of injuries alleged to have been sustained because of the negligent use of oil on their tracks are here included as being of some possible assistance.

It was held in one of these that a street railway which applies oil upon its track at a curve must do so in such a manner as not to endanger the safety of persons entitled to use the street. *Slater v. North Jersey Street R. Co.* (1908), 75 N. J. L. 890, 15 L.R.A.(N.S.) 840, 69 Atl. 163. There was evidence in this case tending to show that the defendant placed upon its track and the cross walk sufficient black oil to throw the plaintiff down when she stepped upon it, and this was held to require the submission of the question of negligence to the jury.

In the other case, *Barrett v. Connecticut Co.* (1912) 85 Conn. 705, 81 Atl. 963, where the plaintiff sought to recover against a street railway company for an injury received through a fall alleged to have been caused by the negligent use of grease by the defendant on its tracks, the evidence was held insufficient to support a finding for the plaintiff.

The question has arisen in one case as to the liability of a municipality for damage sustained by reason of the negligent driving of an oil spreader. In the case referred to, *Hoover v. Fulton* (1914) 177 Mo. App. 95, 163 S. W. 292,

it was held that an employee of a city driving an oil spreader which is liable to frighten horses, after seeing, or having reason to think, that another team is being frightened and is liable to run away, must use ordinary care to avoid this result if it is reasonably possible to do so.

There was evidence that as the oil spreader approached the plaintiff's

horses they became frightened, and that this was plainly manifest to the driver of the spreader, but that although the plaintiff called to him to stop, he did not do so, but kept on approaching until the plaintiff's team ran away. It was held that a finding that the driver was negligent in failing to stop was justified, and a judgment for the plaintiff was sustained.

J. T. W.

UTAH SUPREME COURT.

WARM SPRINGS COMPANY, Appt.,

v.

SALT LAKE CITY, Respnt.

(— Utah, —, 165 Pac. 788.)

Landlord and tenant — eviction — making business illegal.

1. No eviction is effected so as to relieve the tenant from liability for any portion of the rent in case a city which has leased land for a bathing resort with the privilege of subletting a portion for bar purposes adopts an ordinance making the bar business illegal.

For other cases, see Landlord and Tenant, II. d, in Dig. 1-52 N. S.

Same — interference with use of property — abatement of rent.

2. A city which after letting land for a bathing resort with the privilege of subletting a portion for bar purposes, acting under the requirements of a state law, forbids the operation of a bar upon the property, does not become obligated to abate the rent reserved.

For other cases, see Landlord and Tenant, II. d, in Dig. 1-52 N. S.

Same — retention of premises — effect.

3. A tenant cannot retain possession and sue for abatement of rent on the theory of partial eviction.

For other cases, see Landlord and Tenant, II. d, in Dig. 1-52 N. S.

(May 8, 1917.)

APPEAL by plaintiff from a judgment of the District Court for Salt Lake County dismissing a complaint filed to recover certain moneys alleged to have been wrongfully obtained by defendant for the rental of certain premises leased to plaintiff. Affirmed.

The facts are stated in the opinion.

Mr. D. H. Wenger for appellant.

Messrs. H. J. Dininny, W. H. Folland, and M. C. Davis, for respondent:

The lease was made by the city in its personal and private capacity, and any regulation made with reference to restricting the sale of liquor by the city in its legislative and governmental capacity cannot in any way be construed to be a violation of any part of this lease.

Lawrence v. White, 131 Ga. 840, 19 L.R.A. (N.S.) 966, 63 S. E. 631, 15 Ann. Cas. 1097; *O'Byrne v. Henley*, 161 Ala. 620, 23 L.R.A. (N.S.) 497, 50 So. 83; *Hecht v. Acme Coal Co.* 19 Wyo. 18, 34 L.R.A. (N.S.) 773, 113 Pac. 788, 117 Pac. 132, Ann. Cas. 1913E, 258; 5 Elliott, Contr. § 4556; *Jones, Land. & T.* § 383.

Frick, Ch. J., delivered the opinion of the court:

The plaintiff in this action seeks to recover certain moneys which it is alleged the defendant city wrongfully obtained from it for rental of certain premises leased to the plaintiff by the city. In view that the court's findings of fact are not assailed, and as they correctly reflect the issues and the evidence, and because the conclusions of law and judgment which are based upon the findings are vigorously assailed, we insert the court's findings, the material parts of which read as follows: "That on the 21st day of February, 1906, pursuant to a resolution of the mayor and city council, the said Salt Lake City, defendant herein, entered into an agreement in writing with one Maxwell R. Brothers, his executors, administrators, and assigns, whereby said defendant did lease and let unto Maxwell R. Brothers, for a period of ten years, the following described real estate and premises, to wit: All that property situate in Salt Lake City, county of Salt Lake, state of Utah, described as block 157, plat 'A,' Salt Lake City survey, known as the Warm

Note.—The effect upon lease of property for saloon purposes of the passage of prohibitory laws during the term is discussed in the notes to *Heart v. East Tennessee Brewing Co.* 19 L.R.A. (N.S.) 964; *O'Byrne v. Henley*, 23 L.R.A. (N.S.) 497; *Hecht v. Acme Coal Co.* 34 L.R.A. (N.S.) 773; *Strat L.R.A.* 1917F.

ford v. Seattle Brewing Co. L.R.A. 1917C, 935; and see later case, *Holloran v. Jacob Schmidt Brewing Co.* L.R.A. 1917E, 777.

As to effect of partial eviction upon liability for rent, see notes to *Edmison v. Lowry*, 17 L.R.A. 275, and *Kusohinsky v. Manigan*, 41 L.R.A. (N.S.) 430.

Springs property, including the springs and land inclosed by fence, but not including the gravel beds on said tract; to have and to hold the said premises with their appurtenances unto the said Maxwell R. Brothers, his executors, administrators, and assigns, from the 31st day of March, 1906, to and including the 31st day of March, 1916, for the purpose of conducting a bathing resort, with the privilege of subletting a portion of said premises for bar purposes; and in consideration of the said leasing and letting of said premises to him as aforesaid, the said Maxwell R. Brothers as aforesaid agreed to pay the defendant as rent for said premises the sum of \$200 per month for each and every month of said term. Said lease as set forth in defendant's answer is hereby referred to and made a part of these findings of fact. That on or about the 19th day of January, 1906, the said Maxwell R. Brothers assigned said lease to the said Warm Springs Company, the plaintiff herein, and said plaintiff was, during the whole of said term of ten years, the successor in interest of the said Maxwell R. Brothers, with the knowledge, acquiescence, and consent of said Salt Lake City, and the said plaintiff at all times during said term paid said sum of \$200 per month rent as in said lease provided, and has complied with all other covenants and conditions of said lease as the assignor of said Maxwell R. Brothers, and the said plaintiff was at all times entitled to sublet a part of said premises for bar purposes. That under said agreement and lease the plaintiff herein, upon the payment of said sum of \$200 per month, and as consideration therefor, was to have the privilege of conducting a bathing resort, leasing or subletting a portion of said premises for saloon or bar privileges. That the reasonable rental value of said premises as a bathing resort was \$100 per month, and the rental value of said saloon for bar purposes was \$100 per month, and that said plaintiff at all times during the term of said lease was able to let and lease said premises for bar purposes at the rate of \$100 per month. That pursuant to said agreement the plaintiff did sublet a part of the said premises known as the saloon building for bar purposes, beginning on the 21st day of March, 1906, and continuously until the 20th day of June, 1911, at the rate of \$100 per month; and that after the 20th day of June, 1911, the said plaintiff was prevented from further leasing and subletting said premises or any part thereof for bar purposes for the reason that said real estate, as above described, and the surrounding premises were excluded by city ordinance of Salt Lake City from the district in which intoxicating liquors might be sold; L.R.A.1917F.

and that thereafter until the end of said term of said lease said premises were excluded by reason of said ordinance, passed pursuant to the authorization of the legislature of the state of Utah, from the business district in which intoxicating liquors might be sold. That after said exclusion by said city ordinance the said defendant refused to pay to the plaintiff any rebate or bonus because of said exclusion. That on the 6th day of April, 1916, the plaintiff herein presented its claim against said city for the sum of \$5,700, which said claim was refused by said defendant; and that after the 20th day of June, 1911, to the end of said rental term said rent was paid by plaintiff under protest."

The conclusions of law are as follows: "That said city in its governmental and legislative capacity did rightfully pass an ordinance under proper authority from the state of Utah, excluding said property above described from the district in which intoxicating liquors might be sold. That in its private and personal capacity said city did enter into a lease with said parties as aforesaid, and that defendant did collect rents from said plaintiff as set forth, by the provisions of said lease heretofore referred to. That said lease in question does not contain a restrictive clause, but does contain a permissive clause which permitted the said plaintiff to rent a part of said premises for bar purposes. That there was no guaranty or warrant by which said defendant was bound to continue the permissive privilege after said ordinance excluding said property from the restrictive district was passed. That said defendant did lawfully and legally collect said rent from said plaintiff, and that therefore said plaintiff has no cause of action against the defendant in the premises."

Judgment was entered dismissing the complaint, from which plaintiff appeals.

The assignments of error are all directed against the conclusions of law and judgment. Plaintiff's principal contention arises upon the proviso in the lease which reads as follows: "Provided, however, the said party of the second part may sublet a portion of said premises for bar purposes." In 1911 the legislature of this state passed chapter 106, Utah Laws 1911, p. 154, in which it was provided that licenses permitting the sale of intoxicating liquors shall not be issued or granted "outside the limits of the business district of any city or town. The mayor and city council in their respective cities . . . shall from time to time determine and fix such limits for the purposes of this act." Pursuant to that chapter an ordinance was passed by the defendant city in which the district in which the bar was

maintained by plaintiff was declared to be outside of the business district of the city and within which a license to sell intoxicating liquors would not thereafter be granted. The plaintiff, therefore, was unable to obtain a license to sell intoxicating liquors upon the leased premises, and hence it lost the right to sublet a part of the premises for bar purposes as provided in the clause of the lease we have quoted. The plaintiff did not surrender, nor offer to surrender, the demised premises, but paid that portion of the rent which it is contended the bar privilege was worth under protest, and by this action seeks to recover back the rent thus paid.

Plaintiff's counsel, as we understand him, contends that the district court erred in denying recovery upon the grounds: (1) Because the city, by adopting and enforcing the ordinance in question, by its own act deprived plaintiff of subletting a part of the demised premises for bar purposes, and hence it "ex æquo et bono" cannot retain that portion of the rent which represents the value of the bar privilege; and (2) that by the act of the defendant city the plaintiff was in legal effect evicted so far as the right of maintaining a bar is concerned, and for that reason the defendant city may not retain that portion of the rent demanded by the plaintiff. Counsel, in support of his contention, cites the following cases: *Boston Molasses Co. v. Com.* 193 Mass. 387, 79 N. E. 827; *Tallman v. Murphy*, 120 N. Y. 345, 24 N. E. 716; *Lynch v. Baldwin*, 69 Ill. 210; *Grabenhorst v. Nicodemus*, 42 Md. 236; *Allaman v. Oklahoma City*, 21 Okla. 142, 16 L.R.A. (N.S.) 511, 95 Pac. 468, 17 Ann. Cas. 184; *Pearson v. Seattle*, 14 Wash. 438, 44 Pac. 884. Counsel also refers us to 28 Cyc. 674. We cannot, nor is it necessary for us to, pause here to point out the distinction between those cases and the case at bar. It must suffice to say that the decisions of the foregoing cases do not authorize a recovery in a case like the one at bar. We have found one case, however, which is not cited by counsel, namely, *Heart v. East Tennessee Brewing Co.* 121 Tenn. 69, 19 L.R.A. (N.S.) 964, 130 Am. St. Rep. 753, 113 S. W. 364, in which it was held that a lease on certain premises which were leased for saloon purposes terminated when the prohibitory law, which was passed after the lease had been entered into, went into effect. The decision is based upon the ground that when the prohibitory law went into effect the business of conducting a saloon was unlawful; that the premises were therefore leased for an unlawful purpose, and hence the lease terminated, and the tenant was released from paying rent. The great weight of authority, as we shall see, is, how-

ever, contrary to the case just referred to. In the following, among other cases, it is held that where premises are leased for saloon purposes, and pending the lease a law is passed by which the right to deal in intoxicating liquors is prohibited, and hence a saloon business may no longer be carried on, the tenant is not, for that reason, released from paying rent for the demised premises, and that in case the premises in connection with the saloon business are also used for other purposes, or that they thereafter can be used for such other purposes, to prevent the tenant from carrying on the saloon business does not amount to an eviction, and that he is not entitled to an abatement of the rent. *Lawrence v. White*, 131 Ga. 840, 19 L.R.A. (N.S.) 966, 63 S. E. 631, 15 Ann. Cas. 1097; *O'Byrne v. Henley*, 161 Ala. 620, 23 L.R.A. (N.S.) 496, 50 So. 83; *San Antonio Brewing Asso. v. Brents*, 39 Tex. Civ. App. 443, 88 S. W. 368; *Kerley v. Mayer*, 10 Misc. 718, 31 N. Y. Supp. 818, affirmed in 155 N. Y. 630, 49 N. E. 1099. Quite a number of cases in which the same doctrine is held are cited by the annotator in the notes to the case in 19 L.R.A. (N.S.) 966. See also 1 *Tiffany, Land. & T.* § 182, p. 1160, and 2 *Tiffany, Land. & T.* § 185, p. 1289. In the case of *Lawrence v. White*, 131 Ga. 840, 19 L.R.A. (N.S.) 966, 63 S. E. 631, 15 Ann. Cas. 1097, Mr. Justice Lumpkin, in speaking for the court, says: "The question in this case is whether the lessee of a hotel including a barroom was entitled to a reduction or proportional abatement of the agreed rental because during the term of the lease the legislature of the state enacted a law prohibiting the sale of alcoholic, spirituous, malt, or intoxicating liquors, and thus the bar could no longer be used for that purpose. The adjudicated cases with unusual uniformity answer this question in the negative, though they do not all give the same reasons for the ruling. It has been very generally held that the enforcement by public officers of restrictions or conditions in regard to the use of leased premises does not amount to an eviction of the tenant."

In the case of *O'Byrne v. Henley*, 161 Ala. 620, 23 L.R.A. (N.S.) 496, 50 So. 83, the law in the headnote, which correctly reflects the opinion, is stated in the following language: "Where premises are leased for saloon purposes at a time when it was lawful to sell intoxicants and the premises are used by a lessee as a saloon for the sale of intoxicants, soft drinks, etc., the passing of a prohibition law prohibiting the sale of intoxicants does not have the effect to release the lessee from liability for future rent, as the business is not totally destroyed, since the use of the word 'saloon' in the

lease, while including the sale of intoxicants, does not exclude the sale of other things, and the business is not totally destroyed."

It is not necessary to quote further from the cases. In the case at bar the premises were leased for the principal purpose of conducting a bathing resort, and the business of carrying on the saloon was a mere incident to the principal business. When, therefore, the ordinance went into effect by which the carrying on of the saloon business on the demised premises was prohibited, the tenant was still permitted and continued to conduct the principal business for which the premises were used; namely, the conducting of a bathing resort. Under all of the authorities, therefore, the mere fact that the saloon business was prohibited did not constitute an eviction, and the plaintiff was not thereby released from paying the rent, nor was it entitled to any abatement thereof. If the plaintiff desired to protect itself against the payment of rent in case the right to maintain a bar on the premises should be prohibited by law, it should have provided for that emergency in the lease. Not having done so, it cannot now complain.

It is seriously contended, however, by plaintiff's counsel that the defendant city in passing and enforcing the ordinance in question by its own act deprived the plaintiff of its right to sublet for bar purposes, and for that reason the city is required to abate the rent as claimed by plaintiff. We have already pointed out that the city in passing and enforcing the ordinance in question did so in obedience to the command contained in chapter 106, *supra*. While it is true, as plaintiff's counsel suggests, that the city in entering into the lease did so as a proprietor of property, and hence is governed with regard to that matter by the same law and rules as other proprietors would be, counsel, however, entirely overlooks the fact that the city in passing and enforcing the ordinance acted entirely in a governmental capacity and as an arm of the state government. The city was bound by the provisions of chapter 106 the same as all other persons, and it had no more right to disregard the provisions of that chapter than the plaintiff. If, therefore, the city had undertaken to contract or enter into an agreement with the plaintiff so as to relieve it from the effects of chapter 106, such an agreement would have been void and of no effect. The law respecting that subject is very clearly stated by the author in 3 McQuillin, *Mun. Corp.* § 1160, in the following words: "The settled rule is that municipal corporations have no power to make contracts which will embarrass or control

their legislative powers and duties. A city cannot by contract deprive itself of any of its legislative powers, and hence cannot agree that a sidewalk should only be graded to a certain depth. A common council 'cannot bargain away or deplete itself of the right to make reasonable laws, and to exercise the police power whenever it becomes necessary to conserve or promote the health, safety, or welfare of the community.' So, power given to contract respecting a particular thing does not confer power, by implication, to contract even with reference to such thing so as to embarrass and interfere with its future control of the matter as the public interests may require."

If the city had entered into a lease in which it had guaranteed the plaintiff the right to continue the saloon business in the teeth of chapter 106, the lease to that effect would have been void. What could not be accomplished directly, therefore, cannot be accomplished indirectly by compelling the city to pay back part of the money it had received as rent for the demised premises. If by some unlawful act the city in its capacity as proprietor had interfered, or if it had entered into an enforceable covenant not to do so, and had, nevertheless, interfered with plaintiff's enjoyment of the premises, the case would be quite different. The distinction between acting in a governmental capacity and as a mere proprietor of property is made quite clear in the case of *Boston Molasses Co. v. Com.* 193 Mass. 387, 79 N. E. 827. In that case the commonwealth covenanted as a proprietor of property merely, and hence it was held that it was liable as a proprietor. In this case the act by the city which is complained of was a governmental act, and hence the city is not liable for the consequences of that act.

The law also seems to be that, ordinarily at least, a tenant may not hold on to the premises and then sue for an abatement of the rent upon the theory of a partial eviction. 1 *Tiffany, Land. & T.* § 182, pp. 1160 et seq., under the title of "Partial Eviction."

We desire to add in conclusion that the case of *Lawrence v. White*, *supra*, is a very carefully considered case. The other cases, we have cited, and in which the doctrine laid down in the *Georgia* case is followed, are also all well considered, and, in our judgment, there logically is no escape from the conclusions reached in those cases.

The judgment is affirmed, with costs to the defendant.

McCarthy and Coffman, JJ., concur.

Petition for rehearing denied June 21, 1917.

SOUTH CAROLINA SUPREME COURT.

H. R. WHITMAN, Resp.,
v.

SEABOARD AIR LINE RAILWAY COMPANY, Appt.

(— S. C. —, 92 S. E. 861.)

Fraud — preventing action within allotted time.

1. No action lies for fraudulently preventing a person injured by another's negligence from bringing an action therefor within the time allowed by the Statute of Limitations, since the basis of recovery would be purely speculative.

For other cases, see Fraud and Deceit, VIII. in Dig. 1-52 N. S.

Damages — punitive — Federal Employers' Liability Act.

2. Punitive damages cannot be recovered under the Federal Employers' Liability Act in the absence of anything to show wilfulness or wantonness in effecting the injury. *For other cases, see Damages, II. a, in Dig. 1-52 N. S.*

Fraud — inducing one to refrain from bringing action — effect.

3. One is not liable for fraudulently inducing another to refrain from bringing an action for personal injuries within the time allowed by statute by representing that the injuries were temporary, if, for nearly two years before the expiration of the time, he was free from the influence of the one making the representations, with every opportunity to ascertain their truth.

For other cases, see Fraud and Deceit, VIII in Dig. 1-52 N. S.

(February 10, 1917.)

APPEAL by defendant from a judgment of the Common Pleas Circuit Court for Chesterfield County in plaintiff's favor in an action brought to recover damages for fraudulently preventing plaintiff from bringing an action for personal injuries within the time allowed by the Statute of Limitations. Reversed.

The facts are stated in the opinion.

Messrs. Stevenson & Prince, for appellant:

Plaintiff cannot get the benefits of the Statute of Limitations and escape its burdens.

Dennis v. Atlantic Coast Line R. Co. 70 S. C. 258, 106 Am. St. Rep. 746, 49 S. E.

Note. — As to right of action for fraud or deceit causing loss of remedy, see annotation following this case, post, 719.

The Federal Employers' Liability Act is annotated in the notes in 47 L.R.A.(N.S.) 38 and L.R.A.1916C, 47. As to the damages recoverable under that act, see pages 80 et seq. of the earlier note and pages 85 et seq. of the later note. L.R.A.1917F.

860; Atchison, T. & S. F. R. Co. v. Swearingen, 239 U. S. 330, 60 L. ed. 317, 36 Sup. Ct. Rep. 121, 10 N. C. C. A. 778; Winfree v. Northern P. R. Co. 227 U. S. 300, 57 L. ed. 520, 33 Sup. Ct. Rep. 273.

There was no evidence of fraud.

Fetter, Eq. 134; Southern Development Co. v. Silva, 125 U. S. 247, 31 L. ed. 678, 8 Sup. Ct. Rep. 881, 15 Mor. Min. Rep. 435.

The case was speculative.

Holton v. Noble, 83 Cal. 7, 23 Pac. 68; Wells v. Waterhouse, 22 Me. 131; Branham v. Record, 42 Ind. 181; Bridges v. Lanham, 14 Neb. 369, 45 Am. Rep. 121, 15 N. W. 704; Carsten v. Northern P. R. Co. 44 Minn. 454, 9 L.R.A. 688, 20 Am. St. Rep. 589, 47 N. W. 49; Bird v. Western U. Tele. Co. 76 S. C. 348, 56 S. E. 973; Wilhelm v. Western U. Tele. Co. 90 S. C. 536, 73 S. E. 865.

When fraud is relied on to avoid a release, it is avoided by returning or tendering back the money received, when the contract (if the fraud is established) is abrogated and each party stands as he did before. The party can and does then maintain his action on the original cause of action. Manifestly he cannot have his action on the original cause of action and for the fraud, too.

Levister v. Southern R. Co. 56 S. C. 514, 35 S. E. 207; Riggs v. Home Mut. Fire Protective Asso. 61 S. C. 459, 39 S. E. 614.

Mr. Edward McIver also for appellant. Mr. W. P. Pollock for respondent.

Fraser, J., delivered the opinion of the court:

On the 3d day of August, 1911, the plaintiff herein was in the employ of the defendant railroad company, as agent at Kollock, a railroad station in this state. That night the plaintiff was told that the switch lights were not burning; and, as it was a part of his duties to see that these lights were kept burning, he went to the south light and lighted it, and then went to the north light. When he got to the north light, he thought it necessary to fill the lamp, and took it down and filled it. He then put it on the crosstie and sat down on the switch tie. From that time on there is only an inference as to what happened that night. There is some conflict of statement as to whether he went to sleep or fainted. So far as this case is concerned, it does not matter. The switch tie was longer than the other crossties. The last he remembers he was sitting on the switch tie, about 18 inches outside of the rail. The next thing he remembers is that he was lying about 15 feet from the rail and about 10 feet further north, badly injured. His leg was broken, his head cut, and his body bruised. The plaintiff called for help, but no one came.

He went into unconsciousness again. His wife found him about daylight, and with help, which she summoned, took him to his house. He was taken to Columbia and put in the hospital, under the care of the railroad physicians, where he remained until November 22, 1911. Before the plaintiff left the hospital, and while still under the care of the physicians of the defendant, the plaintiff executed a release of the defendant, and was paid the sum of \$100 therefor. The plaintiff stated that he was told by the agents of the defendant that he would be entirely restored to health and given employment, and in consideration of these representations and the money paid he executed the release. The plaintiff went back to work for the defendant, but found after two years, that he could not stand the work and quit the service. The plaintiff's wife then applied to the defendant for assistance, and was given another check for \$150, and signed a new release. This last check was returned to the defendant, and the plaintiff offered to return the \$100 paid for the first release. On the 13th of December, 1915, this action was brought.

There were three causes of action: (a) An action for damages under the Federal Employers' Liability Act (Act April 22, 1908, chap. 149, 35 Stat. at L. 65, Comp. Stat. 1916, §§ 8657-8665); (b) an action at common law for the injuries; (c) an action to set aside the release for fraud, and an action for fraud in preventing the plaintiff from bringing the action within the statutory period of two years, allowed by the Federal statute. The defendant demurred to the complaint, on the ground that the complaint does not state facts sufficient to constitute a cause of action. The record shows that the presiding judge passed on this demurrer formally on the motion to direct a verdict, so the question can be considered later. At the close of the testimony the defendant moved for a direction of a verdict for the defendant. A verdict was directed as to the first and second causes of action, and, as the plaintiff did not appeal, those two causes of action pass out of the case. The motion to direct a verdict as to the third cause of action is based upon three grounds:

I. That the plaintiff's injury is based upon the loss of the judgment he would have secured if his action had been brought within the statutory period, and there is no way to ascertain what that judgment would have been. In other words, the basis of recovery is speculative, and speculative damages cannot be recovered. The presiding judge held that the basis of recovery was not what another jury would have given, as that would be purely speculative; but the jury L.R.A.1917F.

in this case could make their own estimate, after hearing the facts of the case. We have been cited to no authorities directly in point by either side, and we have been able to find none. We do not agree with the trial judge. The plaintiff lost the benefits of the suit he would have brought. When this jury was allowed to make its own estimate of the injury, there was a substitution of their independent judgment for that of an unknown and unknowable jury. It is manifest that, if the charge of fraud can set aside the Statute of Limitations, then the Statute of Limitations is nullified. The amount claimed in the complaint was \$50,000, and the verdict was \$10,000. The amount of the verdict was the estimate of that particular jury, and final as to amount, subject only to the power of the presiding judge to reduce it according to law. The verdict should have been directed on this ground.

II. The second ground was the failure to direct a verdict as to punitive damages. There was no evidence to show that there was any wilfulness or wantonness, nor the adoption of such wilfulness and wantonness, as required by the Federal decisions.

III. The defendant complains that his Honor refused to charge that there was no evidence of fraud. In so far as it affected the prevention of a suit within the two years allowed by the statute is concerned, it certainly should have been charged. The plaintiff was discharged from the hospital on the 22d of November, 1911. The time to bring the action did not expire until August, 1913. During that time the plaintiff was free from the supervision of the employers of the defendant. He was working on a salary, and had every opportunity to ascertain the facts for himself from entirely independent sources. Under *Mobley v. Quattlebaum*, 101 S. C. 221, 85 S. E. 585, one cannot rely upon the misstatement of facts, if the truth is easily within his reach. The statement in this case was a prognosis,—a mere opinion as to what the future would show. In the recent case of *Ballenger v. Southern R. Co.* — S. C. —, 90 S. E. 1019, an opinion was allowed as a basis of an allegation of fraud, because there was evidence that a superficial inspection would not warrant an opinion; that an X-ray was necessary, and no X-ray examination was had. Here there was a prognosis as to the future, and absolutely no evidence to show that anything was omitted that should have been done before the opinion was given, or to cast suspicion on the good faith of those who made the statement. There is no evidence of fraud; but, even if there had been fraud, its effect was destroyed by the abundant opportunity to learn the truth.

IV. The action was barred by the Federal statute, and a verdict should have been directed for the defendant. The other questions have become speculative.

The judgment of this court is that the judgment appealed from is reversed, and the case is remanded to the Court of Common Pleas for Chesterfield County, with directions to the clerk of that court to enter judgment for the defendant.

Hydrick, Watts, and Gage, JJ., concur. Gary, Ch. J., concurs in the result.

A petition for rehearing having been filed, the following Per Curiam response was handed down on May 17, 1917:

The petition is dismissed, after careful consideration.

Annotation—Right of action for fraud or deceit causing loss of remedy.

But few cases have passed upon the specific question here raised, and in none of them has the point been considered from the standpoint of *WHITMAN v. SEABOARD AIR LINE R. CO.* ante, 717, which holds that an action cannot be maintained to recover damages for loss of a right of action to recover for personal injuries, barred by the Statute of Limitations, where the delay in bringing the action was due to the fraud of the defendant on the ground that the measure of recovery is speculative.

In view of the holding in *WHITMAN v. SEABOARD AIR LINE R. CO.*, that an action for fraud and deceit will not lie to recover for loss of remedy for a tort, because the measure of recovery is too speculative, a case of interest in *Urtz v. New York C. & H. R. R. Co.* (1911) 202 N. Y. 170, 95 N. E. 711. While the two cases are not presented from the same standpoints, as will be hereinafter more particularly pointed out, yet the holding in the *Urtz* Case is inconsistent with the holding in the *WHITMAN CASE*, in that it sustains the view that the loss of a right of action for causing the death of a person, due to fraud and deceit, may be the basis for the recovery of substantial damages. On this subject it is pointed out that if the true state of facts "would have established that the defendant was negligent, and the intestate free from contributory negligence, then the plaintiff had a valuable right of action, the acquirement of which through the fraud may have injured her. Until the jury found the real facts and that they created a valid claim against the defendant, they had not a basis for estimating the damages the plaintiff had sustained. The action is not to enforce or vacate the compromise, but to recover the actual pecuniary loss sustained by the plaintiff. An alleged value of the claim, based upon the accident and the death, or facts sufficient to warrant the reason-
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able belief of the plaintiff that she has a just claim, is of a nature too speculative and wagering to be recognized by the law in this action for fraud." The actual holding in this case was that, where the widow was induced to settle her right of action against the defendant to recover for the negligent killing of her husband, through the fraudulent representations of the defendant's agent, it was necessary, in order to recover damages for the fraud and deceit, to show that she had a valid cause of action, and was induced to settle it by the fraud complained of; and that if the jury found in her favor upon this point, then she was entitled to recover the fair value of this disputed claim, to be determined through a rule possessing reasonable certainty and working just results. To attain this end, the court said the jury should take into consideration the probabilities of the successful enforcement of the cause of action, and the probable extent and expense of the litigation over the matter, the law's delays, the probability of the continued insolvency of the wrongdoer, and such other facts pertaining to the question of damages as the evidence might present; that is, "what, under all the conditions and circumstances, was this claim of the plaintiff, valid under the true, yet opposed and contradicted, state of facts, worth for purpose of sale, transfer, or cancellation, if anything at all, above the \$500?"—the amount received by the plaintiff for the release.

While the court held in the foregoing case that the measure of recovery was the value of the claim, and not the loss of the cause of action, this was apparently due to the fact that the plaintiff planted the action to recover for the loss of the claim, and not for loss of the cause of action.

In *Lomax v. Southwest Missouri Electric R. Co.* (1904) 106 Mo. App. 561, 81 S. W. 225, a case very similar

as to the facts, it was held that an action could not be maintained to recover damages for fraud practised upon the plaintiff in inducing him to execute a release for personal injuries, since the fraud complained of rendered the release invalid, and the original cause of action therefore remained to the plaintiff.

In *Pierson v. Holdrige* (1914) 92 Kan. 365, 140 Pac. 1032, the plaintiff was induced to release his claim for damages for personal injuries by reason of a contract with the wrongdoer for life employment, which was made with an agent of the latter, who had no authority to make the same, and an action was sustained against the agent to recover the loss due to this fraud and deceit; but the basis of the recovery was the loss of the contract, and not the loss of the cause of action.

Upon the general question of right to recover for a fraud where the damages are speculative, the doctrine has been asserted that while courts uphold the general principle that wherever there is fraud or deceit by one party and injury to the other, an action will lie to recover the damage suffered thereby, nevertheless this principle has limitations and qualifications, for the law does not undertake to redress all moral wrongs, and there may be also legal torts bringing great damage to individuals, but the damage being so remote, contingent, or indefinite as to furnish no good cause of action. *Austin v. Barrows* (1874) 41 Conn. 287, holding that general creditors who have taken no steps to enforce their claims, or obtain a lien upon the property of the debtor, cannot maintain an action to recover damages, based upon the fraud and deceit of the debtor and third persons in inducing, by false representations and promises, such creditors to refrain from collecting their claims until all opportunity therefor was lost.

But where a person entitled to a mechanics' lien had taken steps to enforce it, but was induced to abandon the same by false representations, he is entitled to recover the damages thereby suffered. *Alexander v. Church* (1885) 53 Conn. 561, 4 Atl. 103. This case is distinguished from the *Austin Case* on the ground that in that case no action whatever had been taken to acquire a lien by an attachment of the debtor's property, and there was nothing to indicate with any degree of certainty that any attachment would ever have been made if the acts of the debtor

and those assisting him in concealing his property had not been committed.

And where, by reason of false and fraudulent representations by a judgment debtor that he had no property, and that certain conveyances of his property were valid and bona fide, a judgment creditor was induced to take no steps to enforce his judgment until after it had become barred by the Statute of Limitations, after which he discovered the fraud, it has been held that he is entitled to maintain an action for damages for the fraud and deceit practised upon him. *Marshall v. Buchanan* (1868) 35 Cal. 264, 95 Am. Dec. 95.

It has been held that where a judgment debtor permitted his judgment to become barred by the Statute of Limitations, in reliance upon representations of the debtor that he had no property, and that conveyances made by him were bona fide, such creditor cannot recover for the fraud and deceit, since he was guilty of laches in relying entirely upon the representations of the judgment debtor, and not attacking the validity of the conveyances by him of his property. *Morrill v. Madden* (1886) 35 Minn. 493, 29 N. W. 193, subsequent appeal in (1887) 37 Minn. 232, 34 N. W. 25.

Where an insured was induced to release his claim under an insurance policy through fraud of an insurance company and others, he has a right of action against the guilty parties to recover the damage suffered by him from this fraud. *Mlnazek v. Libera* (1901) 83 Minn. 288, 86 N. W. 100.

Where the seller of goods had a right to rescind a contract of sale and recover the goods for the fraud of the purchaser, but he was induced not to do so by the fraudulent representations of a third person, the latter is liable in tort for the damages occasioned by this fraud. *Bowen v. Carter* (1878) 124 Mass. 426.

An attaching creditor who was induced to release his judgment upon the debtor's property by the false and fraudulent representations of the mortgagee of such property is entitled to recover from the latter, in an action for the fraud and deceit, the damages occasioned him. *Brown v. Castles* (1853) 11 Cush. (Mass.) 348.

False and fraudulent representations as to the solvency of a lessee which induced the lessor to permit the lessee to retain possession of the leased premises after he was in default in paying his rent, instead of dispossessing him, as the lessor had a right to do, and leasing

the premises to others, entitles the lessor to recover damages from the persons making such representations. *New York Land Improv. Co. v. Chapman* (1890) 118 N. Y. 288, 23 N. E. 187.

Compare with *Wemple v. Hildreth* (1882) 10 Daly (N. Y.) 481, affirmed in (1883) 94 N. Y. 644, holding that the

mere fact that the general creditors extended the time for payment and forbore to take steps to collect their claims, because of false and fraudulent representations of a third person, does not render the latter liable to them for the damages they suffered. A. G. S.

WASHINGTON SUPREME COURT.
(Department No. 1.)

ELSIE G. RUGE, Respt.,

v.

EDWARD C. RUGE, Appt.

(— Wash. —, 165 Pac. 1063.)

Divorce — modification of decree for alimony.

A court has not, in the absence of statutory authority, power to modify the provisions of a decree of absolute divorce providing for alimony, where there are no minor children and there is no reservation in the decree of authority to make further orders.

For other cases, see Divorce and Separation, V. d, in Dig. 1-52 N. S.

(Chadwick, J., dissents.)

(June 19, 1917.)

APPEAL by defendant from a judgment of the Superior Court for Whatcom County, refusing to modify a decree for alimony which had been rendered in a divorce proceeding. Affirmed.

The facts are stated in the opinion.

Messrs. S. M. Bruce and Romaine & Abrams, for appellant:

Reservation of power to change the provision for alimony is not necessary.

King v. Miller, 10 Wash. 274, 38 Pac. 1020; *Philbrick v. Andrews*, 8 Wash. 7, 35 Pac. 358; *Trumble v. Trumble*, 26 Wash. 133, 66 Pac. 124; *Poland v. Poland*, 63 Wash. 597, 116 Pac. 2; *Dyer v. Dyer*, 65 Wash. 535, 118 Pac. 634.

Our statute confers a continuing authority of revision by the court.

Rem. & Bal. Code, § 989; *Plaster v. Plaster*, 47 Ill. 290; *Harris v. Harris*, 71 Wash. 307, 128 Pac. 673.

Messrs. Craven & Greene, for respondent:

The decree was final.

Re Cave, 26 Wash. 213, 90 Am. St. Rep. 736, 66 Pac. 425; *King v. Miller*, 10 Wash.

Note. — For power to modify alimony awarded by a decree of absolute divorce in the absence of reservation by decree or statute, see annotation following this case, post, 729.

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274, 38 Pac. 1020; *Mahncke v. Mahncke*, 43 Wash. 425, 86 Pac. 645; *Fries v. Fries*, 1 MacArth. 291; *Jones v. Jones*, 131 Ala. 443, 31 So. 91; *Brandt v. Brandt*, 40 Or. 477, 67 Pac. 508; *Harris v. Harris*, 71 Wash. 307, 128 Pac. 673; *Kamp v. Kamp*, 59 N. Y. 212; *Mitchell v. Mitchell*, 20 Kan. 685; *Livingston v. Livingston*, 173 N. Y. 377, 61 L.R.A. 800, 93 Am. St. Rep. 600, 66 N. E. 123; *Sampson v. Sampson*, 16 R. I. 456, 3 L.R.A. 349, 16 Atl. 711; *Law v. Law*, 64 Ohio St. 369, 60 N. E. 560; *Erkenbrach v. Erkenbrach*, 96 N. Y. 456; *Howell v. Howell*, 104 Cal. 45, 43 Am. St. Rep. 70, 37 Pac. 770, 772.

Webster, J., delivered the opinion of the court:

This is an appeal from an order and judgment sustaining a demurrer to and dismissing a petition the purpose of which was to obtain an order modifying a decree for alimony, payable in periodical instalments, as fixed by a decree of divorce rendered in an action between the parties to this proceeding by the court to which the petition was addressed. The material facts are as follows:

On November 16, 1912, a decree was rendered by the superior court of Whatcom county dissolving the bonds of marriage theretofore existing between plaintiff and defendant and adjudging, among other things, that the defendant and petitioner pay to the plaintiff as alimony the sum of \$125 per month so long as the plaintiff should live. The decree was based upon findings to the effect that the defendant had been guilty of cruelty toward the plaintiff; that he was a regularly licensed physician with a lucrative practice, and was actually earning from \$500 to \$1,000 per month; that plaintiff was physically frail and delicate and would never be well and strong; that she was not able to support or maintain herself by her own exertions; and that she was totally without means of support. On February 23, 1915, the defendant filed a petition entitled in the original cause, wherein he alleged in substance that since the entry of the decree in the divorce action the plaintiff had become well and vigorous; that his practice as a physician had materially fallen off; that business conditions had greatly

changed; and that he was not financially able to pay the instalments of alimony. He prayed that the amount of alimony be reduced; that the same be converted into a gross sum to the end that he might pay the same either at one time or at such periods and in such instalments as the court saw fit to provide. It is conceded that there were no children as the result of the marriage between plaintiff and defendant, and there is no reservation or provision in the decree whereby the allowance of alimony is subject to the further orders of the court.

To this petition the plaintiff interposed a demurrer upon the grounds, among others, that it did not state sufficient facts to entitle defendant to the relief prayed, and that the court was without jurisdiction to entertain it. The demurrer was sustained, and, the defendant electing to stand upon his petition, the same was dismissed. Defendant appeals.

The question presented for our consideration is this: Has the superior court which rendered the decree in the divorce action jurisdiction to modify the same in respect to the periodical instalments of permanent alimony provided for therein, the divorce being an absolute one, there being no minor children of the parties, there being no provision in the decree reserving to the court the power to subsequently make further orders relating to the alimony, but being absolute and final upon its face, there being no statute in this jurisdiction expressly or by necessary implication conferring upon the court the power to change or modify decrees in such cases to meet altered conditions, the defendant not having appealed from the decree nor moved or petitioned the court for its modification within the time limited by statute, and the decree not being attacked on the ground of fraud or mistake.

The question thus presented is one of first impression in this court, is exceedingly vexatious, and one upon which the authorities are in an unsatisfactory condition. Because of the great importance of the question not alone to the defendant in this case, but to the public as well, and in the hope of bringing something approximating order out of the chaotic mass of judicial expression upon the question, we have made a painstaking examination of the authorities. From our investigation we are induced to conclude that what at first blush appears to be a hopelessly entangled skein of discordant and conflicting cases upon closer analysis will be found not to be such, but that, by resorting to scientifically sound fundamental principles and by keeping in mind well-established lines of demarcation, the question is one upon which there is not great actual

conflict. Upon careful analysis the cases seem naturally to arrange themselves into six well-defined and distinct classes, each class being based upon sound fundamental principles, and the rule pertaining to it being the result of clear logic. These classifications are as follows:

I. Where the decree in the main action is one granting a divorce *a mensa et thoro*, which in modern parlance we refer to as a decree for separate maintenance. Cases falling within this class are controlled largely, if not entirely, by the thought that, inasmuch as the power of the court to award alimony in such cases is a power incident to the jurisdiction to regulate the rights of the parties growing out of and pertaining to the marital status, and this status being unaffected by the decree for legalized separation, but continuing to exist, the power to modify the decree in respect to alimony to meet changed or changing conditions likewise continues to endure. This rule seems to have had its origin in the ecclesiastical courts where absolute divorces were never granted. These tribunals sometimes entered decrees of annulment for causes which rendered the marriage void *ab initio*, but such decrees were not, in the proper sense of the term, divorces; they amounted merely to an official declaration of a pre-existing fact, viz., that there had never been a valid marriage between the parties. Absolute divorces were infrequently granted in England by acts of Parliament, and hence it is that the granting of such divorces is historically a legislative function. While inherently the matter of granting a divorce involves the judicial process, historically and theoretically the power to grant a divorce *a vinculo* is purely legislative. Consequently there is no inherent jurisdiction in the common-law courts to grant a divorce absolutely severing and canceling the marital bonds; but they have only such power with respect to granting absolute divorces as the legislative department in the particular jurisdiction sees fit to expressly confer upon them, or such as are necessarily implied from those expressly given them. In an early English case, however, after careful consideration and debate, it was determined that the rules announced and acted upon by the ecclesiastical courts were part and parcel of the common law. In cases of divorce from bed and board, therefore, the courts of the common law, exercising the powers formerly exercised by the ecclesiastical courts, have authority to modify decrees relating to alimony. The continued existence of the status of marriage upon which the power to grant decrees of alimony depends carries with it the continu-

ing power to modify or alter the allowance of alimony to meet new conditions.

II. The second class includes the cases where the alimony awarded is temporary, or pendente lite, as distinguished from permanent. In these cases the power to modify exists for reasons which are perfectly obvious. While the cause is still pending in the court of first instance the power to make any appropriate order in the premises clearly exists. The court has the same power to modify its order with respect to temporary alimony that it has to make any other appropriate order in a case pending in court.

III. This class includes cases where there are minor children of the parties to the divorce action, and the courts of all the states are at one upon the proposition that, so far as the decree of alimony is for the benefit of the minor children of the spouses, the power to modify the decree continues so long as there are minor children under the protection of the court. While in cases dealing with this aspect of the question the courts have not always paused to state the fundamental principle upon which the right to modify is based, it is manifest in reading them that the dominant thought and controlling circumstance in the cases is the fact that there are minor children to be cared for as wards of the court. As it seems to us, the true basis upon which the power to modify the decree in these cases rests is that out of the marital relation springs a new relationship, viz., that of parent and child. Palpably neither executive edict, enactment of legislature, nor decree of court can change the relationship existing between parent and child. The courts may decree that the marital tie shall be absolutely severed and the parties be placed, so far as the law is concerned, in the same situation that they occupied prior to the solemnization of the marriage ceremony; but they cannot alter or modify the fact that a father is the parent of his offspring. This parental relationship, springing, as it does, from the relationship of marriage, is to this extent incident to the marital status. But the duty of the father, if he has means with which to do so, to support his infant children, springs immediately from the parental relationship. As this relationship, incidental, as it is, to the marriage state, continues to exist after the status out of which it arose has been terminated, either naturally, as by death, or artificially, as by divorce, the duty incident to that continuing relationship still exists. The right of the wife to alimony arises immediately out of the marriage contract, but the right of the child to support at the hands of its parents springs from the L.R.A.1917F.

incidental relationship which had its origin in marriage; to wit, that of parent and child. The court, therefore, acting upon this relationship as one of the things brought to it by the divorce action, has the power to modify or alter its decree so long as there are minor children under the protection of the court.

IV. Comprising this class are the cases where the court, by express provision in its decree, reserves to itself either all or a portion of its power to provide alimony for the wife or maintenance for the children. In such cases the decree is not final and conclusive as a matter of law, because it does not purport to be final and conclusive as a matter of fact. The reservation in the decree plainly indicates an unfinished determination of the judicial mind; that is, the court has not completely disposed of the case. The power of the court not having been exhausted, it reserves to itself the right to exercise the unexhausted portion of its power in such manner as changed conditions and circumstances may indicate to be just. As a judgment in any kind of action thus inconclusive and incomplete is not final, so also it is not final in a decree relating to alimony. The cases are in harmony that, where the power to modify is thus expressly reserved in the decree, the tribunal reserving it has the power to exercise it to meet changed or changing conditions thereafter arising.

V. In this division are included the cases where, by statute in the particular jurisdiction, power is expressly conferred upon the court to from time to time, on the petition of either of the parties, revise or alter its judgment or decree respecting the amount of alimony or maintenance. Comment on this class of cases is unnecessary. Suffice it to suggest that the legislative department of the state, being the repository of all the power concerning absolute divorce and its incidents, may, if it sees fit, delegate this power to courts in the absence of constitutional inhibition.

VI. In this class fall all of the cases not included in the foregoing classifications; viz., cases where the divorce is absolute, the alimony awarded is permanent, there are no minor children, there is no express reservation in the decree, and there is no statute in the particular jurisdiction expressly or by necessary implication conferring upon the court the authority to modify or alter its decrees in respect to alimony for the support of the wife. It is in this class that the case now under consideration is included.

The question, May decrees in this class of cases be modified? seems to carry its own answer. The status to which the power to

award alimony is incident having by judicial mandate ceased to exist, the court having exercised all of the power in the premises that it possessed, there being no continuing relationship of parent and child to which the power to modify may be referred, the alimony in question involving the right of the wife only, the judgment or decree by its terms purporting to be final and conclusive upon the question, and there being no statute conferring upon the court the power to modify, there is no other source of authority to which we may look. The answer is scientifically and logically irresistible that such power does not exist. We must disabuse our minds of the thought that there is any peculiar mystery attaching to decrees of divorce and alimony merely because they are such. But if they and their incidents are to be treated differently from ordinary judgments and decrees, it must be so because of some scientifically and logically sound basis upon which they can be considered as exceptions to the general rules. Unless this be true, our boast that the law is a science is a mockery and a sham, and judicial tribunals will be left to embark upon a thick and uncertain sea with neither chart nor compass. In such a situation the judicial expressions upon the question in the very nature of things will result in a mass of conflicting and discordant utterances referable to no principle of law, either substantive or adjective. Fortunately, however, the courts of the country have not fallen into the error of considering a decree for alimony or maintenance as a thing apart, but, speaking generally, have developed a jurisprudence pertaining to the question in keeping with sound fundamental principles. It is elementary that an adjudication by a court having jurisdiction of the subject-matter and of the parties is final and conclusive not only as to the matters actually determined, but as to every other matter which the parties ought to have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action. Consequently, when the question of alimony is in fact actually litigated and finally determined in the divorce action, as it is in this class of cases, a judgment or decree in the action operates as *res judicata* upon the question of alimony. We therefore confidently assert that it is sustained both in principle and by the great weight of authority that, where permanent alimony is awarded as incidental to the granting of an absolute divorce, and there are no minor children of the parties, and the court does not reserve to itself the right to thereafter exercise an unexhausted portion of its power, but actually exhausts its jurisdiction at L.R.A.1917F.

one time, and there is no statute conferring upon the court the power to modify or alter its decrees in respect to the allowance of alimony to meet new conditions thereafter transpiring, and the time for appeal or review has expired, and the period limited by law within which judgments may be modified on motion or petition has elapsed, and the judgment is not attacked on the ground of fraud or mistake,—the court has absolutely no jurisdiction to change its decree, but possesses only the right to enforce obedience to it. *Sammis v. Medbury*, 14 R. I. 214; *Sampson v. Sampson*, 16 R. I. 456, 3 L.R.A. 349, 16 Atl. 711; *Smith v. Smith*, 45 Ala. 264; *Petersine v. Thomas*, 28 Ohio St. 596; *Kamp v. Kamp*, 59 N. Y. 212; *Kerr v. Kerr*, 59 How. Pr. 255; *Erkenbrach v. Erkenbrach*, 96 N. Y. 456; *Coffee v. Coffee*, 101 Ga. 787, 28 S. E. 977; *Spain v. Spain*, — Iowa, —, L.R.A.1917D, 319, 158 N. W. 529; *Hardin v. Hardin*, 38 Tex. 617; *Shepherd v. Shepherd*, 1 Hun. 240; *Livingston v. Livingston*, 173 N. Y. 377, 61 L.R.A. 800, 93 Am. St. Rep. 600, 66 N. E. 123; *Fries v. Fries*, 1 MacArth. 291; *Howell v. Howell*, 104 Cal. 45, 43 Am. St. Rep. 70, 37 Pac. 770, 772; *Mitchell v. Mitchell*, 20 Kan. 665; *Stratton v. Stratton*, 73 Me. 481; *Mayer v. Mayer*, 154 Mich. 386, 19 L.R.A.(N.S.) 245, 129 Am. St. Rep. 477, 117 N. W. 890; *Martin v. Martin*, 6 Blackf. 321; *Walker v. Walker*, 155 N. Y. 77, 49 N. E. 663; *Bacon v. Bacon*, 43 Wis. 197; *White v. White*, 130 Cal. 597, 80 Am. St. Rep. 160, 62 Pac. 1062; *Silliman v. Silliman*, 66 Or. 402, 133 Pac. 769; *Buckminster v. Buckminster*, 88 Am. Dec. 652, note; *Johnson v. Johnson*, 12 Daly, 232; *Methvin v. Methvin*, 60 Am. Dec. 664, note; 2 Am. & Eng. Enc. Law, 2d ed. 135; 1 R. C. L. p. 946; 9 R. C. L. p. 439; *Brown*, Div. p. 278; 2 *Nelson, Marr. & Div.* § 933a; *Stuart, Marr. & Div.* § 366.

Mr. Bishop, in his valuable treatise on *Marriage, Divorce, and Separation* (vol. 2, § 872, states: "Because the procedure of a court always bends with the right to which it gives effect, it early became and it remains the doctrine in the country whence our laws are derived, and it is accepted and practised upon by a considerable proportion of our American tribunals, that the court may at any time and from time to time, on any change in the circumstances of the parties, increase or reduce the sum allotted for alimony, temporary or permanent."

In support of this rather broad general statement the following cases which we are about to notice are cited:

Otway v. Otway, 2 Phillim. Eccl. Rep. 109. In this case, decided by the ecclesiastical court, the divorce was one from bed and board, and the question of permanent

alimony was expressly reserved in the decree.

The case of *Cook v. Cook*, reported in the same volume at page 40, upon which the *Otway Case* was based, is likewise a case of divorce a mensa et thoro.

Rogers v. Vines, 28 N. C. (6 Ired. L.) 293. In this case the divorce was one from bed and board.

Richmond v. Richmond, 2 N. J. Eq. 90. This case was based squarely upon a statute conferring upon the court the power at any time, on a change of circumstances to vary the allowance of alimony by increasing or diminishing it, and the decree involved the rights of minor children.

Bursler v. Bursler, 5 Pick. 427. The divorce in this case was from bed and board.

Holmes v. Holmes, 4 Barb. 295. This case was one where the divorce was a mensa et thoro.

Barber v. Barber, 1 Chand. (Wis.) 280. The decree in this case granted a divorce from bed and board.

Sheafe v. Sheafe, 36 N. H. 155. The opinion in this case was based upon a statute of New Hampshire expressly empowering the court to modify its decrees in such cases.

Saunders v. Saunders, 1 Swabey & T. 72, 4 Jur. N. S. 147, 6 Week. Rep. 328. The divorce in this case was from bed and board.

Foote v. Foote, 22 Ill. 425. The decree involved the rights of minor children, and was rendered in a state having a statute expressly conferring upon the courts the power to modify decrees in divorce cases.

Sparhawk v. Sparhawk, 120 Mass. 390. The judgment was based upon a statute conferring the power to modify.

Coad v. Coad, 41 Wis. 23. This case is based upon a statute of Wisconsin expressly conferring the power to modify decrees in such cases.

Williams v. Williams, 29 Wis. 517. The power exercised was expressly reserved in the decree, and the case was based upon a statute.

Waters v. Waters, 49 Mo. 385. The allowance was for temporary alimony made, of course, during the pendency of the action.

Ellis v. Ellis, 13 Neb. 91, 13 N. W. 29. This case was based upon an express statute of Nebraska empowering the court to modify its decrees in reference to alimony from time to time.

Olney v. Watts, 43 Ohio St. 499, 3 N. E. 354. This case, stripped from the authorities upon which it is based, would seem to sustain the general statement in the text that all decrees for alimony might be modified or changed to meet new conditions. It is, however, based in part upon Mr. Bishop's former work on the Law of Marriage and L.R.A.1917F.

Divorce, § 429, where the same authorities are referred to as those above noted and reviewed. It also cites the rule announced by Dr. Lushington in the ecclesiastical court, where, as we have already observed, the decrees were always from bed and board merely.

In addition to the authorities contained in the footnote to *Bishop on Marriage, Divorce and Separation*, the cases of *Fisher v. Fisher*, 32 Iowa, 20, *McGee v. McGee*, 10 Ga. 486, *Wheeler v. Wheeler*, 18 Ill. 39, and *Lockridge v. Lockridge*, 2 B. Mon. 258, are cited. In the *Fisher Case* the opinion is based upon a statute of Iowa providing that, after a divorce is granted, subsequent changes may be made by the court in reference to maintenance of the wife when circumstances render them expedient. The *McGee Case* was one dealing with the question of temporary alimony. In the *Wheeler Case* the question was considered on appeal from the original decree, so that palpably no question of subsequent modification was involved, and the rather loose, general language contained in the opinion with reference to the right to modify such decrees was pure dictum. In the *Lockridge Case* the decree granted a divorce from bed and board only, as will be seen from the statement of the case on a former hearing in the Kentucky court of appeals. 3 Dana, 28, 28 Am. Dec. 52. It is therefore evident that the authority upon which the *Olney Case* is based, does not warrant the conclusion reached in it. The soundness of this case has also been questioned by the learned tribunal which rendered it. In *Law v. Law*, 64 Ohio St. 369, 60 N. E. 560, it is said: "The view presented by counsel for the plaintiff in error is that the terms of the original decree, not being affected by fraud or mistake, were conclusive upon the subject of alimony, and not subject to modification for any reason. Since no question was reserved by the decree for future consideration, that view receives strong support from *Petersine v. Thomas*, 28 Ohio St. 596, and from the general course of decisions upon the subject. Authority for the subsequent modification of the decree is, however, said to be found in the later case of *Olney v. Watts*, supra. . . . If it be assumed that the case was correctly decided, it affords no warrant for the present judgment."

Thus it will be seen that not one of the cases save the *Olney Case* is in point in this case. They are all distinguishable in that they are either divorces from bed and board, cases relating to alimony pendente lite, where the rights of children are involved, where the power is expressly reserved in the decree or is based upon a statute expressly conferring it. Not one of them,

except the Olney Case, is a case where the decree was absolute, the alimony permanent, the rights of children were not involved, there was no reservation in the decree, and no statute authorizing the change. And we have endeavored to show that the Olney Case is not sound in that the authorities upon which it is based do not sustain it.

14 Cyc. at page 784, in discussing the question here under consideration, uses this language: "A decree for permanent alimony is subject to modification because of fraud or mistake in the same manner and under the same circumstances as other decrees. The general rule would seem to be that, where the divorce is absolute, a decree for permanent alimony containing no reservation of the power of modification cannot be altered after the expiration of the time within which an appeal may be perfected, although it has been held that the court may modify a decree for alimony at any time upon proper allegations of the changed conditions and circumstances of the parties."

In support of the latter statement it cites a number of the same cases referred to by Mr. Bishop and the cases cited in *Olney v. Watts*, supra, which we have already reviewed. In addition the following cases are cited, upon which we shall comment in passing:

Stevens v. Stevens, 31 Colo. 188, 72 Pac. 1061. The entire opinion in that case is as follows: "By virtue of the general equity powers of a court granting a divorce as well as by virtue of the provision of § 9 of the Divorce Act (Sess. Laws 1893, p. 240, chap. 80), such court has the authority to modify the decree relative to alimony payable in the future, and the custody and control of minor children, as the changed circumstances of the parties may render necessary and just. *Richmond v. Richmond*; *Sheafe v. Sheafe*; *Coad v. Coad*; *Foote v. Foote*,—supra. There are no decisions of this court or the court of appeals to the contrary. The judgment of the county court is reversed, and the cause remanded, with directions to overrule the demurrer to the petition. Reversed."

It will be seen that the cases cited have all been distinguished in discussing the cases cited by Mr. Bishop. Justice Steele wrote a dissenting opinion, which was concurred in by the Chief Justice, wherein he pointed out that the Colorado statute did not confer the power to modify, and, in the course of the opinion, said: "The authorities cited in the opinion are not in point. In New Jersey, New Hampshire, Wisconsin, and Illinois the statutes provide that, after final decree, the court shall have power to change or modify it in accordance L.R.A.1917F.

with the changed circumstances of the parties."

Andrews v. Andrews, 15 Iowa, 423, and *Jungk v. Jungk*, 5 Iowa, 541. Both of these cases are based upon the same statute referred to in *Fisher v. Fisher*, 32 Iowa, 20.

Bristow v. Bristow, 21 Ky. L. Rep. 481, 51 S. W. 819. In this case the alimony allowed was for the benefit of the wife and a minor child, and, as we have already noted, the jurisdiction in such cases, as it relates to children, is continuing. The general language found in the opinion will be understood by reading § 2123, Kentucky Statutes.

Barbaras v. Barbaras, 88 Minn. 105, 92 N. W. 522. This case is based upon a statute conferring upon the court the power to modify, being § 4809, General Statutes of 1894.

King v. King, 38 Ohio St. 370. In this case the alimony was pendente lite, and the question involved was the power to increase it.

Whitton v. Whitton, L. R. [1901] P. 348, 71 L. J. Prob. N. S. 10, 85 L. T. N. S. 646. This was an action for the purpose of varying a marriage settlement, and was based upon the Matrimonial Causes Act. None of these cases, in our opinion, in any way militate against the rule as we have heretofore stated it, applicable to the class of cases we are now considering.

In our examination of the authorities we have found three cases which we deem worthy of special notice. These are *Alexander v. Alexander*, 13 App. D. C. 334, 45 L.R.A. 806; *Emerson v. Emerson*, 120 Md. 584, 87 Atl. 1033; and *Francis v. Francis*, 192 Mo. App. 710, 179 S. W. 975. In the *Alexander Case* the court seems to have adopted the rule that, where the alimony awarded to the wife is payable in installments, the court has the power to subsequently change it, even though it was allowed in a case where the divorce was absolute and there was no reservation in the decree giving to the party who sought the modification the right to petition the court therefor. In reading the opinion, however, it is plain that the conclusion was induced somewhat by the acts of Congress relating to the District of Columbia. That this is so is indicated by the opinion in *Emerson v. Emerson*, supra. In that case Justice Constable, commenting upon the *Alexander Case*, said: "It declared the jurisdictional right of modification existed in virtue of the acts of Congress, which acts are virtually in the language and meaning of our acts."

No authorities are cited in support of the conclusion reached in the *Alexander Case* in the absence of statute, but it is sought to distinguish that case from the cases

from Maine, Rhode Island, New York, Ohio, Alabama, and Kansas, and one from its own court, upon the thought that the alimony allowed in most of those cases was in gross, and was not alimony in the proper sense of the term; that is to say, the alimony was not payable in periodical instalments, but was an arrangement of property interests between the parties. It is admitted in the opinion, however, that in two of the cases sought to be distinguished the alimony allowed was payable in monthly instalments of indefinite continuance. In the course of the opinion the court says: "It is conceded on the part of the appellant that, upon good cause shown of inability on the part of the husband to pay the alimony, the court might order a suspension of payment, and would not, or rather should not, punish him as for contempt of court. But it seems to us that this concession virtually concedes the whole case. If the decree for the allowance of the alimony is of the rigid, inflexible, and unchangeable character claimed for it in the bill of review now before us, it is not apparent how it can be suspended any more than it can be modified by a reduction of the amount."

We are unable to subscribe to this reasoning. It seems to us to confuse the means of enforcing the decree with the power to modify it. In the event the delinquent husband is cited for contempt, and it is made to appear that he is unable to pay, the wife is simply deprived of one of the means provided by law for the collection of her alimony. The decree, however, is in no sense modified or suspended, but remains unaltered and in full force, and, if the husband should subsequently acquire property or become able to pay, he could be compelled to satisfy the decree according to its precise terms. If an execution is issued upon a judgment in an ordinary action and is returned by the sheriff "No property found," would it be contended that the judgment had been altered? In the latter as in the former case the holder of the judgment is merely deprived of one of the means by which it may be enforced. It will not do to say that the inability to enforce a judgment or decree either suspends it or works a modification of its provisions.

It is next argued that it is conceded that, if there is a reservation in the decree in favor of the one seeking to have the allowance of alimony changed, he or she may apply to the court at any time for a modification, and the court would have authority to make it. Then follows this statement: "And yet it is not quite apparent how the court could have well reserved to itself the authority to modify a decree if that authority was not already vested in it by law." L.R.A.1917F.

In our opinion, this argument overlooks the principle upon which the rule rests, that where the decree contains a reservation, the power to modify exists. By such a reservation the court does not undertake to confer jurisdiction upon itself. It merely reserves the right to exercise the unexhausted portion of jurisdiction which it already has. As we have heretofore pointed out, the reason such decrees are not conclusive as a matter of law is because they do not purport to be conclusive as a matter of fact. We freely confess that many reasons of practical convenience may be urged in favor of the conclusion reached in the *Alexander Case*, and these, no doubt, have had their influence in causing the legislatures in most of the states to enact statutes expressly conferring upon the courts the power to alter or modify decrees relating to alimony; but the very existence of such statutes is at least some argument that the courts did not possess the power to modify in all cases prior to the enactment of the statutes. What was the necessity for such statutes if the courts, prior to their enactment, possessed the power to modify their decrees in all cases relating to alimony?

In the *Emerson Case* the statute of Maryland provided: "The courts of equity of this state shall and may hear and determine all causes for alimony in as full and ample manner as such causes could be heard and determined by the laws of England in the ecclesiastical courts there."

The statute also conferred upon the courts of equity power to grant alimony in all cases where divorces were granted, and there was no definition of alimony in the statute. It was therefore concluded that, as the power of the court was like that of the ecclesiastical courts of England, and as such courts had power to modify their decrees relating to alimony, the courts of Maryland likewise possessed that power by virtue of the statute, regardless of the nature of the decree to which the award of alimony was incident, and cited with approval the *Alexander Case*, with the comment, among others, heretofore quoted.

In the *Francis Case* the supreme court of Missouri recently discussed the question now before us at some length, notwithstanding the decree in that case contained the provision "until the further orders of this court," and further, that by § 2375 of the Revised Statutes 1909, of Missouri, it is provided that, on application of either party, the court may make such alterations in its decrees relating to alimony or maintenance as may be proper at any time. In the course of the opinion it is said that the case of *Alexander v. Alexander*, 13 App. D. C. 334, 45 L.R.A. 806, was cited approvingly

by the Supreme Court of the United States in *Audubon v. Shufeldt*, 181 U. S. 575, 45 L. ed. 1009, 21 Sup. Ct. Rep. 735. An examination of the *Audubon* Case will disclose that the appeal in that case was from the District of Columbia, and the question presented was whether a judgment rendered in the state of Maryland, requiring Shufeldt to pay alimony to his divorced wife at the rate of \$50 per month, was such a debt as might be discharged in bankruptcy. In commenting upon the law of Maryland and the District of Columbia, it notices, among other cases, the *Alexander* Case. In determining the character of the judgment the Supreme Court would look to the laws of the jurisdiction in which it was rendered, and the Maryland court has since approved the holding in the *Alexander* Case as being based upon statutes similar to its own. Mr. Justice Gray, in the course of his opinion in the *Audubon* Case, said that, "generally speaking," alimony may be altered at any time, as the circumstances of the parties may require. To this statement of the rule we subscribe; but cases of the character we are now considering are very exceptional.

We cannot, without inordinately extending this already too long opinion, undertake to discuss at length the cases from our own jurisdiction. We have endeavored to examine all of them, and our investigation discloses that, whenever a decree has been modified, it has been in a case where the right to modify was expressly reserved in the decree, or the rights of children were involved; and in the latter class of cases this court has said, in varying forms of words, that, where alimony is awarded for the support of children, the decree is a continuing one, and the jurisdiction of both the parties and the subject-matter continues so long as there is a minor child whose welfare and maintenance are provided for in the decree. If the power to modify decrees relating to children terminates when there is no longer a minor child whose welfare and maintenance are provided for in the decree, does it not necessarily follow that, if there had been no minor child, the power to modify would not have existed in the first instance? As the result of our study of the authorities, we are induced to conclude that, where the divorce is from bed and board, and the decree provides for the payment of alimony, it may be modified to meet changed conditions, because of the continuance of the status of marriage, and further, because the common-law courts have inherent jurisdiction in such cases, the rules of the ecclesiastical courts being a part of the common law; that where the alimony is temporary, it may, of course, be changed during the pendency of the action; where the alimony is for

the purpose of providing maintenance for minor children, the decree may be modified so long as there are minor children to be cared for, the duty to support the child springing from the parental relation, which continues to subsist after the marital status in which it had its origin has terminated: that, where the decree contains an express reservation of the power to modify, the court may thereafter exercise the unexhausted portion of its jurisdiction, the judgments in such cases not purporting to be final; where the right to modify is conferred by statute, it clearly exists regardless of whether the decree be one of absolute divorce or mere separation; but that, both upon principle and authority, where the decree grants an absolute divorce and permanent alimony, though payable in instalments, is allowed, and there are no minor children to be cared for, and the decree contains no reservation of jurisdiction, and there is no statute conferring the power to modify, after the time for appeal has expired and the time limited by statute within which judgments may be modified has elapsed, and the judgment is not attacked upon the ground of fraud or mistake, there is no power in the court to modify or alter it to meet changed conditions.

The judgment is affirmed.

Ellis, Ch. J., and Morris and Main, JJ., concur.

Chadwick, J., dissenting:

That the sea of matrimony is "thick and uncertain," with neither chart nor compass to guide the mariner who embarks upon it, is well understood. Judge Webster has most ably read the chart which marks the tortuous channels that lie in front of those who divide the life belt and thenceforward drift alone. His opinion is sustained by authority, and, as it demonstrates the state of the law, it seems to me that it as clearly demonstrates a necessity for curative legislation. After a marriage has been dissolved by divorce and alimony awarded the divorcee,—it is not regarded as chivalrous to award alimony to a divorcee,—there is no reason, except in law, why the parties should not be subject to the call of changed conditions.

The grass widow may marry again, or may prosper upon her own account. In either event the rejected spouse should be freed of the burden of support. Or the grass widower may become poor, or again marry, and happily, in which case society should concern itself to see that a tie that is broken between persons intolerable to each other does not become a club of re-

venge and hate in the hands of the one, or a millstone about the neck of the other.

As I have said, every reason, the dictates of common sense, the interest of society, and the logic of our statutes defining the status of married persons, save the law, call for a different rule. The law has wasted an eddy in the banks of the judicial stream into which the courts of this country are drift-

ing around and around helplessly on the flotsam of "authority" which is grounded in reasons long since obsolete.

It might well behoove the legislature of this state to put us in line with other states where the evil to which we are bound by authority has been cured by appropriate legislation.

Annotation—Power to modify alimony awarded by a decree of absolute divorce in the absence of reservation by decree or statute.

This note, as is indicated by the title, is confined to cases where the divorce was final and some provision for alimony or support was made, with no reservation in the decree of power to alter the allowance, and no express statutory authorization to make such alteration. Many cases in which a modification of the award has been upheld are not within the scope of this note, for the reason that the power to modify was given by statute or reserved by the decree.

For the power to amend a decree of divorce by adding a provision for alimony or support of children where no such provision was contained in the original decree, see *Spain v. Spain*, L.R.A.1917D, 319, and the note thereto.

For modification of decree for alimony because of subsequent misconduct of former wife, see *Weber v. Weber*, 45 L.R.A.(N.S.) 875, and the note thereto.

For the amount of permanent alimony allowable on absolute divorce, including the amount on modification because of changed conditions, see *Van Gorder v. Van Gorder*, 44 L.R.A.(N.S.) 998, and the note thereto.

For power, in the absence of statute, to decree alimony or maintenance independently of proceedings for divorce, see *Lang v. Lang*, 38 L.R.A.(N.S.) 950, and the note thereto.

For the effect of a second marriage upon the obligation to pay alimony, see *State ex rel. Brown v. Brown*, 62 L.R.A. 974, and *Staton v. Staton*, L.R.A.1915F, 820, and the notes thereto.

Alimony—in general.

The conclusion reached in *RUGE v. RUGE*, ante, 721, that, in the absence of statutory authorization or reservation of power, a court granting a decree of absolute divorce and alimony, as distinguished from an allowance for the support of children whose custody is awarded to her, has no power after the term to alter such allowance, appears to L.R.A.1917F.

be sustained by the weight of authority, though the decisions are not in entire harmony upon the question.

By analogy this conclusion is also supported by the rule concerning the power of the court subsequently to award alimony to the wife in a case where the question of alimony was before the court in a suit for divorce, and no award was made; the general rule being that in such a case the court has no power to make the subsequent award. See *Spain v. Spain* and note to which reference is made above.

Where a suit for permanent alimony has terminated by the rendition of a final decree awarding alimony, and this decree has, by the lapse of time, become final, the amount of alimony passes beyond the discretionary control of the trial judge, and he has no authority either to abrogate the award or to modify its terms, unless the power to do so is reserved in the decree, or is given by statute. *Smith v. Smith* (1871) 45 Ala. 264; *Harlan v. Harlan* (1898) 154 Cal. 341, 98 Pac. 32; *Wilkins v. Wilkins* (1917) 146 Ga. 382, 91 S. E. 415; *Mitchell v. Mitchell* (1878) 20 Kan. 665; *Stratton v. Stratton* (1882) 73 Me. 481.

The decree for alimony is a judgment of the court, having the same finality as other judgments. *Sammis v. Medbury* (1883) 14 R. I. 214. And this is the rule although the alimony was awarded in the form of monthly payments. *Sampson v. Sampson* (1889) 16 R. I. 456, 3 L.R.A. 349, 16 Atl. 711.

In *Nelson v. Nelson* (1910) 56 Wash. 571, 106 Pac. 138, it was held that, under a general statute relating to the vacation and modification of judgments, providing that action therefor, whether by petition or motion, should be commenced within one year after the entry of judgment, a decree awarding alimony could not be modified after the expiration of the one-year period. And on rehearing (1910) 56 Wash. 573, 107 Pac. 195, the relief was denied although it

was shown that the proceeding for modification was commenced within a year after the decree, it appearing that appellant delayed more than ten months after being fully aware of the contents of the decree, and there being a statute requiring that an applicant seeking relief from what he deems an oppressive judgment shall proceed with diligence.

In *Sperry v. Sperry* (1917) — W. Va. —, 92 S. E. 574, the court recognizes that it is necessary for the trial court to reserve the power to modify alimony to enable it to do so in the absence of statute, and apparently regards its failure to make such reservation as error which may be corrected by appeal.

The jurisdiction of the court terminates with the entry of final judgment for alimony except as to proceedings for its enforcement and to correct mistakes. *Walker v. Walker* (1898) 155 N. Y. 77, 49 N. E. 663.

And a provision for alimony in a judgment granting divorce, which cannot be changed under existing laws, is a vested right which cannot be impaired by a subsequent statute conferring power upon the courts to modify it. *Livingston v. Livingston* (1903) 173 N. Y. 377, 61 L.R.A. 800, 93 Am. St. Rep. 600, 66 N. E. 123.

When a divorce is decreed for the aggression of the husband, and alimony adjudged to the wife in accordance with an agreement of the parties, the terms of the decree as to alimony are not generally, if unaffected by fraud or mistake, subject to modification upon a petition filed by the former husband. *Law v. Law* (1901) 64 Ohio St. 369, 60 N. E. 560; *Stanfield v. Stanfield* (1908) 22 Okla. 574, 98 Pac. 334.

In *Petersine v. Thomas* (1876) 28 Ohio St. 596, where a lump sum was awarded to a wife as alimony, it was held that the court had no power subsequently to make a further allowance.

And where a gross sum was decreed and received as or in lieu of alimony, it was held to be in full discharge and satisfaction for all claims for future support of the wife, although by a statute the court was authorized, on application, to make from time to time, alterations in the allowance of alimony and maintenance. *Plaster v. Plaster* (1868) 47 Ill. 290; *Shaw v. Shaw* (1894) 59 Ill. App. 268; *Barkman v. Barkman* (1900) 94 Ill. App. 440; *Guess v. Smith* (1911) 100 Miss. 457, 56 So. 166, Ann. Cas 1914A, 300.

The finality of an allowance of alimony in the absence of reservation in L.R.A.1917F.

the decree or statutory provision for modification is recognized in *Mayer v. Mayer* (1908) 154 Mich. 386, 19 L.R.A. (N.S.) 245, 129 Am. St. Rep. 477, 170 N. W. 890,—a case arising out of an attempt to enforce in Michigan a decree for alimony rendered in Oklahoma. It is held that the court has the right to enforce such decree as to arrears accruing on alimony awarded a wife where no statute in the state of Oklahoma gave the court authority to modify such decree as to her, and such authority was not reserved in the decree itself, the court having no power to modify it in the absence of statutory authorization or reservation in the decree. It was also held that the court had no power to enforce that part of the decree providing for payment in behalf of the children, inasmuch as the statute of Oklahoma gives the court granting the divorce power to modify its decree concerning the custody, support, and education of the children, and therefore, as to the arrears on such payment, the judgment was not final, and could not be enforced in another state.

(The power of the court which grants alimony to modify the award, as affecting the right to maintain an action thereon in another state, is considered in the notes to *Israel v. Israel*, 9 L.R.A. (N.S.) 1168, and *Sistare v. Sistare*, 28 L.R.A.(N.S.) 1068; and see the case of *Henry v. Henry*, L.R.A.1916B, 1024, and other cases cited in the footnote thereto.)

But in *Emerson v. Emerson* (1913) 120 Md. 584, 87 Atl. 1033, where it appears that, by statute, the courts are given jurisdiction over both limited and absolute divorces, and are also given power in all cases where divorces are granted to award alimony, but no statutory authority is given to modify the decree concerning alimony, the court, after an extended discussion of the question, decided that the trial court had power subsequently to modify an award of alimony made in a decree granting absolute divorce, saying: "We are of the opinion that the better reasoning leads irresistibly to the conclusion that in states where alimony is regarded as a maintenance for the wife's support out of the income of the husband, and not a division of property, the jurisdiction exists in the courts of equity to modify that part of the decree providing for alimony, whether the decree grants divorce a vinculo or a mensa." As pointed out in *RUGE v. RUGE*, ante, 721, however, the statute

of Maryland gave the courts of equity power to hear all causes for alimony in the same manner as they could be heard and determined by the laws of England in the ecclesiastical courts, and in further giving the court power to grant alimony in the case of absolute divorce, which power was not possessed by the ecclesiastical courts, and in making no distinction whatever between alimony in the two classes of cases, the court reasoned that the acts providing for alimony in the case of absolute divorce were intended to provide for alimony of the same character and limitation as the alimony the court had so long dealt with; i. e., in the case of divorce from bed and board; and that the court should have the same power of modification in the case of absolute divorce that the ecclesiastical courts had in the case of divorce a mensa.

And, as the court points out in *Emerson v. Emerson* (Md.) supra, *Alexander v. Alexander* (1898) 13 App. D. C. 334, 45 L.R.A. 806, is based upon statutes substantially the same as those involved in that case, and the same conclusion is reached.

In *Davis v. Davis* (1857) 19 Ill. 334, in which it does not appear whether a statute existed covering the question, the court said that as to the disposition of the children and the award of alimony, it must be understood they are questions subject always to re-examination and reconsideration by the circuit court.

In *Stevens v. Stevens* (1908) 31 Colo. 188, 72 Pac. 1061, which is discussed in *Ruge v. Ruge*, it appears that the custody and control of minor children was involved, but that fact does not appear to have influenced the court in deciding that the lower court had authority to modify a decree relative to alimony payable in the future. It appears that the court was divided two to one upon that question, the chief justice apparently concurring on the question as above stated, and agreeing with the dissenting judge upon another point.

And in *Prewitt v. Prewitt* (1912) 52 Colo. 522, 122 Pac. 766, the court reaffirmed the decision in *Stevens v. Stevens* (Colo.) supra, holding that the court had, by virtue of its general equity power, authority to modify a decree relative to alimony payable in the future, the statute making no specific provision for the future modification of a decree for alimony by the court. It does not appear that any children were involved in the decree.
L.R.A.1917F.

In *Olney v. Watts* (1885) 43 Ohio St. 499, 3 N. E. 354, it is held that a court granting a divorce and alimony has power subsequently to modify the award of alimony where it is made in the form of periodical payments; but, as is pointed out in *Ruge v. Ruge*, the authorities upon which the decision is based do not sustain it.

And in *Kurtz v. Kurtz* (1881) 38 Ark. 119, the court states obiter that decrees for alimony are always subject to modification by the original court, on a change of circumstances, making no distinction between absolute divorce and divorce from bed and board.

—fraud.

In *Griswold v. Griswold* (1903) 111 Ill. App. 269, an appeal from a decree changing an award of a certain amount to the wife to a gross sum, on the ground that the original alimony was fixed by the consent of the wife, upon fraudulent representations and concealments by the husband, the court changed the second award to an increased monthly allowance instead of a gross sum, holding that, because of the fraud, a court of equity had inherent jurisdiction to change the decree and award such alimony as, from the circumstances of the parties and the nature of the case, appeared reasonable, although the divorce statute did not apply to such a case.

See also *Law v. Law* (1901) 64 Ohio St. 369, 60 N. E. 560, and *Stanfield v. Stanfield* (1908) 22 Okla. 574, 98 Pac. 334, which imply that the court would have jurisdiction to alter alimony fixed by an agreement between the parties which was made a part of the decree, if fraud was practised in procuring the agreement.

Allowance for maintenance of child.

In *Cox v. Cox* (1865) 25 Ind. 303, *Tobin v. Tobin* (1902) 29 Ind. App. 382, 64 N. E. 624, *Plummer v. Plummer* (1913) — Tex. Civ. App. —, 154 S. W. 597, *Beers v. Beers* (1913) 74 Wash. 458, 133 Pac. 605, and *State ex rel. Jones v. Superior Ct.* (1914) 78 Wash. 372, 139 Pac. 42, it was held that an allowance made in divorce proceedings for the support of children is subject to future modification; but it does not appear whether there were statutes allowing such modification.

In *Coffee v. Coffee* (1897) 101 Ga. 787, 28 S. E. 977, where, by consent of both parties, a decree in an alimony proceeding was rendered, giving custody of the children to the wife, and

providing for a payment by the husband to the wife of a certain sum per month, to be used towards the support of the children, the decree being in full settlement of both temporary and permanent alimonies, and subsequently a total divorce was granted, it was held that the husband could not thereafter secure a modification of the decree concerning payment for the support of the children, the court saying that the wife became, by virtue of the decree, in her capacity as trustee for her minor children, a judgment creditor, and the court could no more vacate that judgment so rendered in her favor than it could vacate a judgment rendered against the husband in favor of a creditor upon any other account.

In *Foot v. Foot* (1859) 22 Ill. 425, the court, in directing a decree of separate allowances for alimony for the support of the wife and minor children, said, obiter, that in time, if the children became able to earn a portion of their own support, the amount allowed might be diminished, as such matters always remain under the control of the court, subject to any alterations that varying circumstances may render necessary.

— **undivided allowance.**

Where the statutes make no provision for modification of alimony awarded for the support of the wife, but do make a provision for the modification of the allowance for support of the children, the court may, where a gross sum per annum is awarded to the wife and child, subsequently change the amount allowed by reducing or enlarging it in a proper case. *Wells v. Wells* (1887) 10 N. Y. S. 248.

In *Kerr v. Kerr* (1880) 59 How. Pr.

(N. Y.) 255, the court, although recognizing its power to modify a decree of alimony as to the support of children, declined, where a gross sum had been awarded for the support of the wife and children, to modify the decree because of change of circumstances of the children, on the ground that he had nothing to guide him as to the amount allowed for the wife, and might, in making a reduction, encroach upon that allowance. However, upon appeal it was held that the trial court had in the record all the evidence upon which it acted in fixing the allowance originally, and it could determine from that evidence what amounts were allowed for the support and education of the children and what was allowed to the wife for her individual support, and that it was the duty of the court to modify the allowance upon the presentation of a proper case concerning changes in the condition of the children. 9 Daly, 517.

In *King v. Miller* (1894) 10 Wash. 274, 38 Pac. 1020, an undivided allowance to a wife of a certain sum monthly for the support of herself and minor children was subsequently changed to payment of a sum in gross.

And in *Bristow v. Bristow* (1899) 21 Ky. L. Rep. 481, 51 S. W. 819, the court, in approving an award of alimony to the wife for the support of herself and infant daughter, said that it is always within the power of the chancellor, if conditions change, to change the amount to conform to the necessities of the case; and it was therefore unnecessary for the court to make any orders in that direction. See also *Staton v. Staton* (1915) 164 Ky. 688, L.R.A.1915F, 820, 176 S. W. 21.

R. L. S.

LOUISIANA SUPREME COURT.

FRANK JACKSON, Appt.,

v.

MRS. ADDIE HODGES et al.

(— La. —, 76 So. 174.)

Exemptions — sale — right to attack.

1. The fact that a farmer, having movables exempt from seizure under the home-

Headnotes by MONROE, Ch. J.

Note. — The subject of the selection of exempt property, including the time when the selection must be made, is treated in the note to *Parsons v. Evans*, L.R.A.1916D, 381. L.R.A.1917F.

stead provisions of the Constitution, is unable to give bond for an injunction to stay a seizure and sale of the same under execution, furnishes no ground for an estoppel which would prevent him from thereafter attacking the sale, where the property has been adjudicated to the plaintiff in execution and is still in his possession, and especially where he, through his attorney and the sheriff, was notified, in advance of the sale, that the property was exempt from seizure.

For other cases, see *Estoppel*, III. a, in Dig. 1-52 N. S.

Same — attence — distinction.

2. A distinction is to be drawn between such cases and those in which the owner of seized property remains silent whilst the

property passes into the hands of innocent third persons purchasing for value.

For other cases, see Estoppel, III. g, in Dig. 1-52 N. S.

(Provosty, J., dissents.)

(June 30, 1917.)

APPEAL by plaintiff from a judgment of the Judicial District Court for the Parish of Bossier dismissing a suit to have a sale declared null and void or to recover from defendant the value of the property sold. Reversed.

The facts are stated in the opinion.

Messrs. Herndon & Herndon, for appellant;

The proceeds of exempted property may be claimed at any time before the sheriff or the purchaser at the judicial sale has paid out the proceeds.

Johnson v. Agurs, 116 La. 634, 114 Am. St. Rep. 562, 40 So. 923; Abbott v. Heald, 128 La. 718, 55 So. 28.

An exception of no cause or right of action admits as true all the allegations of petition in so far as the exception is concerned.

Bouligny v. Gary, 21 La. Ann. 642; Kird v. New Orleans & N. W. R. Co. 105 La. 226, 29 So. 729; Watkins v. North American Land & Timber Co. 107 La. 107, 31 So. 683.

So a constitutional provision that every homestead not exceeding 80 acres shall be exempt from sale for any debt is self-executing.

Miller v. Marx, 55 Ala. 322.

Monroe, Ch. J., delivered the opinion of the court:

Plaintiff has appealed from a judgment dismissing this suit on an exception of "no cause of action." He brought the suit in November, 1916, alleging that he is a farmer living on a tract of land containing 186 acres, worth \$5 an acre and encumbered by a mortgage of \$630; that he is married and has minor children; that about July 18, 1915, defendant obtained judgment against him for \$530, with interest and attorneys' fees, and, issuing execution thereunder caused to be seized two mules, one wagon, 78 bushels of corn, one hog, and one mower, —the corn being necessary for feed for the current year and to enable him to make a crop; that the property so seized was exempt under the homestead provisions of the Constitution; that he has no other property; and that, prior to the sale, "he gave written notice to the sheriff, and to the defendant herein through her attorney, that the property was exempt and that he was unable to give bond and stop the sale," but that the sale was made nevertheless, and that the L.R.A.1917F.

property was bought in by the plaintiff, who now has it in her possession. He prays that she be cited and that he have judgment decreeing said sale to be null and ordering the return of the property, or, in the alternative, condemning defendant to pay him its value, which he fixes at the aggregate amount of \$402.

Article 244 of the Constitution exempts from seizure, under any process whatever, except as otherwise specially provided in the Constitution, and without registration, the homestead used and occupied by every head of a family, and "also one wagon or cart, two work horses, . . . one yoke of oxen, two cows and calves, twenty-five head of hogs, or 1,000 pounds of bacon or its equivalent in pork, whether these exempted objects be attached to a homestead or not, and on a farm the necessary quantity of corn and fodder for the current year, and the necessary farming implements, to the value of \$2,000: Provided, that in case the homestead exceeds \$2,000 in value, the beneficiary shall be entitled to that amount in case a sale of the homestead under any legal process realizes more than that sum."

Article 245 declares that the exemption so granted shall not apply as against debts due for the price of the property, or for labor, money, or materials furnished for building, repairing, or improving homesteads, or by any public officer, fiduciary, or attorney at law for money collected or received on deposit, or for taxes or assessments, or for rent, bearing a privilege; and further that "no court or ministerial officer of this state shall ever have jurisdiction or authority to enforce any judgment, execution, or decree against the property exempted as a homestead, except the debts above mentioned," etc.

Article 246 provides that any person entitled to a homestead may waive the same "by signing with his wife, if she be not separated a mensa et thoro, and having recorded in the mortgage records of his parish, a written waiver of the same, in whole or in part."

In support of the exemption and prohibition thus provided and declared, plaintiff invokes the decisions of this court in Johnson v. Agurs, 116 La. 634, 114 Am. St. Rep. 562, 40 So. 923, and Abbott v. Heald, 128 La. 718, 55 So. 28, in both of which cases homestead property was sold in satisfaction of claims which were among the exceptions to the exemption and prohibition of the Constitution, and being realized more than enough to satisfy them, the controversy arose in each case over the disposition to be made of the surplus, and it was held that the debtor (in the one case) and his assign (in the other) were entitled to as-

sert the claim for exemption to the extent of \$2,000 as against such surplus so long as it remained in the hands of the sheriff or of the purchaser of the property.

The defendant herein, on the other hand, cites the decisions in *Kuntz v. Baehr*, 28 La. Ann. 90, *Gilmer v. O'Neal*, 32 La. Ann. 979, *Fruge v. Fulton*, 120 La. 750, 45 So. 595, and *Cunningham v. Steidman*, 133 La. 44, 62 So. 346, to the effect that the claim of homestead exemption comes too late when asserted after the sale of the property under judicial process, and invokes the doctrine of *stare decisis*.

The case of *Kuntz v. Baehr* arose out of a contract that was entered into at some time prior to 1876, and it was decided prior to the Constitution of 1879, when the Constitution (of 1868) then in force contained no homestead provisions. Defendant (*Baehr*) had caused certain property to be seized under executory process, and, it having been adjudicated to him, plaintiff enjoined the sheriff from putting him in possession (making him also a party defendant), on the ground that the property was his homestead, and exempt. The only homestead law then in force was Act No. 33 of 1865, now incorporated in the Revised Statutes as § 1691. It exempted from sale under execution the homestead of the debtor and certain animals, implements, etc., but contained no such prohibition as was afterwards put in the Constitutions of 1879 and 1898. The suit was dismissed by the district court upon an exception of no cause of action, and, in affirming that judgment, this court merely said: "The judgment is correct. The sale of the property divested all of plaintiff's rights, including that under the homestead law. If he had any right to a homestead, he should have asserted it prior to the sale. His personal notice to the sheriff and the plaintiff in the seizure and sale did not amount to a legal assertion of his right, so as to secure or preserve the right of a homestead on the property under seizure. Judgment affirmed."

We have no means of knowing the reasons which led to the conclusion that the owner of the property which is exempt by law from sale under execution is forever estopped to complain after the property has thus been sold, even though it has been adjudicated to the seizing creditor, who has parted with nothing in payment of the price and has not yet been put in possession. It may, perhaps, be inferred that the owner was presumed by reason of his nonaction, to have waived his homestead; if so, it affords an additional reason for holding that the judgment has no application to a case arising under the present Constitution, which declares (art. 246): ". . . Any person L.R.A.1917F.

entitled to a homestead may waive the same, by signing with his wife, if she be not separated a mensa et thoro, and having recorded in the office of the recorder of mortgages of his parish a written waiver of the same, in whole or in part."

The method of waiving the homestead, as thus provided, is exclusive, and leaves no room for a waiver predicated upon a presumption.

In *Gilmer v. O'Neal*, it appeared that the rights of the parties originated in transactions antedating the Constitution of 1879, and, as the court expressly decided, they were to be and were determined in accordance with the Homestead Act of 1866. Moreover, it appeared that *Gilmer*, the owner, had entered into a written agreement that the property should be sold as it was sold, was allowed to remain in possession and gather a crop in accordance with that agreement, and, having failed to make a certain payment, also agreed on, brought the suit to prevent the sheriff from dispossessing him. He was at liberty in 1877 to waive his homestead, and the fact that he did not assert it until after the sale was the last, and the least, of the reasons assigned by the court for holding that he had no standing to make that assertion, and the sole authority cited in support of that reason was *Kuntz v. Baehr*.

In *Fruge v. Fulton* it appeared that in 1893 plaintiff imposed a mortgage upon his property for a debt then incurred, and for which judgment was obtained in 1898, when the property was seized and sold for its satisfaction, long after which (in 1908) he sought to recover it on the ground that it was his homestead. It was found that the Constitution of 1879 granted the homestead exemption only when the claim thereof was registered; that plaintiff's claim had not been registered; that he was therefore not entitled to the exemption; and that it was competent for him to mortgage the property when he did. And then, as in *Gilmer v. O'Neal*, the fact that he had not set up his claim until after the sale was given as an additional reason for denying his right to recover.

The case of *Cunningham v. Steidman* is therefore the only one cited by defendant in which the immediate question here presented was necessarily involved, or can be said to have been seriously considered, and in that case it appeared that the property claimed as a homestead was sold in 1908 under a judgment obtained by *Edwards Brothers, Limited*, to *A. M. Edwards*, who sold it to *M. T. Tucker*, who sold it to *Steidman*, after which, in 1912, the suit was brought by the judgment debtor for its recovery, on the ground that it was his

homestead. In dealing with the constitutional question now under consideration the court said: "If the question of homestead vel non, or the question of the property sold not having been liable to seizure from any other cause, were allowed to hang indefinitely over every piece of property sold at sheriff's sale, where would be the safety or confidence in titles? So, in *Gilmer v. O'Neal*, . . . where this same prohibition was relied on, . . . the court held that the homestead right must be asserted before a sheriff's sale is made, or else the property will pass free from it. The court had previously announced the same principle under the Homestead Law of 1865," referring no doubt, to the case of *Kuntz v. Baehr*.

In the case thus cited judgment was rendered against Cunningham, and his property was seized thereunder and offered for sale, with no notice to the public as to the character of the claim upon which the judgment was founded, and which, for aught that appeared, might have been one of those excepted by the Constitution, for which even a homestead may be seized and sold. The debtor remained silent and the sale took place; he still remained silent and the purchaser sold the property to a third person; he spoke not, and the third person sold it to another; and, finally, after a lapse of four years, the judgment debtor, defendant in execution, came into court and, assigning no reason for his silence and inactivity, demanded that the last purchaser surrender the property that he had thus bought and paid for at public sale made by a sheriff acting under the authority of a judgment rendered by a competent court and a writ which directed him to seize the property of the judgment debtor wherever it might be found. The court did not deny that plaintiff might possess a homestead without recording that peculiar title; it merely denied that he could make use of that title for the undoing of others, by allowing the property to be sold and the proceeds applied to the payment of his debts, and then reclaiming it to the prejudice of the innocent purchaser.

The case here presented is, upon the face of the petition, quite different. Plaintiff alleges that he notified the sheriff, before the sale was made, that the property was exempt, and also notified the plaintiff in execution through her attorney, and that he did not stop the sale by injunction because he was unable to furnish the bond which the law requires. He also alleges that the property was adjudicated to the plaintiff in execution, and that she is now in possession of it. Moreover, the property was of a character which might very well have conveyed the warning that it was not subject

to seizure, since it consisted of objects which, being on a farm where the defendant in execution lived, have, for the most part, always been exempt, just as have been the tools and implements of the mechanic. We have then a case in which, according to the allegations of the petition, a plaintiff in execution and a sheriff, assuming to proceed under the authority of a judgment and writ of a court of this state, have caused to be, and have, seized and sold, in the enforcement and execution thereof, property "exempted as homestead," though the Constitution declares in most emphatic terms that no judgment shall be executed or writ enforced in that way; and the only answer that is made to the demand that the wrong be righted and the Constitution vindicated is that complaint was not made until after the sale, and that it is now too late, not because, by reason of the silence and inaction of the complainant, loss and injury will be visited upon innocent third persons, not because the plaintiff in execution, to whom the property was adjudicated, will be deprived of any right or property to which she would otherwise have been entitled, but because, being unable to give bond to stay an execution which the seizing creditor and the sheriff were notified would be not only unauthorized, but forbidden by law, the plaintiff herein is forever estopped to complain; and that this court, having so decided heretofore, must adhere to the doctrine of its previous decisions.

The answer, we think, is not well founded; it suggests no basis for the estoppel set up against the plaintiff herein, and, considering carefully the decisions to which the learned counsel for defendant refers, in their relation to the cases decided and to this case, we do not find that they carry the significance which he attaches to them, or establish any precedent by which we should be governed in the decision of the question here presented. The language of the Constitution is unambiguous; it is a repetition of that contained in the Constitution of 1879; it was intended to establish, as the public policy of the state, that the citizen shall be protected in a home, once secured, and that the small farmer shall not be deprived of the implements wherewith to make his crop; and, being part of the supreme law of the state, it is the duty of this court, so far as the opportunity is afforded, to see that its purposes are not defeated.

The judgment appealed from is therefore set aside, the exception overruled, and the case remanded to be proceeded with according to law and to the views herein expressed; the costs of the appeal to be paid

by defendant, and those of the District Court to await the result.

O'Neill, J., subscribes to the decree on the peculiar facts of this case. Leche, J., takes no part.

Provosty, J., dissents for the reason that the homesteader, like every other litigant, must assert his rights at the time and in the manner prescribed by law, or else lose them. Mere protest cannot be made by any litigant to serve in place of injunction.

I apprehend the effects of this decision will be far-reaching. Under its operation

in any case where the property offered at judicial sale is susceptible of being homesteaded, the debtor may cast a cloud upon the title to be derived at the sale by rightly or wrongly making such a protest, and thus fair competition might be interfered with, and every such sale of real estate would have to be followed by a jactitation suit to clear the title, unless the purchaser chose to let the cloud hand over his title.

I think the court had better let the jurisprudence stand as heretofore established, and not rob it of its efficacy by making the distinction sought to be made in this decision.

MINNESOTA SUPREME COURT.

ESTELLA SIMMONS, Resp't.,
v.

NORTHWESTERN TRUST COMPANY,
Appt.

(— Minn. —, 162 N. W. 450.)

Trust — termination by court.

An express trust may be terminated by decree of the court when the entire beneficial interest in and to the trust property, including the estate in reversion, has become vested in the cestui que trust, and the character and purpose of the trust as expressed in the instrument creating it does not conflict with or preclude the right of termination.

For other cases, see *Trusts*, I. f, in *Dig.* 1-52 N. S.

(April 27, 1917.)

APPEAL by defendant from a judgment of the District Court for Ramsey County in plaintiff's favor and from an order denying a new trial in an action brought to terminate a trust. Affirmed.

The facts are stated in the opinion.

Messrs. O'Brien, Young, & Stone, for appellant:

The absolute and positive duty is imposed upon the trustee to defend the life of the trust whenever it is assailed, if the means of defense are known to him, or can with diligence be discovered.

Cuthbert v. Chauvet, 136 N. Y. 326, 18 L.R.A. 745, 32 N. E. 1088.

Miss Essie W. Williams, for respondent:

Plaintiff has the common-law power to alienate all her beneficial rights under the

Headnote by BROWN, Ch. J.

Note. — For divorce as the equivalent of death for the purpose of terminating a trust, see note to *Re Cornila*, L.R.A.1915E, 762.
L.R.A.1917F.

trust during the existence of the trust, unless that power has in some way been taken away.

Perry, Tr. & Trustees, 6th ed. § 386 (a); 39 Cyc. 203, 237; *Baker v. Whiting*, 3 Sumn. 475, Fed. Cas. No. 787; *Bennett v. Chapin*, 77 Mich. 526, 7 L.R.A. 377, 43 N. W. 893; *Mithoff v. Fritter*, 14 Ohio S. & C. P. Dec. 321; *Brooks v. Davis*, 82 N. J. Eq. 118, 88 Atl. 178.

A beneficiary having the entire beneficial interest for life and acquiring the entire remainder in fee is entitled to a conveyance of the legal title by the trustee.

Anson v. Potter, L. R. 13 Ch. Div. 141, 41 L. T. N. S. 582; *Taylor v. Huber*, 13 Ohio St. 288; *Inches v. Hill*, 106 Mass. 575; *Sharpless's Estate*, 151 Pa. 214, 25 Atl. 44; *Thom v. Thom*, 95 Va. 413, 23 S. E. 583; *Yerkes's Appeal*, 2 Chester Co. Rep. 410; *Owen's Estate*, 3 Pa. Dist. R. 331; *Waite v. Roff*, 1 Ohio C. D. 472; *Bennett v. Chapin*, 77 Mich. 526, 7 L.R.A. 377, 43 N. W. 893; *Whall v. Converse*, 146 Mass. 345, 15 N. E. 660; *Langley v. Conlan*, 212 Mass. 135, 98 N. E. 1064, Ann. Cas. 1913C, 421; *Brooks v. Davis*, 82 N. J. Eq. 118, 88 Atl. 178; *Warner v. Sprigg*, 62 Md. 14; *Turnage v. Greene*, 55 N. C. (2 Jones, Eq.) 63, 62 Am. Dec. 208.

The trust is passive and the entire legal title in fee must vest in the plaintiff.

Jasper v. Maxwell, 16 N. C. (1 Dev. Eq.) 357; *Turnage v. Greene*, 55 N. C. (2 Jones, Eq.) 63, 62 Am. Dec. 208; *Keifer v. Bard*, 20 Ohio S. & C. P. Dec. 629; *Com. v. Louisville Public Library*, 151 Ky. 420, 152 S. W. 262.

It may be held, as a matter of law, that the purpose of this trust has been accomplished or ceased to exist.

Wells v. Malbon, 31 Beav. 48, 54 Eng. Reprint, 1055, 31 L. J. Ch. N. S. 344, 8 Jur. N. S. 249, 6 L. T. N. S. 32, 10 Week. Rep. 364; *Koenig's Appeal*, 57 Pa. 352; *Cary v. Slead*, 220 Ill. 508, 77 N. E. 234; *Lee's Estate*, 207 Pa. 218, 56 Atl. 425; *Buttan-*

shaw v. Martin, Johns. V. C. 89, 70 Eng. Reprint, 351, 5 Jur. N. S. 647; *McNeer v. Patrick*, 93 Neb. 746, 142 N. W. 283; *Sears v. Choate*, 146 Mass. 395, 4 Am. St. Rep. 320, 15 N. E. 786; *Welch v. Episcopal Theological School*, 189 Mass. 108, 75 N. E. 139; *Langley v. Conlan*, 212 Mass. 135, 98 N. E. 1064, Ann. Cas. 1913C, 421; *Donaldson v. Allen*, 182 Mo. 626, 81 S. W. 1151.

The happening of that which was not anticipated or foreseen or provided against by the creator of a trust will justify a court in terminating a trust.

Soteldo v. Clement, 11 Ohio Dec. Reprint, 802; *Mithoff v. Fritter*, 14 Ohio S. & C. P. Dec. 321; *Waite v. Roff*, 1 Ohio C. D. 472; *Thorne v. Thorne*, 125 Md. 119, 93 Atl. 406.

If all the parties who are or may be interested in the trust property are in existence and sui juris, and if they all consent and agree thereto, courts of equity may decree the determination of a trust and the distribution of the trust fund among those entitled.

Perry, Tr. & Trustees, 6th ed. § 920, p. 1497; *Sears v. Choate*, 146 Mass. 395, 4 Am. St. Rep. 320, 15 N. E. 786; *Williams v. Thacher*, 186 Mass. 293, 71 N. E. 567; *Lohrer v. Citizens Sav. & T. Co.* 14 Ohio S. & C. P. Dec. 289; *Eakle v. Ingram*, 142 Cal. 15, 100 Am. St. Rep. 99, 75 Pac. 566; *Soteldo v. Clement*, 11 Ohio Dec. Reprint, 802; *Culbertson's Appeal*, 76 Pa. 145; *Thompson's Estate*, 10 Pa. Co. Ct. 472; *Huber v. Donoghue*, 49 N. J. Eq. 125, 23 Atl. 495; *Tilton v. Davidson*, 98 Me. 55, 56 Atl. 215; *Angell v. Angell*, 28 R. I. 592, 68 Atl. 583; *Anderson v. Williams*, 262 Ill. 308, 104 N. E. 659, Ann. Cas. 1915B, 720; *Dodge v. Dodge*, 112 Me. 291, 92 Atl. 49; *Harrar's Estate*, 244 Pa. 542, 91 Atl. 503; *Kennedy v. Badgett*, 19 S. C. 591; *Browning v. Fiklin*, 26 Ky. L. Rep. 470, 12 S. W. 714; *Coram v. Davis*, 39 Mont. 495, 104 Pac. 518; *Armistad v. Hartt*, 97 Va. 316, 33 S. E. 316; *Biggs v. Peacock*, L. R. 22 Ch. Div. 284, 52 L. J. Ch. N. S. 1, 47 L. T. N. S. 341, 31 Week. Rep. 148; *Innis v. Flint*, 106 Minn. 343, 119 N. W. 48.

Brown, Ch. J., delivered the opinion of the court:

This action was brought to terminate a trust created and established by the last will and testament of Sarah J. Robbins, late of Ramsey county, on the ground that the purpose thereof has been fully accomplished, rendering a continuance of the trust wholly unnecessary. Plaintiff had judgment, and defendant appealed from an order denying a new trial.

The facts are not in dispute and are substantially as follows: By the last will and testament of Sarah J. Robbins an undivided

interest in and to certain property belonging to the testatrix, real and personal, was devised and bequeathed to defendant, Northwestern Trust Company, in trust for the use and benefit of plaintiff, a sister of testatrix, the same to be held by the trustee and the income therefrom paid over to plaintiff during her life, with the remainder over at her death to Luella Webb and Annette Simmons, two other sisters of testatrix. The will was duly admitted to probate, and the estate administered in accordance with its provisions. The trust property was decreed to the trustee, and thereafter, except the real estate, was duly managed by it in conformity with the trust, and the income therefrom paid over to plaintiff. The trustee never took possession of the real property, but committed the same to the possession and control of plaintiff, the cestui que trust, and those jointly interested therein with her. The final decree of the probate court was rendered and duly entered on May 15, 1914.

At the time of the execution of the will plaintiff was, and for some years prior thereto had been, the duly wedded wife of one Frank Sans Souci. She has at all times been, and still is, a person of intelligence, of character, possessing business capacity to manage her property affairs, and there is no suggestion that she is or was a spendthrift or otherwise unfitted to own and control property in her own right. The precise purpose of testatrix in creating the trust for her benefit is not disclosed by the will, though it is clear that it could not have been because of any incompetence on the part of plaintiff. The unexpressed purpose, as claimed by plaintiff, and as disclosed by evidence dehors the record, which was received over defendant's objection that the purpose of the trust could not thus be shown, was to prevent the property from reaching the hands of plaintiff's husband, who, testatrix believed, would squander the whole thereof should it go to plaintiff direct. If that was the situation which testatrix had in mind when she made the will, it has been entirely changed by the divorce which plaintiff procured from Sans Souci on November 1, 1915. So that plaintiff is no longer subject to his control or influence.

Subsequent to the dissolution of the marriage, as just stated, plaintiff acquired and now holds in her own right the reversionary interest in and to the trust property, which the will provided should pass to the two sisters of plaintiff upon her death. They have conveyed their said interest to plaintiff, and she is now the sole owner of all the property as well as of the income therefrom.

Plaintiff thereafter demanded the property from defendant, on the ground that the purposes of the trust, by reason of the facts

stated, had been accomplished, entitling her to the possession of the trust property. The demand was refused, and this action followed, with the result stated.

Two principal contentions were made by plaintiff in the court below, as well as in this court, namely: (1) That the purpose of the trust was the protection of plaintiff from her spendthrift husband and to prevent the property coming into his hands, and since plaintiff has procured a divorce, and thus relieved herself from further control of the objectionable husband, all danger of a dissipation of the property from that source has passed, and the purpose of the trust therefore accomplished; and (2) since the entire beneficial interest in and to the trust property, both income and the estate in reversion, has become vested in her, that she is for that reason also entitled to a termination of the trust.

1. The power and jurisdiction of the court in a proper case to terminate an express trust, in proceedings brought for that purpose, when the purposes thereof have been fully accomplished, even before the expiration of the term for which it was created, is well settled by the authorities. 39 Cyc. 99; *Eakle v. Ingram*, 142 Cal. 15, 100 Am. St. Rep. 99, 75 Pac. 566; *Webster v. Bush*, 19 Ky. L. Rep. 565, 39 S. W. 411, 42 S. W. 1124; *Tilton v. Davidson*, 98 Me. 55, 56 Atl. 215; *Sands v. Old Colony Trust Co.* 195 Mass. 575, 81 N. E. 300, 12 Ann. Cas. 837. See also § 6722, Gen. Stat. 1913. But where the purpose of the trust does not, expressly or by fair implication, appear upon the face of the instrument creating it, as in the case at bar, it may be doubted whether such purpose may be shown by extrinsic evidence, in the manner here attempted. We do not find it necessary to consider the question, and pass it without further remark; for it seems clear that plaintiff's second contention above stated must be sustained.

2. Plaintiff is *sui juris*. There is no suggestion in the record that she is mentally or otherwise incompetent to act for herself, or properly care for her property rights, and she may under the law freely contract and be contracted with. Nor is there any suggestion that her condition was otherwise when the will was executed, or that the purpose of the testatrix in creating the trust was to protect her from her own incapacity or inability to manage her property affairs. She has, since she was divorced, acquired the entire beneficial estate in the trust property, by conveyance and transfer from the holders of the estate in reversion. The title to the property and the income therefrom is subject to sale by her, precisely as she might sell and convey other property owned by her. L.R.A.1917F.

Upon such facts, appearing without dispute, and the character of the trust or the purpose thereof as expressed by the instrument creating it not conflicting, the authorities hold that the trust may be terminated by decree of court, and the whole estate turned over to the *cestui que trust*. *Anson v. Potter*, L. R. 13 Ch. Div. 141, 41 L. T. N. S. 582; *Taylor v. Huber*, 13 Ohio St. 288; *Inches v. Hill*, 106 Mass. 578; *Sharpless's Estate*, 151 Pa. 214, 25 Atl. 44; *Thom v. Thom*, 95 Va. 413, 28 S. E. 583; *Healey v. Alston*, 25 Miss. 190; *Whall v. Converse*, 146 Mass. 345, 15 N. E. 660. There can be no serious doubt of her right of alienation, not only of the corpus of the estate, but also the income, since the will contains nothing inconsistent with the exercise of such right. *Perry, Trusts*, § 386; *Patton v. Patrick*, 123 Wis. 218, 101 N. W. 408; *Bennett v. Chapin*, 77 Mich. 526, 7 L.R.A. 377, 43 N. W. 893; *Brooks v. Davis*, 82 N. J. Eq. 118, 88 Atl. 178; 39 Cyc. 234, and authorities there cited. Section 6718, Gen. Stat. 1913, has no application to a trust of the character of the one at bar. It applies only to trusts to receive and apply to specific purposes the rents and profits of land.

It follows, therefore, that upon the ground stated the trial court properly awarded to plaintiff a judgment terminating the trust, and the order appealed from must be and is affirmed.

NEW JERSEY COURT OF ERRORS AND APPEALS.

MARY M. FRASER, Appt,
v.
WILLIAM J. FRASER.

(— N. J. —, 101 Atl. 58.)

Husband and wife — home — provision necessary.

1. It is the duty of a husband to provide a home for his wife, in which she is recognized by its inmates as the household mistress, and when the husband subjects his

Headnotes by BERGEN, J.

Note. — The subject of the relations between one spouse and the relatives of the other as affecting the question of desertion or cruelty is treated in the notes to *Brewer v. Brewer*, 13 L.R.A.(N.S.) 222; *Hall v. Hall*, 34 L.R.A.(N.S.) 758, and *Marshak v. Marshak*, L.R.A.1915E, 161; and see later case, *Spafford v. Spafford*, L.R.A.1917D, 773.

The duty of one spouse to seek a reconciliation as a condition of desertion by the other is treated in the note to *Hill v. Hill*, 39 L.R.A.(N.S.) 1118; and see later case, *Rogers v. Rogers*, 46 L.R.A.(N.S.) 711.

wife in the management of her household affairs to the interference of his mother, who manifests an enmity towards the wife, and by words and acts assails her conduct and reputation to such an extent that she cannot endure it, and leaves the home for that reason, her desertion may be wilful, but it does not become obstinate, so long as the husband makes no effort to induce her to return to a home freed from the contentious element.

For other cases, see Divorce and Separation, III. b, in Dig. 1-52 N. S.

Same — desertion — effort at reconciliation.

2. A wife left her husband's home, after notifying him that she would do so unless he provided a home apart from his mother, whose conduct she claimed humiliated her, and who had charged her with being a bad, wicked woman. This the husband refused, saying, "That is up to you." When she left her husband was present, made no protest, and did not ask her to stay.

She took with her their only child, three weeks old, and the husband never attempted to see his wife or the child, although they lived in the same city. After two years the husband decided to move to this state in order to obtain a divorce for desertion. Shortly before coming to this state he wrote a letter to his wife, and the day after he moved he wrote her another; the contents of these letters being the only proof of an attempt to induce his wife to return. Neither letter contained any request or invitation, but a mere statement that the home was open for her return under old conditions, including the presence of his mother. Held, that these letters were not proof of a bona fide effort to induce the wife to return, for there was no promise to remove the real cause of the separation, which the husband recognized when he permitted his wife to leave without protest. Nor did they invite the wife to return, and were evidently written as a basis for the intended divorce proceedings, embodying terms which he knew the wife could not accept.

For other cases, see Divorce and Separation, III. b, in Dig. 1-52 N. S.

(March 20, 1917.)

APPEAL by defendant from a decree of the Court of Chancery in favor of plaintiff in an action for divorce. Reversed.

The facts are stated in the opinion.

Mr. Edward Maxson for appellant.

Mr. James A. Sullivan for appellee.

Bergen, J., delivered the opinion of the court:

From a decree of divorce, based upon the petition of the husband, alleging desertion by the wife, she has appealed.

They were married in the city of Brooklyn, New York, where both resided, July 10, 1910; a child was born April 24, 1911; the defendant left petitioner's house with the L.R.A.1917F.

child May 13, 1911; and since that date the parties have lived in separate homes. The reason which the wife gives for leaving her husband's house is that the conduct of the husband's mother, who was an inmate of the home, made her life intolerable by constant quarrels, charged her with being a bad woman, estranged her husband's affection, who espoused the cause of the mother, and in many ways manifested her ill will towards the wife by acts and speech, so that her position as mistress of the home was depreciated, and she humiliated and deprived of the comfort and happiness she had a right to enjoy. That there were many disagreements and quarrels between the women is not disputed; the testimony showing that the husband was aware of the condition, and that as early as November, 1910, his wife complained to him that, unless he provided her a home separate from his mother, she would have to leave him. There is no doubt that it was a contentious household, for which the mother was at least partly to blame, so that, if her conduct was not modified, there could be no happiness; and this the husband did not undertake to accomplish, for he testified that he heard both sides and remained neutral, even when told by his wife that his mother had written a letter to a fortune teller, in which the wife was described as "a bad, wicked woman." This attitude on the part of the husband is not, perhaps, such legal cruelty that it would justify a wife in leaving the home; but there is a species of cruelty which cuts deeper than a blow or the lash, and that is the weakening of a husband's love and affection through the disparagement of the wife by the husband's mother, and when not resented by him, but apparently sustained, is bound to destroy the happiness of the home. Under such circumstances it is his duty to remove the cause, and if he refuses, it is a potent element in the consideration of the questions whether he did not consent to the separation, and whether he made a bona fide effort to induce his wife to return. The animus of the mother is further manifested by the fact that, although an inmate of the house when the child was born, she never made any effort to see the child, and, so far as the testimony shows, never did.

This case illustrates the futility of attempting to establish such a home as a husband should provide for his wife, when one of the component parts is his mother, who up to the time of the introduction of the wife is its head, and who is not willing to graciously accord to the wife her rightful position as mistress, and where the husband, in all disagreements between his mother and wife, either supports the mother or remains neutral between the contending

forces. It is the duty of the husband to provide a home for his wife, where she is recognized by its inmates as the household mistress, and when the husband subjects his wife in the management of her household affairs to the interference of his mother, who manifests an enmity towards the wife, and by words and acts assails her conduct and reputation to such an extent that she cannot endure it, and leaves the home for that reason, her desertion may be wilful, but it does not become obstinate so long as the husband makes no effort to induce her to return to a home freed from the contentious element. Shortly before the wife left, she again told her husband that, unless he provided a home apart from his mother, she would leave, and he admits that his reply was, "that is up to you," and on the day she moved he was present cutting the lawn, but paid no attention to the moving, nor did he say a word to her of protest, or request her to remain.

The fair inference from this record is that he tacitly consented to the separation, preferring to retain his mother, rather than his wife and child. Under these circumstances the husband was not without fault, and, assuming that the desertion by the wife was wilful, it is not obstinate unless, after a bona fide effort to effect a reconciliation, the wife refused to return, and we must therefore consider and determine whether such an effort has been made. It was manifest to the husband that no permanent reconciliation could be effected if the same conditions remained, and the wife required to accept a home with his mother, who considered her "a bad, wicked woman." This was an humiliation he knew she would not submit to. In our opinion the record fails to show any such bona fide effort as the law requires. In *Van Wart v. Van Wart*, 57 N. J. Eq. 598, 41 Atl. 965, the husband, when the wife was leaving, as in this case, "stood by without asking her to stay," and it was held that it was his duty to make a bona fide effort to induce her to return. "Desertion cannot be considered as obstinate on the part of one, when the separation is acquiesced in by, and entirely satisfactory to, the other, who neither entertains nor manifests any desire that the separation, nor the causes which brought it about, should cease." *Chipchase v. Chipchase*, 48 N. J. Eq. 549, 22 Atl. 588, affirmed on opinion below 49 N. J. Eq. 594, 26 Atl. 468.

What has the petitioner done in this case to manifest a sincere desire that the separation, and the causes which brought it about, should cease; the cause being a contentious mother-in-law, unkindly disposed towards the wife? We have his admission that he has never visited his wife or child, although L.R.A.1917F.

they lived in the same city, and he testifies that he has no affection for the child. He does not claim that he would not have been allowed to see either his wife or child, or that he made any effort to do so; he sulked in his tent until he wished to obtain a divorce. In March, 1913, he removed to New Jersey for, as he testified, the express purpose of obtaining a divorce for desertion, and his only effort to induce his wife to return was sending her two letters, one dated February 1, 1913, and the other April 1, 1913. The first letter was written shortly before he moved to this state, and when, presumably, he had decided to do so for the purpose of obtaining a divorce, and it should be read from that viewpoint. He asks whether she expects to live in the present manner for the rest of her life, whether she intends to return to his home, or whether she is going to get a divorce, and then adds, "the home is just the same as it always was; I never told you to go, or debarred you from returning, and you can return under the same conditions as you originally came to it," and that, if she wished a divorce, "you can have a divorce from me at any time without any contest." It is not difficult to read between the lines that this was not a bona fide attempt to remove the cause and end the separation. It contains no word of affection, no request to return; all that he offers is a place to live under the old conditions, and it was evidently written to lay the basis for a divorce in this state after removal thereto; besides this, an offer not to contest a divorce suit instituted by her is hardly consistent with a bona fide desire to induce a reconciliation, but rather an invitation to join with him in making it permanent by a divorce.

The second letter contains a notification that he has removed to New Jersey, and that his house was still open to her, "the same as prior to the time you left me and your home at Brooklyn." Neither letter contains any invitation or request to return, and the last was written immediately after he moved to this state in order that he might secure a divorce; and it is not credible that the petitioner, having just moved to the state with the intention of obtaining a divorce, really intended that it should induce his wife to accept, and thus prevent the accomplishment of the purpose he had in view. He knew that so long as the original cause remained he was in no danger of acceptance; he does not invite, but informs her that she may return under old conditions; and it was manifestly not his intention to ask her to come, for he carefully avoids doing so, but at the same

time notifies her that, if she comes, she must do so with the cause of separation still present. To this letter defendant replied, 'expressing her desire and willingness to return if the mother was not a part of the family. The petitioner, having, in effect, consented to the separation, and failed to

show that he has made a bona fide attempt to end the separation, is not entitled to a decree for divorce for desertion.

The decree appealed from will be reversed, and the record remanded to the Court of Chancery, so that the petition may be dismissed.

OHIO SUPREME COURT.

P. C. O'BRIEN, Treasurer of Cuyahoga County, Plff. in Err.,
v.

PHYSICIANS' HOSPITAL ASSOCIATION

(— Ohio St. —, 116 N. E. 975.)

Corporation — purpose — proof.

1. A corporation organized not for profit may show by its charter, constitution, and by laws, or by oral evidence not inconsistent therewith, that it is organized solely for the purpose of administering a public charity, the foundation of which is derived from private donations.

For other cases, see Charities, I. b, in Dig. 1-52 N. S.

Trust — property purchased with charity funds.

2. Property purchased with funds donated for public charity is impressed with the trust character of the funds with which it was purchased, and neither the property itself nor the income derived from its use can be diverted to private profit.

For other cases, see Charities, II. a, in Dig. 1-52 N. S.

Same — use of property.

3. The trustee of real estate purchased with funds donated for a specific public charity cannot lawfully use the property so purchased for purposes other than the administration of the trust imposed by the donors of the fund.

For other cases, see Charities, II. a, in Dig. 1-52 N. S.

Same — public charity.

4. Where funds are donated for the purpose of establishing and operating a public charity hospital, and the trustee of such funds purchases property therewith, and uses the same for the purpose of a hospital,

Headnotes by the COURT.

Note. — The effect of requiring payment from inmates as affecting the right of a charitable institution to public aid or exemption from taxation is discussed in the notes to *Ingleside Asso. v. Nation*, 29 L.R.A. (N.S.) 190, and *Dayton v. Speers Hospital*, L.R.A.1917B, 782.

The question suggested in the second headnote, with reference to the trust character of the funds of a public charity and their diversion from such trust, is discussed in its relation to the liability of a charitable L.R.A.1917F.

such hospital must be conducted as a public charitable hospital.

For other cases, see Charities, II. a, in Dig. 1-52 N. S.

Charity — hospital — pay patient.

5. A public charitable hospital may receive pay from patients who are able to pay for the hospital accommodations they receive, but the money received from such source becomes a part of the trust fund, and must be devoted to the same trust purposes, and cannot be diverted to private profit.

For other cases, see Charities, II. a, in Dig. 1-52 N. S.

Same — exhausting accommodations with pay patients.

6. A public charitable hospital cannot receive pay patients to such an extent as will exhaust its accommodations so that it cannot receive and extend hospital service to the usual and ordinary number of indigent patients applying for admission under proper rules and regulations adopted by the authority managing and controlling the operation of such hospital.

For other cases, see Charities, II. a, in Dig. 1-52 N. S.

(March 6, 1917.)

ERROR to the Court of Appeals for Cuyahoga County to review a judgment affirming a judgment of the Court of Common Pleas in plaintiff's favor in an action brought to enjoin defendant from demanding or collecting from plaintiff a tax on certain real estate used for hospital purposes. Affirmed.

Statement by Donahue, J.:

On the 15th day of January, 1915, the Physicians' Hospital Association filed its petition in the common pleas court of Cuyahoga county, averring that it is a corpora-

institution for personal injuries, in some of the following cases and notes on that general question: *Farrigan v. Pevear*, 7 L.R.A.(N.S.) 481; *Bruce v. Central M. E. Church*, 10 L.R.A.(N.S.) 74; *Thornton v. Franklin Square House*, 22 L.R.A.(N.S.) 486; *Hordern v. Salvation Army*, 32 L.R.A.(N.S.) 62; *Basabo v. Salvation Army*, 42 L.R.A.(N.S.) 1144; *Schloendorff v. New York Hospital*, 52 L.R.A.(N.S.) 505; and *Loeffler v. Sheppard & E. P. Hospital*, L.R.A.1917D, 505.

tion not for profit; that it is the owner of certain described real estate situate in Cleveland, Cuyahoga county, Ohio, upon which premises it is operating and conducting a public hospital, known as "Grace Hospital," as an institution of purely public charity only; that the same is exempt from taxation under the laws of Ohio; that the hospital maintains thirty-seven beds for patients and is open to the public to the extent of its facilities; that all moneys received by it are applied toward the discharge of its outstanding indebtedness and in the payment of current expenses and the advancement and promotion of the objects and purposes of its incorporation; and that the auditor of Cuyahoga county has, without authority of law, placed its property upon the tax duplicate, charged with \$367.10 taxes and penalty, and delivered the duplicate to the defendant, P. C. O'Brien, treasurer of Cuyahoga county, who threatens to, and will unless restrained by the court, proceed to advertise and sell the same for the payment of the taxes illegally assessed against it and the penalty illegally charged thereon for nonpayment. The prayer of the petition is that the defendant treasurer be permanently enjoined from demanding and collecting from plaintiff said taxes and penalty, and enjoined from advertising and selling the property for the purpose of collecting the same, and for all other equitable relief.

The defendant by answer admits his official capacity as treasurer of Cuyahoga county; that plaintiff is the owner of the property described in the petition; that there is charged against the property, upon the tax duplicate, the amount stated in plaintiff's petition; and denies each and every other allegation in the petition contained.

On November 3, 1915, the court of common pleas found on the issues joined in favor of the plaintiff, and permanently enjoined the defendant treasurer from demanding or collecting said taxes and penalty. Error was prosecuted to this judgment in the court of appeals, which court affirmed the judgment of the common pleas court, and this proceeding is brought in this court to reverse the judgment of the common pleas court and the judgment of the court of appeals affirming the same.

Messrs. Cyrus Locher and Frederick W. Green, for plaintiff in error:

The exemption from taxation of property is determined by its exclusive use for certain purposes.

Watterson v. Halliday, 77 Ohio St. 150, 82 N. E. 962, 11 Ann. Cas. 1096; Gerke v. Purcell, 25 Ohio St. 229; Cincinnati v. L.R.A.1917F.

Lewis, 66 Ohio St. 49, 63 N. E. 588; Benjamin Rose Institute v. Myers, 92 Ohio St. 252, L.R.A.1916D, 1170, 110 N. E. 924.

Messrs. Chapman, Howland, Niman, & Younger, for defendant in error:

The real estate in question is exempt from taxation under the Constitution and the laws of Ohio.

Gerke v. Purcell, 25 Ohio St. 229; Humphries v. Little Sisters of the Poor, 29 Ohio St. 201; Cleveland Library Assn. v. Pelton, 36 Ohio St. 253; Davis v. Cincinnati Camp-Meeting Assn. 57 Ohio St. 257, 49 N. E. 401; Conner v. Sisters of the Poor of St. Francis, 10 Ohio S. & C. P. Dec. 86; Cincinnati Gymnasium & Athletic Club v. Edmondson, 13 Ohio N. P. N. S. 489.

Donahue, J., delivered the opinion of the court:

It is shown by the articles of incorporation, and conceded by counsel for plaintiff in error, that the Physicians' Hospital Association was organized as a corporation not for profit, under the general corporation laws of this state. Neither the articles of incorporation nor the constitution adopted by the association shows that the purpose of the organization is a public charity. The written by-laws were not admitted in evidence, but the oral evidence fairly establishes the fact that this hospital is conducted as a public hospital, open at all times to the public, regardless of color, and is at the service of any reputable physician of any school of medicine to the extent of its facilities, without limitation or discrimination as to the individual applicant,—excepting cases of contagious disease and cases of mental disease requiring restraint, for the handling of which the hospital has no facilities, maternity cases not of emergency or surgical nature, and cases where it is suspected that the hospital is to be used to cover up criminal practices.

Where patients are financially able, they are required to pay \$10 per week for ward beds, and from \$15 to \$35 per week for rooms, depending upon the number occupying a room, or the size, location, or desirability thereof; and whenever the doctor sending a patient to the hospital certifies that the patient is not able to pay anything, no charge is made. Accident and other emergency cases are admitted without recommendation, regardless of the ability of the patient to pay. It also appears from the evidence that the expenses of operating the hospital are largely in excess of the revenues derived from patients; that the physicians who are members of this corporation, and one other, donated the original fund necessary for the purchase and equipment of the hospital; and that since that time further

donations have been made, for none of which certificates of stock were issued, nor can they be issued under the charter.

Taken in connection with this evidence, the petition of the plaintiff filed in this case—now a matter of public record, the truth of which can never be challenged by the Physicians' Hospital Association—declares that this hospital is operated and conducted exclusively for charitable purposes. The trial court found these allegations to be true, and unless reversed by this court in this error proceeding that judgment becomes res judicata of the facts so found. Therefore, notwithstanding the indefiniteness of this charter and constitution, this corporation is forever estopped from denying its eleemosynary character, and can never divert its revenues from the purposes of public charity.

The state is fully authorized to enforce the execution of the trust involved in the gift of the foundation fund, according to the intention of the donors and the purposes of the organization, and prevent the diversion of its funds to private profit. While it appears from the evidence that the physicians who are members of this corporation receive pay for the treatment of patients who are sent there upon their recommendation, where the patient is able to pay, this cannot affect the character of the institution itself. The hospital purports to furnish only hospital accommodation, and not professional treatment by physicians or surgeons. Whatever services are rendered indigent patients without charge is a matter of charity on the part of the physicians, who may or may not be members of the hospital association. Nor does the fact that a public charitable hospital receives pay from a patient for lodging and care affect its character as a charitable institution. *Taylor v. Protestant Hospital Asso.* 85 Ohio St. 90, 39 L.R.A. (N.S.) 427, 96 N. E. 1089, 1 N. C. C. A. 438.

There is no claim made in the pleadings that this corporation is a plan or subterfuge on the part of its promoters for the purpose of deriving profit under the guise of a charitable institution. That question could hardly be made in this case, but rather in a case brought by the state, or on behalf of the state, to revoke its charter either for a fraud upon the state in procuring the charter to issue, or for an abuse of its corporate powers. It further appears that this property is actually used by the defendant in error in the operation of its hospital. Under its charter, the allegations of its petition, the evidence in this case, and the finding and judgment of the court of common pleas, this property cannot lawfully be used by

this corporation for a hospital other than a public charity hospital.

Where private property is temporarily used exclusively for purposes of public charity, it may be withdrawn from such use at any time at the will of the owner, but that cannot be done with the property in question. It was purchased with trust funds donated for the purposes of a public charity hospital, and is impressed with that trust. It cannot be withdrawn from the uses of this trust at the will of the trustee, or of any or all of the donors of the fund. The donors of this fund have parted with all private ownership in the fund itself. They have no property interest in the fund, or the real estate purchased with the fund, and no rights whatever in relation thereto, except to compel the administration of the trust in accordance with the terms of the gift. The title to this property is in this corporation only as a trustee for the purposes of this trust, and it cannot divert it to any use other than public charity.

Every dollar received by this association from patients who are able to pay, or from other sources, immediately becomes impressed with the same trust, and cannot be diverted to private profit. This corporation can be compelled by a court of competent jurisdiction to administer this trust according to the intent and purpose of the donors of the fund, as found by the court of common pleas in this case; or, upon its failure to do so, it can be removed, and another trustee appointed who will properly administer the same. It is true that this corporation is not compelled to use this property for hospital purposes. It may find the property inadequate for its needs, and purchase other property for the purposes, or it may find it unnecessary to occupy the entire property for a hospital, and may sell the same, or rent the whole, or a part thereof, as may in its judgment be for the best interest of the trust; but the funds obtained from sale or rentals would still be trust funds, that could not be devoted to any purpose other than the purposes of the trust, although the property itself would no longer be used exclusively for public charity. If, however, it uses this property exclusively for hospital purposes, then such hospitals must be a public charitable hospital, and as such its doors must open to those who are unable to pay the same as they open to those who have the means to contribute further sums to this public charity commensurate in a degree at least with the hospital accommodations they receive.

The fact that it may receive pay patients without losing its character as a public charitable hospital does not authorize it to receive pay patients in such numbers as to

exhaust its accommodations, so that it cannot receive and extend hospital service to the usual and ordinary number of indigent patients applying for admission under proper rules and regulations of the board of trustees,—excepting, of course, the cases it has no facilities for handling, as described and defined by the evidence in this case. The first concern of a public charitable hospital must be for those who are unable to pay. If, after taking care of these, it still has further accommodations, there can be no objection to making use of the same for pay patients in order to increase the fund which may be at its disposal for the benefit of the poor. It may be, however, that it cannot always nicely measure these demands. It is sufficient if it conforms its conduct along the lines of its experience as

to the ordinary and usual demand made upon it by charity patients, provided, always, that it act in good faith and consistent with the purposes of its organization.

If this defendant in error fails in these particulars, the remedy is not by placing this property upon the tax duplicate, but by action to enforce a proper administration of the trust, or the revocation of its charter for abuse of its corporate franchise, and the appointment of another trustee to administer the trust.

The judgment of the Court of Appeals affirming the judgment of the Court of Common Pleas is affirmed.

Nichols, Ch. J., and Wanamaker, Newman, Jones, Matthias, and Johnson, JJ., concur.

FLORIDA SUPREME COURT.

SOUTHERN COLONIZATION COMPANY,
Appt.,
v.

H. D. DERFLER.

(— Fla. —, 75 So. 790.)

Deed — condition — use of word.

1. The word "condition" is not necessary to the creation of an estate upon condition, if it plainly appears from the words used that the intent of the parties was to create an estate of that description.

For other cases, see Deeds, II. c, 2, in Dig. 1-52 N. S.

Vendor and purchaser — rescission — breach of covenant.

2. Where a covenant is dependent, the failure to perform it entitled the other party to the contract to rescission.

For other cases, see Vendor and Purchaser, I. c, in Dig. 1-52 N. S.

Same — undertaking to construct railroad.

3. In a contract for the sale of lands which contains a proviso that "these presents are made and entered into partly in consideration thereof, anything in this agreement to the contrary notwithstanding; that the vendor will construct and operate, or cause to be constructed and operated, on or before December 31, 1912, a line of railroad running approximately in a northerly and southerly direction through the body of land of which the aforesaid lands are a

part; said line of railroad to be so constructed as to be within 10 miles thereof."—such proviso is a dependent covenant, and upon the failure of the land company to comply with the same the vendee has the right to rescission of the contract and the return to him of any amount which he may have paid on the same.

For other cases, see Vendor and Purchaser, I. c, in Dig. 1-52 N. S.

Covenant — dependent — intent.

4. To ascertain whether covenants are dependent or not, the intention of the parties is to be sought for and regarded rather than the order or time in which the acts are to be done, or the structure of the instrument, or the arrangement of the covenant.

For other cases, see Covenants and Conditions, II. a, in Dig. 1-52 N. S.

Contract — proviso — condition.

5. A proviso in a contract creates a condition precedent, in the absence of anything in the contract to show that such was not the intention of the parties.

For other cases, see Covenants and Conditions, II. a, in Dig. 1-52 N. S.

Sale — tender — article not bargained for.

6. In a contract of sale where the article tendered is different in any respect from the article bargained for, the other party is not bound to take it.

For other cases, see Sales, III. a, in Dig. 1-52 N. S.

Contract — failure to perform — abandonment.

7. When the failure to perform a contract is in regard to matters which would render the performance of the rest a thing differ-

Headnotes by BROWNE, Ch. J.

Note. — The right of the vendee to rescind a contract for the sale of land because of the vendor's breach of covenant to make improvements is treated in the notes to *Crampton v. McLaughlin Realty Co.* 21 L.R.A.(N.S.) 823, and *McMillan v. American Suburban Corp.* L.R.A.1917B, 403. L.R.A.1917F.

Generally, as to the waiver or loss of a purchaser's right to rescind a contract for purchase of real property, including effect of laches or delay, see note to *Faulkner v. Wassmer*, 30 L.R.A.(N.S.) 872; and later case, *Whitney v. Bissell*, L.R.A.1915D, 257.

ent in substance from what was contracted for, the party not in default may abandon the contract.

For other cases, see Contracts, V. b, in Dig. 1-52 N. S.

Same — rescission — laches — negotiations.

8. Where one party to a contract, on the breach thereof by the other, promptly gives notice that he will not be bound by the same, and demands to be put in the position in which he was at the time the contract was made, and offers to surrender all his rights under the contract, and enters into negotiations with the other party with the object of settling their differences without recourse to the courts, which ultimately come to naught, the doctrine of laches will not be applied to defeat the injured party of his remedy, when only about three years have elapsed, unless it is clearly shown that the defendant has been injured or deprived of some defense by reason of the delay in instituting suit.

For other cases, see Limitation of Actions, I. b, in Dig. 1-52 N. S.

Same — remedy at law — speculative damages.

9. The difference between the value of wild and unimproved lands situated about 70 miles from any railroad, and the same lands with a railroad running through or within 10 miles from them, may be very appreciable, but is so speculative as not to be susceptible of proof, and the party injured by the failure of one who agreed with him to construct the railroad has not an adequate remedy at law to recover damages for the breach.

For other cases, see Contracts, V. c, in Dig. 1-52 N. S.

(April 28, 1917.)

APPEAL by defendant from a judgment of the Circuit Court for Osceola County overruling a demurrer to the complaint in a suit for the cancellation of a contract for the sale of land and for the recovery of a certain amount, with interest, paid by plaintiff on the contract. Affirmed.

The facts are stated in the opinion.

Messrs. Crawford & Jarrell for appellant.

Messrs. Dickinson & Dickinson for appellee.

Browne, Ch. J., delivered the opinion of the court:

The appellee, the complainant below, brought suit against appellant by bill in equity in Osceola county to cancel a contract for the sale of land, and to recover \$730.95, with interest.

Under the terms of the contract, which is set out in full in the bill, the appellee agreed to buy a fraction over 82 acres of wild unimproved lands situated about 70 miles from any accessible railroad station, and was to L.R.A.1917F.

pay therefor \$1,441.30, with interest at the rate of 6 per cent per annum, payable \$480.40 on the execution of the contract, and the balance in five payments of \$192.90 and interest on the 13th day of February of 1912, 1913, 1914, 1915, and 1916.

The contract contained this clause:

"Provided, however, and these presents are made and entered into partly in consideration thereof, anything in this agreement to the contrary notwithstanding:

"1. That the vendor (Southern Colonization Company) will construct and operate, or cause to be constructed and operated, on or before December 31, 1912, a line of railroad running approximately in a northerly and southerly direction through the body of land of which the aforesaid lands are a part; said line of railroad to be so located as to be within ten (10) miles thereof."

There are various other terms and stipulations which are not necessary to refer to here, as nothing is involved concerning them.

The complainant alleges in substance he made the initial payment of \$480.40, and the first payment of \$192.90 and interest amounting to \$57.65, which came due on February 13, 1912, and otherwise complied with the terms of the contract. He further alleges that the Southern Colonization Company did not construct and operate, or cause to be constructed and operated, on or before December 31, 1912, a line of railway as conditioned in the contract, and that complainant, when the payment by him provided for in the contract came due on February 13, 1913, notified the defendant that he would not make the payment because the defendant had not built the railroad as provided and agreed, and demanded the return of the money he had paid on the contract, amounting to \$730.95, and offered to return and surrender his contract; and after considerable correspondence between them, the defendant finally stopped corresponding and failed to comply with his demand; that complainant never took or entered into possession of the land, and that the same are wild and unimproved, and in the same condition that they were at the time the contract was entered into, and that he is ready and willing to place defendant in statu quo by surrendering the contract and relieving him from all liability to complainant, and that he has filed the contract and a duly executed release thereof in the registry of the court to be delivered to defendant on cancellation of the contract and return by defendant of money paid him by complainant on the same.

The defendant filed a demurrer to the bill on the following grounds:

"(1) The bill of complaint does not show

a sufficient cause of action to warrant a rescission of the contract.

"(2) The bill of complaint shows that complainant has been guilty of laches.

"(3) The bill of complaint shows that complainant did not restore the property in controversy or any of the rights acquired in same to the respondent at the time rescission is claimed.

"(4) That the stipulation to build the railroad mentioned in said bill of complaint within a limited time is an independent covenant, and therefore not ground for rescission of any contract."

The demurrer being overruled, the defendant appealed, and assigns as error the overruling of the demurrer.

The main question raised by the demurrer is whether the clause in the contract of sale whereby the Southern Colonization Company bound itself to construct and operate a line of railroad through the body of land of which the land under consideration is a part, the railroad to be located so as to be within 10 miles thereof, is a dependent or an independent covenant. Notwithstanding that this question has been the source of much litigation, the authorities are helpful only in a general way, because, while the rule seems to be clear that where a covenant is dependent, the failure to perform it entitles the other party to the contract to a rescission, we come back to the proposition, whether this is a dependent or an independent covenant, and for the determination of that we must look to the contract itself. Where the contract states clearly that any or all the covenants to be performed by one party are conditioned upon the other party carrying out his covenants, or any of them, there is no trouble in construing it; but where it is not so expressed, it becomes necessary to construe the contract and derive therefrom what was intended. The word "condition" is not necessary to the creation of an estate upon condition, if it plainly appears from the words used that the intent of the parties was to create an estate of that description. *Glocke v. Glocke*, 113 Wis. 303, 57 L.R.A. 458, 89 N. W. 118; *Richter v. Richter*, 111 Ind. 456, 12 N. E. 698. "To ascertain whether covenants are dependent or not, the intention of the parties is to be sought for and regarded rather than the order or time in which the acts are to be done, or the structure of the instrument, or the arrangement of the covenant." 2 *Parsons*, Contr. 645.

A proviso in a contract creates a condition precedent, in the absence of anything in the contract to show that such was not the intention of the parties.

In *Wright v. Tuttle*, 4 Day, 313, Mr. Justice Swift said: "There is no word L.R.A.1917F:

more proper to import or express a condition than the word 'provided;' and it shall always be so taken, unless it appear from the context to be the intent of the party that it shall constitute a covenant."

In *Robertson v. Caw*, 3 Barb. 410, the court said: "'Provided' . . . is the appropriate term for creating a condition precedent." "The word 'provided' means 'on condition.'" *De Vitt v. Kaufman County*, 27 Tex. Civ. App. 332, 66 S. W. 224. "No word better expresses a condition, and it is always so taken, unless the context shows that the intent was to create a covenant." *Rich v. Atwater*, 16 Conn. 409. Webster defines "provided" as "on condition; with the stipulation; with the understanding." The Standard Dictionary definitions are: "On condition; it being stipulated or understood; a conditional particle expressing a limitation or exception; followed by that expressed or understood, or provided that so and so shall happen."

The clause in the contract under consideration is even stronger than if it had merely said "provided, that," etc. It says: "Provided, however, and these presents are made and entered into partly in consideration thereof, anything to the contrary notwithstanding; that the vendor (Southern Colonization Company) will construct and operate, or cause to be constructed and operated, on or before December 31, 1912, a line of railroad running approximately in a northerly and southerly direction through the body of land of which the aforesaid lands are a part; said line of railroad to be so located as to be within ten (10) miles thereof."

The price contracted to be paid, nearly \$17.50 per acre for wild lands approximately 70 miles from any line of railroad, supports the appellee's contention that the Southern Colonization Company contracted to sell him land situated within 10 miles of a railroad, the construction of which by appellant was a condition precedent to the complete fulfilment of his part of the contract.

An examination of the cases cited by the appellant in support of its contention that the agreement of the Southern Colonization Company to build the railroad is not a dependent condition discloses that in all of them the decision was predicated on a different state of facts from that presented in the instant cause. A brief review of some of them will disclose the distinction. The case of *Stephenson v. Atlas Coal Co.* 147 Ala. 432, 41 So. 301, was one to cancel an executed contract. In the case of *Piedmont Land Improv. Co. v. Piedmont Foundry & Mach. Co.* 96 Ala. 389, 11 So. 332, a deed had been given in part consideration of

the Piedmont Foundry & Machine Company erecting a foundry on the land and keeping it in full operation for a term of two years. The foundry company erected the works and operated them for a time, but stopped work before the expiration of two years upon becoming insolvent. In this case the deed had passed, and the foundry had been erected, conditions which are not found in the case under consideration. The court in that case said: "From these facts it is quite manifest that if a rescission should be decreed by the court, it would not be practicable for the parties to be put in the situation they occupied when the contract was made."

There is no impediment to putting parties to this suit in the identical situation they occupied when the contract was made. The bill alleges that the complainant never took possession of and entered into possession of the lands, which are wild and unimproved, and are in the same condition they were at the time the contract was made; and that complainant has deposited the contract and a duly executed release thereof with the clerk of the circuit court for Osceola county, to be held by him in the registry of the court to be delivered to the appellant upon the court decreeing a waiver of the contract, and the return to complainant of the money he has paid on account of same. In *Barnes v. Campbell*, — Tex. Civ. App. —, 179 S. W. 444, the vendor filed a plat showing a viaduct which connected a tract of land in which vendee purchased a number of lots, within the city of Dallas. Contemporaneously to filing this plat, there was filed a deed of dedication to the city of Dallas by the appellant (vendor), which began with the recital, "Whereas, there is to be built a viaduct on or across the G., C. & S. F. R. R. tracks," and the right of way had been conveyed and dedicated. In the deed of dedication the city was granted the privilege to construct an approach to the viaduct, and a sufficient portion of the company's land was given the city for the construction of the approaches. Campbell sold some of the lots, and subsequently he and other owners thereof brought suit to have the deeds canceled. The case differed from the instant case in that the deeds had passed and the consideration fully paid, and there was no express agreement that Barnes and Mitchell were to construct the viaduct.

In the case of *Lewis v. Brookdale Land Co.* 124 Mo. 672, 28 S. W. 324, a street car manufacturing company, for a bonus, contracted with the Brookdale Land Company to construct its plant on the land company's land, and to maintain it there for a certain time. The land company to raise the bonus sold a number of lots in the tract

where the manufacturing plant was to be built, and the contract of sale contained a condition that it should only be in force if the land company should secure the location of the car company's works on a designated part of the tract. The car company constructed its works and had them in running order and operated its business as a plant by the time called for in its contract with the land company. Lewis then closed up his lot purchase by taking a deed, and finally met all deferred payments; but before making his last payment he visited the street car works and found them in full operation. Subsequently the car works were destroyed by fire and were not rebuilt. Lewis brought suit against the land company to have his deeds canceled, and to recover what he had paid for his lots. The court held that Lewis was a mere stranger to the contract between the two companies, "and was not in privity with either of the contracting parties in that contract." The court further held that the evidence showed that the car company's works were secured and located as required, and in actual operation when destroyed by fire, and said: "It seems to be evident that the ultimate object in view, the capsheaf of the contract, was the securing of the location of the car company's works at the point designated; the other portions of the instrument were but subsidiary to that end. . . . The authorities cited by defendant abundantly support the position that if the end to be attained has been secured, . . . minor matters and measures conducing thereto, . . . although they remain to some extent unperformed, will be disregarded."

If the appellant in the instant case had built the railroad and commenced operating it, and the appellee had completed his payments and taken deeds for his land, and subsequently, through adversity or other cause, the company ceased to operate the railroad, the case would come within the doctrine of the case cited. The "capsheaf" of the contract in the instant case was the construction of the railroad, and that was unperformed.

In the case of *Crampton v. McLaughlin Realty Co.* 51 Wash. 525, 21 L.R.A.(N.S.) 823, 99 Pac. 586, a contract for the sale of land on deferred payments contained several clauses in the nature of building restrictions, and concluded with these covenants: "Said first parties agree that they will, free of cost to said second party, put in the necessary cement sidewalks, sewer and water mains, and pave the abutting street, within one year from the date hereof." The defendants set up in their answer that they had partially paved the street, and had put in sidewalks, water mains, gutters, and

curbs, and had laid the foundation for paving the street, and had completed 75 per cent in the cost and value of the improvements which they had agreed to make.

A leading English case, that of *Bowes v. Shand*, L. R. 2 App. Cas. 455, after several appeals, was finally decided by the House of Lords. In that case, two contracts were made in London, each for the sale of 300 tons of "Madras rice, to be shipped at Madras or coast for this port during the months of March and April, 1874, per Rajah of Cochin." Part of the rice was shipped in February and part in March; the purchaser refused to accept the rice, and the seller sued for the purchase price, contending that the clause in the contract "to be shipped during the months of March and April" was not a condition precedent, and that its being shipped at another and different time was only a breach of stipulation which could be compensated for in damages. The purchaser contended that the time when the rice was to be shipped was part of the description of the subject-matter of what was sold, and if that part of the contract was not complied with, he had the right to ignore the contract, and should not be required to take the goods, seek compensation in damages; and this view was accepted by the House of Lords. Lord Chancellor Cairns said: "Before leaving that part of the case, I must advert to a suggestion which was made at the bar on behalf of the respondents, although it does not appear to have been made in the court below. It was suggested that even if the construction of the contract be as I have stated, still if the rice was not put on board in the particular months, that would not be a reason which would justify the appellants in having rejected the rice altogether, but that it might afford a ground for a cross action by them if they could show that any particular damage resulted to them from the rice not having been put on board in the months in question. My lords, I cannot think that there is any foundation whatever for that argument. If the construction of the contract be as I have said that it bears, that the rice is to be put on board in the months in question, that is part of the description of the subject-matter of what is sold. What is sold is not 300 tons of rice in gross or in general. It is 300 tons of Madras rice to be put on board at Madras during the particular months."

In the same case Lord Blackburn said: "It was argued, or tried to be argued, on one point, that it was enough that it was rice, and that it was immaterial when it was shipped. As far as the subject-matter of the contract went, its being shipped at another and different time being (it was

said) only a breach of a stipulation which could be compensated for in damages. But I think that that is quite untenable. . . . If the description of the article tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it. . . . Before the defendants can be compelled to take anything in fulfillment of that contract, it must be shown not merely that it is equally good, but that it is the same article as they have bargained for; otherwise they are not bound to take it."

In the case of *Ballance v. Vanuxem*, 191 Ill. 319, 61 N. E. 85, the court said: "When the failure to perform the contract is in respect to matters which would render the performance of the rest a thing different, in substance, from what was contracted for, so far as we are advised the authorities all agree the party not in default may abandon the contract."

See also *Bank of Columbia v. Hagner*, 1 Pet. 455, 7 L. ed. 219; *Norrington v. Wright*, 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. Rep. 12; *Telfener v. Russ*, 162 U. S. 170, 40 L. ed. 930, 16 Sup. Ct. Rep. 695; *Bordenave v. Gregory*, 5 East, 107, 102 Eng. Reprint, 1009, 1 Smith, 306.

Construing this contract in the light of all conditions and circumstances, it seems clear to us that Derfler intended to buy, and the Southern Colonization Company agreed to sell to him, land situated on or within 10 miles of a railroad. He did not contract to buy wild, unimproved lands upward of 75 miles from a railroad, but lands either on or within 10 miles of one. The payments were distributed over a period of time, so that the last four payments would not fall due until the time when the railroad was to be completed and in operation. When this time had elapsed and the railroad had not been constructed as provided and agreed, Derfler at once notified the colonization company that he would make no more payments, and demanded the return of all the money he had paid them, and offered to surrender his contract.

There was some delay before the suit to rescind was instituted, and the appellant contends that Derfler was guilty of laches. The bill charges that promptly upon the expiration of the time when the railroad was to have been completed, Derfler offered to surrender his contract, and demanded the return of all money he had paid the colonization company, but that they kept writing and dickering with him for some months, and finally refused to correspond with him any further.

Where one party to a contract on the breach thereof by the other party promptly gives notice that he will not be bound by

the same, and demands to be put in the position in which he was at the time the contract was made, and offers to surrender all his rights under the contract, and enters into negotiations with the other party with the object of settling their differences without recourse to the courts, which ultimately come to naught, the doctrine of laches will not be applied to defeat the injured party of his remedy, when only about three years have elapsed, unless it is clearly shown that the defendant has been injured or deprived of some defense by reason of the delay in instituting suit.

The only other question for consideration is the contention that the appellee is confined to a suit at law for damages for the breach of the contract. The difference between the value of wild and unimproved lands situated about 70 miles from any railroad, and the same lands with a railroad running through, or within 10 miles of

them, is so speculative as not to be susceptible of proof. In the cases cited by the appellant in support of his position, the damages were capable of being accurately estimated and proven. The proper determination of this point, however, does not depend solely on whether the damages are capable of being estimated and proven, because, as we have already shown, the article which the Southern Colonization Company was capable of selling to Derfler was not what he contracted to buy, and that he therefore had the right to ignore the contract, and demand that he be placed in the position in which he was at the time the contract was made. We find no error in the order of the Chancellor overruling defendant's demurrer to the bill, and the judgment is affirmed.

Taylor, Shackelford, Whitfield, and Ellis, JJ., concur.

KANSAS SUPREME COURT.

HENRY D. FRASER

v.

CHICAGO, ROCK ISLAND, & PACIFIC
RAILWAY COMPANY, Appt.

(101 Kan. 122, 165 Pac. 831.)

Master and servant — injury of servant by burglar — liability of master.

The defendant, an interstate carrier, maintains a large freight house having many doors. It was known there were persons about the freight house at different times of the night watching for an opportunity to steal property in the defendant's care. At the close of business each day, it was the duty of an employee known as the door man to close all doors and bolt them. The plaintiff was night watchman of the freight house, and his duties were to look after and protect the property in the defendant's custody. The first duty of the watchman, on coming into the building in the evening, was to see that all doors were closed and bolted, but this duty had not been communicated to the plaintiff. At 1:05 A. M., while going his rounds, the plaintiff discovered that one of the doors was open. Suspecting the presence of an intruder, he commenced to draw his revolver, when he was shot in the arm by which he carried his lantern, by a man who escaped through the open door. The plaintiff had passed by the door hourly since 7:05 of the evening before, and the door had been closed. Assuming the door

man failed to bolt the door, it is held the omission merely created a condition which made entrance into the building less difficult, and that the cause of the plaintiff's injury was the independent, unrelated, criminal act of the intruder, who used the door to gain admission to the building. For other cases, see *Proximate Cause, V. in Dig. 1-52 N. 8.*

(June 9, 1917.)

APPEAL by defendant from a judgment of the District Court for Wyandotte County in plaintiff's favor in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. Reversed.

The facts are stated in the opinion.

Messrs. Paul E. Walker, Luther Burns, and O. L. Miller, for appellant:

As between a railroad company and its employee, it will be presumed, in the absence of anything to the contrary, that the railroad company has performed its duty in all respects.

Atchison, T. & S. F. R. Co. v. Wagner, 33 Kan. 660, 7 Pac. 204, 15 Am. Neg. Cas. 19; Chicago, R. I. & P. R. Co. v. Rhoades, 64 Kan. 553, 68 Pac. 58, 11 Am. Neg. Rep. 383; Atchison, T. & S. F. R. Co. v. Baumgartner, 74 Kan. 148, 85 Pac. 822, 10 Ann. Cas. 1094.

The leaving of this door unlocked or unfastened was not the proximate cause of the injury to the plaintiff.

Missouri P. R. Co. v. Columbia, 65 Kan. 390, 58 L.R.A. 399, 69 Pac. 338; Cleghorn v. Thompson, 62 Kan. 727, 54 L.R.A. 402, 64 Pac. 605; Cole v. German Sav. & L. Soc. 63 L.R.A. 416, 59 C. C. A. 593, 124 Fed. 113,

Headnote by BURCH, J.

Note. — As to liability of master for the intentional killing or injury of a servant by a third person, see annotation following this case, post, 753.
L.R.A.1917F.

14 Am. Neg. Rep. 676; *Jennings v. Davis*, 109 C. C. A. 431, 187 Fed. 703; *Teis v. Smuggler* Min. Co. 15 L.R.A. (N.S.) 893, 85 C. C. A. 478, 158 Fed. 260; *Scheffer v. Washington City*, V. M. & G. S. R. Co. 105 U. S. 249, 26 L. ed. 1070; *Atchison, T. & S. F. R. Co. v. Calhoun*, 213 U. S. 8, 53 L. ed. 874, 29 Sup. Ct. Rep. 321; *Kitchen v. Carter*, 47 Neb. 776, 66 N. W. 855; *Texas & P. R. Co. v. Beckworth*, 11 Tex. Civ. App. 153, 32 S. W. 347, 6 Am. Neg. Cas. 723; *Claypool v. Wigmore*, 34 Ind. App. 35, 71 N. E. 509; *Alexander v. New Castle*, 115 Ind. 51, 17 N. E. 200; *McGahan v. Indianapolis Natural Gas Co.* 140 Ind. 335, 29 L.R.A. 355, 49 Am. St. Rep. 199, 37 N. E. 601; *Stone v. Boston & A. R. Co.* 171 Mass. 536, 41 L.R.A. 794, 51 N. E. 1, 4 Am. Neg. Rep. 490.

The independent act of a third person that intervenes between the wrong complained of and the injury sustained is a good test of remoteness that forbids recovery.

Cuff v. Newark & N. Y. R. Co. 35 N. J. L. 17, 10 Am. Rep. 205; *South Side Pass. R. Co. v. Trick*, 117 Pa. 390, 2 Am. St. Rep. 672, 11 Atl. 627; *Glassey v. Worcester Consol. Street R. Co.* 185 Mass. 315, 70 N. E. 199, 18 Am. Neg. Rep. 86; *Thweatt v. Houston, E. & W. T. R. Co.* 31 Tex. Civ. App. 227, 71 S. W. 976, 13 Am. Neg. Rep. 452.

Messrs. W. B. Sutton and W. B. Sutton, Jr., for appellee.

Burch, J., delivered the opinion of the court:

The action was one for damages for personal injuries sustained by the plaintiff, who was an employee of the defendant. The plaintiff recovered, and the defendant appeals.

The defendant maintains two freight houses in Kansas City, Missouri, which extend north and south and are connected by a dock or platform. At the close of business each day, a door man sees to it that all doors are closed and bolted. About 6 o'clock in the evening, a watchman comes in and remains until 6 o'clock the next morning. The watchman is the only man in charge of the company's property at night, and his duties are to protect and look after such property in all respects,—the lights, fire, water, theft, and, if doors be not secured, to secure them. Two registry boxes are installed in each building. In case of fire, the watchman breaks the box, pulls down a lever, and so gives an alarm. Besides this, the watchman is required to visit each box at stated intervals throughout the night, and by means of the bell indicate to the Western Union Telegraph office in the Stock Exchange building a block and a half from the freight houses that he is awake

and on duty. Frank Holland was the watchman for both buildings. The work was too heavy for one man, and the plaintiff took Holland's place as watchman of the north building. The plaintiff had been fireman of the heating plant which heated the freight house office. It required but a small amount of work to attend the heating plant, and he continued to do so after he assumed the duties of watchman. One night as the plaintiff was going his rounds, he saw an open door on the west side and toward the north end of the building. He had passed by the door hourly from 7:05 P. M. to 12:05 A. M., and the door had been closed; but, as he came to it at 1:05 A. M., it was open. He carried a lantern at his side in his left hand and a revolver in a holster under his left arm. Upon seeing the open door, he reached for his revolver with his right hand, and was immediately shot in the left arm by a man who escaped through the open door.

The plaintiff's petition does not contain the word "watchman." He framed his petition, and he framed his testimony to make it appear that aside from his duties as fireman his duties consisted in ringing those two bells, installed for the purpose of compelling him to make an hourly record of the fact that he was awake and about his business. He said the registry boxes were for protection against fire, and had to be rung every hour. He had no orders covering anything except his duties as fireman and turning in those registry boxes. He said Holland was a watchman, and had pulled the bells as part of his duties as watchman. Holland was relieved of all duty in the north building, but the plaintiff said one of Holland's duties was taken away and given to him, and that was to pull the bells, and he pulled them as fire protection. The plaintiff's superior officer left the order for him to ring those bells. He had no orders about doors, except the one through which he entered the building. That one he was required to shut, so people could not steal or burn or do any damage, and he locked it behind him to keep anybody from coming in after him. But there his duties in respect to doors ended. True, he said, "While working there I went round some with Holland, and found doors open, and we closed them;" but when he took Holland's place, and there was no other employee except himself in the building, sometimes he glanced around when going to ring his bells, and sometimes he did not. When not ringing the bells, he stayed in the office.

The supposed foundation for the defendant's legal liability in damages is this: The plaintiff was obliged to pass by the door through which the intruder entered every

hour of the night, in going from the office to the places where he worked the bell-ringing charm against fire. The door was left unlocked, and no guard was set to prevent desperadoes from making a breach through this weak place in the fortifications behind which the plaintiff rung his bells. These culpable omissions exposed the plaintiff, who was entirely without fault, to great bodily harm, and even to death, and did in fact, through a series of events linked together in natural sequence, proximately cause the plaintiff to be shot.

Testimony which the plaintiff himself produced, and the testimony of witnesses produced by the defendant whom the plaintiff did not undertake to contradict, cut the underpinning from the fabrication that bell ringing was an independent employment, and not a means of making hourly reports, and established the fact that the plaintiff was watchman of the north building in place of Holland, and succeeded to Holland's duties there. There are doors and doors of the north freight house, which is 600 feet long and 45 feet wide. A rolling door at the south end opens on the dock between the two buildings, and has bolts in the sides. Another door fastens in that way. The west doors, about thirty in number, are sliding doors, and when closed are fastened by bolts pushed down with the foot into slots. Sometimes it would be discovered that in closing the building in the evening a bolt had not been pressed down, and the proof, coming from the lips of the plaintiff's own witness as well as the witnesses for the defendant, was that the watchman's first duty on coming into the building in the evening was to see that doors were closed and fastened. The plaintiff did not dispute this proof, but on rebuttal merely reiterated his claim that he had no instructions regarding doors, and said he was carried on the pay roll as a fireman. The plaintiff had pleaded that he was engaged in interstate commerce, the defendant being an interstate carrier, and the case was submitted to the jury to say whether or not the defendant was negligent in not furnishing the plaintiff a safe place in which to pursue his nocturnal, indoor, interstate commerce pastime of bell ringing.

There was just one fair dispute concerning the facts, and that was whether or not, when the plaintiff became watchman as well as fireman, he was drilled with respect to looking after the doors of the building. There was no rational ground for dispute to be settled by the jury that the plaintiff was watchman, "ringing bells" being a freight-house expression denoting the duties of watchman, and the court should have in-

structed the jury to that effect. There was no dispute to be settled by the jury that the first thing for the watchman to do when he came on duty was to see that the doors were secured. A watchman of ordinary capacity might be expected to understand this fact without instruction. The plaintiff admitted he had gone about the building with the watchman, had observed open doors, and had closed them. But if the plaintiff needed instruction, the defendant's negligence consisted not in leaving the door unbolted, or failing to appoint a watchman to guard its watchman while on guard, but in not telling the plaintiff to see that the door was bolted. This negligence was not relied on as a basis for recovery.

There was evidence that it was generally known there were persons about the freight house at different times of night looking for an opportunity to steal property in the defendant's care. An unlocked door would facilitate an attempt to steal should one be made. The defendant, however, had taken precaution against theft. Besides providing a man whose instructions were to close and bolt the doors each evening, it provided a watchman, who went through the freight house with a lantern hour by hour throughout the night, and the plaintiff testified there were other watchmen about the freight house and railroad yards. The duty to take precaution to protect the property of shippers from theft was owed to shippers, and not to the plaintiff. That duty was performed, and was performed in part through the agency of the plaintiff himself.

The omission of the door man to bolt the closed door, and the shooting of the plaintiff, do not bear to each other the relation of cause and effect. Omission to bolt the door was fraught with no peril to the plaintiff, active or latent. Bolted or unbolted, the door was not a hazard which plaintiff encountered in his rounds, and omission to bolt it neither supplied nor set in action any dangerous instrumentality or agency. It merely created a condition which made entrance to the building less difficult than it otherwise would have been, should anyone desire to enter. The injury resulted from the violent and malicious act of a desperate person who took advantage of the condition to enter the building for some purpose not disclosed. He may have gone there to steal. When surprised, he exhibited such conduct as he willed, shot the plaintiff, and fled, but conduct which originated with him, and which did not originate with the door man or the door the evening before.

The plaintiff cites the well-known authorities to the effect that, if the action of an

intervening cause might have been anticipated, the intervening cause will not interrupt the connection between the original cause and the injury. The rule is sound, but it presupposes an original cause of injury which manifests consequences in an injurious result. We all anticipate pocket picking when the circus comes, and house-breaking during fair week; but the circus and the fair are not the causes of such crimes. We know, too, that should a house-breaker be discovered in the act of committing burglary, he might do violence to a person interrupting his depredation. But if, knowing the city to be infested with such characters we go out for the evening leaving the back door unlocked and leaving a servant in the house, omission to lock the door is not the cause of the burglary, should one occur, or the cause of injury to the servant who tries to intercept commission of the crime. The cause of injury originates with the burglar, whose entrance into the house was not obstructed by a locked door. On the other hand, when an act or omission has bound up in it perils which, in the natural order of things, are liberated or eventuate through the conduct of a responsible human being, which might have been anticipated, and injury results, the original act or omission is proximate cause. Potency to do harm was contained in the act or omission from the beginning, continued to threaten throughout the chain of events, and came to fruition in the ultimate injury, albeit the ultimate injury was promoted or precipitated through the agency of an intervening third person.

The principle involved is well illustrated by the case of *Clark v. E. I. du Pont de Nemours Powder Co.* 94 Kan. 268, L.R.A. 1915E, 479, 146 Pac. 320, Ann. Cas. 1917B, 340, which is cited by the plaintiff. Van Gray, the driller of an oil well, left solidified glycerin lying at the well. McDowell, an employee of the driller, carried the dangerous substance home with him. McDowell's mother required him to take it away, and he placed it in the fence surrounding an abandoned graveyard, where some boys found it and exploded it. In the opinion of the court prepared by Mr. Justice Dawson it was said: "No new power of doing mischief was communicated to the solidified glycerin by the acts of young McDowell. The power of doing mischief was inherent in the glycerin all the time. That some terrible accident was likely to happen in letting it out of the close custody of some one skilled in its use was not only natural and probable, but almost inevitable." 94 Kan. 276.

The plaintiff cites the case of *Horan v. Watertown*, 217 Mass. 185, 104 N. E. 464, L.R.A.1917F.

which is clearly against him. The sewer department of the town kept dynamite in a tool chest which could be opened without a key, which was not guarded, and which was left on a highway. Boys unlawfully took the dynamite from the box and threw it into a bonfire. The court stated the rule with reference to anticipating the independent act of a third person, and said: "Tested by this rule, the plaintiff's case fails. While the dynamite and the other contents of the box were left in such a way that a thief might not find it very difficult to steal them, it cannot be said that the defendant was bound to anticipate that this might be done and to guard against the consequences that might follow if a thief should steal the dynamite and so use it as to do injury to others. The general presumption of innocence would be inconsistent with this." 217 Mass. 186.

Let it be supposed that the court held the action of the boys should have been anticipated. The case would then afford no comfort to the plaintiff. The danger lay in the dynamite from the beginning, which merely waited for some one to explode it to cause injury, as in the Powder Company Case just referred to.

The plaintiff cites the case of *Norton v. Chandler & Co.* 221 Mass. 99, 108 N. E. 897, which does not sustain his contention. Friction strips on the revolving door of a store were out of order and did not keep the door from spinning. As a woman was entering the store, a wing of the door behind her struck her in the back. The door had been set spinning by a customer leaving the store in a hurry. It was held the act of the customer might have been anticipated. Here again the power to do mischief inhered in the defective door, and the wing of the door was the thing which struck the woman, not the customer.

In this case, no faculty for harm resided in the door, or was imparted to the door by the door man, which finally functioned upon the plaintiff through the instrumentality of the intruder's pistol.

The plaintiff cites the case of *Filson v. Pacific Exp. Co.* 84 Kan. 614, 114 Pac. 863, as a parallel case. The express company left a portable package worth \$600, the value of which was plainly marked on the package, in a frame depot at the outskirts of a small town over night. The depot had no police protection or watchman, was used for the deposit of express matter, freight, and mail received on night trains, and had been burglarized. The doors of the building were locked, and the windows were fastened; but some one broke a window and carried off the package in the nighttime. The question was whether or not the bailee

used due care to prevent loss of the property in its custody, considering its tempting character, the security afforded, and all other circumstances. It was held the question was one for the jury. The point was made that the lack of better protection was not the proximate cause of the loss, and it was held that if, under all the circumstances, loss by burglary might have been foreseen, it was the proximate result of the breach of duty complained of.

The difference between the two cases has been indicated by what has already been said. The plaintiff seeks to appropriate a cause of action for breach of duty which did not relate to him. It was the duty of the defendant to protect the property of shippers from theft. An unbolted door would make theft easier, and theft of property might be anticipated as a result of not bolting the door, if the property had no other protection. As to the plaintiff, however, the unbolted door was merely a condition and not a cause of injury. In the case of *Missouri P. R. Co. v. Columbia*, 65 Kan. 390, 58 L.R.A. 399, 69 Pac. 338, it was said: "A prior and remote cause cannot be made the basis of an action for the recovery of damages if such remote cause did nothing more than furnish the condition, or give rise to the occasion, by which the injury was made possible, if there in-

tervened between such prior or remote cause and the injury a distinct, successive, unrelated, and efficient cause of the injury." Syl. ¶ 2.

If it could be conceived that because a door was not bolted the plaintiff fell through it into some space and was injured, the unsafe condition of the door would be the cause of his injury. The injury would be the natural, foreseeable, proximate result of the cause. Here the proximate and efficient cause of the plaintiff's injury was the unrelated and independent act of a reckless ruffian, who used the door to gain admittance to the building. While the plaintiff tried to reduce himself to the status of the inert and inanimate personal property in the building, he was part of the protection afforded to that property. He accepted employment as part of the barricade against theft, and not as a thing to be surrounded by an impregnable barricade. He was a guard over property, and not a thing to be guarded. The bell-ringing theory of his employment broke down. He had no case, and the motion for a directed verdict in favor of the defendant should have been sustained.

The judgment of the District Court is reversed, and the cause is remanded, with direction to enter judgment for the defendant.

Annotation—Liability of master for the intentional killing or injury of a servant by a third person.

This annotation is intended to include only cases which have considered the common-law liability of a master for injury to or the death of a servant as a result of the felonious or malicious act of a third person. So cases coming under the Workmen's Compensation Act are excluded, as are also cases where the injury was inflicted by an employee or a fellow servant.

For cases under Workmen's Compensation Act where the workman suffers injury from assault, see annotation attached to *Re McNicol*, L.R.A.1916A, 309.

As to liability of master for injuries inflicted upon an employee maliciously or in sport by other employees, see *Medlin Mill. Co. v. Boutwell*, 34 L.R.A. (N.S.) 109, and *Robinson v. Melville Mfg. Co.* 52 L.R.A. (N.S.) 385; and see later cases, *Arkansas Natural Gas Co. v. Lee*, L.R.A.1916C, 1200, and *Sunderland v. Northern Exp. Co.* L.R.A.1916E, 1151.

A case presenting a situation analogous to, and which sustains the decision in, *FRASER v. CHICAGO, R. I. & P. L.R.A.1917F.*

R. Co. is Drake v. Topeka R. Co. (1915) 96 Kan. 727, L.R.A.1916E, 332, 153 Pac. 539, which held that the railroad company was not liable for an injury to its conductor inflicted by a drunken passenger who became incensed when, because of his behavior, he was remonstrated with, as was the conductor's duty under the rules promulgated by the company. The injury in each case was held to be proximately caused by the malicious act of the person inflicting it, and not, as alleged in the *FRASER CASE*, by a negligent act in leaving a door unbolted, nor, as alleged in the *Drake Case*, by the promulgation of the rules by the company. That in each case the injury was one which the employee might reasonably have expected might happen from the nature of the employment seems to have been an element entering into, if not the basis of, the decision. Thus, in the *Drake Case* the court stated that it was impossible to see how the conductor could have taken the employment without incurring the danger incident to all conductors

from drunken and disorderly passengers who now and then infest the cars of common carriers. And to the same purport is the statement in the FRASER CASE, that the watchman accepted employment as part of the barricade against theft, and not as a thing to be surrounded by an impregnable barricade; that he was a guard over property, and not a thing to be guarded.

In *Thomas v. Sloss-Sheffield Steel & I. Co.* (1905) 144 Ala. 188, 39 So. 715, an action to recover for death of one employed to guard the shaft of a mine to prevent escape of convicts, as result of being shot by life termers attempting to escape, the complaint, which alleged that the proximate cause of the death was the negligence in permitting ladders to be left in the shaft, by which the convict could climb up to the surface, also in permitting a dangerous life termers to have a firearm, and in failing to search him for firearms; was held not to state a cause of action, as there was an intervening, independent, and efficient cause of the injury complained of between the alleged negligence and the injury, and the damages were too remote.

A different situation is presented, distinguishable from that presented in the FRASER and Drake Cases, where an employer knowingly exposes an employee to personal danger from felonious or tortious designs of a third person, which are not to be expected from the nature of the employment, without acquainting the employee of such danger. The general rule in such cases is that the employer is liable for the consequences.

Thus, one who employs another, concealing the fact that former employees are on a strike and threaten violence against anyone taking their place, will be liable to such employee for injuries inflicted by such striking employees. *Holshouser v. Denver Gas & E. Co.* (1903) 18 Colo. App. 431, 72 Pac. 289, 13 Am. Neg. Rep. 635. The court stated that such employee, when he contracted to work, took upon himself the usual and necessary risks of the employment, but that concerning extrinsic or extraordinary dangers of which he had no knowledge he was entitled to information from the employer before he entered the service, where such information was within the employer's possession. It was sought to distinguish this case from the Baxter Case (Cal.) *infra*, in that in the latter case the employer was invading the premises of another and was therefore a

trespasser, and the attack occurred immediately upon the attempted interference with the fence, whereas in the instant case the employer was conducting its business upon its own premises and there was no assault for eighteen days. But the court stated that it did not consider this difference to be important. That the degree of danger to be apprehended from exasperated men is not safely measurable by the cause of exasperation, and the destructiveness of firearms in the hands of persons determined to use them is the same whatever the grievance or fancied grievance may be by which the murderous disposition is excited. The controlling feature of both cases, the court stated, is that the employer knowingly exposed the employee to personal danger and concealed the danger from him.

And in *Baxter v. Roberts* (1872) 44 Cal. 187, 13 Am. Rep. 160, 13 Am. Neg. Cas. 514, an owner of a lot who had employed one to do carpenter work thereon directed the employee to tear down a fence erected across one corner of the premises by one who claimed to be in possession, and, while so engaged, the employee was shot by someone who fired from a shanty located upon a neighboring lot. The evidence tended to show that when the employer engaged such services, he knew, or had every reason to know, that interference with the fence would be forcibly resisted by the parties who had erected it and claimed to be in possession, and who actually occupied the shanty with loaded firearms within shooting distance of the fence, and who had announced to the employer their purpose to resist by force any interference therewith. In affirming a judgment for the injury, obtained by the employee against the employer, it was held that the trial court properly instructed the jury to the effect that if the employer knew, or if he had good reason to believe, that rigid or forcible resistance would be offered to him and his party by parties whom he knew or believed to be there, on that ground or in the vicinity near by, it was his duty to inform the employee of the nature of the employment,—to disclose to him that knowledge so that the employee might act understandingly, and take the chances if he chose to do so. If he had such knowledge and concealed it from the employee, then he was liable. And further, that if the persons shooting had any adverse possession or occupation, whether complete or otherwise, at the time of the shoot-

ing, and the employer knew the fact, and if it should be further found that the employer had knowledge that such possession would be maintained by force if interfered with by him by the taking of the fence, and concealed such knowledge and information from the employee, and failed to inform him of the danger of the employment, he must be held liable in damages. The court stated that "the general principle which forbids the employer to expose the employee to unusual risks in the course of his employment, and to conceal from him the facts of such danger, is not affected by the fact that the danger known to the employer arose from the tortious or felonious purposes or designs of third persons acting in hostility to the interests of the employer, and through agencies beyond his control. The employee is as clearly entitled to information of such danger of that character as of any other, the existence of which is known to the employer. The employer, if he knew or was informed of a threatened danger of that character, was bound to communicate the information to his employee about to be exposed to it in the course of his employment and in ignorance of its existence. The nature or character of the agency or means through which the danger of injury to the employee is to be apprehended can make no difference in the rule, for the employee is entitled in all cases to such information upon the subject as the employer may possess, and this with a view to enable him to determine for himself if, at the proffered compensation, he be willing to assume the risk and incur the hazard of the business; and if the employer have such information or knowledge and withhold it from the employee, and the latter afterward be injured in consequence thereof, the employer is liable to him in damages therefor."

And in *Medlin Mill. Co. v. Boutwell* (1911) 104 Tex. 87, 34 L.R.A.(N.S.) 109, 133 S. W. 1042, action by employee for injuries inflicted upon him by co-employees during an attempt to initiate him, there is a dictum to the effect that an employer may become liable for negligently exposing a servant to a hidden danger known to the master and unknown to the servant, which is to be incurred by the latter in doing the work which he is employed to do, although it arises from the conduct of strangers. (See notes referred to at beginning of the present note.)

In *Kelly v. Shelby R. Co.* (1893) 15 L.R.A.1917F.

Ky. L. Rep. 311, 22 S. W. 445, where an employee of a railroad company sought to recover for injuries due to a hostile attack by persons in the employ of third persons, predicating the right to recover on the alleged concealment by the employer of the fact that such attack was contemplated, the peremptory instruction for defendant was held to have been properly given, as the uncontradicted evidence showed that he was without any knowledge of any contemplated attack.

In *Lewis v. Taylor Coal Co.* (1902) 112 Ky. 845, 57 L.R.A. 447, 66 S. W. 1044, action for death of coal miner as result of injuries inflicted by a mob of strikers, the decision as to nonliability was based on the fact that the cause of action for the injuries abated with the death of the injured party.

The court in the course of its opinion stated that a master does not undertake to protect a servant from the criminal act of others, as this is not a duty which the law imposes or which arises from the relation of master and servant. But that this statement was not intended to be construed as meaning that an employer would not be liable for consequent injuries if he knowingly exposed an employee to personal danger from felonious or tortious designs of third persons without acquainting the employee of such danger seems to be evident from the statement immediately preceding, that the law imposes the duty upon the master to furnish his servants with reasonably safe tools or machinery to use or operate, and reasonably safe premises upon which to work, and the master is responsible for an injury which the servant receives in consequence of a violation of such duty, when the servant is ignorant of the master's neglect.

J. H. B.

MASSACHUSETTS SUPREME JUDICIAL COURT.

W. A. SNOW IRON WORKS

v.

LEONARD B. CHADWICK et al., Appts.

(227 Mass. 382, 116 N. E. 801.)

Injunction — against strike by labor union.

1. A labor union may be enjoined from

Note. — For controversy over "open" or "closed" shop as justification for means employed to aid strike, see annotation following this case, post, 760, and see references therein for annotation on related questions.

interfering with performance of existing contracts by calling a strike to force an employer to unionize his labor, and from placing his name on a black list which will hamper him in securing the help necessary to such performance.

For other cases, see Injunction, I. d, in Dig. 1-52 N. S.

Appeal — rulings not appealed from.
2. Rulings on exceptions to a master's report not appealed from are not open to review on appeal.

For other cases, see Appeal and Error, VII. h, in Dig. 1-52 N. S.

Labor union — authority of officers — contract for labor.

3. The officers of a labor union cannot without express authority contract to furnish union labor to be individually performed by members of the union, and a contract cannot be established by proof of a custom of the union to furnish such laborers when notified that they are needed.

For other cases, see Labor Organizations, in Dig. 1-52 N. S.

Pleading — prayers — effect on scope of bill.

4. The scope of a bill cannot be enlarged by the prayers for relief.

For other cases, see Pleading, II. f, in Dig. 1-52 N. S.

Damages — loss of profits — liability of union laborers.

5. Members of a labor union are not liable for loss of profits which their employer might have made upon contracts which he could have taken had they not refused to work for him because of his refusal to sign a union agreement.

For other cases, see Damages, III. p, 1, in Dig. 1-52 N. S.

Same — shop loss — existing contracts.

6. Members of a labor union who refuse to work for an employer until he signs a union agreement are liable for the loss due to accumulation in his shop of materials prepared for contract actually interrupted by such action, but not for that due to accumulation for prospective contracts alleged to have been lost because of their action.

For other cases, see Damages, III. e, in Dig. 1-52 N. S.

Pleading — necessity to support judgment.

7. Injunction cannot be awarded against imposition of fines by a labor union where the bill contains no allegation that they had been or were intended to be imposed.

For other cases, see Pleading, II. p, in Dig. 1-52 N. S.

(June 11, 1917.)

APPEAL by defendants from a decree of the Superior Court for Suffolk County in complainant's favor in a suit to enjoin interference by defendants with complainant's business and to recover damages for injuries inflicted. Affirmed.

The facts are stated in the opinion.
L.R.A.1917F.

Messrs. Frederick W. Mansfield and Edmund R. Mansfield, for appellants:

A strike which would compel an employer to unionize his factory, called not for the purpose of injuring him, but for the purpose of benefiting the strikers, is lawful.

Pickett v. Walsh, 192 Mass. 572, 6 L.R.A. (N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638; Com. v. Hunt, 4 Met. 111, 38 Am. Dec. 346; Bowen v. Matheson, 14 Allen, 499; Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287; Walker v. Cronin, 107 Mass. 553; Snow v. Wheeler, 113 Mass. 179; Vegelah v. Guntner, 167 Mass. 92, 35 L.R.A. 722, 57 Am St. Rep. 443, 44 N. E. 1077; Plant v. Woods, 176 Mass. 492, 51 L.R.A. 339, 79 Am St. Rep. 330, 57 N. E. 1011; Beekman v. Marsters, 195 Mass. 205, 11 L.R.A. (N.S.) 201, 122 Am. St. Rep. 232, 80 N. E. 817, 11 Ann. Cas. 332; Reynolds v. Davis, 198 Mass. 294, 17 L.R.A. (N.S.) 162, 84 N. E. 457; Minasian v. Osborne, 210 Mass. 250, 37 L.R.A. (N.S.) 179, 96 N. E. 1036, Ann. Cas. 1912C, 1299; Hoban v. Dempsey, 217 Mass. 166, L.R.A. 1915A, 1217, 104 N. E. 717, Ann. Cas. 1915C, 810; Fairbanks v. McDonald, 219 Mass. 291, 106 N. E. 1000; Shinsky v. Tracey, 226 Mass. 21, L.R.A.1917C, 1053, 114 N. E. 957; Tracey v. Osborne, 226 Mass. 25, 114 N. E. 959; Burnham v. Dowd, 217 Mass. 351, 51 L.R.A. (N.S.) 778, 104 N. E. 841; Aberthaw Constr. Co. v. Cameron, 194 Mass. 208, 120 Am St. Rep. 542, 80 N. E. 478; Cornellier v. Haverhill Shoe Mfrs. Asso. 221 Mass. 554, L.R.A.1916C, 218, 109 N. E. 643; Folsom v. Lewis, 208 Mass. 336, 35 L.R.A. (N.S.) 787, 94 N. E. 316; 24 Cyc. 821; Passaic Print Works v. Ely & W. Dry-Goods Co. 62 L.R.A. 673, 44 C. C. A. 426, 105 Fed. 163; Giblan v. National Amalgamated Labourers Union [1903] 2 K. B. 600, 1 B. R. C. 528, 72 L. J. K. B. N. S. 907, 89 L. T. N. S. 386, 19 Times L. R. 708; Pickett v. Walsh, 192 Mass. 572, 6 L.R.A. (N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638; Reynolds v. Davis, 198 Mass. 294, 17 L.R.A. (N.S.) 165, 84 N. E. 457; Folsom v. Lewis, 35 L.R.A. (N.S.) 787, note; De Minico v. Craig, 42 L.R.A. (N.S.) 1048, note; Perrault v. Gauthier, 28 Can. S. C. 241; Connors v. Connolly, 86 Conn. 641, 45 L.R.A. (N.S.) 564, 86 Atl. 600; Ruddy v. United Asso. 79 N. J. L. 467, 75 Atl. 742; Schwarcz v. International Ladies' Garment Workers' Union, 68 Misc. 528, 124 N. Y. Supp. 968.

The long-continued custom of supplying union men for some of its outside work constituted an implied contract.

Strong v. Carver Cotton Gin Co. 197 Mass. 53, 14 L.R.A. (N.S.) 274, 83 N. E. 328, 14 Ann. Cas. 1182.

Messrs. Elder & Whitman, for appellee: The strike in this case was not a lawful strike.

Cornellier v. Haverhill Shoe Mfrs. Asso. 221 Mass. 554, L.R.A.1916C, 218, 109 N. E. 643; Folsom v. Lewis, 208 Mass. 336, 35 L.R.A.(N.S.) 787, 94 N. E. 316; Reynolds v. Davis, 198 Mass. 294, 17 L.R.A.(N.S.) 162, 84 N. E. 457; Vegelah v. Guntner, 167 Mass. 92, 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077; O'Brien v. People, 216 Ill. 354, 108 Am. St. Rep. 219, 75 N. E. 108, 3 Ann. Cas. 966; Tracey v. Osborne, 226 Mass. 25, 114 N. E. 959; Berry v. Donovan, 188 Mass. 353, 5 L.R.A.(N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 603, 3 Ann. Cas. 738; Fairbanks v. McDonald, 219 Mass. 291, 106 N. E. 1000; Farrer v. Close, L. R. 4 Q. B. 602, 10 Best & S. 533, 38 L. J. Mag. Cas. N. S. 132, 20 L. T. N. S. 802, 17 Week. Rep. 1129.

The union had no right to induce men to leave their jobs.

Minasian v. Osborne, 210 Mass. 255, 37 L.R.A.(N.S.) 179, 96 N. E. 1036, Ann. Cas. 1912C, 1299; Lopes v. Connolly, 210 Mass. 487, 38 L.R.A.(N.S.) 986, 97 N. E. 80.

The imposition of fines and penalties should have been enjoined.

L. D. Willcutt & Sons Co. v. Driscoll, 200 Mass. 137, 23 L.R.A.(N.S.) 1236, 85 N. E. 897; Boutwell v. Marr, 71 Vt. 1, 43 L.R.A. 803, 76 Am. St. Rep. 746, 42 Atl. 607.

It is enough to show what the profits probably would have been.

1 Sutherland, Damages, 4th ed. § 70; New England Cement Gun Co. v. McGivern, 218 Mass. 204, L.R.A.1916C, 986, 105 N. E. 885; Hetherington v. William Firth Company, 210 Mass. 8, 95 N. E. 961; Weston v. Boston & M. R. Co. 190 Mass. 298, 4 L.R.A.(N.S.) 569, 112 Am. St. Rep. 330, 76 N. E. 1050, 5 Ann. Cas. 825, 19 Am. Neg. Rep. 306.

Damages have been allowed against labor unions.

Aberthaw Constr. Co. v. Cameron, 194 Mass. 208, 120 Am. St. Rep. 542, 80 N. E. 478; Burnham v. Dowd, 217 Mass. 351, 51 L.R.A.(N.S.) 778, 104 N. E. 841; De Minico v. Craig, 207 Mass. 593, 42 L.R.A.(N.S.) 1048, 94 N. E. 317; Hanson v. Innis, 211 Mass. 801, 97 N. E. 756; Fairbanks v. McDonald, 219 Mass. 291, 106 N. E. 1000; Shinsky v. Tracey, 226 Mass. 21, L.R.A. 1917C, 1053, 114 N. E. 957; Harvey v. Chapman, 226 Mass. 191, L.R.A.1917E, 389, 115 N. E. 304; Purvis v. Local No. 500, U. B. C. J. 214 Pa. 348, 12 L.R.A.(N.S.) 642, 112 Am. St. Rep. 757, 63 Atl. 585, 6 Ann. Cas. 275; Purington v. Hinchliff, 210 Ill. 159, 2 L.R.A.(N.S.) 824, 109 Am. St. Rep. 322, 76 N. E. 47; Doremus v. Hen-

nessy, 176 Ill. 608, 43 L.R.A. 797, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524.

Braley, J., delivered the opinion of the court:

The master's elaborate and exhaustive report states the relations of the parties as well as the economic and industrial conditions from which the present suit originated. It appears that the plaintiff, being engaged in the manufacture and installation of all kinds of wrought ornamental and other ironwork, and in the employment of labor at its factory, conducts "what is commonly known as an open shop, which, while it means strictly that inquiries are not made of its employees as to whether they are members of a union, nevertheless under present-day conditions results in all the employees being nonunion men." But in performance of the contract with one Crane, into which it entered as described in the bill, the plaintiff, having been on friendly terms with the union, and in accordance with its custom for several years to employ "union men on certain of its outside jobs, so that about one half of its outside help has in fact been done by union men, at least for the last three years, such men being members" of the defendants' unincorporated organization, hired the defendants Swanson, Gustafson, McDonough, Grant, Husband, Crane, Muldoon, and Brennan, who formed part of its working force of twenty men. While the work was proceeding satisfactorily, and without any complaint from the union employees as to the rate and time of payment of wages, the number of hours of labor required, or that nonunion men also had been employed and retained, the union, having by vote instructed its secretary "to send out new proposed agreements to all the contractors in their line, . . ." passed a further vote instructing its business agent that "no member be allowed to work for unfair firms until they had been signed up by the business agent." A conference shortly after followed between the plaintiff and the union's business agent, the defendant Chadwick, when the plaintiff declined to sign the agreement, and no settlement was reached. The master reports that while other provisions appeared, the agreement "was intended to mean, and would have meant, that the employer signing it agreed not to employ nonunion labor on any of his outside jobs during the period of the agreement. It had no reference to the inside or shop work." What followed is thus stated in the report: "While the matter was . . . under discussion, and with no specific notice . . . that the plain-

tiff's men would be interfered with, . . . or that they would themselves cease work, I find that . . . the eight defendants . . . without warning or notice to the plaintiff . . . left the work," which was "about two thirds completed."

It is found that: "This leaving of these eight defendants . . . was, and was by them and the union intended, as a strike: that it was in consequence of the vote of the union and the advice and suggestions of Chadwick, in which advice or suggestions I find that he was carrying out the wishes or suggestions of the union."

If the right of the employees to cease work of their own volition is unquestioned, the object or motive for which the strike was precipitated is a question of fact. If the master's subsidiary findings only were to be considered, it is settled that a strike would not be unlawful if upon ascertaining that they could not have all they declined to take part of the work. *Pickett v. Walsh*, 192 Mass. 572, 6 L.R.A. (N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638. But these findings as they appear in the report are made subordinate to the express findings: "That the purposes of this strike were primarily to compel the plaintiff to sign the agreement . . . which among other things would have required it to unionize its outside work," and "the reason that the plaintiff was singled out as the first point of attack in the efforts of the union to induce open shop contractors to sign the agreement was chiefly that the work upon which the plaintiff was engaged was easily the best and most notorious in Boston at that time. I find that if the plaintiff could be compelled to sign this agreement it would bring many of the other forty open shop contractors into line. It is also probably true that the plaintiff was thus singled out because it was one of the two open shop contractors who had definitely refused to sign the agreement. I do not find that the purpose of the union was to injure the plaintiff, but I am of the opinion that the union was entirely indifferent as to whether it did or not."

It is further decided, although the union never sent out any list called an "unfair list," "that Chadwick intended the plaintiff to understand that upon such list as the union was in the habit of sending out it would be made to appear to architects and contractors that the union did not consider the plaintiff and other contractors as fair contractors unless in the meantime they had signed the agreement."

The purpose of the strike is restated, and the participation of the union of which Chadwick was the mouthpiece is set forth L.R.A.1917F.

in these words: "I find that if the plaintiff would sign the agreement it would be furnished with all union men necessary for all of its work, but that unless and until it does so it is the intention of the union to refuse to let any of their men work on any of its jobs, in which intention, so far as appears, the individual members of the union concur."

It is now plain that the paramount motive actuating all the proceedings of the defendants and their fellow members was by means of the strike to force the plaintiff to employ only union men on all of its "outside work," under the penalty, if compliance was refused, that full performance of the contract with Crane would be seriously embarrassed, if not rendered impossible, while its name would be published by the union in the labor market, and among architects and contractors for its products, as an employer of nonunion labor, making the obtainment of future contracts and the necessary union labor exceedingly precarious, if not practically impossible. The right of the plaintiff to the benefit of its contract and to remain undisturbed by the union during performance, as well as to hire and retain such employees as it might select, unhampered by the interference of the union acting as a body through the instrumentality of a strike or of a secondary boycott or black list, is a primary right which has not been abrogated by any of our decisions. "An intentional interference with such a right, without lawful justification, is malicious in law, even if it is from good motives and without express malice." *Berry v. Donovan*, 188 Mass. 353, 355, 356, 5 L.R.A. (N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 604, 3 Ann. Cas. 738; *Reynolds v. Davis*, 198 Mass. 294, 17 L.R.A. (N.S.) 162, 84 N. E. 457; *Folsom v. Lewis*, 208 Mass. 336, 35 L.R.A. (N.S.) 787, 94 N. E. 316; *Burnham v. Dowd*, 217 Mass. 351, 51 L.R.A. (N.S.) 778, 104 N. E. 841; *Cornellier v. Haverhill Shoe Mfrs. Assn.* 221 Mass. 554, L.R.A.1916C, 218, 109 N. E. 643; *Shinsky v. Tracey*, 226 Mass. 21, 114 N. E. 957, L.R.A.1916C, 1053.

While the plaintiff is entitled to injunctive relief accordingly, the question of damages remains. The plaintiff took no exceptions to the report, and by the interlocutory decree, from which neither party appealed, the defendants' forty-first, fifty-first, fifty-second, fifty-third, fifty-fifth, fifty-sixth, fifty-eighth, and fifty-ninth exceptions were sustained, and the report confirmed, "except so far as it contains rulings of law, said rulings not being confirmed, but left open for consideration upon the entry of the final decree." It follows that none of the defendants' remaining exceptions are open on

their appeal, and the plaintiff's damages are to be ascertained from the report and the memorandum of decision and order for decree of the trial judge.

The scope of the bill cannot be enlarged by the specific prayers for relief, or the general prayer, which, although not inserted, is read in by force of the statute. *Fordyce v. Dillaway*, 212 Mass. 404, 99 N. E. 166; *Rev. Laws*, chap. 159, § 12. The eighth paragraph of the bill alleges that if the union persists in its hostility,—“it would be very difficult, if not impossible, for your orator to get work, and much work which might be otherwise open to it will be rendered impossible; and that such conduct has caused damages to your orator to the amount of \$10,000, . . . which will be made to appear upon the trial of this cause, with other due damages.”

It is to be gathered from the report that the plaintiff sought to establish and relied upon an agreement that the union as a voluntary body had promised and engaged to provide union labor to the amount the plaintiff needed on any of its outside contracts under the condition that nonunion labor should be concurrently employed as the plaintiff might determine. No express contract was ever made. The master acted within his province in making such rulings of law as he deemed necessary for a full trial of the issues raised by the pleadings. *Bradley v. Borden*, 223 Mass. 575, 112 N. E. 416. But his finding, which is, and was intended to be, a conclusion or ruling of law, that an implied contract existed between the plaintiff and the union whereby the union understood and constructively agreed that it would furnish union labor on outside work whenever required cannot be sustained. It is true that in the absence of an express agreement between them an implied contract from the conduct and relations of the parties may be found to exist. *Hayes v. Philadelphia & R. Coal & I. Co.* 150 Mass. 487, 23 N. E. 225. It cannot be found, however, unless a contract status is shown. The officers of the union could not create either by word or conduct a binding bargain in behalf of the members of their union to furnish labor to be individually performed unless they had been authorized expressly or impliedly by the members in some form sufficient to show mutuality of will and consent.

The “custom and practice” of furnishing men when the plaintiff communicated its needs directly, or by its foreman, the defendant Husband, to the responsible officers of the union, even if known to the union and never formally disapproved, did not constitute a contract for breach of which damages could be recovered or specific per-

formance enforced by either party. *Newell v. Borden*, 128 Mass. 31; *McFadden v. Murphy*, 149 Mass. 341, 21 N. E. 888; *Tracey v. Osborne*, 226 Mass. 25, 114 N. E. 959. There having been no evidence that any concerted action recognizing such an obligation had ever been taken by the union at any of the meetings, or that individual members possessed full knowledge of the circumstances, or that the “responsible officers” had ever been authorized expressly or by fair implication to take such action, the damages, if any, resulting from the loss of the contracts which the plaintiff made, if obtained prior to the date which the master finds was the time when the implied contract terminated, need not be considered.

The master's denial of damages for loss of profits on eleven contracts which the plaintiff would have taken if its amicable relations with the union had continued and its members had remained in the plaintiff's employment, while not excepted to, is manifestly right, as the members could lawfully refuse of their own volition to work for the plaintiff. *Pickett v. Walsh*, 192 Mass. 572, 6 L.R.A. (N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638. A further claim is made for “shop loss” arising under the Crane contract, and the eleven contracts, on the ground that by “the cessation of the work under the Crane contract, and on the other eleven contracts above mentioned,” it has been necessary to store in the plaintiff's shop the various fabricated material upon all those jobs which ordinarily would have been delivered to them as fast as completed; that a large amount of said material has accumulated already, necessitating extra handling, much inconvenience, and crowded conditions at the shop, and will necessitate if and when these contracts are proceeded with extra labor and expense in getting the material out and transported to the various jobs. And the master awards a very substantial lump sum for the consequent loss. The plaintiff, however, cannot recover for “shop loss” suffered under the other contracts for reasons already stated, and while entitled to such loss under the Crane contract, the amount cannot be ascertained from the report. If the plaintiff deemed the matter of sufficient importance it should have moved for a recommitment.

It is also urged that the decree should contain a clause forbidding the imposition of fines and penalties as a mode of enforcing the purpose of the union in its contest with the plaintiff. But no fines having been imposed, or any threats made that their imposition is intended, and the bill not containing any allegations thereof, we find no reason for the modification. *Aber-*

thaw Constr. Co. v. Cameron, 194 Mass. 208, 215, 120 Am. St. Rep. 542, 80 N. E. 478. It, moreover, is to be presumed that the defendants will not act unlawfully in the future, and any discussion of the constitutionality of Stat. 1911, chap. 431, would not be germane to the questions

raised by the pleadings and the report. *Aberthaw Constr. Co. v. Cameron*, supra. It results that the decree for the plaintiff should be affirmed with costs.

Ordered accordingly.

Petitions for rehearing denied.

Annotation—Controversy over “open” or “closed” shop as justification for means employed to aid a strike.

This note supplements notes on the same question appended to *Reynolds v. Davis*, 17 L.R.A.(N.S.) 162, and *Folsom v. Lewis*, 35 L.R.A.(N.S.) 787.

Upon a somewhat analogous question as to the lawfulness of a strike, or threat to cause a strike, when there is no trade dispute between the strikers and their own employer, see note appended to *New England Cement Gun Co. v. McGovern*, L.R.A.1916C, 989. And for a note dealing with the right of a labor union to forbid its members serving a designated person, see note appended to *Rhodes Bros. Co. v. Musicians' Protective Union*, L.R.A.1915E, 1037. In the latter note there is a reference to many other notes dealing with different phases of the law with reference to industrial controversies; and for a more exhaustive reference to notes upon these questions, see L.R.A. Indexes under titles, “Conspiracy,” and “Labor Organizations.”

It is not the purpose of the present note to engage in the controversy as to the power of a court to enjoin employees, acting individually or collectively, from ceasing to labor for a particular employer for the purpose of compelling the latter to unionize his shop. Upon this point it may be said that there is a conflict of authority, some cases holding that without reference to their motive, and although they might be liable in damages to the injured persons, nevertheless a court will not by its injunctive process undertake to compel men to work by enjoining them from ceasing to labor on the ground that their motive is unlawful. The lack of harmony on this question is not due so much to decisions where the question is specifically presented as to the expressions of the court in considering matters not involving this specific point. For the purposes of the present note, it is assumed that there is an inaugurated strike, and the question is as to whether or not the court will inquire into the object of the strike for the purpose of determining the lawfulness of the means used to bring it to a L.R.A.1917F.

successful issue. As pointed out in the preceding notes on this point, heretofore referred to, even though a court may refuse to enjoin a strike as such, regardless of the motive or object sought thereby, it will inquire into the motive or object to determine whether or not a subsequent interference with the business of the employer is justified, and the burden of proof is upon the striking employees to show such justification.

In *Folsom v. Lewis* (1911) 208 Mass. 336, 35 L.R.A.(N.S.) 787, 94 N. E. 316, at least a portion of the relief sought was to enjoin certain labor leaders from calling or declaring any strike, as well as proceeding with any strike already called. It does not clearly appear what relief was given, the question presented on appeal that was considered being as to the finding of the master in chancery that the strike was not for a lawful object. The rule is asserted that strengthening the forces of a labor union to put it in a better condition to enforce its claims in controversies that may afterwards arise with employers is not enough to justify an attack upon the business of an employer by inducing his employees to strike.

In *White Mountain Freezer Co. v. Murphy* (1917) — N. H. —, 101 Atl. 357, it is held that a strike to secure a closed shop and the picketing of the employer's place of business is an unlawful interference with the business of such employer, unless justified; and the burden is upon the labor union to justify the same by showing that the purpose or object was to promote the legitimate interest of the employees, rather than to injure the business of the employer.

In *Cohn & R. Electric Co. v. Bricklayers, Masons & Plasterers Local Union* (1917) — Conn. —, 101 Atl. 659, it is held that where the purpose of a strike is to strengthen the labor union by unionizing a factory or shop it is lawful to adopt by-laws against its members working with nonunion employees, and an employer is not entitled to restrain the members of the union from refusing

to continue to work for him while he employs nonunion men.

In *Albro J. Newton Co. v. Erickson* (1911) 70 Misc. 291, 126 N. Y. Supp. 949, affirmed in (1911) 144 App. Div. 939, 129 N. Y. Supp. 1111, it is recognized that a strike for the purpose of compelling an employer to unionize his shop is lawful, and that hence legitimate means to aid the strike are also lawful. It is, however, held that it is not lawful to boycott the employer's business by

intimidating prospective purchasers of his product by the union employees of such purchasers refusing to handle such product. As to this latter question of the lawfulness of the refusal of the union employees to handle the product of a person with whom the union is having an industrial controversy, see notes in 12 L.R.A.(N.S.) 643; 32 L.R.A.(N.S.) 792; and 51 L.R.A.(N.S.) 778.

A. G. S.

MICHIGAN SUPREME COURT.

MILO O. BENNETT, Plff. in Err.,
v.
JOHN W. STOCKWELL et al.

(— Mich. —, 163 N. W. 482.)

Libel — privilege — report by grand jury.

1. A report by the grand jury unaccompanied by indictment, upon the conduct of a public official, which is not authorized by statute, is not privileged.

For other cases, see Libel and Slander, II. e, 5, in Dig. 1-52 N. S.

Same — good faith — effect.

2. Good faith is, in the absence of privilege, no bar to an action for libel.

For other cases, see Libel and Slander, III. e, in Dig. 1-52 N. S.

Evidence — acquiescence in libel.

3. The presentation by the foreman of the grand jury in open court in the presence of the other jurors, of a libelous report, is sufficient prima facie to show acquiescence by all in the report.

For other cases, see Evidence, II. e, 4, in Dig. 1-52 N. S.

Grand jury — testimony of members — libelous report.

4. A statute forbidding a member of a grand jury to testify how any member voted on a question before them, or what opinions were expressed in relation to such question, does not apply to testimony concerning a libelous report made by the jury outside its jurisdiction.

For other cases, see Grand Jury, I. in Dig. 1-52 N. S.

(June 27, 1917.)

ERROR to the Circuit Court for Kalamazoo County to review a judgment in defendants' favor in an action brought to recover damages for an alleged libel. Reversed.

The facts are stated in the opinion.

Note. — For privilege as to proceedings of grand jury, see annotation following this case, post, 765.
L.R.A.1917F.

Mr. Milo O. Bennett, in propria persona:

The libel was not absolutely privileged. *Rector v. Smith*, 11 Iowa, 307; *Poston v. Washington, A. & Mt. V. R. Co.* 36 App. D. C. 359, 32 L.R.A.(N.S.) 785.

The libel was not qualifiedly privileged. *Smith v. Smith*, 73 Mich. 447, 3 L.R.A. 52, 16 Am. St. Rep. 594, 41 N. W. 499; *Bennett v. Kalamazoo Circuit Judge*, 183 Mich. 200, 150 N. W. 141, Ann. Cas. 1916E, 223; *Newell, Slander & Libel*, p. 558; *Bacon v. Michigan C. R. Co.* 66 Mich. 166, 33 N. W. 181; *Rector v. Smith*, supra; *Jones v. People*, 101 App. Div. 55, 92 N. Y. Supp. 277; *Re Osborne*, 68 Misc. 597, 125 N. Y. Supp. 317; *Re Hefferman*, 125 N. Y. Supp. 738.

Even if qualifiedly privileged, plaintiff had overcome the burden.

Carroll v. Owen, 178 Mich. 551, 146 N. W. 168; *Howard v. Dickie*, 120 Mich. 240, 79 N. W. 191; *Maclean v. Scripps*, 52 Mich. 220, 17 N. W. 815, 18 N. W. 209; *Cherry v. Des Moines Leader*, 114 Iowa, 298, 54 L.R.A. 857, 80 Am. St. Rep. 365, 86 N. W. 323; *Thompson v. Rake*, 140 Iowa, 232, 18 L.R.A.(N.S.) 921, 118 N. W. 279.

The acts of defendants Carnes and Stockwell amounted to a composition and publication, under the circumstances, rendering all the defendants liable.

Loranger v. Loranger, 115 Mich. 681, 74 N. W. 228; 25 Cyc. 365; *Wilcox v. Moon*, 64 Vt. 450, 15 L.R.A. 760, 33 Am. St. Rep. 936, 24 Atl. 244; *Rex v. Burdett*, 4 Barn. & Ald. 314, 106 Eng. Reprint, 952, 23 Revised Rep. 284; *Cooley, Torts*, p. 371; *Odgers, Libel & Slander*, p. 154; *Townshend, Libel & Slander*, p. 115; *Pollaaky v. Minchener*, 81 Mich. 280, 9 L.R.A. 102, 21 Am. St. Rep. 516, 46 N. W. 5.

The grand jurors should have been allowed to testify to the proceedings in the grand jury room as respects the composition and publication of the libel.

People v. Lauder, 82 Mich. 122, 46 N. W. 956; 9 Am. & Eng. Enc. Law, 17; *People v. O'Neill*, 107 Mich. 561, 65 N. W. 540;

People v. Thompson, 122 Mich. 416, 81 N. W. 344; Re Archer, 134 Mich. 410, 96 N. W. 442; State v. Campbell, 73 Kan. 688, 9 L.R.A.(N.S.) 533, 85 Pac. 784, 9 Ann. Cas. 1203; Atwell v. United States, 17 L.R.A.(N.S.) 1049, 89 C. C. A. 97, 162 Fed. 97, 15 Ann. Cas. 253; Re Summerhayes, 70 Fed. 769; Switzer v. State, 7 Ga. App. 7, 65 S. E. 1080; People v. Woodard, 71 Misc. 607, 130 N. Y. Supp. 854; State v. Puttman, 53 Or. 266, 100 Pac. 2; Com. v. Green, 126 Pa. 531, 12 Am. St. Rep. 894, 17 Atl. 878, 8 Am. Crim. Rep. 391; Sands v. Robison, 12 Smedes & M. 704, 51 Am. Dec. 132; Way v. Butterworth, 106 Mass. 75; State v. Wood, 53 N. H. 484; Jones v. Terpin, 6 Heisk. 181; Burdick v. Hunt, 43 Ind. 381; New Hampshire F. Ins. Co. v. Healey, 151 Mass. 537, 24 N. E. 913; Com. v. Meade, 12 Gray, 167, 71 Am. Dec. 741; Com. v. Hill, 11 Cush. 137; Whart. Crim. Ev. p. 1051; 1 Elliott, Ev. p. 745; 20 Cyc. 1352, et seq.; 4 Wigmore, Ev. p. 3312.

Mr. Alfred J. Mills, for defendants in error:

The report filed by the grand jury was at least qualifiedly privileged.

Newell, Slander & Libel, p. 557; Edwards, Grand Jury, p. 166; 20 Cyc. 1356; 1 Cooley, Torts, 344; 2 Cooley, Torts, 797; Konkle v. Haven, 140 Mich. 473, 103 N. W. 850; Re Archer, 134 Mich. 410, 96 N. W. 442; Yancey v. Com. 135 Ky. 207, 25 L.R.A.(N.S.) 455, 122 S. W. 123; Ramsey v. Cheek, 109 N. C. 276, 13 S. E. 775; Lange v. Benedict, 73 N. Y. 12, 29 Am. Rep. 80; Turpen v. Booth, 56 Cal. 65, 38 Am. Rep. 48; Griffith v. Slinkard, 146 Ind. 117, 44 N. E. 1001; Rector v. Smith, 11 Iowa, 302.

If the report was improper and unlawful, it was the duty of the court to suppress it, and to instruct the jury as to its duty concerning the same.

1 Whart. Crim. Law, 7th ed. § 506; State v. Cowan, 1 Head, 280.

The jury was in no manner blamable for the refusal of the court to strike the report from its files and to suppress the same.

Allen v. State, 61 Miss. 627, 4 Am. Crim. Rep. 252; Re Archer, 134 Mich. 408, 96 N. W. 442.

In no case can a member of a grand jury be obliged or allowed to testify or declare in what manner he, or any other member of the jury, voted on any question before them, or what opinions were expressed by any juror in relation to any such question.

People v. Clarke, 105 Mich. 169, 62 N. W. 1117; People v. Thompson, 122 Mich. 411, 81 N. W. 344; Re Archer, supra; United States v. Farrington, 5 Fed. 343; United States v. Kilpatrick, 16 Fed. 765; Stewart v. State, 24 Ind. 142; State v. Lewis, 38 La. Ann. 680; Com. v. Twitchill, 1 Brewst. L.R.A.1917F.

(Pa.) 551; Ex parte Sontag, 64 Cal. 525, 2 Pac. 402, 4 Am. Crim. Rep. 523; Tindle v. Nichols, 20 Mo. 326; 20 Cyc. 1353; 12 R. C. L. pp. 1037 et seq.

Stone, J., delivered the opinion of the court:

This is an action of libel against the defendants, who served as grand jurors in the circuit court for the county of Kalamazoo, for the composition and publication of an alleged false, malicious, and defamatory document, styled a "report," which was filed with the circuit court for said county by the defendants, through Byron J. Carnes, their foreman, on February 5, 1914. The report was written by defendant Stockwell and handed to the circuit judge by defendant Carnes. The said "report," containing the alleged libelous language, was before this court in Bennett v. Kalamazoo Circuit Judge, 183 Mich. 200, 150 N. W. 141, Ann. Cas. 1916E, 223, and is fully set forth there in the opinion of Justice Brooke; to which reference is made. It was addressed to the circuit court for the county of Kalamazoo, and the opening sentence is: "We, the members of the grand jury now in session, beg leave to report," etc. It was signed: "The Grand Jury of Kalamazoo County, by Byron J. Carnes, Foreman of Grand Jury." It appears undisputed that this report was presented to the court by the foreman thereof, in the presence of the entire jury. In Bennett v. Kalamazoo Circuit Judge, supra, we said: "In this state there are but two matters upon which a grand jury have statutory right to make reports or presentations; i. e., trespass on public lands (1 Comp. Laws, § 1395), and violation of the election laws (§ 11,443 [5 How. Stat. 2d ed. § 14,910]), 3 Comp. Laws, §§ 11,891-11,893 (5 How. Stat. 2d ed. §§ 15,062, 15,064), provide how indictments shall be found, but contain no provisions for the filing of a report or presentment reflecting upon the conduct of public officials. An examination of the report filed by the grand jury in the instant case shows that it contains reflections of the gravest character upon the official conduct of the petitioner, if it does not actually charge him with the commission of a felony. A review of all the cases cited upon both sides of the question, and such others as we have been able to examine, leads us to the conclusion that inherently, apart from statutory sanction, the grand jury has no right to file such a report, unless it is followed by an indictment. The evils of the contrary practice must be apparent to all. While the proceedings of the grand jury are supposed to be secret, it is clear that in the present instance that secrecy was not inviolate, for

the objectionable report found its way into the press of Kalamazoo within a few hours after it had been filed. Whether the matter contained in such report be true or false, it can make no difference with the principle involved. In either event the accused person is obliged to submit to the odium of a charge or charges based, perhaps, upon insufficient evidence, or no evidence at all, without having the opportunity to meet his accusers and reply to their attacks. This situation is one which offends everyone's sense of fair play, and is surely not conducive to the decent administration of justice."

And this court issued a mandamus to compel the respondent therein to grant a motion of the relator to strike from the files of the court said report. Upon the trial of the instant case it appeared that the plaintiff had been elected prosecuting attorney of Kalamazoo county at the general election held in the month of November, 1912, and that he served as such officer during the years 1913 and 1914. There was evidence in the case that defendant Stockwell prepared the report. He testified: "I prepared that report myself and not from any dictation. . . . I made two copies, one original and one carbon. The original was signed by the foreman."

It appears that the carbon copy reached the newspaper publisher through the hands of the circuit judge. The witness Stockwell says he does not remember what was done with the carbon copy, but testifies that he did not give it to the circuit judge. It does appear undisputed that the circuit judge had possession of the carbon copy shortly afterward and exhibited it to Mr. Nichols, the special prosecuting attorney who had been appointed to attend the grand jury. It further appeared that Mr. Nichols, although attending the grand jury in the examination of witnesses and the preparation of indictments, had no knowledge that such report had been made, or was in existence, until the carbon copy was shown to him by the circuit judge on the same day the original was filed and spread upon the journal of the court. At the close of the plaintiff's evidence a motion was made to direct a verdict for the defendants upon the grounds that the alleged libelous article declared on and made a basis of the action was privileged absolutely, or, if not privileged absolutely, that it was qualifiedly privileged; and after some discussion the court directed a verdict for the defendants.

The case is brought here by the plaintiff upon writ of error, and the assignments of error discussed are that the court erred (1) in charging the jury to return a verdict in favor of the defendants upon plaintiff's own case, as shown by the record; (2) L.R.A.1917F.

in striking out the testimony of one of the defendants as to the action of certain jurors in their deliberations; (3) in granting the motion of defendants' counsel to withdraw plaintiff's case from the jury, and direct a verdict against plaintiff without submitting the same to the jury for their determination as a question of fact whether the article was libelous, and as to the extent of plaintiff's damages. We are of opinion that this court has already passed on the question whether this alleged report was privileged, either absolutely or qualifiedly. If it had been privileged at all, this court would not have ordered it stricken from the record. It is manifest that if the defendants composing the grand jury had returned an indictment against the plaintiff, that would have been privileged.

It is the principal contention of defendants' counsel that the article was qualifiedly privileged. We are of the opinion that it was not privileged at all. This court has repeatedly held that the occasion determines the question of privilege, and we have said that qualified privilege extends to all communications made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, to a person having a corresponding interest or duty. *Bacon v. Michigan C. R. Co.* 66 Mich. 166-170, 33 N. W. 181; *Garn v. Lockard*, 108 Mich. 196, 65 N. W. 764; *Schultz v. Guldenstein*, 144 Mich. 636-641, 108 N. W. 96; *Madill v. Currie*, 168 Mich. 546-558, 134 N. W. 1004. In *Rector v. Smith*, 11 Iowa, 302, the supreme court of that state held that a grand jury had no power to present to the court otherwise than by indictment the misconduct of an officer; and that a report to the district court charging an officer with malfeasance was not a privileged communication; and that the defendant could not plead this privilege in bar of plaintiff's right to recover. We think that court was illogical when it further held that if such publication was made without malice, and as the defendant supposed in the discharge of a public duty, and without any illwill or hatred toward the plaintiff, there could be no recovery. The court there referred to the language of Chief Justice Shaw in the case of *Bradley v. Heath*, 12 Pick. 163, 22 Am. Dec. 418. A reference to that case shows that Chief Justice Shaw was there speaking of a case which presented a qualified privilege. In our opinion it is illogical to say that, in the absence of privilege, good faith can be shown in bar of plaintiff's right to recover. Undoubtedly all the surrounding circumstances may be shown in mitigation of damages, but not in bar of the action, where the matter published is

not privileged. Cases are numerous in this state where evidence in mitigation of damages has been received under such circumstances, but not in bar of the action.

It seems to have been the opinion of the trial court in the instant case that there was no evidence as to which or how many of the defendants concurred in the action of the grand jury. It should be borne in mind that this is an action for publishing alleged libelous matter. As we have said, the undisputed evidence shows that this so-called report was presented in open court by the foreman of the grand jury, purporting to act in behalf of all the defendants, and that all of the defendants were present, apparently acquiescing in what was done. We have called attention to the manner in which the report was signed. We think that, *prima facie* at least, it may be said that all of the defendants acquiesced in the publication of the report. Certainly the foreman and the defendant who prepared it for publication would be responsible for it, and we think, as we have said, that *prima facie* all of the defendants acted in or acquiesced in its publication.

It is the further claim of the appellant that the members of the grand jury should have been allowed to testify to the proceedings in the grand jury room as respects the voting for, and composition and publication of, the alleged libel. Our statute (Comp. Laws 1897, § 11,887), provides as follows: "Members of the grand jury may be required by any court to testify whether the testimony of a witness examined before such jury is consistent with, or different from, the evidence given by such witness before such court; and they may also be required to disclose the testimony given before them by any person, upon complaint against such person for perjury, or upon his trial for such offense; but in no case can a member of a grand jury be obliged or allowed to testify or declare in what manner he or any other member of the jury voted on any question before them, or what opinions were expressed by any juror in relation to any such question."

In the following cases we have referred to and passed upon this statute: *People v. Lauder*, 82 Mich. 122, 46 N. W. 956; *People v. O'Neill*, 107 Mich. 556, 65 N. W. 540; *People v. Thompson*, 122 Mich. 411-417, 81 N. W. 344; *Re Archer*, 134 Mich. 408-410, 96 N. W. 442. An examination of these cases will show that we were there dealing with indictments which had been properly found and presented by grand jurors.

The pertinent question is whether this statute should be held to apply in the instant case, where we have held that the proceedings of the grand jury in this matter were without authority or jurisdiction. It has long been the policy of the law, in furtherance of justice, that the legitimate investigations and deliberations of a grand jury should be conducted in secret, and that for most intents and purposes its proceedings are legally sealed against divulgence. The grand jurors are sworn to keep secret the state's, their fellows', and their own counsel. The policy is to inspire the jurors with a confidence of security in the discharge of their legitimate and responsible duties, so that they may deliberate and decide without apprehension of any detriment from an accused or any other person; to secure the utmost freedom of disclosure of alleged crimes and offenses by prosecutors; to conceal the fact that an indictment is found against a party, in order to avoid the danger that he may escape and elude arrest upon it, before the presentment is made. That grand jurors cannot testify how they or any of their fellows voted, or as to what induced them to find an indictment, or as to opinions expressed by their fellows or themselves, upon any question properly before them and considered by them, is well settled. *Hooker v. State*, 98 Md. 145, 56 Atl. 390, reported in 1 Ann. Cas. 644, and note citing many cases, including *People v. Lauder*, *supra*, and *People v. Thompson*, 122 Mich. 411-417, 81 N. W. 344. In accord with our statute, it is not competent for a grand juror to testify as to the character or sufficiency of the evidence upon which an indictment was found, or how he voted thereon; but should that rule obtain in matters before the grand jury where it had no jurisdiction to make the "report"? We think not. For instance, it was held at an early day that where process was issued on the complaint of a grand juror, which was without any authority whatever and was void, he was held liable to the person injured. *Allen v. Gray*, 11 Conn. 95. We are of opinion that the statute above quoted does not apply to such a proceeding as was had by the grand jury in the instant case, and that its provisions cannot be invoked by the defendants here.

We think that the court erred in excluding the testimony offered to show the action of certain grand jurors in their deliberations, with reference to this so-called report; and that the court also erred in directing a verdict for the defendants, and in not submitting the case to the jury upon proper instructions.

The judgment is reversed, and a new trial granted, with costs to the appellant.

Annotation—Libel and slander: privilege as to proceedings of grand jury.

Earlier cases on this question will be found in a note to *Poston v. Washington*, A. & Mt. V. R. Co. 32 L.R.A.(N.S.) 785.

The question as to the privilege of a witness who testifies before the grand jury is not within the scope of these notes. As to the privilege of witnesses generally, see note to *Keeley v. Great Northern R. Co.* L.R.A.1915C, 987.

Questions as to libel or slander of a member of a grand jury are also beyond the scope of these notes. See, for example, the recent case of *State v. Fish* (1917) — N. J. L. —, 100 Atl. 181.

As to libel or slander by a judicial officer or juror, see note to *Houghton v. Humphries*, L.R.A.1915E, 1051. Attention is called particularly to the cases of *Little v. Pomeroy* (1873) Ir. Rep. 7 C. L. 50, and *Rector v. Smith* (1860) 11 Iowa, 302, cited on page 1056 of that note.

As to privilege of informal communication with respect to criminal charge, see note to *Beshirs v. Allen*, L.R.A. 1915E, 413, and earlier notes therein referred to.

As to privilege of defamatory statement made by one attorney concerning another in course of judicial proceedings, see note to *La Porta v. Leonard*, L.R.A.1916E, 782.

The decision in *BENNETT v. STOCKWELL*, ante, 761, that the unauthorized report of a grand jury, not followed by indictment, containing matter defamatory of a county officer in respect to his official conduct, is not privileged, either absolutely or qualifiedly, is in accord with the authorities cited in the present and the earlier note on this question, in so far as it denies an absolute privilege. However, the effect of several of the decisions discussed in this and the earlier note is apparently to allow such a report a qualified privilege.

In *Rich v. Eason* (1915) — Tex. Civ. App. —, 180 S. W. 303, it was held erroneous to sustain, on the ground that the report was privileged, a demurrer to a petition in an action against grand jurors for libel based on the report of the grand jury to the district court, unaccompanied by an indictment, charging the plaintiff, a sheriff, with immoral conduct. The court quoted from and followed the case of *Rector v. Smith* (Iowa) supra, cited in the note in 32 L.R.A.(N.S.) 785.

In holding that a newspaper could not escape liability for libel for erroneously

publishing that a certain person was one of those indicted by a grand jury, because of the fact that it was honestly mistaken on account of similarity of names, after a bona fide attempt to obtain the facts for publication, the court in *Sweet v. Post Pub. Co.* (1913) 215 Mass. 450, 47 L.R.A.(N.S.) 240, 102 N. E. 661, Ann. Cas. 1914D, 533, said: "The investigation and report by the grand jury constituted a judicial proceeding, and, in the absence of express malice, a fair and correct report of it by the defendant in the newspaper published by it was privileged. . . . The privilege attaching to such a report rests, however, upon a somewhat different ground from that on which privileged communications between private persons rest. In them the person making the communication has an interest to protect or a duty to perform, or his relation to the party to whom the communication is made is of a confidential nature, and the law holds that in such cases, if what is said or written is communicated in good faith, in the belief that it is true, and with no malevolent motive and for the purpose of protecting or promoting his interest, or in the performance of a duty incumbent upon him, social or legal or moral, and is justified or required by the nature of the relations existing between him and the person to whom the communication is made, and does not go beyond what is fairly warranted by the occasion, the communication is privileged. But no duty rests upon the publishers of a newspaper to report judicial proceedings, and their interest in such matters is only that which all the rest of the community has. It is for the interest of everyone that crime should be detected and punished, and everyone has the highest interest in whatever pertains to the proper administration of justice. It is upon these grounds that reports of judicial proceedings fairly and correctly made are privileged. . . . In order to be privileged such reports must be not only fair and impartial, but they also must be accurate."

The official report of a grand jury as to reprehensible official conduct of a constable, unaccompanied by an indictment or a finding of an impeachable offense, although made in open court, was held in *Parsons v. Age-Herald Pub. Co.* (1913) 181 Ala. 439, 61 So. 345, not to constitute a judicial proceeding within the rule of qualified privilege recognized

by the common law in respect to the publication of such proceedings. Nevertheless, the court held that the report was such a matter of public concern as to be within the policy of the privilege, so that a newspaper was not liable for publishing a fair, accurate, and impartial statement of the report, if the publication was made bona fide, without malice, and in the belief that the matters published were true. It was said: "The grand jury is said to be a constituent part of the court, though it is also a distinct and partly independent body. . . . And its functions, though always proceeding ex parte, are obviously of a judicial nature. It is the duty of every grand jury to investigate any alleged incompetency or misconduct of any public officer in the county; and, if they find that any county officer ought to be removed from office for any impeachable offense named in § 7099 of the Code, they shall so report to the court, 'setting forth the facts, which report shall be entered on the minutes of the court.' . . . They are neither required nor authorized by any statute to report the result of such investigations when they fail to find any impeachable fault or offense; and when they report and criticize any misconduct, real or fancied, of lesser grade, it cannot be for the purpose of invoking any judicial action, and is in fact no part of any judicial proceeding, actual or potential. . . . Our conclusion is that that part of the grand jury's report dealing with the official conduct of the plaintiff was no part of any 'judicial proceeding' within the rule of qualified privilege recognized by the common law in respect to the publication of such proceedings, and that it is not privileged as being the publication of a

report required or authorized by law. Nevertheless, we think its publication by the defendant under the conditions averred in the plea is within the spirit and policy of that rule. The grand jury is essentially a public body, and what it says or does in regard to public matters, though stopping short of indictment or impeachment, is a matter of public interest, and, with respect to the official conduct of public officers in the county, is a matter of such public concern as to justify its communication to the public for their information, through the public press or other appropriate agencies." And after quoting the rule that, while the publication of matter defamatory of an individual is not privileged merely because the libel is contained in a fair report in a newspaper of what occurred at a meeting held for a public purpose, yet proceedings of public interest need not be those of a judicial or legislative body to render a fair report thereof privileged, the court observed that in the application of this rule to cases like that before it, discrimination was necessary, and that libelous imputations in a grand jury's report upon private citizens, or upon public officers not touching their fitness for office, or their fidelity to the public service, or the propriety of their official acts, are not properly matters of public interest; that the privilege does not attach at all until the report has been duly published by the grand jury itself in open court; and that matters, the publication of which is forbidden by law, or by the order of the court, as being improper for publication, are not to be regarded as privileged with respect to their publication by third persons.

R. E. H.

NEW YORK COURT OF APPEALS.

PEOPLE OF THE STATE OF NEW YORK,
Appt.,
v.

LOUIS P. CLAIR, Respnt.

(221 N. Y. 108, 116 N. E. 868.)

Game — serving birds as part of meal — sale.

The serving by a hotel keeper of game birds which had been rightfully given to

him, as part of a meal for which he receives pay, is within a statute providing that such birds shall not be sold or offered for sale for food purposes.

For other cases, see Game and Game Laws, in Dig. 1-52 N. S.

(June 5, 1917.)

APPEAL by the People from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a trial term for Herkimer

Note. — For serving game or fish with meal as violation of game law, see annotation following this case, post, 769.

Somewhat analogous to the question whether the serving by a hotel keeper of

game as a part of a meal amounts to a sale is the question treated in the notes to *Seelbach Hotel Co. v. Com.* 25 L.R.A. (N.S.) 943, and *Skermetta v. State*, 52 L.R.A. (N.S.) 722.

County in favor of defendant in an action brought to recover penalties for selling partridges in violation of the Conservation Law. Reversed.

The facts sufficiently appear in the opinion.

Mr. William T. Moore, with Mr. E. E. Woodbury, Attorney General, for the People:

The service of partridges with a meal paid for in a weekly board bill is a sale of the partridges within the prohibition of §§ 176 and 180 of the Conservation Law.

Fleming v. People, 27 N. Y. 329; People v. Kibler, 106 N. Y. 321, 12 N. E. 795; People v. Briggs, 114 N. Y. 56, 20 N. E. 820; Rowell v. Janvrin, 151 N. Y. 60, 45 N. E. 398; Hart v. Cleis, 8 Johns. 41; Hudson Iron Co. v. Alger, 54 N. Y. 173; Com. v. Phoenix Hotel Co. 157 Ky. 180, 162 S. W. 823; People v. Fox, 4 App. Div. 38, 38 N. Y. Supp. 635; People v. Laning, 40 App. Div. 227, 57 N. Y. Supp. 1057; People v. Russell, 134 N. Y. Supp. 1068; Com. v. Warren, 160 Mass. 533, 36 N. E. 308; Com. v. Wieth, 155 Mass. 442, 29 N. E. 577; Com. ex rel. Allegheny County v. Miller, 131 Pa. 118, 6 L.R.A. 633, 18 Atl. 938; Herbert v. Shanley Co. 242 U. S. 591, 61 L. ed. 511, 37 Sup. Ct. Rep. 232.

Mr. James P. O'Donnell, for respondent:

The service of the partridges in question was merely a gift, and not a sale as contemplated by the statute.

Gray v. Barton, 55 N. Y. 68, 14 Am. Rep. 181; 23 Cyc. 181; Williams v. State, 91 Ala. 14, 8 So. 668; Com. ex rel. Allegheny v. Miller, 131 Pa. 118, 6 L.R.A. 633, 18 Atl. 938.

Chase, J., delivered the opinion of the court:

On October 30, 1915, two men, one a confidential agent of the conservation commission of the state of New York and the other a game protector employed by said commission, but unknown to the defendant, went to a small hotel in the town of Wilmurt, in the county of Herkimer, of which the defendant was the proprietor, and remained there until the morning of November 7th. They departed that morning, paying \$15.50 each for their board and room, being at the rate of \$2 per day for the time that they had been guests for pay of the defendant. At the close of the noon meal on November 6th the defendant brought from the kitchen into the dining room two dead partridges, and said to one of his said guests that the partridges had been given to him, and that he was going to serve them at the evening meal that night. The meal was served in the dining room that evening, at a table

occupied by the commission employees, the defendant's said guests, separate from the table occupied by the defendant and his wife and one of his employees. The only meat course served to the defendant's said guests was the two partridges which they ate.

Section (added by Laws 1912, chap. 318) of the Conservation Law (Consol. Laws, chap. 65) provides: "The dead bodies of birds belonging to all species or subspecies, native to this state, protected by law or belonging to any family, any species or subspecies of which is native to this state and protected by law, shall not be sold, offered for sale, or possessed for sale for food purposes within this state whether taken within or without this state, except as provided by §§ 372 and 373.

Partridges are native to this state. They are game birds and were at the time mentioned protected by law. Conservation Law, §§ 210, 214 (added by Laws 1912, chap. 318). Sections 372 and 373 of the Conservation Law are not material in the consideration of the question now before us. The question is a simple one, and it is whether serving the partridges by the defendant as a part of the meal furnished by him and paid for by his guests as stated constitutes a sale of said partridges for food purposes.

It is not claimed that there was any illegality in the possession of the birds, nor that it would be illegal if in good faith they were given away. The Conservation Law is intended to preserve the natural resources of the state, including game birds enumerated therein, and to prevent what is commonly known as "pot hunting," or the killing of birds for profit to the hunter, and in generally dealing therein commercially. For that purpose, among other things, it prohibits the sale of the dead bodies of birds that are protected by law.

The preservation of such animals, birds, and fish as are adapted to consumption as food, or to any other similar useful purpose, is a matter of public interest, and it is within the police power of the state as the representative of the people to make such laws as will best preserve such game and secure its beneficial use in the future to the citizens of the state, and to that end it may adopt any reasonable regulations not only as to time and manner in which such game may be taken and killed, but also may impose limitations upon the right of property in such game after it has been reduced to possession. Such limitations deprive no person of his property, because he who takes or kills game had no previous right to property in it, and when he acquires such right by reducing it to possession he does so subject to such conditions and limitations as the legislature has seen

fit to impose. *State v. Rodman*, 58 Minn. 393, 59 N. W. 1098; *Geer v. Connecticut*, 161 U. S. 519, 40 L. ed. 793, 18 Sup. Ct. Rep. 600; *American Exp. Co. v. People*, 133 Ill. 649, 9 L.R.A. 138, 23 Am. St. Rep. 641, 24 N. E. 758; *State v. Dow*, 70 N. H. 286, 53 L.R.A. 314, 47 Atl. 734, 15 Am. Crim. Rep. 267; *People v. Bootman*, 180 N. Y. 1, 72 N. E. 505, 2 Ann. Cas. 226.

A construction of the Conservation Law should be adopted as appears most reasonable and best suited to accomplish its purpose. *Pierson v. People*, 79 N. Y. 424, 35 Am. Rep. 524; *People v. Fox*, 4 App. Div. 38, 38 N. Y. Supp. 635; *People v. Laning*, 40 App. Div. 227, 57 N. Y. Supp. 1057.

Clearly, if in a hotel where meals are served à la carte a partridge is ordered prepared and served as food and paid for as such, it would constitute a sale within the meaning of the statute. *Com. v. Phoenix Hotel Co.* 157 Ky. 180, 162 S. W. 323.

The service of the partridges by the defendant enabled him to omit the service to his guests of other meat or food in their place and stead, and saved him the expense of purchasing and paying for such other meat or food. The service of prohibited game as a part of a table d'hôte meal is necessarily a sale of such game, and it is paid for by the payment for the meal, at least to the extent of a part of the agreed price for such meal.

Any other construction of the statute would enable hotel and boarding-house keepers with the aid of associates and assistants to serve game during the open season at regular table d'hôte meals with little, if any, limitation or restriction. An incentive for an unwise and unreasonable destruction of game would thus remain notwithstanding the statute. It was, among other things, to take away such incentive that the statute was passed. See *People v. Bootman*, 180 N. Y. 1, 72 N. E. 505, 2 Ann. Cas. 226.

There are many reported decisions by the courts which, while not involving the precise question now before us, are analogous in principle. It was held in Vermont that the furnishing of intoxicating liquors by a boarding-house keeper to his boarders as a part of a meal for which they paid is in effect a sale to them. *State v. Lotti*, 72 Vt. 115, 47 Atl. 392. It was held in Massachusetts that the delivery of milk to the purchaser of a table d'hôte breakfast as a part of such breakfast is as much a sale of the milk, within the statute regulating the quality of milk, as if a special price L.R.A.1917F.

had been put on it, or if it had been bought and paid for by itself. *Com. v. Warren*, 160 Mass. 533, 36 N. E. 308. See *Com. v. Worcester*, 126 Mass. 256. It has been held in Pennsylvania that serving oleomargarin at a public restaurant as a substitute for butter and as a part of a meal for pay constitutes a sale thereof, within the prohibition of the statute for the prosecution of the adulteration of dairy products and fraud in the sale thereof. *Com. ex rel. Allegheny County v. Miller*, 131 Pa. 118, 6 L.R.A. 633, 18 Atl. 938.

It has recently been held by the United States Supreme Court that the performance in a restaurant or hotel dining room by persons employed by the proprietor, of copyrighted musical compositions for the entertainment of patrons without charge for admission to hear it, infringes the exclusive right of the owner of the copyright under the Federal statutes. Justice Holmes, writing for the court, said: "If the rights under the copyright are infringed only by a performance where money is taken at the door, they are very imperfectly protected. . . . It is enough to say that there is no need to construe the statute so narrowly. The defendants' performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere." *Herbert v. Shanley Co.* 242 U. S. 591, 594, 61 L. ed. 511, 513, 37 Sup. Ct. Rep. 232, 233.

Persons who have game in their rightful possession within the terms of the statute may in good faith give the same away or serve the same to an invited guest. It is possible that if the game is served independently of the regular meal by a hotel or boarding-house keeper, the question whether the same as so served is a gift or a sale may be one of fact. The facts appearing by the record in this case, however, show that the partridges were sold as matter of law and within the prohibition of the statute.

The judgment should be reversed, with costs in this court and in the Appellate Division.

Collin, Cuddeback, Cardozo, McLaughlin, Crane, and Andrews, JJ., concur.

Annotation—Serving game or fish with meal as violation of game law.

As to statutes forbidding possession of game during close season, see note to *People ex rel. Hill v. Hesterberg*, 3 L.R.A.(N.S.) 163; as to regulation of the sale or transportation of game raised in captivity, see note to *State v. Weber*, 10 L.R.A.(N.S.) 1155; and as to applicability of game laws to domesticated animals, see annotation to *Graves v. Dunlap*, L.R.A.1916C, 338. For other questions in relation to the game laws, see L.R.A. Indexes under the title, "Game Laws."

The question under annotation depends largely upon the phraseology of the particular statutes in question, but in every instance considered herein the statute has been construed as prohibiting the serving for pay of game or fish by a hotel or restaurant keeper as a part of a meal.

Thus, under the New York statute as quoted and construed in *PEOPLE v. CLARK*, ante, 766, it is unlawful for a hotel keeper to serve prohibited game at his hotel, irrespective of whether the service is à la carte or on the American plan, and notwithstanding it had been rightfully given to him, the theory being that such service, when for a consideration, is necessarily a sale. It should also be noted, however, that the court in this case said that persons who have game in their rightful possession may give the same away or serve the same to an invited guest, and that it is possible that if the game is served at a hotel or boarding house independently of the regular meal, the question whether the game as so served is a gift or a sale may be one of fact.

So under a Maine statute prohibiting the selling or exposing for sale, or having in possession with intent to sell, trout during a specified part of the year, it has been held that the serving of trout to guests at a hotel at the regular table as a part of the regular bills of fare constitutes a sale in violation of the statute, although the fish were received by the hotel keeper from a friend who had caught them lawfully in unprohibited waters. *State v. Beal* (1883) 75 Me. 289. This decision, however, was by a divided court, one judge dissenting upon the ground that the statute only applied to the sale of fish caught in violation of law. In reaching this conclusion he argued as follows: "There is then no close time for taking in Great Tunk pond. There is no penalty for taking, catching, killing, or fishing for trout or

togue there at any time. The fish caught there were lawfully taken. The fisherman might give them away, for that is not prohibited. He might eat them. His family might partake of the result of his skill. It would hardly be contended that if he and the rest of the family could eat, that if he happen to have a boarder, whether for a longer or shorter period, that the penalty would attach for the fish eaten by the boarder, and not to the portion partaken of by the rest of the family."

And under the Kentucky statute making it unlawful to "catch, kill, or pursue, or have in possession after it has been caught or killed," quail, etc., or to expose "any of the animals or birds intended to be protected by this law" for sale during specified portions of the year, it has been held that the words "exposing for sale" apply to a hotel or restaurant keeper who serves a quail to a guest for a certain price within the prohibited season. *Com. v. Phoenix Hotel Co.* (1914) 157 Ky. 180, 162 S. W. 823. In this connection the court said that the "words of the statute should be construed reasonably and naturally and according to their customary usage. So construed, a quail is as fully exposed for sale by a hotel or restaurant when offered to a guest for compensation as it would be if exposed for sale by a dealer in game or any other person for compensation. The guest at the hotel or restaurant who is served with quail for compensation as certainly purchases it, and the proprietor of the hotel or restaurant as certainly exposes it for sale and sells it, as if it were purchased for compensation from a dealer who had it for sale, and was carried home by the purchaser to be served on his table. It would be giving to the statute a strained and unnatural meaning, and one that would defeat in a large measure the purpose of its enactment, to hold that a hotel keeper who furnished to his guest for 75 cents a quail did not expose it for sale. It would be saying that the merchant who offered for sale and sold birds would be guilty of exposing them for sale under the statute, but that the hotel keeper who did exactly the same thing would not be, and there is no room in this statute for a discriminating construction like this."

And in Missouri under a statute declaring it unlawful for any person to purchase, have in possession, or expose for sale any prairie chicken, the killing,

etc., of which in the state during a certain period was prohibited under another section of the act, it has been held that the statute is violated by a restaurant keeper serving prairie chicken to his customers within the prohibited period. *State v. Randolph* (1876) 1 Mo. App. 15.

And under both the Kentucky and Missouri statutes it has been held that it was immaterial that the game in question was caught or killed in a foreign state. *Com. v. Phoenix Hotel Co.* (Ky.) and *State v. Randolph* (Mo.) *supra*. And in some instances the statutes expressly provide that the prohibition upon the sale of game shall apply equally to game imported from another state. See for example *People v. Waldorf-Astoria Hotel Co.* (1907) 118 App. Div. 723, 103 N. Y. Supp. 434, construing and applying N. Y. Forest, Fish, & Game Law, § 31, to English pheasants killed in New Jersey and imported into New York city for sale, and actually offered for sale.

But in connection with the foregoing cases see *People v. Dunston* (1903) 84 N. Y. Supp. 257, wherein it was held that the penalty provided by the N. Y.

Forest, Fish, & Game Laws for having "unlawfully, wilfully, and knowingly possessed four quail during the close season for quail" could not be recovered upon evidence that a party went to defendant's place and ordered quail from the waiter, who said he would see, and after going back and speaking to "someone in the rear of the place, ostensibly the manager," came back and said that it was all right and served the quail, the decision evidently being put upon the ground that the evidence did not sufficiently show defendants' connection with the transaction in that it did not appear, except by inference, that defendants were proprietors of the business nor that the waiter was employed by them or that they were present when the quail in question were served. However, one judge dissented, and he in his opinion stated that it was alleged in the complaint and admitted by answer that the defendants were engaged in business at a certain place, and that the evidence showed that the place was a restaurant, and that the quail were purchased at such place from a waiter employed there. G. J. C.

ALABAMA SUPREME COURT.

STATE OF ALABAMA EX REL. PERRY
W. TURNER, Appt.,
v.

CHARLES HENDERSON, Governor.

(— Ala. —, 74 So. 344.)

Mandamus — to governor — when lies.

1. Mandamus lies to require the governor of the state to perform a ministerial act.

For other cases, see *Mandamus, I. o, in Dig.* 1-52 N. S.

Appropriation — how effected.

2. A sufficient appropriation is effected by a statute permitting the employment of assistants to the attorney general and appropriating out of the state treasury a sum of money sufficient to meet the expenses incurred, although no amount is mentioned. For other cases, see *Appropriations, in Dig.* 1-52 N. S.

Mandamus — ministerial act — what is.

3. If the governor approves the employment of an assistant by the attorney general under a statute permitting such em-

ployment with his approval, his approval of a certificate by the attorney general to secure a warrant to pay for the services is merely ministerial and may be enforced by mandamus, although the statute provides for the warrant upon certificate of the attorney general approved by the governor.

For other cases, see *Mandamus, I. o, in Dig.* 1-52 N. S.

(February 2, 1917.)

APPEAL by relator from a judgment of the Circuit Court for Montgomery County sustaining a demurrer to a petition for a writ of mandamus to require the Governor to approve the certificates of the Attorney General for services rendered by relator as special assistant. Reversed.

The facts are stated in the opinion.

Messrs. William L. Martin, Attorney General, Lawrence E. Brown, Perry W. Turner, and Harwell G. Davis, Assistant Attorneys General, for appellant:

The governor is amenable to the process of the court where it is sought to require him to perform a ministerial duty.

Tennessee & C. R. Co. v. Moore, 36 Ala. 371; *State ex rel. Irvine v. Brooks*, 14 Wyo. 393, 6 L.R.A.(N.S.) 750, 84 Pac. 488, 7 Ann. Cas. 1108; *Chisholm v. McGehee*, 41 Ala. 197; *State ex rel. Plock v. Cobb*, 64 Ala. 127; *State ex rel. Higdon v. Jells*, 138 Ala. 115, 35 So. 60; Board of Educa-

Note. — As to mandamus to governor, see annotation following this case, post, 774.

The requisites of an appropriation for official salary or expenses are discussed in the notes to *State ex rel. Davis v. Eggers*, 16 L.R.A.(N.S.) 631; *Menefee v. Askew*, 27 L.R.A.(N.S.) 537; and *State ex rel. Birdzell v. Jorgenson*, 49 L.R.A.(N.S.) 67. L.R.A.1917F.

tion v. Kingfisher, 5 Okla. 82, 48 Pac. 103; Traynor v. Beckham, 116 Ky. 13, 74 S. W. 1105, 76 S. W. 844, 3 Ann. Cas. 388; Cotten v. Ellis, 52 N. C. (7 Jones, L.) 545; Territory ex rel. Tanner v. Potts, 3 Mont. 364; Middleton v. Lowe, 30 Cal. 601; Harpending v. Haight, 39 Cal. 189, 2 Am. Rep. 432; State ex rel. Whiteman v. Chase, 5 Ohio St. 528; State ex rel. Loomis v. Moffitt, 5 Ohio, 358; Chamberlain v. Sibley, 4 Minn. 309, Gil. 228; Board of Liquidation v. McComb, 92 U. S. 531, 541, 23 L. ed. 623, 628; Magruder v. Swann, 25 Md. 173; Greenwood Cemetery Land Co. v. Routt, 17 Colo. 156, 15 L.R.A. 369, 31 Am. St. Rep. 284, 23 Pac. 1125; McCreary v. Williams, 153 Ky. 49, 154 S. W. 417.

The duty required of the governor is ministerial.

Cosner v. Colusa County, 58 Cal. 274; Cochran v. Beckham, 28 Ky. L. Rep. 370, 89 S. W. 262; Lovelady v. Loveman, 191 Ala. 96, 68 So. 48; State ex rel. Baas v. McKinnon, 68 Fla. 548, 67 So. 77; Columbia v. Spigener, — S. C. —, 67 S. E. 552; Breslin v. Earley, 36 Pa. Super. Ct. 49; Grider v. Tally, 77 Ala. 422, 54 Am. Rep. 65; Little Rock v. United States, 43 C. C. A. 261, 103 Fed. 418; Roberts v. United States, 176 U. S. 221-231, 44 L. ed. 443-447, 20 Sup. Ct. Rep. 376; Halsey v. Nowrey, 71 N. J. L. 481, 59 Atl. 449; State ex rel. Trebby v. Vassaly, 98 Minn. 46, 107 N. W. 818; People ex rel. New York & H. R. Co. v. Havemeyer, 47 How. Pr. 494; State ex rel. Baker v. Farker, 166 Mo. 130, 65 S. W. 720; Rice v. Gwinn, 5 Idaho, 394, 49 Pac. 412; Thoreson v. State Examiners, 19 Utah, 18, 57 Pac. 176; Ramsdale v. Orleans County, 8 App. Div. 550, 40 N. Y. Supp. 840; State ex rel. Butler County Agri. Soc. v. Coufal, 1 Neb. (Unof.) 128, 95 N. W. 362; Von Forel v. State, 4 Neb. (Unof.) 843, 96 N. W. 648; State ex rel. Maddaugh v. Ritter, 74 Wash. 649, 134 Pac. 492; State ex rel. American La France Fire Engine Co. v. Seymour, 79 N. J. L. 92, 74 Atl. 439; State ex rel. Jordan v. Bechtner, 132 Wis. 632, 113 N. W. 42; Nicely v. Raker, 250 Pa. 386, 95 Atl. 556; Board of Education v. Kingfisher, 5 Okla. 82, 48 Pac. 103; Traynor v. Beckham, 116 Ky. 13, 74 S. W. 1105, 76 S. W. 844, 3 Ann. Cas. 388; Cotten v. Ellis, 52 N. C. (7 Jones, L.) 545; Territory ex rel. Tanner v. Potts, 3 Mont. 364; Middleton v. Lowe, 30 Cal. 601; Harpending v. Haight, 39 Cal. 189, 2 Am. Rep. 432; State ex rel. Whiteman v. Chase, 5 Ohio St. 528; State ex rel. Loomis v. Moffitt, 5 Ohio, 358; Chamberlain v. Sibley, 4 Minn. 309, Gil. 228; Board of Liquidation v. McComb, 92 U. S. 531, 541, 23 L. ed. 623, 628; Greenwood Cemetery Land Co. v. Routt, 17 Colo. 156, 15 L.R.A. 369, 31 Am. L.R.A.1917F.

St. Rep. 284, 28 Pac. 1125; McCreary v. Williams, 153 Ky. 49, 154 S. W. 417.

There is nothing in the Constitution to invalidate the payment of funds out of the state treasury under the so-called attorney general's act.

Shattuck v. Kincaid, 31 Or. 379, 49 Pac. 758; Prime v. McCarthy, 92 Iowa, 569, 61 N. W. 220; Campbell v. State Soldiers & Sailors Monument Comrs. 115 Ind. 591, 18 N. E. 33; Henderson v. State Soldiers & Sailors Monument Comrs. 129 Ind. 92, 13 L.R.A. 169, 28 N. E. 127; Bosworth v. Harp, 154 Ky. 559, 45 L.R.A.(N.S.) 692, 157 S. W. 1084, Ann. Cas. 1915C, 277; Hart v. State, — Ind. —, 64 N. E. 854; Callaghan v. Boyce, 17 Ariz. 433, 153 Pac. 773; People ex rel. Becker v. Minor, 46 Ill. 384.

Messrs. Ball & Samford and Rushton, Williams, & Crenshaw, for appellee:

Mandamus will never issue to a governor to compel the performance of a duty imposed by his office, whether ministerial, judicial, or political, and it is an open question in this court.

Tennessee & C. R. Co. v. Moore, 36 Ala. 371; Chisholm v. McGehee, 41 Ala. 197; State ex rel. Higdon v. Jelks, 138 Ala. 121, 35 So. 60; Hawkins v. The Governor, 1 Ark. 570, 33 Am. Dec. 346; People ex rel. Sutherland v. The Governor, 29 Mich. 320, 18 Am. Rep. 89; People ex rel. Broderick v. Morton, 156 N. Y. 136, 41 L.R.A. 231, 66 Am. St. Rep. 547, 50 N. E. 791; Rice v. The Governor (Rice v. Draper), 207 Mass. 577, 32 L.R.A.(N.S.) 355, 93 N. E. 821; State ex rel. Atty Gen. v. Johnson, 30 Fla. 433, 18 L.R.A. 410, 11 So. 845; Gray v. McLendon, 134 Ga. 224, 67 S. E. 859; People ex rel. Bacon v. Cullom, 100 Ill. 472; State v. Illinois C. R. Co. 246 Ill. 188, 92 N. E. 814; Hovey v. State, 127 Ind. 588, 11 L.R.A. 763, 22 Am. St. Rep. 663, 27 N. E. 175; State ex rel. Hope v. Board of Liquidation, 42 La. Ann. 647, 7 So. 706, 8 So. 577; Re Dennet, 32 Me. 508, 54 Am. Dec. 602; Vicksburg & M. R. Co. v. Lowry, 61 Miss. 102, 48 Am. Rep. 76; State ex rel. Robb v. Stone, 120 Mo. 428, 23 L.R.A. 194, 41 Am. St. Rep. 705, 25 S. W. 376; State, Gledhill, Prosecutor, v. The Governor, 25 N. J. L. 331; Bates v. Taylor, 87 Tenn. 319, 3 L.R.A. 316, 11 S. W. 266; Keehan v. Perry, 24 Tex. 253; Houston Tap & B. R. Co. v. Randolph, 24 Tex. 317; Hartranft's Appeal, 85 Pa. 433, 27 Am. Rep. 667; Huidekoper v. Hadley, 40 L.R.A.(N.S.) 505, 100 C. C. A. 395, 177 Fed. 1; Oklahoma City v. Haskell, 27 Okla. 495, 112 Pac. 992; State ex rel. Atty. Gen. v. Huston, 27 Okla. 606, 34 L.R.A.(N.S.) 380, 113 Pac. 190; State ex rel. Lockwood v. Kirkwood, 14 Iowa, 162; Mauran v. Smith, 8 R. I. 192, 5 Am. Rep. 564.

The Act of September 22, 1915, confers upon the governor the discretionary duty of approving the certificate of the attorney general as to expenses incurred under the provisions of said act.

4 C. J. 1463, 1464; *State ex rel. State Pub. Co. v. Smith*, 23 Mont. 44, 57 Pac. 449; *Ex parte Harris*, 52 Ala. 91, 23 Am. Rep. 559; *Tennessee & C. R. Co. v. Moore*, 36 Ala. 371; *State ex rel. Higdon v. Jelks*, 138 Ala. 121, 35 So. 60; *Armstrong v. O'Neal*, 176 Ala. 611, 58 So. 268; *Cosner v. Colusa County*, 58 Cal. 274; *Hover v. People*, 17 Colo. App. 375, 68 Pac. 679.

The Act of September 22, 1915, does not make any legal appropriation for the payment of the expenses authorized by it.

Institute for Education v. Henderson, 18 Colo. 105, 18 L.R.A. 398, 31 Pac. 714; *Ingram v. Colgan*, 106 Cal. 118, 28 L.R.A. 187, 46 Am. St. Rep. 221, 38 Pac. 315, 39 Pac. 437; *State ex rel. Davis v. Eggers*, 29 Nev. 469, 16 L.R.A.(N.S.) 630, 91 Pac. 819; *State ex rel. McDonald v. Holmes*, 19 N. D. 286, 123 N. W. 884; *Menefee v. Askew*, 25 Okla. 623, 27 L.R.A.(N.S.) 537, 107 Pac. 159; *State ex rel. Norfolk Beet-Sugar Co. v. Moore*, 50 Neb. 88, 61 Am. St. Rep. 538, 69 N. W. 373; *Ristine v. State*, 20 Ind. 328; *Clayton v. Berry*, 27 Ark. 129; *Humbert v. Dunn*, 84 Cal. 57, 24 Pac. 111; *People ex rel. McCauley v. Brooks*, 16 Cal. 11; *Stratton v. Green*, 45 Cal. 149; *State ex rel. Pyne v. La Grave*, 23 Nev. 25, 62 Am. St. Rep. 764, 41 Pac. 1075; *Epperson v. Howell*, 28 Idaho, 338, 154 Pac. 621; *Fergus v. Russel*, 270 Ill. 304, 110 N. E. 130, Ann. Cas. 1916B, 1120.

Sayre, J., delivered the opinion of the court:

This appeal was submitted for decision under rule 46 (178 Ala. xix., 65 So. vii.), and has been considered by the court in accordance with that rule.

This is a petition by the state, on the relation of Perry W. Turner, for a writ of mandamus, commanding the governor to approve the attorney general's certificate to the effect that relator had rendered services as special assistant attorney general for the month ending September 30, 1916, that such services were necessary for the efficient conduct of the public business, and could not be promptly performed by the officers regularly provided by law, and that thereupon relator was entitled to be paid from the state treasury the sum of \$250. The petition shows that on December 18, 1915, the attorney general, acting for and on behalf of the state, had entered into a contract with relator by the terms of which relator had agreed to devote his time as special assistant attorney general to the L.R.A.1917F.

performance of such duties as might be assigned to him by the attorney general for the period beginning January 1, 1916, and ending January 20, 1919, in consideration whereof the state had agreed to pay him the sum of \$3,000 per annum in monthly instalments. In the court below a demurrer was sustained to the petition, and petitioner, declining to plead further, took this appeal.

Of the several questions raised by the appeal we consider first that which involves the availability of the remedy sought in the circumstances of this case. It is hardly necessary to say that with one accord the courts deny their power to coerce the governor to perform any act calling for the exercise of judgment or discretion. As to the question whether the governor is amenable to the writ in case it is sought to compel his performance of a purely ministerial duty, the courts are not agreed. In a good number of the states it is held that mandamus will never issue to the chief executive to compel the performance of any duty imposed upon him by law, whether ministerial or otherwise. In a note to the case of *State ex rel. Irvine v. Brooks*, 6 L.R.A.(N.S.) 750, where the cases are collected and reviewed, the editor, after noting the irreconcilable conflict of authority upon the question of the judicial control of the chief executive in regard to purely ministerial duties, says: "But the reason, if not the weight, of authority would seem to be . . . that as to duties of this character the general principle of allowing relief against ministerial officers should apply, and that the mere fact that it is the governor against whom the relief is sought should not deter the courts from the exercise of their jurisdiction, since the authority of the courts is supreme in the determination of all legal questions judicially submitted to them within their jurisdiction, and no one is exempted from the operation of the law, and the duty of faithfully executing the laws is solemnly enjoined upon the governor by his oath of office; and if the relief sought were refused, those persons whose rights have been invaded by executive neglect or refusal to act would very often be altogether without redress."

This court, in *Tennessee & C. R. Co. v. Moore*, 36 Ala. 371, held that mandamus would lie to compel the governor to draw his warrant in favor of the relator for a sum of money lent to it by an act of the legislature, the court being of the opinion that the governor, as well as any other officer, was amenable to the writ. This conclusion was questioned by Judge Byrd in *Chisholm v. McGeehee*, 41 Ala. 197, who doubted "whether this court has the right

or power to enforce by mandamus any duty imposed upon a governor of the state by law," citing cases holding that the court had no such power. And in *State ex rel. Plock v. Cobb*, 64 Ala. 127, Brickell, Ch. J., considered it "a question not free from difficulty, and embarrassed by a conflict of authority, whether the governor, the head of the executive department . . . of the state, can be controlled by the judicial department, in the performance of duties devolved on him in his official capacity." He referred to the decision in *Tennessee & C. R. Co. v. Moore*, supra, but dismissed the subject with the observation that "whether this case falls within the principle thus announced, or whether the principle itself is sound and can be safely acted on, are questions which have not been argued by counsel, and in reference to which we express no opinion." Again, in *State ex rel. Higdon v. Jelks*, 138 Ala. 115, 35 So. 60, the court pointedly "declined to express any opinion as to the soundness of the principle in *Moore's Case*."

Notwithstanding the shadow that may have been thrown over the authority of *Moore's Case* by subsequent references thereto, the court, now considering that it has jurisdiction, and, having jurisdiction, is under duty to declare the law of this case, apprehending no disturbance or impairment of the independence of the separate powers assigned to the different departments of government, nor permitting the intrusion of a doubt that the governor will faithfully execute the law so declared, notwithstanding it would lack the power to enforce its judgment should he choose to ignore its mandate, prefers to follow the authority of that case, and, without further citation of authorities or elaboration of the principle involved, refers to the quotation from the note to *State ex rel. Irvine v. Brooks*, supra, for a sufficient statement of the rationale of its conclusion.

In the next place we consider the objection to the writ in this case, taken on the ground that there has been no lawful appropriation of money for the purpose in question.

Section 72 of the Constitution provides that "no money shall be paid out of the treasury except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof."

Relator claims relief according to the provisions of the act entitled, "An Act to Further Prescribe the Authority and Duties of the Attorney General," etc., approved September 22, 1915 (Gen. Acts 1915, pp. 719 et seq.), § 4 of which in pertinent part reads as follows: "That whenever in his opinion the public interest requires it, by L.R.A.1917F.

reason of the volume of the work in his office and in the importance of the business and the interest of the state in the matter, whether civil or criminal, the attorney general, with the approval of the governor, or the governor himself, may retain and employ, in the name of the state of Alabama, such attorneys and counselors at law as he thinks necessary to the proper conduct of the public business, and shall stipulate in writing with such attorneys and counselors the amount of their compensation to be approved by the governor before employing them. . . . The special assistants to the attorney general herein authorized shall be paid upon the warrant of the auditor drawn upon the certificate of the attorney general, approved by the governor, that their services were actually rendered," etc.

Section 8 of the same act reads as follows: "There is hereby appropriated out of the state treasury a sum of money sufficient to meet the expenses incurred under the provisions of this act."

Appellee contends that § 8 of the act, supra, cannot be allowed to operate as an appropriation, for that it sets apart no maximum or otherwise ascertained amount to meet the expenses that may be incurred under authority of the act; that, quoting from *State ex rel. Davis v. Eggers*, 29 Nev. 469, 16 L.R.A.(N.S.) 630, 91 Pac. 819: "As all appropriations must be within the legislative will, it is essential to have the amount of the appropriations, or the maximum sum from which the expenses could be paid, stated. This legislative power cannot be delegated nor left to the recipient to command from the state treasury sums to any unlimited amount for which he might file claims. True, the exact amount of these expenses cannot be ascertained nor fixed by the legislature when they have not yet been incurred, but it is usual and necessary to fix a maximum . . . specifying the amount above which they cannot be allowed."

Here again the cases are in conflict. The wisdom of the rule announced in the case supra, i. e., that to allow any person or officer to draw upon the treasury for unlimited amounts in effect delegates to that person or officer the power of appropriating the public money, so commends itself to the reason that were the question altogether a new one in this state we might feel inclined to appellee's view. But the question is not entirely new. This provision has been common to all the Constitutions of this state. In the Constitutions of 1819 and 1861 it appeared under the head, "General Provisions." In the later instruments it has appeared under the head of "Legislative Department." In *Smith v. Speed*, 50

Ala. 276, where may be found a brief statement of its historical development, it was said of the provision upon which appellee now relies that "in the light of its history, this constitutional provision is conservative, not restrictive or prohibitory of the legislative power over the public revenue;" and in most of the older states, where any question has been raised concerning its meaning and effect, it has been held not to prohibit indefinite appropriations such as that of the act under consideration, while the decisions to the contrary come from the newer western states. Now the diligence of counsel for appellant has brought to light many examples of appropriations made in this way from the beginning of the state's legislative history down to the date hereof, and it may be assumed, nothing appearing to the contrary, that from time to time as occasion arose during all these years these indefinite appropriations have been acted upon by the executive departments of the government, thus in one way or the other involving a long line of the state's legislative and executive officials in a necessarily implied approval of that interpretation of the provision which would sustain the act now in question, and providing a practical exposition of its meaning too strong and obstinate to be now shaken or controlled except upon a clear conviction of error. *Stuart v. Laird*, 1 Cranch, 299, 2 L. ed. 115; *Cohen v. Virginia*, 6 Wheat. 264, 5 L. ed. 257; *Wetmore v. State*, 55 Ala. 198. However loose, unwise, or dangerous this mode of appropriating the public money may be

deemed, the court, in view of the considerations to which we have adverted, is unwilling to hold that it is prohibited by the Constitution. If the statute be as mischievous in its tendencies as appellee's brief would indicate, the answer, sufficient for us, is that the responsibility therefor rests upon the legislature, not upon the court.

It is further contended by appellee that the payment sought is made discretionary with the governor, and for that reason cannot be compelled by mandamus. It appears, however, that the governor gave his written approval to the contract between the relator and the attorney general at the time it was entered into, and that the relator has fully performed the services he then agreed to perform. At least there is no denial of the truth of the attorney general's certificate, nor any indication that the governor's refusal was put upon any such ground. Upon these facts the court holds that the governor's discretion was exercised in this case at the time when he gave his approval to the contract, and that his required approval of the attorney general's certificate remains to be performed as an act merely ministerial. The judgment of the Circuit Court, sustaining the demurrer to relator's petition, is therefore reversed, and the cause is remanded, to the end that, if necessary, it may proceed to a final judgment.

Anderson, Ch. J., and McClellan and Gardner, JJ., concur.

Annotation—Mandamus to governor.

This note is supplemental to the notes to *State ex rel. Irvine v. Brooks*, 6 L.R.A. (N.S.) 750, and *Rice v. Draper*, 32 L.R.A. (N.S.) 355, where the earlier cases are collected.

It will be observed that in *STATE EX REL. TURNER v. HENDERSON*, ante, 770, the court follows the view taken in the note in 6 L.R.A. (N.S.), that mandamus should issue to the governor to require the performance of a ministerial duty.

At the same time with the principal case were argued the cases of *State ex rel. Daly v. Henderson* (1917) — Ala. —, 74 So. 951, and *State ex rel. Martin v. Henderson* (1917) — Ala. —, 74 So. 952, in each of which cases there had been no approval by the governor of the contract, as in the case now under annotation; and it was held that the governor's approval of the expenses required by the statute was not a mere ministerial act, and the court declined L.R.A.1917F.

to issue a mandamus to him. The *Daly Case* was a proceeding to mandamus the governor to approve an account for expenses and compensation of the relator in conducting an investigation at the instance of the attorney-general in the matter of the impeachment of a sheriff. The *Martin Case* was a proceeding to mandamus the governor to approve a certificate of expenses incurred by the petitioner in the performance of his duties as attorney general in connection with the prosecution of crime in a certain county. The statute quoted in the *HENDERSON CASE* also provided: "Sec. 6. The attorney general is authorized to incur such expenses as may be necessary in the investigation of violations of the criminal law, in the prosecution of crime, and in the conduct, investigation and prosecution of any civil cause in which the state is interested or the state's revenues involved. Authority is herein

contained for the attorney general and his assistants to incur such traveling expenses in the performance of their duties as may be necessary; and the like expenses of solicitors traveling in obedience to the direction of the attorney general as herein prescribed shall be paid; and such other incidental expenses of the office as may be necessary. All such expenses shall be paid by warrant drawn by the state auditor upon the certificate of the attorney general of accounts properly itemized and sworn to, such certificate to be approved by the governor."

In Kentucky and Maryland the courts have followed the earlier decisions in those states granting mandamus against the governor requiring the performance of ministerial duties.

Thus, in *McCreary v. Williams* (1913) 153 Ky. 49, 154 S. W. 417, the court mandamusd the governor to issue a commission to one elected county judge on the ground that the governor in so doing would be acting in a ministerial capacity only.

So, in *Warfield v. Vandiver* (1905) 101 Md. 78, 60 Atl. 538, 4 Ann. Cas. 692, the court ordered that a mandamus issue to the governor commanding him to publish proposed amendments to the Constitution, the Constitution providing that such proposed amendments should be published by order of the governor.

In *Gantenbein v. West* (1915) 74 Or. 334, 144 Pac. 1171, it was held that mandamus would lie to the governor to compel the performance of a merely ministerial duty, such as issuing a certificate of election.

Since the earlier notes there have been illustrations of the principle that mandamus will not issue to the governor requiring the performance of a discretionary act. *State ex rel. Daly v. Henderson*, and *State ex rel. Martin v. Henderson* (Ala.) *supra*; *State ex rel. Young v. Hall* (1914) 135 La. 420, 65 So. 596. In the last case the relief sought of the governor apparently was the rescinding of the order of removal of the relator from his office of state examiner of state banks.

The former Illinois cases holding that the governor cannot be mandamusd to perform a ministerial duty are followed in *People ex rel. Bruce v. Dunne* (1913) 258 Ill. 441, 45 L.R.A.(N.S.) 500, 101 N. E. 560, holding that mandamus will not lie to a canvassing board of which the governor is a member, requiring it to

declare a person elected a representative of the general assembly although the act denied is merely ministerial, where the writ would be ineffective unless the governor were included and required to make proclamations and issue the certificates, the court not passing on the question whether a mandamus could be issued in any case to the other members of a board of which the governor was a member.

In *State ex rel. Dunlop v. Cruce* (1912) 31 Okla. 486, 122 Pac. 237, it was held that while a mandamus would not lie to compel a ministerial duty by the governor, a mandamus to the secretary of state, state auditor, and two other state officers, who with the governor comprise the commissioners of the land office of the state, might be issued to require them to perform ministerial duties cast upon them by law as members of said board. But the court denied the mandamus, as there was no legal duty undone.

The doctrine expressed in the last case is not without authority; but it may be suggested that such a decision involves, in substance, first, that the court dismisses the governor as a member of the board, second, that it holds that the remaining members constitute the board, and third, that, having constituted the board as it saw fit, it issues its commands to the body which it has constituted. And the situation is similar in kind, if not in degree, though the statute provides, as in *Huidekoper v. Hadley* (1910) 40 L.R.A.(N.S.) 505, 100 C. C. A. 395, 177 Fed. 1 (referred to in the note in 32 L.R.A.(N.S.) 355), that a certain less number than all of the members of the board should constitute a quorum.

Generally as to the power of courts to enforce ministerial duties of heads of departments, see the note to *Cooke v. Iverson*, 52 L.R.A.(N.S.) 415.

For immunity of the heads of the state from mandamus to restore to office one who has been illegally removed, see the note to *State ex rel. Moyer v. Baldwin*, 19 L.R.A.(N.S.) 52.

For power of court to review action of governor in removing officer, see the note to *State ex rel. Kinsella v. Eberhart*, 39 L.R.A.(N.S.) 788.

As to when action against governor is deemed to be action against state, see the note to *Louisville & N. R. Co. v. Burr*, 44 L.R.A.(N.S.) 193.

For personal liability of governor, see the note to *Hatfield v. Graham*, L.R.A. 1915A, 175.

B. B. B.

FLORIDA SUPREME COURT.

STATE OF FLORIDA EX REL. THOMAS
F. WEST, Attorney General,

v.

FLORIDA COAST LINE CANAL & TRANSPORTATION COMPANY.

(— Fla. —, 75 So. 582.)

Canal — highway.

1. A canal for public use, constructed and operated by a corporation authorized by its charter or by the statutes of the state to charge tolls for the use of its canal, to construct and operate the same as a part of the navigable waters of the state, receiving grants of land from the state to aid it in effecting the public purposes of its formation, with the right of eminent domain, is a navigable public highway for the transportation of persons and property.

For other cases, see Waters, I. a, in Dig. 1-52 N. S.

Same — power to regulate.

2. A canal forming a navigable public highway is subject to the right and duty of the government to regulate in a proper manner.

For other cases, see Canals, in Dig. 1-52 N. S.

Same — duties of owner.

3. The duties of a canal company to construct and maintain its canal, forming a navigable highway, may arise either from express statutory requirements or by implication of law from authority permitting the use of the special franchises and privileges granted to, and exercised by, such a company, and the undertaking to serve the public; and the acceptance or exercise of the rights carries with it the duty of properly rendering the public service undertaken.

For other cases, see Canals, in Dig. 1-52 N. S.

Same — duty to maintain.

4. After a canal company has elected to proceed and exercise special rights, privileges, and franchises delegated to it by the sovereign power, by constructing its canal, operating it for public use, accepting large grants of land from the state to aid it in effecting the public purposes and objects of its formation, then the duty of keeping and maintaining its canal and waterways in an adequate and proper manner attaches, from the performance of which it cannot be released except by due process of law.

For other cases, see Canals, in Dig. 1-52 N. S.

Headnotes by LOVE, Circuit Judge.

Note. — As to duty of canal company to maintain and operate canal, see annotation following this case, post, 789.

Generally, as to the construction and operation of canals, see note in 61 L.R.A. 833.

L.R.A.1917F.

Same — availability.

5. A canal constituting a navigable public highway, thrown open for navigation to all upon the payment of a fixed toll, should be available at all reasonable times for public use with safety and convenience.

For other cases, see Canals, in Dig. 1-52 N. S.

Same — duties — how determined.

6. The existence and extent of a chartered canal company's privileges and franchises and of its resultant duties and obligations must be determined by reference to the particular law or charter creating it and such valid statutory provisions as may relate thereto.

For other cases, see Canals, in Dig. 1-52 N. S.

Mandamus — to compel maintenance of canal.

7. A canal company owning and operating a canal forming a navigable public highway devoted to public service, and exercising special rights, privileges, and franchises delegated to it by the sovereign power, is charged with the duty of exercising ordinary and reasonable care to maintain the canal and waterways operated and controlled by it according to the dimensions and of the capacity required by its charter and the statutes of the state prescribing particular specifications applicable thereto; and the performance of such duty may be enforced by mandamus in a proper case, upon the relation of the attorney general, when the allegations of the alternative writ are sufficiently specific and there is no other adequate remedy afforded by law.

For other cases, see Mandamus, I. e, in Dig. 1-52 N. S.

Same — scope of remedy.

8. The ordinary office of the writ of mandamus is to coerce the performance of single acts of specific and imperative duty. The court will not undertake to compel the performance of a series of continuous acts, where it is impossible for it to furnish that superintendence without which its mandate becomes nugatory.

For other cases, see Mandamus, I. a, in Dig. 1-52 N. S.

Same — peremptory and alternative writs.

9. The commands of a peremptory writ of mandamus must strictly follow and conform to those of the alternative writ, and unless they do so, such peremptory writ will be refused.

For other cases, see Mandamus, II. c, in Dig. 1-52 N. S.

Same — certificate of obedience.

10. When a peremptory writ of mandamus is issued, it is to be obeyed, and a certificate showing obedience is required to be made by respondent and filed in the cause.

For other cases, see Mandamus, II. c, in Dig. 1-52 N. S.

Same — care in preparation.

11. Great care, particularly, and certainty are required in the preparation of

the mandatory part of the alternative writ of mandamus. It should conform to the recitals in the writ, and must not require more to be done than is justified by such recitals.

For other cases, see Mandamus, II. c, in Dig. 1-52 N. S.

Same — general and particular allegations.

12. General allegations in the recitals of an alternative writ of mandamus, alleging that respondent has failed to maintain its canal and waterways according to certain prescribed specifications and as required by law, are limited by the particular defaults alleged as existing at and between definite points along said waterways, as, when both general and special allegations are made in the same pleading respecting the same subject-matter, the latter control.

For other cases, see Mandamus, II. c, in Dig. 1-52 N. S.

Same — excessive relief.

13. When the allegations in the recitals of an alternative writ of mandamus as to a specific default and breach of duty are confined to designated parts only of such waterway, and the mandatory part of such writ applies to the waterway as a whole, such writ is defective in that its mandatory part requires more to be done than is justified by its recitals.

For other cases, see Mandamus, II. c, in Dig. 1-52 N. S.

Same — questions not properly raised.

14. Questions not properly raised or presented by the pleadings will not be considered or determined by the court on a motion to quash an alternative writ of mandamus.

For other cases, see Mandamus, II. d, in Dig. 1-52 N. S.

Same — scope of writ.

15. The range of action required of the respondent by an alternative writ of mandamus should be clearly, particularly, and specifically set forth in the mandatory part of such writ. The duty commanded should not be left to indiscriminate or indefinite outside ascertainment dehors the writ.

For other cases, see Mandamus, II. c, in Dig. 1-52 N. S.

Same — alternative writ as pleading.

16. The alternative writ in mandamus proceedings stands as the pleading on the part of the relator, and, if too much is asked, respondent may show this as a sufficient cause for not complying with the mandate of the writ.

For other cases, see Mandamus, II. d, in Dig. 1-52 N. S.

Same — motion to quash — when granted.

17. The mandatory part of the writ of mandamus must be enforced in its entirety, and when a motion to quash the alternative writ is made, and it appears from the face of such writ that relator is not entitled to have the order enforced as a whole, the motion to quash should be granted, with leave L.R.A.1917F.

to relator to amend such writ, if he shall be so advised.

For other cases, see Mandamus, II. c, in Dig. 1-52 N. S.

(May 10, 1917.)

MOTION to quash an application for a writ of mandamus to compel the restoration and maintenance of a canal. Motion granted on condition.

Statement by Love, Circuit Judge:

The alternative writ issued in this case, January 31, 1917, is as follows:

The State of Florida to Florida Coast Line Canal & Transportation Company—Greeting:

Whereas, by petition filed in this our supreme court of the state of Florida, wherein the state of Florida upon the relation of Thomas F. West as attorney general, who sues for the state of Florida and for the people of the state of Florida, is the relator, and Florida Coast Line Canal & Transportation Company, a corporation organized under the laws of the state of Florida, is respondent, it has been made to appear:

That the relator, Thomas F. West, is the duly elected, commissioned, and acting attorney general of the state of Florida, and the respondent, Florida Coast Line Canal & Transportation Company, is a corporation organized as a canal and transportation company under the laws of the state of Florida, and particularly chapter 1987 of the Acts of 1874, entitled 'An Act to Provide a General Law for the Incorporation of Railroads and Canals,' as amended by chapter 3166 of the Acts of 1879, Laws of Florida, by which amendment aid from the state in the way of grants of land was authorized and given to railroad and canal companies incorporated under said act, copies of the articles of association of said respondent corporation with the amendments thereto on file in the office of the secretary of state being hereto attached, marked Exhibits A1, A2, A3, and A4, and made a part hereof.

II. That respondent owns and pretends to maintain for public use in the carrying of passengers and property by vessel and other water craft a certain canal composed of artificial and natural waterways paralleling the east coast of Florida and lying wholly within the state of Florida and extending from the St. Johns river on the north, beginning at the point where Pablo creek enters the St. Johns river, thence in a southerly direction by canal to North river, thus connecting the navigable waters of St. Johns river with the navigable waters of North river; thence in a southerly direc-

tion through North river into Matanzas river; thence through Matanzas river and in a southerly direction by canal from Matanzas river into and through Smith's creek and Halifax creek to Halifax river, thus connecting the navigable waters of Matanzas river with the navigable waters of Halifax river; thence in a southerly direction through Halifax river and various canals, cuts, and excavations into the navigable waters of Mosquito lagoon, thus connecting the navigable waters of Halifax river with the navigable waters of Mosquito lagoon; thence in a southerly direction through Mosquito lagoon to the narrow strip of land separating Mosquito lagoon from Indian river; thence by canal through said strip of land into the waters of Indian river, thus connecting the navigable waters of Mosquito lagoon with the navigable waters of Indian river; thence in a southerly direction through the Indian river by various excavations, cuts, and canals into Peck lake; thence in a southerly direction through Peck lake, South Jupiter narrows, Hobes sound, Jupiter sound, Lake Worth creek and various excavations, cuts, and canals into Lake Worth, thus connecting the navigable waters of Indian river with the navigable waters of Lake Worth; thence in a southerly direction through Lake Worth to its southern shore; thence in a southerly direction from Lake Worth by canal into and through Hillsborough river, Lake Mabel, and various excavations, cuts, and canals into Biscayne bay, thus connecting the navigable waters of Lake Worth with the navigable waters of Biscayne bay, thereby providing and affording a navigable inland waterway from Jacksonville to Miami, the location of said canal and waterway being indicated generally by a dotted line on the map of the state of Florida, copy of which is hereto attached, marked Exhibit B and made a part hereof, but more accurately by a blueprint of an actual survey of said canal, copy of which is also hereto attached, marked Exhibit C and made a part hereof.

III. That, although said respondent was authorized by its articles of association to extend said canal southward to Key West, this was never done, and the southern terminus of said canal and waterway is Biscayne bay.

IV. That in addition to cutting and maintaining the canals authorized and necessary for the purpose of connecting the waters of the natural streams and providing and affording navigation to the public, the said respondent was and is authorized and required to remove all shoals, oyster banks, or other obstruction to the complete navigation of said waterway from the St. Johns

river on the north to the Biscayne bay on the south, to the end that a channel of the dimensions fixed and prescribed by the specifications for said canal hereinafter referred to, for the entire length of the said waterway, may be afforded and a safe and inexpensive means of transportation for the people of the state thereby provided and maintained.

V. That the state of Florida, in order to aid financially in the construction of said canal, by chapters 3166 of the Acts of 1879, Laws of Florida, 3641 of the Acts of 1885, Laws of Florida, and 3995 of the Acts of 1889, Laws of Florida, did grant and thereby authorize and direct the trustees of the internal improvement fund of the state of Florida to convey to said respondent large acreages of land held by said state lying adjacent to the line of said canal, and in pursuance of said authority and direction the said trustees of the internal improvement fund did, from time to time, make conveyances of the land so granted to said respondent until the aggregate acreage so granted and conveyed to said respondent by the state of Florida for said purpose was 1,031,128 acres.

VI. That in addition to the land grant to said respondent contained in chapter 3995 of the Acts of 1889, Laws of Florida, for the purpose of aiding and facilitating the construction of said canal and thus affording transportation to the people of the state, specifications for said canal were prescribed by the legislature, and it was therein provided that the said canal and waterway of said respondent should be not less than 50 feet wide and not less than 5 feet deep at mean low water for the entire distance of said canal, and that it should be so maintained by said respondent; and it was provided in said act that no conveyance of any lands reserved for that purpose should be made by the trustees of the internal improvement fund to said respondent for any portion of the said canal and waterway between St. Augustine and Biscayne bay which should remain uncompleted in accordance with such specifications at the end of five (5) years from the 1st day of June, A. D. 1889; and it was further provided in said act that said respondent should accept the provisions thereof within sixty (60) days after it had been approved by the governor and should file a notice of such acceptance with the trustees of the internal improvement fund, which acceptance should be held to constitute a contract between the state of Florida and the said respondent in accordance with the provisions of said act. And this relator, for and on behalf of said state of Florida,

avers that said respondent did accept the provisions of said act, and did file a notice of its acceptance as therein required to be filed with the trustees of the internal improvement fund, a copy of which acceptance is hereto attached, marked Exhibit D, and made a part hereof.

VII. That thereafter, by chapter 4284 of the Acts of 1893, Laws of Florida, the time for the completion of said canal according to said specifications was extended for four (4) years from the 1st day of June, A. D. 1893, and said extension and the conditions thereof were accepted by said respondent as required by said act, and notice of such acceptance was filed with the trustees of the internal improvement fund as therein required, a copy of such notice being hereto attached, marked Exhibit E1, and made a part hereof. That thereafter, by chapter 4623 of the Acts of 1897, the time for the completion of said canal, according to said specifications, was extended to the 1st day of January, A. D. 1898, and said extension and the conditions thereof were accepted by said respondent as required by said act, and notice of such acceptance was filed with the trustees of the internal improvement fund as therein required, a copy of such notice being hereto attached, marked Exhibit E2, and made a part hereof. That thereafter, by chapter 4846 of the Acts of 1899, Laws of Florida, the time for the completion of said canal, according to said specifications, was extended for four (4) years from the 1st day of January, A. D. 1899, and said extension and the conditions thereof were accepted by said respondent as required by said act, and notice of such acceptance was filed with the trustees of the internal improvement fund as therein required, a copy of such notice being hereto attached, marked Exhibit E3, and made a part hereof. That thereafter, by chapter 5279 of the Acts of 1903, Laws of Florida, the time for the completion of said canal, according to said specifications, was extended to the 1st day of June, A. D. 1905, and said extension and the conditions thereof were accepted by said respondent as required by said act, and notice of such acceptance was filed with the trustees of the internal improvement fund as therein required, a copy of such notice being hereto attached, marked Exhibit E4, and made a part hereof.

VIII. That notwithstanding the liberality of said state to said respondent, as evidenced by said donation of more than one million (1,000,000) acres of land for the purpose of aiding in the construction and maintenance of said canal, and the apparently almost inexhaustible patience of the said state, evidenced by the granting of said several extensions of time for the com-

pletion of said canal according to said specifications, the said respondent had not completed said canal at the expiration of the period covered by the last extension, that is to say, on June 1, 1905, whereupon the said trustees of the internal improvement fund refused to convey to said respondent large acreage of land claimed by it under said legislative grants, the title to which was held by said trustees as hereinbefore stated.

IX. That thereafter, on December 1, A. D. 1906, a contract was entered into between said trustees of the internal improvement fund and the said respondent, where it is recited that it is recognized by the parties thereto that great benefits would accrue to the state by the completion of the said canal to the St. Johns river in the drainage and reclamation of lands, the increasing of tax values, the furnishing of transportation facilities to a large portion of the east coast of Florida, as well as enhancing the value of said canal as a transportation line to said company and to the public, and it was agreed by said company in said contract that it would complete said canal according to said specifications; that it would cut and construct that portion of said canal from St. Augustine to the St. Johns river according to said specifications and as originally proposed and authorized, but not theretofore constructed, and that it would pay over to said trustees the sum of fifty thousand dollars (\$50,000), in consideration of which and in consideration of the work of said respondent in draining and reclaiming certain swamp and overflowed lands through which said waterway would run, the trustees agreed to convey to said respondent the lands claimed by it to have been earned under said grants of the legislature of the state, a copy of which said contract is hereto attached, marked Exhibit F, and made a part hereof.

X. That said contract was substantially carried out and performed by the parties thereto, and the said canal was regarded by them as completed according to said specifications, and on the 23d day of November, A. D. 1912, the last deed to be delivered to said respondent in compliance with the terms and conditions of said contract was delivered to and accepted by it.

XI. That thereupon it became and is the legal duty of said respondent under said several contracts, as well as under the law prescribing the public duties of transportation lines and carriers of the character of this respondent, to maintain said canal and waterway at all times and at all points on and along said canal and waterway according to the specifications prescribed and fixed by said statute; that is to say, it was and

is the legal duty of said respondent to maintain said canal at a width of not less than 50 feet and a depth of not less than 5 feet at mean low water for the entire distance of said canal from its intersection with said St. Johns river on the north to Biscayne bay on the south, and said relator says that unless said canal is so maintained it will serve no useful purpose to the public, transportation for the people of the state of Florida by boat, vessel, and other craft on said waterway will not be afforded, the intent and purpose of the state in aiding in the construction and maintenance of said waterway as hereinbefore stated will be defeated, and said respondent will escape from and be relieved of the duty imposed upon it by law to so maintain said canal.

XII. That notwithstanding the duty of said respondent to the people of the state of Florida and the public generally, the said relator, as attorney general of said state, avers and informs this honorable court that the said Florida Coast Line Canal & Transportation Company, the said respondent, has not maintained its said canal and waterway according to said specifications and as required by law, but, on the contrary, it has neglected its duty so to do, and has failed to maintain said canal at a width of not less than 50 feet and a depth of not less than 5 feet at mean low water; that practically nothing is being done, particularly on the southern portion of said canal, in the way of maintenance, and for months at a time great stretches of said waterway are neglected and practically abandoned by said respondent and permitted to remain at less than 50 feet in width and less than 5 feet in depth at mean low water.

That, measured from St. Augustine and beginning at the southern terminus of said canal, indicated by check marks in red ink on the blueprint hereto attached, the said canal and waterway has been permitted to shoal and partially fill up and become narrow, and at the following points is now and has for months been permitted to remain at less than 5 feet deep at mean low water and less than 50 feet wide, namely: at and near mileposts 314 and 313 in Biscayne bay; at and near the entrance of said canal and waterways into Biscayne bay; at the entrance of said canal into Dumfounding bay from the south between mileposts 309 and 308; at and near milepost 308 in Dumfounding bay; at and near mileposts 303 and 302; at and near milepost 300; at and near mileposts 299, 298, 297, 295, 294, 293, 292, 291, 290, 289, and 288; at and near mileposts 285, 284, and 283; at and near mileposts 281 and 280; at and near mileposts 265 and 264; at and near mileposts 94, 93, and 92; at and near mile-L.R.A.1917F.

posts 79, 78, 77, 76, and 75; at and near mileposts 52, 51, and 50; at and near mileposts 48, 47, 46, 45, 44, 43, 42, and 41.

That at said points and at various and sundry other points easily ascertainable by examination, measurement, and test, along said canal and waterway, and for great stretches of said waterway, it is only 3 to 3½ and 4 feet in depth, and is only 30 to 40 feet in width, particularly on the southern portion of said canal and waterway from Miami in a northerly direction to where said canal and waterway enters the navigable waters of Indian river, and from the canal connecting Indian river with Mosquito lagoon in a northerly direction to the town of Ormond.

That the work proposed to be done by said respondent by way of restoration and maintenance of said canal and waterway is wholly inadequate, and will be of practically no value or benefit to said respondent or to the public, as will appear by reference to a letter recently written to the general manager of said respondent by the chief drainage engineer of the state of Florida after a personal inspection of said canal and waterway by said engineer and this relator, copy of which letter is hereto attached, marked Exhibit G, and made a part hereof.

XIII. That the said respondent, in failing to maintain said canal and waterway in compliance with said specifications and as required by law in the performance of its public duty, is evading and shirking the obligations and duties which it owes to the state of Florida and to the general public, is subjecting the public to great inconvenience and damage, depriving them of convenient, inexpensive, and certain transportation for themselves, their freight, and their products, and injuring and destroying the industries of the people, retarding and hindering the development of the state, thereby defeating in a large measure the object and intent of the state in aiding in the construction and maintenance of said canal and the purpose for which said waterway was constructed, and is escaping its obligations and duties to the public, to the great wrong and injury, loss and damage, of the state of Florida and the public generally.

XIV. That the relator for and on behalf of the said state further avers and shows unto this honorable court that the people of the said state and the public generally are without remedy in the premises, unless it be afforded by interposition of this court as herein prayed.

Now, therefore, we, being willing that full and speedy justice shall be done in the premises, do command you, Florida Coast Line Canal & Transportation Company,

forthwith to proceed in the performance of your public duty to restore the said canal and waterway to its original dimensions according to the specifications prescribed by law; that is to say, to a width of not less than 50 feet and a depth of not less than 5 feet at mean low water for the entire length of said canal and waterway from the St. Johns river on the north to Biscayne bay on the south, and particularly to so restore said canal and waterway to a width of not less than 50 feet and a depth of not less than 5 feet at mean low water at the following points, measured from St. Augustine and beginning at the southern terminus of said canal, namely: At and near mileposts 314, 313 in Biscayne bay; at and near the entrance of said canal and waterway into Biscayne bay; at the entrance of said canal into Dumfounding bay from the south, between mileposts 309 and 308; at and near milepost 308 in Dumfounding bay; at and near mileposts 303 and 302; at and near milepost 300; at and near mileposts 299, 298, 297, 295, 294, 293, 292, 291, 290, 289, and 288; at and near mileposts 285, 284, and 283; at and near mileposts 281 and 280; at and near mileposts 265 and 264; at and near mileposts 94, 93, and 92; at and near mileposts 79, 78, 77, 76, and 75; at and near mileposts 52, 51, and 50; at and near mileposts 48, 47, 46, 45, 44, 43, 42, and 41; and at various and sundry other points easily ascertainable by examination, measurement, and test, along said canal and waterway; and particularly on the southern portion of said canal and waterway from Miami in a northerly direction to where said canal and waterway enters the navigable waters of Indian river, and from the canal connecting Indian river with Mosquito lagoon in a northerly direction to the town of Ormond.

And we do further command and require you to hereafter, at all times and at all points along said canal and waterway from St. Johns river to Biscayne bay, maintain said canal and waterway according to the specifications prescribed by law and in compliance with your public duty, at a width of not less than 50 feet and a depth of not less than 5 feet at mean low water.

Or that you appear before the justices of this our supreme court sitting within and for the state of Florida at the court room in the city of Tallahassee, the capital, on the 14th day of February, A. D. 1917, at 10 o'clock in the morning of that day, and show cause why you refuse so to do.

And have you then and there this writ.

Witness the Honorable Jefferson B. Browne, Chief Justice of the Supreme Court of the State of Florida, and the seal of said L.R.A.1917F.

court at Tallahassee, the capital, this 31st day of January, A. D. 1917.

[Seal.] G. T. Whitfield,
Clerk Supreme Court, State of Florida.

The respondents filed the following motion to quash:

"Now comes the defendant, Florida Coast Line Canal & Transportation Company, in the above-entitled cause, and moves the court to quash the alternative writ of mandamus issued therein, upon the following grounds, to wit:

"(1) That the allegations in said alternative writ do not state or constitute a cause of action that authorizes or entitles the relator to the remedy sought and mentioned in said alternative writ, or to the relief prayed in said alternative writ.

"(2) The facts stated in said alternative writ are not sufficient to authorize or entitle the relator to mandamus against said defendant as mentioned or prayed in said alternative writ.

"(3) That said alternative writ does not contain sufficient allegations of fact to show that the defendant is under legal duty or obligation to perform the things mentioned in said alternative writ, and which it is sought or prayed therein to have the defendant commanded or compelled to do by mandamus.

"(4) That the alleged duties or obligations of defendant in the premises, alleged in said alternative writ, are not such as the court will enforce by mandamus in the premises as prayed, commanded, or required in said alternative writ.

"(5) That the allegations of said alternative writ are too vague, indefinite, and uncertain to authorize or to entitle relator to mandamus as therein mentioned or prayed, or to require that they be answered by said defendant.

"(6) That the alleged duties or obligations sought or prayed to be enforced in said alternative writ are too vague, indefinite, and uncertain to be enforced by mandamus in the premises.

"(7) That the said alternative writ does not state a cause of action for mandamus in the premises.

"(8) That the allegations of said alternative writ do not sufficiently state or show such breach for legal duty or obligation on the part of defendant, or such failure to perform legal duties or obligations on the part of defendant, as to authorize or require mandamus, or to entitle relator to mandamus as therein mentioned or prayed.

"(9) That the relief prayed, or matter commanded and required in said alternative writ, is too broad and cannot be granted

on and in the matters alleged in said alternative writ and the law applicable thereto.

"(10) That it appears upon the face of said alternative writ, and the statutes and exhibits referred to therein and made a part thereof, that said canal company was not and is not under or legally bound to perform the alleged obligations and duties alleged in said alternative writ, and which it is sought therein by mandamus to have the defendant compelled to do and perform.

"(11) Said alternative writ seeks to have defendant required and commanded to restore the said canal and waterway to a width of not less than 50 feet and a depth of not less than 5 feet at mean low water for the entire length of said canal and waterway from the St. Johns river on the north to Biscayne bay on the south, and so to maintain the same, but is not alleged or shown in said alternative writ or exhibits that said canal and waterway was not, at and before the time of the issuing of said alternative writ, 50 feet wide and 5 feet deep at mean low water, and maintained in proper condition from the St. Johns river to St. Augustine, and it appears affirmatively on the face of said alternative writ and exhibits that the relator had no knowledge or information that said canal and waterway from the St. Johns river to St. Augustine was not of said width and depth and in proper condition, and relator does not inform or state to the court that such was not the fact.

"(12) Said alternative writ seeks to have the defendant required and commanded to restore the said canal and waterway to a width of not less than 50 feet and a depth of not less than 5 feet at mean low water for the entire length of said canal and waterway from the St. Johns river on the north to the Biscayne bay on the south, and so to maintain the same, but it is not alleged or shown in said alternative writ or exhibits that said canal and waterway was not, at and before the time of the issuing of said alternative writ, 50 feet wide and 5 feet deep at mean low water, and maintained in proper condition between St. Augustine and a point at and near milepost 41 south from St. Augustine, and it does not appear that the relator had any knowledge or information that said canal and waterway from St. Augustine southward to a point at or near milepost 41 was not of said width and depth and in proper condition, and relator does not inform or state to the court that such was not the fact.

"(13) That said defendant was under no duty or obligation in law to maintain said canal and waterway of the width of 50 feet and of the depth of 5 feet between the St. Johns river and St. Augustine, and it ap-

pears in the statutes mentioned or referred to in said alternative writ, that the requirement thereof to construct and maintain a canal or waterway of said width and depth was limited to the portion thereof between St. Augustine and Biscayne bay.

"(14) That it appears upon the face of said alternative writ and in the contract between the trustees of the internal improvement fund and said defendant mentioned in said alternative writ, and a copy of which is thereto attached, marked Exhibit F, and made a part thereof, that said canal company thereby contracted to cut and construct said portion of said canal between St. Augustine and the St. Johns river according to said specifications, to wit, not less than 50 feet in width and not less than 5 feet in depth, but said canal company did not contract to keep or maintain said canal, or any portion thereof, between St. Augustine and the St. Johns river, of said width and depth.

"(15) If said canal company had contracted to keep or maintain the portion of said canal between St. Augustine and the St. Johns river, or any portion thereof, of said width and depth, such contract would not have been enforceable by mandamus.

"(16) That said alternative writ seeks to have the defendant required and commanded to restore the said canal and waterway to a width of not less than 50 feet and a depth of not less than 5 feet at mean low water for the entire length of said canal and waterway from the St. Johns river on the north to Biscayne bay on the south, and so to maintain the same, but said defendant has no right, power, or authority in law so to do in natural waterways covering or including a large part of said line of alleged canal or waterway between the St. Johns river and Biscayne bay.

"(17) That said alternative writ seeks to have the defendant required and commanded to restore the said canal and waterway to a width of not less than 50 feet and a depth of not less than 5 feet at mean low water, for the entire length of said canal and waterway from the St. Johns river on the north to Biscayne bay on the south, and including the waters of the Indian river, but said defendant has no right, power, or authority so to do in the waters of Indian river, and the waters of the said Indian river are not subject to any digging, dredging in, removing any obstructions therefrom, or digging or maintaining any canal therein, by defendant, as sought to be commanded by said alternative writ, but said waters of Indian river are under the jurisdiction and authority of the United States of America, and all such matters in said river are controlled, directed, and pro-

vided for by acts of Congress and by the government of the United States acting therein and under the laws of the United States and the state of Florida, and no such mandamus can be granted against defendant in the premises as is prayed or mentioned in said alternative writ.

"(18) For other good grounds appearing in said alternative writ."

Messrs. C. M. Cooper, Charles P. & J. J. G. Cooper, for respondent:

Where the court will not enforce the mandate of the alternative writ as it is framed, a peremptory writ will not issue thereon.

State ex rel. Bloxham v. Gibbs, 13 Fla. 55, 7 Am. Rep. 233; State ex rel. Ellis v. Atlantic Coast Line R. Co. 51 Fla. 578, 40 So. 875, 51 Fla. 543, 41 So. 529; State ex rel. Oliver v. Grubb, 85 Ind. 213; State ex rel. Ellis v. Atlantic Coast Line R. Co. 53 Fla. 653, 13 L.R.A.(N.S.) 320, 44 So. 213, 12 Ann. Cas. 359.

Mandamus will not be granted as to any matter where there is not sufficient allegation in the alternative writ of breach of legal obligation and actual default therein.

Lake County v. State, 24 Fla. 264, 4 So. 795; Ex parte Ivey, 26 Fla. 541, 8 So. 427; Puckett v. State, 33 Fla. 387, 14 So. 834; State ex rel. Ellis v. Atlantic Coast Line R. Co. 53 Fla. 652, 13 L.R.A.(N.S.) 320, 44 So. 213, 12 Ann. Cas. 359; Florida C. & P. R. Co. v. State, 31 Fla. 483, 20 L.R.A. 419, 34 Am. St. Rep. 30, 13 So. 103.

Mandamus must command only a single act, or only a course of action that can be performed practically by a single act, or a course of action that is limited in its character and can be performed within a short time, and a final return or certificate can be made that it has been performed.

State ex rel. Ellis v. Atlantic Coast Line R. Co. 53 Fla. 686, 13 L.R.A.(N.S.) 320, 44 So. 213, 12 Ann. Cas. 359; Diamond Match Co. v. Powers, 51 Mich. 145, 16 N. W. 314; State ex rel. Rosenfeld v. Einstein, 46 N. J. L. 479; State ex rel. Star Pub. Co. v. Associated Press, 159 Mo. 410, 51 L.R.A. 151, 81 Am. St. Rep. 368, 60 S. W. 91; People ex rel. Fitzgerald v. Whipple, 41 Mich. 548, 49 N. W. 922; State ex rel. Hawes v. Brewer, 39 Wash. 65, 109 Am. St. Rep. 858, 80 Pac. 101, 4 Ann. Cas. 197; Iron Age Pub. Co. v. Western U. Teleg. Co. 83 Ala. 498, 3 Am. St. Rep. 758, 3 So. 455; State ex rel. Sunday v. Richards, 50 Fla. 284, 39 So. 152.

Mr. T. F. West, Attorney General, for relator.
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Love, Circuit Judge, delivered the opinion of the court:

The alternative writ issued by this court on the relation of the attorney general alleges that the respondent owns and pretends to maintain for public use for transporting passengers and property by vessels and other watercraft a certain canal composed of artificial and natural waterways, paralleling the east coast of Florida, and lying wholly within the state of Florida, extending from the St. Johns river on the north to Biscayne bay on the south.

From its original articles of association, attached to the alternative writ, marked Exhibit A1, upon which letters patent issued May 23, 1881, it appears that the respondent company was organized "for the purpose of constructing, maintaining, and operating a canal or artificial water course for the passage of boats and vessels, with the necessary locks, for public use in the conveyance of persons and property." No dimensions of the proposed canal then contemplated to connect the Matanzas river with Indian river were stated in the company's charter. Subsequently, other articles of association were executed by the same incorporators appearing in the original articles, and filed in the office of the secretary of state on July 23, 1881, upon which letters patent also issued, setting forth substantially the same purpose, with the same objects, and between the same navigable waters as the original articles, which appear from Exhibit A2, attached to the alternative writ and made a part thereof.

Afterwards the respondent company, in order to extend its canal, adopted, and on June 27, 1882, filed in the office of the secretary of the state, the following resolution, set out in Exhibit A3, attached to and made a part of the alternative writ, viz.:

"Resolved, that in accordance with § twelve (12) of the Laws of Florida, entitled an act to provide a general law for the incorporation of railroads and canals, 'the said canals shall be extended southward from lower end of Indian river through Lake Worth by the most practicable route after survey of the same, to the navigable waters of Biscayne bay in Dade county, a distance of about eighty-four (84) miles; also the said canal be extended northward from St. Augustine on the most practicable route to connect the navigable waters of North river with the navigable waters of Pablo creek at its junction with the St. Johns river a distance of about twelve (12) miles, in St. Johns and Duval counties.

"Resolved, further, that it is the true intent and meaning of the articles of association of said corporation for connecting the navigable waters therein and herein

mentioned, that whenever in the said rivers or creeks and lagoons along the said route from the St. Johns river on the north and Biscayne bay on the south, any shoals, oyster banks, or other obstructions to the complete navigation of the waters of the coast between the points above named, to steamers, boats, or vessels navigating the same drawing three (3) feet of water or less, shall occur, interfering with the progress and navigation of the steamers, boats, or vessels of the said corporation, that it is a part of the work in connecting the said canals and approaches and artificial waterways to remove such obstructions as may occur by opening new channels for their own use and profit without interference with the present or other natural channels that may be formed."

The legislature of the state, by chapter 3166, Acts 1879, chapter 3641, Acts 1885, and chapter 3995, Acts 1889, authorized grants of public lands to be made to the respondent company to aid it in effecting the purposes for which it was formed, as a result of which said company has received, as is alleged in the alternative writ, over 1,000,000 acres of land from the state.

By § 3, chapter 3995, Acts 1889, it is provided as follows: "That the canals and waterways of the said company shall be not less than fifty (50) feet wide and not less than five (5) feet deep at mean low water for the entire distance between St. Augustine and Biscayne bay, and so maintained by the said company."

From a reference to the articles of association of the respondent company, attached to and made a part of the alternative writ, the statutes of this state, under which the said company was incorporated, whereby it was granted certain franchises and privileges such as the right of eminent domain, the right to charge tolls for the use of its canals and waterways, the right to construct and operate its canal as a part of navigable rivers, which can be held and exercised only by legal authority derived from the sovereign power, as well, also, as those statutes authorizing grants of land to the company to aid it in effecting the purposes for which it was formed, there can be no question but that the respondent company is a public service corporation, and as it has been granted by the state, and exercises, certain rights, franchises, and privileges, some of which are the attributes of sovereignty, so there exists correlative duties and obligations to the public, which it should and by appropriate proceedings can be compelled to faithfully and properly discharge.

A canal such as the one constructed and operated by the respondent company is a L.R.A.1917F.

navigable public highway for the transportation of persons and property. *Kennedy v. Indianapolis*, 103 U. S. 599, text 604, 605, 26 L. ed. 550, 553; *Robinson v. Chamberlain*, 34 N. Y. 389, 90 Am. Dec. 713; *Barnett v. Johnson*, 15 N. J. Eq. 481; *Buffalo Bayou Ship Channel v. Milby*, 63 Tex. 492, 51 Am. Rep. 668. As a public highway it is in this respect like railroad companies, which, as stated in *Wiaconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115, "have from the very outset been regarded as public highways, and the right and the duty of the government to regulate in a reasonable and proper manner the conduct and business of railroad corporations have been founded upon that fact. Constituting public highways of a most important character, the function of proper regulation by the government springs from the fact that in relation to all highways the duty of regulation is governmental in its nature. At the present day there is no denial of these propositions" (citing cases).

Canals owned and operated by chartered companies with the rights, privileges, and franchises, such as are enjoyed by the respondent company, in addition to being public highways, have many of the distinguishing characteristics that make railroad companies quasi public corporations in respect to the authority of the courts and legislature to enforce the public duties enjoined upon them. If not, then what redress has the state or public for a neglect, infringement, or violation of these duties?

As a general rule, a canal company is not a common carrier, its business, ordinarily, being that of providing, artificial channels or navigable ways for public transportation; and, except in rare instances, its public duties pertain exclusively to the construction and maintenance of its waterways.

This duty may be either expressly required by statute, or implied by law in conferring or permitting the use of the franchises and privileges, granted to and exercised by canal companies undertaking to serve the public, "whether the provision of the grants be mandatory or merely permissive, and the acceptance of exercise of the rights carries with it the duty of properly rendering the public service undertaken by virtue of the rights conferred or permitted to be exercised." *State ex rel. Ellis v. Atlantic Coast Line R. Co.* 53 Fla. 650, 13 L.R.A.(N.S.) 320, 44 So. 213, text 219, 12 Ann. Cas. 359.

After the canal company has elected to proceed and exercise the rights, privileges, and franchises delegated to it by the sovereign power, by constructing its canal, operating it for public use, accepting large

grants of land from the state to aid it in effecting the public purposes and objects of its incorporation, then the duty of maintaining its canals and waterways in a proper manner attached, from the performance of which it cannot be released except by due process of law. *Riddle v. Locks & Canals*, 7 Mass. 169, 5 Am. Dec. 35.

To subserve the purpose of its construction, a canal thrown open for navigation to all upon the payment of a fixed toll should be available at all reasonable times for public use with safety and convenience. If the canal is allowed to shoal or narrow, reducing its proper size and capacity to accommodate the different water craft for the use of which it was constructed, and if it is permitted so to remain for long periods of time, as is alleged in the alternative writ has been the condition of the canal and waterways of the respondent company, then the very object and purpose of its construction, which were to provide a waterway to be used by the public with safety and convenience, are defeated, the state deprived of at least a large part of the consideration for the large grants of land made to, and the special privileges, franchises, and rights conferred upon, such company, and the company is thus allowed to evade and escape its clear and plain duty and obligation imposed upon it by the general law as well as by the statutes, the provisions of which, as is alleged in the case of the respondent company, it has expressly accepted.

The general rule governing a canal company with respect to the operation and maintenance of its waterways in the absence of particular and legally enforceable specifications, it is held, is that it is bound so to maintain and manage the canal that it can be used with reasonable safety and convenience by the public, for whose benefit it was constructed. To this end the duty of such company to the public demands the exercise of ordinary and reasonable care. *Pennsylvania Canal Co. v. Burd*, 90 Pa. 281, 35 Am. Rep. 659.

In determining the existence and extent of a canal company's privileges and franchises, and of its resultant duties and obligations therefrom, reference must be had to the particular law or charter creating it and such valid statutory provisions as may relate thereto. *State v. Portland General Electric Co.* 52 Or. 502, 95 Pac. 722, 98 Pac. 160.

Referring then to the charters of the respondent company and to the statutes relating to its public duties and obligations, it is clear that said company is charged with the duty of exercising ordinary and reasonable care to keep and maintain its canal and the waterways operated and con-

trolled by it according to the dimensions and of the capacity required by its charter and by chapter 3995, Acts 1889, the latter prescribing particular specifications for part of the canal; and the performance of such duty may be enforced by mandamus in a proper case, upon the relation of the attorney general, when the allegations of the writ are sufficiently specific and there is no other adequate remedy afforded by law. *State ex rel. Ellis v. Atlantic Coast Line R. Co.* 53 Fla. 650, 13 L.R.A. (N.S.) 320, 44 So. 220, 12 Ann. Cas. 359. The policy of the law is to require by mandatory process the performance by public utility corporations of their duties to the public. *State ex rel. Ellis v. Tampa Waterworks Co.* 57 Fla. 533, 22 L.R.A. (N.S.) 680, 48 So. 639.

While the duty of the canal company with respect to the maintenance of the waterways operated and controlled by it is as above stated, yet it is contended by respondent that in the event it should be held that mandamus is the appropriate remedy in this case to require the canal company to restore its waterways to the dimensions provided by statute or the charter of the company, should it appear that it has failed so to do, yet it is beyond the province of such a remedy to require the company "to hereafter, at all times and at all points along said canal and waterway from St. Johns river to Biscayne bay maintain said canal and waterway" in accordance with such requirements as is commanded in the writ.

On the other hand, relator contends that this question has been definitely determined and settled by this court in the case of *State ex rel. Ellis v. Atlantic Coast Line R. Co.* supra. An examination of this case develops that in the discussion of the duty of a railroad as a common carrier, the court states that it is the duty of such a railroad to provide a reasonably safe and sufficient roadbed, track, equipment, and facilities, and to maintain and operate the property in a proper condition for rendering safe, prompt, and adequate service, and that such duty might be enforced in a proper case by mandamus, yet the court did not there expressly decide that mandamus would issue to require the performance of a series of continuous acts, prolonged indefinitely. That such was not the holding of the court as expressed in the judgment is apparent from an examination of the writ then being considered, and the scope and nature of the remedy sought. The writ in that case mentioned specific defects in the roadbed and track of the respondent railroad company, and commanded said respondent "to forthwith repair and put in reasonably safe and suitable condi-

tion your roadbed and track over and along the line of railroad" at certain definitely designated sections of the railroad. It will be noted that the specific duty contemplated being enforced by the writ was that of repairing and putting in reasonably safe and suitable condition the roadbed and track of the railroad, not of keeping it so at all times thereafter.

Further, the court in its opinion indicates that the duty enjoined upon the railroad company had reference to certain definite and determinable acts, the completion and performance of which might be ascertained within some definite time, for it is stated in the opinion that "the roadbed and track of a railroad have the elements of stability and fixedness, and it can readily be ascertained when they are put in the condition required by specific allegations and commands." If the court had decided that the railroad could be compelled by mandamus to keep and maintain its track and roadbed in a safe and suitable condition at all times after the issuance of the writ, how could it readily be ascertained when the commands of the writ had been obeyed? In the subsequent case of *State ex rel. Ellis v. Atlantic Coast Line R. Co.* 53 Fla. 689, 44 So. 223, the alternative writ was amended, and it appears that the mandatory part did command the respondent company "to forthwith repair and put in reasonably safe and suitable condition, and maintain the same in such condition, your roadbed and track," etc.; but it does not appear that this part of the writ was there challenged by respondent or that the court considered it in the light of requiring the railroad company to perpetually maintain its roadbed in the condition to which it was required to restore it.

Neither do we consider the case of *State ex rel. Lunig v. Johnson*, 71 Fla. 363, 72 So. 477, an authority sustaining this contention of relator. While the alternative writ considered in that case required the tax collector to discharge his statutory duty by remitting to the state treasurer 15 per cent of the amount of certain taxes collected for the month of February, 1916, "and for each succeeding month hereafter," no question as to that part of the writ was raised by demurrer or otherwise, nor was such question considered or determined by the court in its decision of this case.

The channel of a canal, such as the one now under consideration, extending for hundreds of miles through artificial and natural water courses, varies and shifts in width and depth from time to time as the result of floods, freshets, storms, tides, and other natural causes incident to such property, beyond the control of its owners. Thereby L.R.A.1917F.

shoals and sand bars are formed, which narrow and fill the channel and form other obstructions, rendering it humanly impossible for the command in the alternative writ, "hereafter at all times," to be strictly obeyed. Every temporary shoaling or narrowing of the canal, however trivial or transitory, would subject respondent to be brought before this court on charges of contempt, involving the necessity of frequent investigations by this court as to the causes, seriousness, extent, character, and permanency of such obstructions, whether the canal company was exercising due diligence in preventing or removing such obstructions, and various related matters, in effect rendering this court a supervising and managerial body as to the operation and conduct of the canal. Such a condition is not within the province of a writ of mandamus to create, nor is it practical for the courts by mandamus to enforce a series of continuous acts, required to be performed as long as the canal continued to be operated.

It would be out of the question to keep this case open for all time, or even for an indefinite number of years, to superintend the continuous performance of these duties by the respondent. There would be no end to the number of occasions when this court might be called upon to determine whether the respondent had performed the duties in question faithfully and efficiently, or so negligently and unskillfully as to justify it being arraigned for contempt for a violation of the mandate of this court. *Iron Age Pub. Co. v. Western Union Teleg. Co.* 83 Ala. 498, 3 Am. St. Rep. 758, 3 So. 449.

The ordinary office of the writ of mandamus is to coerce the performance of single acts of specific and imperative duty. The court will not undertake to compel the performance of a series of continuous acts, as it is impossible to furnish that superintendence without which the court's mandate becomes nugatory. *State ex rel. Mobile v. Revenue & Road Comrs.* 180 Ala. 489, 61 So. 368; *Diamond Match Co. v. Powers*, 51 Mich. 145, 16 N. W. 314; *State ex rel. Rosenfeld v. Einstein*, 46 N. J. L. 479.

Appropriate to the facts under consideration, and as a correct statement of the law here involved, is the language of the supreme court of Washington in the case of *State ex rel. Hawes v. Brewer*, 39 Wash. 65, 109 Am. St. Rep. 858, 80 Pac. 1001, 4 Ann. Cas. 197: "Mandamus will not lie to compel a general course of official conduct, as it is impossible for a court to oversee the performance of such duties. 13 Enc. Pl. & Pr. 497. It will be seen in this case that the remedy sought was entirely too general to be at all practical. It is true that we decided in *State ex rel. Grinsfelder v.*

Spokane Street R. Co. 19 Wash. 518, 41 L.R.A. 515, 67 Am. St. Rep. 739, 53 Pac. 719, that mandamus would lie to compel a street railway company to resume the operation of a line which it had discontinued. But there was one specific thing which the street railway company was required to do which involved the entire controversy; but here there is a general course of official conduct sought to be compelled."

In connection with this feature of the mandatory part of the alternative writ, we are confronted with another and practical difficulty. The commands of a peremptory writ of mandamus must strictly follow and conform to those of the alternative writ, and unless it does so, such peremptory writ will not be enforced. *State ex rel. Bloxham v. Gibbs*, 13 Fla. 55, 7 Am. Rep. 233; *State ex rel. Moody v. Call*, 39 Fla. 165, 22 So. 266.

The peremptory writ, being issued, is to be obeyed, and a certificate showing obedience is required to be filed. *State v. McLin*, 16 Fla. 17; *State ex rel. Bisbee v. Alachua County*, 17 Fla. 9. Such being the requirements in mandamus proceedings, how could a certificate show obedience to a writ requiring the respondent "hereafter at all times" to maintain its canal and waterways according to the required standard? This would be impracticable and cannot consistently be required.

It is contended by respondent that the mandatory clause of the alternative writ is broader than its recitals will properly support or the statutes and its charter will require. By the mandate of the writ, respondent is commanded, in the performance of its public duty, "to restore said canal and waterway to its original dimensions, according to the specifications prescribed by law, that is to say, of a width of not less than 50 feet and of a depth of not less than 5 feet at mean low-water mark, for the entire length of its said canal and waterway from the St. Johns river on the north to Biscayne bay on the south," and further "to hereafter, at all times and at all points along said waterway from St. Johns river to Biscayne bay, maintain said canal and waterway . . . at a width of not less than 50 feet and a depth of not less than 5 feet at mean low water." It will be noted that this mandatory clause in part requires the entire canal and waterway from the St. Johns river to Biscayne bay, as a whole, to be restored to the stated dimensions and so kept and maintained at all times hereafter.

The allegations of the writ, charging the default of respondent, are:

That the respondent has failed to maintain its canal and waterway as required by law, "that practically nothing is being done, L.R.A.1917F.

particularly on the southern portion of said canal, in the way of maintenance, and for months at a time great stretches of said waterway are neglected and practically abandoned by said respondent, and permitted to remain at less than 50 feet in width and 5 feet in depth at mean low water."

"That, measured from St. Augustine and beginning at the southern terminus of said canal, indicated by check marks in red ink on the blueprint hereto attached, the said canal and waterway has been permitted to shoal and partially fill up and become narrow, and at the following points is now and has for months been permitted to remain at less than 5 feet deep at mean low water and less than 50 feet wide, namely." Then follows the designation of certain points along the course of the said canal and waterway.

"That at said points and various and sundry other points easily ascertainable by examination, measurement, and test, along said canal and waterway, and for great stretches of said waterway, it is only 3 to 3½ feet in depth, and is only from 30 to 40 feet in width, particularly on the southern portion of said canal and waterway from Miami in a northerly direction to where said canal and waterway enters the navigable waters of Indian river, and from the canal, connecting Indian river with Mosquito lagoon, in a northerly direction to the town of Ormond. That the work proposed to be done by said respondent by way of restoration and maintenance of said canal and waterway is wholly inadequate and will be of practically no value or benefit to said respondent or to the public."

It is well settled that great care, particularity, and certainty is required in the mandatory part of the alternative writ, and that it must conform to the case made by the recitals in the writ, and must not require more to be done than is justified by the recitals. *Florida C. & P. R. Co. v. State*, 31 Fla. 482, 20 L.R.A. 419, 34 Am. St. Rep. 30, 13 So. 103.

A careful consideration of the quoted recitals of said writ, in connection with the blueprint and map attached to and made a part of said writ, develops that nowhere is it charged particularly and certainly that the canal between St. Johns river and St. Augustine, and between St. Augustine and the forty-first milepost along said canal, south of the latter place, or that any part of the said waterway along the Indian river, between Goat creek and Jupiter inlet, does not conform to the standard of requirements to which relator urges it is the duty of respondent to maintain such waterway.

The allegations of the writ do not amount to a charge that the respondent company

has totally failed to properly maintain and keep in repair its waterway along its entire course, for the general allegation in the first paragraph of § XII. of the writ, to the effect that said respondent has not maintained its said canal and waterway according to said specifications and as required by law, must be construed and held to be limited by the particular defaults alleged at and between definite points along said waterways. *Generalibus specialia derogant*. It is a well-settled rule of pleading that, where both general and specific allegations are made respecting the same subject-matter, the latter control. 31 Cyc. 85. The allegations in the recitals of the writ as to the specific default and breach of duty on the part of respondent must be held to be confined to only the designated parts of said waterway, while the mandatory part of the writ applies to the waterway as a whole, thus violating the rule of pleading above stated.

It is further contended by respondent that the dimensions of that portion of its waterway between the St. Johns river and St. Augustine are not prescribed by any statute of this state; that the particular specifications as to width and depth of such canal and waterways prescribed by chapter 3995, Acts 1889, specifically refer to, and are confined as to their application to, the canal and waterways of the said company between St. Augustine and Biscayne bay; that any requirement that the part of said canal between St. Augustine and the St. Johns river should be not less than 50 feet wide and 5 feet deep rests solely upon the terms of its contract with the trustees of the internal improvement fund, bearing date December 1, 1906, wherein it is provided that "the portion of said canal between St. Augustine and the St. Johns river shall be governed by and conform to the same requirements as to width, depth of water, and construction, as is provided by statutes for the canal south of St. Augustine," a copy of said contract being attached to the alternative writ, marked Exhibit F, and made part thereof; that in the event it owes any public duty with reference to that part of its canal north of St. Augustine, subject to enforcement by mandamus, such duty is to be determined solely from the provisions of its charter, because, as respondent contends, mandamus will not lie to enforce the terms of a contract.

It is further contended by respondent that the mandate of the writ should not apply to the waterway along Indian river between Goat's island and Jupiter inlet, because by the provisions of chapter 4283 of the Acts of 1893, it has been released from any obligation to maintain such part

of the said waterway; that the conditions for such release imposed by statute, viz., the surrender and release to the United States by the canal company of such portion of said waterway, and the assumption and control thereof by the United States, have been fully complied with, and that the United States has assumed the jurisdiction, authority, and control over such portion of said waterway as is evidenced by certain statutes of the United States making appropriations for improving that part of Indian river; and, further, that, as Indian river is a navigable waterway, the canal company is prohibited from excavating therein or in any manner altering or modifying the course, condition, or capacity thereof, unless the work has been recommended by the chief of engineers and authorized by the secretary of state, under the provisions of § 10, chapter 425, of the Act of Congress of March 3, 1899 (30 Stat. at L. 1151, Comp. Stat. 1916, § 9910), and that the rule that mandamus will not issue to enforce a right which is contingent upon the further act of a third person, or which is beyond the power of the respondent to perform, is applicable and controls. While these contentions may not be without weight and merit under a state of facts involving their application, yet it is unnecessary and improper at this time to pass upon them, in view of our construction that the allegations of the writ as to the default and breach of duty on the part of respondent do not charge that such sections of the canal and waterway are not of the dimensions required by law, or that they are not in good order and open for the safe and convenient use of the public.

That portion of the mandatory part of the writ requiring the respondent to restore to certain stated dimensions its canal and waterways "at various and sundry other points easily ascertainable by examination, measurement, and test, along said canal and waterway," is objectionable in that it violates another well-settled rule applicable to mandamus, to the effect that the respondent should not be required to look beyond the writ to ascertain the precise acts which he is commanded to perform. In other words, "that the range of action required of the respondent cannot be left to indiscriminate outside ascertainment, nor can he be required to look dehors the writ to ascertain his duty. *Florida C. & P. R. Co. v. State*, 31 Fla. 482, 20 L.R.A. 419, 34 Am. St. Rep. 30, 13 So. 103; *Howell v. State*, 54 Fla. 199, 45 So. 453. In the last case this court cites approvingly the holding in *Clayton v. McWilliams*, 49 Miss. 311, to the effect that when anything remains to be done, or fact

to be ascertained, relief cannot be granted by mandamus.

The last-quoted clause in the mandatory part of the writ leaves the precise acts to be done thereunder in a more or less indefinite and uncertain state, contingent upon the result of an "examination, measurement, and test" to be conducted by some indefinite person or agent, and which may be more or less thorough, careful, and efficient.

This construction is not at variance with the views expressed by this court in *State ex rel. Ellis v. Atlantic Coast Line R. Co.* 53 Fla. 689, 44 So. 223, to the effect that the duty to maintain its roadbed and track in a proper condition requires a railroad company to have a more or less detailed knowledge of every portion of its roadbed and track, and therefore more specific allegations than were made in the alternative writ in that case, as to the points at which and the particulars in which the breaches of duty occurred, were not required. In that case the recitals of the writ alleged the condition of the roadbed and track to be such "that the main line of the railroad as a whole must be in an unfit and unsuitable state for the public service in which it is used." Such a broad construction cannot

be given to the allegations of the writ in the present case, as hereinbefore pointed out.

As the alternative writ in mandamus proceedings stands as the pleadings on the part of the relator, if too much is asked, the respondent may show this as a sufficient cause for not complying with the mandate of the writ. The mandate of the writ must be enforced as a whole, and where a motion to quash the alternative writ is made, and it appears from the face of such writ that relator is not entitled to have the order enforced as a whole, the motion to quash should be granted with leave to relator to amend such writ if it should be so advised. *Merchants Broom Co. v. Butler*, 70 Fla. 397, 70 So. 383.

An order will be entered that, unless the attorney general shall within twenty days amend the alternative writ so as to conform to the principles announced in this opinion, the motion to quash the alternative writ will be granted.

Browne, Ch. J., and Taylor, Shackelford, and Whitfield, JJ., concur. Ellis, J., disqualified.

Annotation—Duty of canal company to maintain and operate canal.

For the general subject of the construction and operation of canals, see the note to *Mullen v. Lake Drummond Canal & Water Co.* 61 L.R.A. 833. For canal as navigable water, see the note to *State ex rel. Lyon v. Columbia Water Power Co.* 22 L.R.A.(N.S.) 435.

The right of a railroad to abandon the operation of its road is treated in the note to *State v. Old Colony Trust Co.* L.R.A.1915A, 549.

There is no doubt, as is held in the principal case, that a canal company in possession of a franchise from the state is bound to operate and maintain its canal.

In *State ex rel. Lyon v. Columbia Water Power Co.* (1909) 82 S. C. 181, 22 L.R.A.(N.S.) 435, 129 Am. St. Rep. 876, 63 S. E. 864, 17 Ann. Cas. 343, it was held that one who received a grant of a public navigable canal upon condition that it be kept open cannot defeat an injunction against its obstruction on the ground that the necessity for its navigation has ceased.

In *Savannah & O. Canal Co. v. Sherman* (1893) 91 Ga. 400, 44 Am. St. Rep. 43, 17 S. E. 937, mandamus was granted requiring a canal corporation to keep its canal in a navigable condition, where

its charter declared "that the said corporation shall be obliged to keep the said canals and locks in good and sufficient order, condition, and repair, and at all times free and open to the navigation of boats, rafts, and other water crafts, and for the transportation of goods, merchandise, and produce." This was at the suit of a private individual who alleged that he was in the lumber business and that, because of the unnavigable condition of the canal, he was compelled to ship his timber by a more circuitous route. It was held that it was no defense that it would not be profitable to operate the canal if it were put in navigable condition, and that the lack of funds to make repairs was not an absolute defense, although it might make the order impossible of enforcement.

In *Riddle v. Locks & Canals* (1810) 7 Mass. 169, 5 Am. Dec. 35, the plaintiff recovered a judgment against the canal proprietors for damages caused by his inability to take through the canal a raft for which he had paid toll, and the delay and consequent loss of part of his cargo, etc., due to a storm, he having alleged that the defendants did omit to open and dig the said canal of a depth sufficient for boats, rafts, etc., to float upon,

and did permit the same to remain in a ruinous and decayed state and out of repair, and the passage to become and remain choked and filled up. The court said that it was stated by the defendants that it was not the duty of the defendants to keep the canal in repair, sufficient for the passage of rafts and boats of the description mentioned in the declaration, and added: "This ground is endeavored to be maintained on the supposition that the powers granted to the corporation were a privilege which might be waived or exercised at its discretion. But we think this supposition is not correct. When the act of incorporation first passed, it was optional with the proprietors whether they would or would not take the benefit of it; but after they had made their election by executing the powers granted and claiming the toll, then the duties imposed by the 10th section, to make the canals, etc., attached; from which they cannot be discharged, but by a seizure of the franchise into the hands of the government, or by a repeal of the act with their assent."

Where a state transferred her canal property to a corporation created by the state, in which she became an associate with her creditors, who appointed part of the trustees of such corporation, it was held that the trustees of the corporation were liable in damages for failure or neglect to keep the canal in navigable order, to one who had paid his toll in advance for the year. *Moore v. Wabash & E. Canal* (1856) 7 Ind. 462.

A canal company purchasing a canal from the state is bound to keep it in repair and condition for use, where the statute authorizing the sale provided that the purchaser shall be bound ever thereafter to keep up in good repair and operating condition the canal, "with the necessary toll-houses, water stations, locks, buildings, and appurtenances; and the said railroad and canal shall be and remain forever a public highway, . . . it being the true intent and meaning of this act that the said sections of canal and railroad, and every part thereof except as is herein provided," "shall be and remain a public highway, and kept open and in repair by the purchaser . . . for the use and enjoyment of all parties desiring to use and enjoy the same." *Pennsylvania R. Co. v. Patterson* (1873) 73 Pa. 491, an action by a boat owner complaining of low water and bad conditions.

But it has been held that one using a canal is estopped to deny the right of the proprietors to the payment of toll, *al-L.R.A.1917F.*

though they might be proceeded against by quo warranto for the repeal and dissolution of their charter, or by indictment for a misdemeanor in not keeping the canal in repair. *Quincy Canal v. Newcomb* (1843) 7 Met. (Mass.) 276, 39 Am. Dec. 778, where it was also held that the defendant had no right to set off damage sustained because the canal had not been dug to the depth required by the charter, as this was a damage which he suffered in common with the public, the court distinguishing the *Riddle Case* (Mass.) supra.

And in *Saylor v. Pennsylvania Canal Co.* (1897) 183 Pa. 167, 63 Am. St. Rep. 749, 39 Atl. 598, an action of trespass by a boat owner for failure of the defendant to repair its canal, so that the plaintiff was unable to use it, it was held that a private citizen could not enforce the duty to repair, which could be enforced only by the state.

In *State v. New Orleans Nav. Co.* (1852) 7 La. Ann. 679, the court forfeited the charter and dissolved a navigation company which had failed to maintain the improvement of a bayou as required by its charter.

A canal corporation which fails for twelve months at a time to keep its canal in repair will forfeit its charter, where the charter provides that in such case "the said corporation shall thenceforth forever cease, and their charter be forfeited." *State ex rel. Atty. Gen. v. Pennsylvania & O. Canal Co.* (1872) 23 Ohio St. 121.

But the court will not forfeit a canal franchise for a slight and temporary failure in the depth or width of a canal channel, where there is no statutory cause for forfeiture. *State v. Morris* (1889) 73 Tex. 435, 11 S. W. 392.

It may be noted that it was held in *State v. George* (1878) 34 Ohio St. 657, that an unauthorized eviction of the lessee of a canal belonging to the state will not excuse the payment of rent.

B. B. B.

IOWA SUPREME COURT.

WISSMATH PACKING COMPANY

v.

MISSISSIPPI RIVER POWER COMPANY,
Appt.

(— Iowa, —, 162 N. W. 846.)

Damages — eminent domain — injury to right to redeem.

1. The right to redeem from a foreclosure sale is not property distinct from the real

estate so that damages may be allowed for prevention of its exercise by flooding the land so that money cannot be borrowed on it, under a statute requiring compensation for lands or other property which may be taken, overflowed, or otherwise damaged by an improvement, where another statute provides that an execution purchaser may, after the estate becomes absolute, recover damages for any injury to the property committed after the sale and before possession is delivered under the conveyance.

For other cases, see Eminent Domain, III. c. 1, in Dig. 1-52 N. S.

Proximate cause — flooding mortgaged land — loss to mortgagor.

2. The flooding under the right of eminent domain of land which has been sold under mortgage foreclosure is not the proximate cause of the loss of the land to the corporate mortgagor, which lacks funds to make the redemption because it cannot borrow on the land in its flooded condition.

For other cases, see Proximate Cause, I. in Dig. 1-52 N. S.

Case — causing breach of contract — flooding land.

3. No action lies against one for causing breach of a contract to lend money to the mortgagor to effect a redemption by flooding the mortgaged land.

For other cases, see Case, II. in Dig. 1-52 N. S.

(May 16, 1917.)

APPEAL by defendant from a judgment of the District Court for Lee County in plaintiff's favor in an action brought to recover damages for alleged injuries to a right of redemption in certain real estate. Reversed.

Statement by Evans, J.:

Action for damages for alleged injuries to a right of redemption in certain real estate. There was a general denial by the defendant. The jury rendered a verdict for plaintiff for \$53,000, and the defendant appeals.

Messrs. J. O. Boyd, George B. Stewart, and James C. Davis, for appellant:

The dam having been constructed under the authority of an authorized act of Congress, the only damages for which the defendant would be liable would be those which ordinarily result from the taking or acquiring of private property for works of public improvement.

Hileman v. Chicago G. W. R. Co. 113 Iowa, 592, 85 N. W. 800; *Richardson v. Centerville*, 137 Iowa, 255, 114 N. W. 1071; *United States v. Chandler-Dunbar Water*

Note. — As to compensation for right of redemption where property is taken in eminent domain proceedings, see note following this case, post, 801.
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Power Co. 229 U. S. 76, 57 L. ed. 1080, 33 Sup. Ct. Rep. 667.

The measure of damages in an action at law for the taking or injuring of property in works of public improvement is the same as the measure of damages in condemnation proceedings.

Hibbs v. Chicago & S. W. R. Co. 39 Iowa, 342; *Donald v. St. Louis, K. C. & N. R. Co.* 52 Iowa, 414, 3 N. W. 462; *Clark v. Washash R. Co.* 132 Iowa, 12, 109 N. W. 309.

The owner of the fee during the period of redemption is limited in his recovery to such damages only as affect his right of possession.

Dolan v. Midland Blast Furnace Co. 126 Iowa, 258, 100 N. W. 45; *Werthman v. Mason City & Ft. D. R. Co.* 128 Iowa, 135, 103 N. W. 135; *Renwick v. Davenport & N. W. R. Co.* 49 Iowa, 664.

Contracts or mortgages given by the owner of land cannot affect the amount of damages for property taken or injured in public work of internal improvement.

Burt v. Merchants' Ins. Co. 115 Mass. 1; *Cornell-Andrews Smelting Co. v. Boston & P. R. Corp.* 209 Mass. 298, 95 N. E. 887.

Damages to be recovered must be the natural, direct, and proximate result of some actionable or wrongful act, and do not include mere apprehension or fear, or the arbitrary results as they may affect a particular individual.

13 Cyc. 25; *Elliott, Railroads*, §§ 991, 991a; *Alabama Power Co. v. Keystone Lime Co.* 191 Ala. 58, 67 So. 833, Ann. Cas. 1917C, 878; *Harrison v. Berkley*, 1 Strobb. L. 525, 47 Am. Dec. 578; *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695; *Georgia v. Kepford*, 45 Iowa, 48; *Dubuque Wood & Coal Asso. v. Dubuque*, 30 Iowa, 176; *Lee v. Burlington*, 113 Iowa, 356, 86 Am. St. Rep. 379, 85 N. W. 618.

The fact that plaintiff was in financial embarrassment and could not redeem from the execution sale cannot be considered in estimating damages.

Chandler v. Smith, 70 Ill. App. 658; *Lamb v. Buker*, 34 Neb. 488, 52 N. W. 285.

Where the acts of one party interfere with or disturb the contract rights of third parties, there being no knowledge of such relations, and no malice or intent to disturb same, such acts being without knowledge or malice, there can be no recovery.

Byrd v. English, 117 Ga. 192, 64 L.R.A. 94, 43 S. E. 419; *Gregory v. Brooks*, 35 Conn. 446, 95 Am. Dec. 278; *Brink v. Washash R. Co.* 160 Mo. 93, 53 L.R.A. 811, 83 Am. St. Rep. 459, 60 S. W. 1058.

Damages must be compensation only for the actual injury sustained, precisely commensurate with the injury, neither more nor less.

Love & Co. v. Ross, 89 Iowa, 400, 56 N. W. 528; Harvey v. Mason City & Ft. D. R. Co. 129 Iowa, 465, 3 L.R.A.(N.S.) 973, 113 Am. St. Rep. 483, 105 N. W. 958.

It is the duty of plaintiff to exercise reasonable care to avoid injuries, and if by the exercise of such reasonable care damage could have been avoided, there can be no recovery.

Decorah Woolen Mill Co. v. Greer, 49 Iowa, 490; Mystic Mill. Co. v. Chicago, M. & St. P. R. Co. 131 Iowa, 10, 107 N. W. 943; Swift & Co. v. Redhead, 147 Iowa, 94, 122 N. W. 140; Reinking v. Goodell, 161 Iowa, 404, 133 N. W. 774, 143 N. W. 573,

No cause of action as for interference with the right to redeem can result from a lawful act. It is only when there is a malicious or unlawful interference with a definite contract to redeem that a cause of action for interference with the right to redeem arises, and such action is based upon interference with contract.

Kock v. Burgess, 167 Iowa, 727, 149 N. W. 858; Hollenbeck v. Ristine, 114 Iowa, 367, 86 N. W. 377; Faunce v. Searles, 122 Minn. 343, 142 N. W. 816.

Messrs. E. C. Weber, J. R. Frailey, and A. J. Wissmath, for appellee:

Acts of commission or omission by the defendant during the redemption period were the proximate cause of the damage sustained by the plaintiff.

Dairy v. Iowa C. R. Co. 113 Iowa, 716, 84 N. W. 688; Ward v. Chicago, B. & Q. R. Co. 97 Iowa, 50, 65 N. W. 909; Meyer v. Milwaukee Electric R. & Light Co. 116 Wis. 336, 93 N. W. 6; Rich v. New York C. & H. R. R. Co. 87 N. Y. 382; Green-Wheeler Shoe Co. v. Chicago, R. I. & P. R. Co. 130 Iowa, 123, 5 L.R.A.(N.S.) 882, 106 N. W. 498, 8 Ann. Cas. 45; Miller v. Boone County, 95 Iowa, 5, 63 N. W. 352; Burk v. Creamery Package Mfg. Co. 126 Iowa, 730, 106 Am. St. Rep. 377, 102 N. W. 793, 18 Am. Neg. Rep. 62.

Defendant and its agents had actual and constructive notice of the mortgage and of the foreclosure sale and situation of the property.

Wrede v. Cloud, 52 Iowa, 371, 3 N. W. 400; 29 Cyc. 1114.

Plaintiff had made arrangements and found a person who was able and willing to furnish the means with which to redeem from foreclosure sale.

Conway v. Sherman, 78 Iowa, 588, 43 N. W. 541; Tracy v. Fobes, 132 Iowa, 250, 109 N. W. 772; Snyder v. Fidler, 125 Iowa, 378, 101 N. W. 130.

The statutory redemption, being the right to redeem for a period of one year, is a valuable right.

Curtis v. Millard, 14 Iowa, 128, 81 Am. L.R.A.1917F.

Dec. 460; Huston v. Seeley, 27 Iowa, 183; Van Pelt v. McGraw, 4 N. Y. 110; Allen v. Travelers Protective Asso. 163 Iowa, 217, 48 L.R.A.(N.S.) 600, 143 N. W. 574; Lieuwen v. Kline, 142 Iowa, 14, 120 N. W. 312; Hendershott v. Ottumwa, 46 Iowa, 658, 26 Am. Rep. 182; Montgomery v. Locke, 72 Cal. 75, 13 Pac. 401; Paris Mountain Water Co. v. Greenville, 53 S. C. 82, 30 S. E. 699; Costigan v. Pennsylvania R. Co. 54 N. J. L. 233, 23 Atl. 810; Chicago, K. & W. R. Co. v. Hurst, 41 Kan. 740, 21 Pac. 781; Burlington, K. & S. W. R. Co. v. Johnson, 38 Kan. 142, 16 Pac. 125; 6 Cyc. 691.

The causes of action of the plaintiff packing company and of the holder of the title under sheriff's deed are separate and distinct.

4 Sutherland, Damages, 3d ed. § 1033; 1 C. J. pp. 986, 1188, § 3, and notes; 10 R. C. L. § 118, p. 134.

Evans, J., delivered the opinion of the court:

The case presented by the plaintiff is unique. The plaintiff is a Missouri corporation and the defendant a Maine corporation. The defendant constructed the public improvement popularly known as the "Keokuk dam." This improvement was constructed by the defendant under authority of an act of Congress, which imposed, however, upon the defendant the obligation to make compensation to all persons whose property might be taken or damaged by the construction and maintenance of such improvement, in accordance with the laws of the state where such property might be situated; the improvement in question extending across the Mississippi river and being therefore situated partly in Iowa and partly in Illinois.

The plaintiff was the owner of a certain packing plant located at Fort Madison near the Mississippi river, and about 25 miles above the dam. This plant was encumbered by two mortgages, and these mortgages had been foreclosed and an execution sale had thereunder prior to the injuries complained of. Judgments of foreclosure had been entered for something more than \$56,000. Execution sale was had on December 14, 1912, and the property was bid in for the amount of the judgments. The injuries complained of by the plaintiff first occurred on June 20, 1913, and continued for a period of six or eight weeks. The plaintiff had as a part of its plant eight cellars, 8 or 10 feet deep. These communicated with sewers. "The claim is that into three of these cellars the water backed through the sewers to a depth of 5 or 6 inches, and that this condition continued for such period of five or six weeks. It is claimed, also, that this was

caused by the raising of the level of the river which resulted from the maintenance of the dam. The defendant denies that such was the cause of the presence of the water, and the record of the government gauges shows that at no time in 1913 did the river rise high enough to enable the water therefrom to enter the sewers in question. But whatever the cause, it is undisputed that it was entirely remedied within the period indicated, and that no water has ever since appeared in such cellars. The claim of plaintiff is not for damages done to the plant. But it claims that because of the flooding of such cellars the value of the plant was depreciated, and that it was for that reason unable to redeem it from execution sale and unable to interest other parties in a purchase or lease of the same.

Paragraph 10 of its petition is as follows: "That, due to defendant's failure to properly protect said plant, water was during the period of redemption backed up in plaintiff's cellars, and that it was known to defendant that if said property was not protected that the same would be flooded and the property become useless for its intended purpose and would depreciate in value, and that said property during the period of redemption became useless for its intended purposes, and could not, by reason of the acts hereinbefore set forth, be operated as a packing plant, and depreciated in value to such an extent that plaintiff was unable to redeem the property, and was unable to interest parties to purchase said plant, or to lease the same, or to put the same in operation as a packing plant, and that by reason of the acts herein set forth plaintiff lost his right of redemption and has been damaged in the sum of \$93,500."

The plaintiff introduced evidence to the effect that the plant was worth \$150,000; that it was under lease for a term of two years from May 15, 1912, to one Schaper; that in January, 1913, Schaper promised to furnish the money necessary to make redemption from the execution sale; that in March or April, 1913, Schaper ceased the operation of the plant, and the same has never since been operated; that in August, 1913, Schaper refused to furnish the money for the purpose of redemption; that the reason for such refusal was that he had seen the water in the cellars, and was influenced thereby to refuse the loan. The record shows also that this suit was begun on November 22, 1913, while the right of redemption still subsisted. The contention in argument for the defendant is that the damages here claimed were remote and speculative; that the facts upon which plaintiff purports to found such claim for L.R.A.1917F.

damages were not proven; that the verdict on any theory was grossly excessive.

In support of defendant's contention there was evidence to the effect that the plant was of comparatively little value; that it was out of date, having been built more than twenty-five years ago; that its operation was attempted by many persons successively, and that none ever attained any success therein; that the plant was idle for many years; that it was purchased by the plaintiff in 1909 for \$10,000; that it was operated for two or three years by the plaintiff very unsuccessfully, and was finally mortgaged, as already stated, for the payment of existing debts; that it was then leased to Schaper for a rental of 40 per cent of the profits; that the president of the company became an employee of Schaper in the operation of the same; that there were no profits from the operation thereof by Schaper, and that therefore no rent was earned; that Schaper abandoned the use of the property entirely long prior to June 20, 1913; that no interest, taxes, or insurance was paid by the plaintiff after the execution of the mortgages under which execution sale was later had; that the immediate cause of the abandonment of the use by Schaper was undisputedly that certain improvements were required by the Federal inspector, which would require an expenditure of \$300 or \$400, which expenditure both Schaper and the plaintiff refused to make; that after the promise made by Schaper in January, 1913, to make the redemption, the subject was not again mentioned until August, although the parties worked together daily; that if Schaper promised to make such redemption in January and in good faith intended to make the same, no reason is made to appear why it should not have been done forthwith; that the promise by Schaper contemplated the purchase by him of the plant for the amount of the debt and the furnishing of employment by him to the president of the company in the operation of the same; that the later abandonment of the use of the plant by Schaper and the reasons given by him therefor were contradictory to any intention of further operation of the plant or the purchase thereof, and that the conduct of Wissmath, president and manager of the plaintiff corporation, was inconsistent with any intention on his part to redeem from the execution sale. The foregoing will indicate the general scope of the issues and the general nature of the evidence.

Speaking negatively, the plaintiff does not predicate its claim of liability against the defendant upon any wrongful act of the defendant. On the contrary, all that was done by the defendant was admittedly

done under the authority of the act of Congress hereinbefore referred to. Nor does the plaintiff claim damages for any alleged permanent injuries to the real estate, nor for any physical injury thereto, either temporary or permanent, because such damages would admittedly accrue under our statute to the purchaser at execution sale if redemption from such sale were not made. Nor does the plaintiff claim damages for any interference with the use or possession of the premises during the year of redemption, because such damages, if any, would accrue to the tenant. Nor does the plaintiff claim that the alleged depreciation in value resulted from any injury thereto which affected its general market value. The last analysis of its claim is that it had a right of redemption of the property; that it was financially unable to exercise that right; that Schaper would have loaned it sufficient money for the purpose of redemption if he had not seen the water in the cellar; that the presence of the water in the cellar, therefore, was an injury to its right of redemption, in that it operated as an interference with Schaper's contract to loan the money. The case was submitted, therefore, to the jury upon the theory that the extent of the injury to the real estate and the extent of the depreciation of market value resulting therefrom were each immaterial; that if the presence of the water was the sole cause of the failure of the plaintiff to obtain a loan sufficient to make redemption, then the plaintiff was entitled to recover the difference between the value of the property prior to June 20, 1913, and the amount of the bid at execution sale, and this regardless of the extent of damage to the property itself. In other words, the damage and the cause thereof were wholly psychological, and this psychological cause was confined in its operation wholly to its effect upon the mind of one man, Schaper.

The testimony in support of the contract for a loan and the failure thereof was given by the president of the plaintiff company as a witness and by Schaper, and the same was as follows, omitting all objections:

Wissmath: Before Mr. Schaper quit the building as a tenant, I will ask you to state whether or not you had a talk with him about redeeming the property or making a loan to the Wissmath Packing Company so that the Wissmath Packing Company could redeem it?

A. Yes, sir.

Q. And when was this?

A. The latter part of January, 1913.

Q. What was that conversation as near as you can give it?

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Q. You may state whether or not, during the latter part of January, 1913, you asked Mr. F. C. Schaper to let you, or the Wissmath Packing Company, have a sufficient amount of money so that you could redeem or pay off the German-American Bank of St. Louis?

A. Yes, sir; I asked Mr. Schaper.

Q. Now, I will ask you to state whether you had another conversation with Mr. Schaper about furnishing the money, and when that was?

A. Yes, sir; I did. That was the latter part of July or first of August, 1913.

Q. What did you say to him then about furnishing the money?

A. I asked him whether he was ready to furnish that money.

Q. Now, were you successful in obtaining at this second conversation from Mr. Schaper the money?

A. No, sir.

Schaper: You may state whether or not Charles Wissmath ever came to you and spoke to you about furnishing money with which to redeem the plant.

A. He did. This talk was in the fore part of January, 1913.

Q. What, if anything, did he say to you?

A. He wanted to know if I could furnish the money sufficient to redeem the plant.

Q. What, if anything, did you say about doing so?

A. I said I could.

Q. State whether or not you told him you would furnish a sufficient amount.

A. I said I would after due consideration. I knew the amount necessary to redeem. It was \$56,000.

Q. State whether or not you had sufficient funds so that you could have furnished that amount.

A. Yes; I left the premises about the 1st of June, 1913.

Q. Do you know whether or not they had raised the Santa Fe shops, or were raising them?

A. They were raising the roundhouse, and had started to raise the tracks north of the packing plant.

Q. Now, about how much lower were the cellars of the plant than the tracks they were raising?

A. I would have to judge about 8 feet. When I left that plant it was in a condition to be operated as a packing plant. After I left the plant I went down there again and into the cellars. I didn't see anything different until, the latter part of June, 1913, I found there was water in the cellar. I know a low place that has been dug out in the hide cellar. Up to the time I left there was no water in it. I saw water in there the latter part of June. The

pit was not concreted; just a hole dug out in the ground. I don't think at this time there was an embankment built at the south of the plant.

Q. Now, did you ever have another talk with Mr. Wissmath about redeeming that plant?

A. He came to me early in August and asked me whether I had changed my mind about furnishing the money to redeem the plant.

Q. What did you say to him then?

A. Under the conditions I wouldn't furnish it; would not put any money in the plant.

Q. Now, what were the conditions, Mr. Schaper, that made you change your mind about furnishing the money?

A. I saw the condition of the cellar, the water in it, and I noticed they were building a dike with the intention of protecting the plant. I don't know just when it was they placed pumps down near the dike. I cannot say whether they had a pump before that time to take the water out of the cellar. The dike had not been built at that time.

Q. Was there, at the time you refused Mr. Wissmath the money with which to redeem, any protection placed around the plant by the water power company?

A. No, sir.

Q. State whether or not, if the physical condition, if no water had been backed into the cellars and the river had not been raised, the tracks and shops adjacent had not been raised, and no preparations made to build a dike, if then and in that case you would have furnished sufficient money to Charles Wissmath with which to redeem the plant.

A. Yes.

Q. Now, Mr. Schaper, if the physical conditions of the plant had remained the same as they were up to the time you quit operating, you may state whether you would have furnished Mr. Wissmath the money with which to redeem.

A. Yes.

Q. Mr. Schaper, are you acquainted with the reasonable market value of what is known as the Wissmath Packing Plant in the city of Fort Madison, Iowa, just before the water came into the cellars, as it did, back up in the sewers, as it did?

A. I think I know what it would have been worth to me.

Q. Are you acquainted with the reasonable market value of what is known as the Wissmath Packing Plant in the city of Fort Madison, Iowa, as a packing plant, just before the water, if any, came into the cellars?

A. Yes, sir.

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Q. What was the reasonable market value?

A. About \$150,000.

Cross-examination:

My lease was for a period of two years. The lease provided for 40 per cent of the net profits as the rental of the plant. I never paid the company any rent under this lease because there was no profit. I operated under the lease from May 15, 1912, until March 15, 1913. During that time there were no profits. I remember when the foreclosure proceedings commenced. The sale was December 19, 1912. I was not present at the sale. I knew it was coming off. I knew the mortgage amounted to \$56,000, but did not attend the sale and try to bid on it. That was December, 1912, long before the Santa Fe raised any tracks or the roundhouse, long before the dike was started, and long before any water was raised. Neither Mr. Wissmath nor any member of the company ever spoke to me before the foreclosure about money to pay the interest on the mortgage.

In January Charles Wissmath talked to me about furnishing him money to redeem. I told him I could. I told him that in the fore part of January. I did not know anything about the judgment, or the rate of interest it was bearing. There was nothing more said to me by Charles Wissmath about furnishing him money to redeem until the fore part of August. I was meeting him every day. He was working for me under a salary. After I told him in January that I would furnish him money to redeem, we let the matter drop until the fore part of August. I knew the interest was mounting up every day. The amount necessary to redeem was available. I did not have \$56,000 in money in the bank at that time, nor did I have it in my personal possession. I did not see the Prairie Oil & Gas Company raising anything. The Prairie Oil & Gas Company looks 200 feet nearer to the river than the packing plant is. I finally abandoned the packing house premises the latter part of May, 1913. After that there was no one there except a watchman, who was to keep the automatic sprinkler system going. I do not know who paid him. The first water I found in any cellar was in the last part of June. I could only see water in three of the small cellars. They were the rooms of the lowest elevation. One of them was the tank room where the sewer outlet is. That is a small room with a wooden floor. In that room there were two wooden boxes that hold water. The main sewer outlet runs right into one of them. Water was usually kept standing in those wooden boxes. When the

plant was in operation there was always water in those boxes. We used a great deal of water in that room. There were wooden ways that run water down into these boxes. There was about 6 inches of water in that room at the foot of the stairs. I do not know where the water came from. I know that there is a 3-inch pipe that comes into the pump room, designated as room 3 on Exhibit 13, that leads to and is connected with a larger pipe belonging to the Santa Fe water system. There was a valve at the end of the pipe. If the valve was open, I know of nothing to prevent all the water, under high pressure, from the Santa Fe system, from running into the cellar. In the hide cellar there is an excavation originally made for an elevator. In the latter part of June I saw some water in it. The bottom of the hole is 3 feet lower than the floor of the hide cellar.

Q. Mr. Schaper, in January, when Mr. Wissmath talked to you about the matter, the arrangement was, wasn't it, that you were to get the plant for the debt and give employment to Charles Wissmath, Jr.,—that was the arrangement then?

A. Yes, sir.

Q. After that your next talk was in August, and you told him that you had changed your mind?

A. Yes, sir.

Q. Did he then offer to give you any additional security?

A. No, sir. I saw no water in the cellar after the sewer was cut in August. I saw the water the latter part of June. After the sewer was cut, water could not come back into the building. At the time the sewer was cut they had a pumping plant pumping the water out, and the cellars were dry. I have been down there several times since June. The last time I saw water there was in June, 1913, and I knew that they were going to build a dike to protect the plant. . . . Just before I quit, the government inspector notified me that there would not be any more government inspection unless certain repairs were made. The ones that he mentioned that time would have cost \$200 or \$300. He verbally talked about cementing the floors of the hogpens. He said this would have to be done. They were repairs that would have to be made if we wanted to kill and sell in interstate commerce. He could stop our disposing of meat out of the state of Iowa. I refused to make those repairs. In January I tried to get Mr. Wissmath to make them. I have been talking about the repairs he required in January. In March he made other requirements. There were requirements pretty near every week. These were not complied with, and he went away. After I.L.R.A.1917F.

that we could not ship any meat in interstate commerce. The repairs would have cost \$300 or \$400. Neither Mr. Wissmath nor I was willing to put in \$300 or \$400 in repairs to keep on killing and shipping in interstate commerce. The inspector left, and the plant shut down.

Redirect examination:

In the January, 1913, conversation with Mr. Wissmath, he was to be employed by me, and I was to have a trust deed or mortgage.

Q. Mr. Stewart also asked you if you were willing to put up the money for the repairs necessary that the inspector requested, and you said, 'No,' in answer to that question. Now will you explain why?

A. I had fully made up my mind to discontinue at that time.

The foregoing is all the evidence that was introduced to support the allegation that the presence of the water in the plaintiff's cellars was the sole cause of the failure to redeem. If we could accept the plaintiff's theory of liability as a legal proposition, we should find it difficult to say that such evidence was sufficient to support a jury finding of the fact to which it was directed. We pass, however, to a consideration of the soundness of plaintiff's general theory of liability of the defendant for the damages claimed.

I. The act of Congress under which the defendant was authorized to construct the dam in question contained the following proviso: "That compensation shall be made by the said Keokuk & Hamilton Water Power Company to all persons, firms or corporations whose lands or other property may be taken, overflowed, or otherwise damaged by the construction, maintenance, and operation of the said works in accordance with the laws of the state where such lands or other property may be situated."

The parties are agreed that the laws of Iowa applicable to the congressional act are those pertaining to the condemnation of private property for public use. Our Constitution (art. 1, § 18) provides that private property may not be "taken" for public use without just compensation first being made. The congressional act is somewhat broader in its terms, and provides for compensation to all persons "whose lands or other property may be taken, overflowed, or otherwise damaged." That the defendant would be liable to any property owner for appropriate and proximate damages is conceded. Whether the basis of its liability rests theoretically upon contract or tort is not now material for our consideration. Possibly it could be made to rest upon

either one: upon contract on the theory that its acceptance of the provisions of the congressional act was a contractual undertaking in behalf of all property owners affected; upon tort on the theory that the possession of property "taken" should be deemed a continuing trespass until compensation be actually made. The plaintiff in its pleading appears to have adopted the first theory, and the trial court submitted the case on such theory, and we shall likewise adopt it. It is not claimed that the plaintiff's packing plant was "taken" within the meaning of the Iowa law, but it is claimed that it was damaged within the meaning of the congressional act.

The parties dispute in argument whether the plaintiff's so-called "right of redemption" was "other property" within the meaning of the congressional act. The plaintiff's theory of the case carves out of the fee-simple estate the "right of redemption" as being plaintiff's distinctive and exclusive property. The defendant contends that such right of redemption is not "land or other property" within the meaning of the congressional act. Defendant also contends that under the rule of *ejusdem generis* the term, "other property," must be construed to refer to landed property; whereas the plaintiff contends that the right of redemption is an interest in real estate, and in any event is property, and that the rule of *ejusdem generis* has no application. The packing plant was land. The plaintiff was the owner of it in fee simple. If the water damaged it, it was a damage to land. The fact that the plaintiff had encumbered its title with a mortgage did not change its relation to the fee title. By the terms of the mortgage it had a right to pay the debt and discharge the lien at any time. Independent of the terms of the mortgage it had such right as a matter of equity. This was its "right of redemption." This right would continue indefinitely until foreclosure sale and until one year thereafter. As a matter of terminology, the right of redemption before sale is often referred to as the equitable right of redemption, and the right after execution sale as the statutory right of redemption. Whether exercised before sale or after, the right of redemption is essentially the same. It is the right to discharge a lien by payment of the debt. The purchaser at execution sale holds a lien, and a lien only, until his right to a deed matures by the expiration of one year. The mortgagor holds his fee-simple title for the same period. It was expressly so held in *Dolan v. Midland Blast Furnace Co.* 126 Iowa, 256, 100 N. W. 45. The title of the mortgagor being thus complete, the right of redemption adds L.R.A.1917F.

nothing to his title or estate, and carves nothing out of it. It follows that if the cellars were flooded as a result of the maintenance of the dam, the resulting damages would be a damage to land, and the defendant would be liable therefor under the terms of the congressional act. It would likewise follow that such liability would inure to the exclusive benefit of the plaintiff were it not for the provisions of our statute (Code, § 4065), which provides as follows: "When real estate has been sold on execution, the purchaser thereof, or any person who has succeeded to his interest, may, after his estate becomes absolute, recover damages for any injury to the property committed after the sale and before possession is delivered under the conveyance."

The purpose and effect of this statute is to protect the execution purchaser against intervening waste and spoliation after he has bound himself by his bid and before he has become entitled to take title or possession. If before the expiration of the statutory year of redemption the mortgagor shall redeem, then the claim of the execution purchaser is fully discharged, and he has no further interest in the question of waste or damages. In other words, the statute subjects such a claim for damages to the same lien as the land itself. If no redemption be made, then the execution purchaser is entitled to demand all the property upon which he placed his bid, or its equivalent in the form of damages. In such event the owner of the land as mortgagor loses the right to claim intervening damages in the same way and at the same time that he loses his land, viz., by the failure to redeem from the debt within one year. If he does redeem then both the land and the claim for intervening damages continue to be his. Under the statute the claim for damages inures to the benefit of both debtor and creditor. The claim of the creditor is paramount in the same sense that his lien is paramount to the debtor's title. Such paramount right, however, is contingent only, and is wholly subject to the will and act of the debtor. In a legal sense, it is at all times within the power of the debtor to discharge the lien of the creditor, and thereby to protect both his title and his cause of action for damages. In this case there was no redemption. Under the statute, therefore, the title and ownership of the real estate and all intervening damages thereto vested in the execution purchaser. The interest of the debtor in both was wholly extinguished. Counsel for appellee have fully perceived the difficulty confronting them at this point. They therefore disclaim intent to claim damages for injury to the real estate or to the possession thereof. They contend, however,

that their client's right of redemption was a valuable right, measured by the value of the property less the encumbrance, and that such right was an interest in real estate.

What we have already said indicated our view that the right of redemption is not an estate nor an interest in lands in any other sense than that it is a necessary incident of ownership, attaching to it and following it at all times. While the ownership continues the right of redemption continues. When the ownership ceases the right of redemption ceases likewise, of necessity. There can be no right of redemption without ownership; and ownership without a right of redemption would not be ownership. If the plaintiff suffered any damages from the flooding of the cellars, it was because it was the owner of the plant. How, then, can we avoid the effect of the statute above quoted, and fail to say that whatever damages were then suffered have gone the way of the ownership to the execution purchaser? Conceding that a right of redemption has value as contended, such value is precisely the same as the value of ownership subject to the encumbrance, and such was the measure of damage submitted by the court to the jury. If the value of the property had been totally extinguished by the injuries complained of, the measure of damage to the owner would have been precisely the same as that adopted herein. The fact that the measure of damage for the loss of the entire property and that for the loss of the right of redemption are identical is of itself suggestive of the essential identity of the alleged causes of action themselves.

Plaintiff places considerable reliance upon certain language used in the case of Conway v. Sherman, 78 Iowa, 588, 43 N. W. 541. The holding in that case was adverse to the plaintiff therein, and therefore to the theory of the plaintiff herein. A directed verdict therein was sustained. In the discussion of the case, however, it was said that the measure of damage for loss of a right of redemption would be the value of the property less the encumbrance. It was not held therein that a cause of action would lie for the loss of a right of redemption as distinguished from the damage to the property. It might be said, however, that this was the implication of the discussion. It should be borne in mind, however, that the discussion simply proceeded upon the assumption or theory of the plaintiff, and was pointing out additional defect or error. For the purpose of the discussion the general theory of liability put forward by plaintiff therein was simply assumed. The question which is now before us was not passed on at all. All that can be claimed, L.R.A.1917F.

therefore, by plaintiff now is that the measure of damage adopted in the case at bar was consistent with the Conway Case. If we could sustain plaintiff's theory of liability, the measure of damage adopted would seem to follow logically.

Damages to private property by public improvement when assessed are assessed once for all, and include all damages sustained by the owner present or future by reason of a proper use and maintenance of the public improvement. *Hileman v. Chicago G. W. R. Co.* 113 Iowa, 592, 85 N. W. 800; *Richardson v. Centerville*, 137 Iowa, 255, 114 N. W. 1071.

II. Turning to another phase of the case, can it be said in any legal sense that the flooding of the cellars was the proximate cause of the plaintiff's loss of ownership of its plant, or its loss of its right of redemption? The plaintiff puts forward as an element in its case its own financial inability to make redemption except by obtaining credit from a third party by pledge of the property. Because of such financial inability it was rendered dependent upon the mood and temper of such third party. The condition of the cellars being such as to dissuade such third party, the injury to the plaintiff, as contended, necessarily followed. In order to simplify the discussion, we will, for a moment, eliminate entirely the question of plaintiff's inability, and inquire into the legal status of the parties, regardless of such question. Suppose that Schaper, who is shown to have abundant means, had been the owner of the property, and therefore the owner of the right of redemption: Could he have put forward the claim that the presence of the water in the cellar caused him to fear to exercise his right of redemption, and that thereby he abandoned and lost the same, and could he have made such claim the basis of liability on the part of the defendant for having destroyed his right of redemption? Under the instructions of the trial court herein, he could not. The trial court instructed the jury that it was the duty of the plaintiff to redeem if it could, and to use all reasonable efforts to obtain the means to redeem, even though Schaper had refused to extend credit. Concededly if the plaintiff had been financially able to redeem, it would have been required to redeem as a condition precedent to this action. If it had redeemed it could have recovered from the defendant the actual damages sustained by the flooding of the cellars. It could not have recovered the value of its so-called "right of redemption." Manifestly a recovery of the amount of damages actually inflicted upon the premises would be full justice. If such would be the

limit of recovery to Schaper as owner and redemptioner, and if such would be the same limit of recovery to the plaintiff herein if it had redeemed, why should the financial inability of the plaintiff increase the liability of the defendant for the same act? The trial court instructed the jury that in order to render a verdict for the plaintiff it was not enough to show that the flooding of the cellars was a *contributing* cause to the loss of the right of redemption, but it must be shown that it was the *sole* cause. So far as appears in this case, the actual damage inflicted upon the property was nominal. How can it be said that such damage was the sole cause of the loss of the right of redemption by plaintiff, when its own financial inability to redeem is put forward as an essential element in its case? The record does not disclose what its actual financial condition was, nor the amount of its capital stock. It appears only in a general way that it was not able financially either to operate the plant or to make the redemption without the help of credit from Schaper. The plaintiff is a corporation. The amount of its capital stock was made great or small according to the wish of its promoters. Presumptively it was made small, too small to conduct the business for which it was organized. Does that fact furnish reason why a different rule of law should obtain in its favor as regards damages inflicted upon its property? Can this fact be made an element of its case whereby a claim for damages, which would have been comparatively small if held by a corporation of adequate means, may be multiplied manyfold? What was done in this case was to hold the defendant liable for the full alleged value of the plant less the encumbrance thereon. Why? Because the plaintiff was *unable* to redeem without the help of Schaper, and Schaper would not help because he had seen the water. We think it clear that the nature of defendant's liability for the flooding of the cellars was precisely the same, whether the plaintiff's capital was large or small. The fact that such damage inured to the benefit of the execution purchaser was beyond the control of the defendant.

If the defendant had been guilty of some wrongful act directed against the plaintiff *because* of its actual conditions, a different question would be presented. No wrongful act in causing the injury is charged against the defendant. Its liability is predicated upon the provisions of the congressional act; and the one wrong charged against it now is its failure to pay the damages. Under our statute above quoted the plaintiff was in no position to demand the damage until he had redeemed. Until redemption be

made, the claim of the execution purchaser was superior. That fact appears to have been recognized by the plaintiff, and no demand for damages appears to have been made prior to the bringing of this suit. The authorities cited by the plaintiff at this point are cases of intentional and malicious interference by intermeddlers with contracts between others. The rule put forward is that where one intentionally and maliciously induces another to breach his contract, he thereby becomes himself a party to the breach and is liable for damages. The defendant was guilty of no such act. If it had been, its liability could not be predicated upon the provisions of the congressional act. Such a wrong would not be a damage to property. If the defendant were guilty of interference with a contract, it could become liable only for such damages as flowed naturally and proximately from the breach. But an action for such damages would be strictly a personal action. The subject-matter thereof would be entirely foreign to the congressional act and to the condemnation statute.

It is clear also that neither the pleadings nor the evidence presents a case of meddling or interference with a contract on the part of the defendant; nor do they present a situation where the plaintiff may put forward its financial weakness as an element of its case. A state of facts which would warrant a consideration of a plaintiff's financial disability in his favor is particularly pertinent to wrongs perpetrated upon a natural person rather than upon an artificial person. A natural person may be subjected to intentional and malicious injuries to which a mere corporation is not susceptible. A human being, though stripped of property, must still live on, and bear the inevitable burdens of his life. Wife and child must be sheltered and fed; daily obligations must be met; the grocer and the milkman must be paid; pride of character and sense of honor are his continuing goad. They command his energies and hold him to a continuing service. His one resource is his earning capacity and his opportunity for employment. A wrongful interference with his contract of employment affords him a right of action for damages against the wrongdoer. An action for damages for interference with contracts has its particular pertinency to contracts of individual employment. In such a case the financial condition of the complainant may become an important consideration. But this right of action and the right to put forward therein financial disability as an element of the case have little pertinency to a corporate plaintiff. The amount of the capital of a corporation is always a matter within the

volition of its organizers and stockholders. By the same volition it may be increased or decreased. If it be stripped of its capital its function is finished. It does not seek employment, and never becomes a wage-earner. By force of its insolvency alone, it dies artificially. It is therefore not easily subjected to malicious wrongs, and is in no position to command the sympathy of the law for the paucity of its assets. The doctrine itself which the plaintiff invokes is one of the mercies which have ingrafted themselves here and there upon the law and have bent its straight lines somewhat. Such doctrine is not wholly in accord with strict legal uniformity. But it is merciful in its nature, and finds its justification in the higher levels of equity, and perhaps in the ancient foundations of the law. "To do justly and to love mercy" is the Mosaic floor of the structure of our civilization. But mere mercy as such is a response, not to artificial entities, but to flesh and blood in the struggle for life. For cases illustrative of the application of this doctrine see *Hollenbeck v. Ristine*, 114 Iowa, 367, 86 N. W. 377; *Kock v. Burgess*, 167 Iowa, 727, 149 N. W. 858; *Faunce v. Searles*, 122 Minn. 343, 142 N. W. 816; *Lucke v. Clothing Cutters & T. Assembly*, 77 Md. 396, 19 L.R.A. 408, 39 Am. St. Rep. 421, 26 Atl. 505. See also citations in 8 R. C. L. § 174. We find no case where the doctrine has found application to an artificial person.

In this case the capital of the plaintiff corporation was precisely what its organizers and stockholders made it. Their implied obligation to the public was to furnish and maintain it with sufficient capital to conduct the business for which it was organized. If the capital of the corporation was not sufficient to enable it to pay its debts, and thereby to protect its property against execution sale, the loss of the property was the only ultimate alternative. There was no legal impediment to the increase of the capital up to the needs of the corporation. If it be true that the plant was worth twice as much as the judgment against it, it would seem to be the first requirement of business prudence to increase the capital stock sufficiently to enable the discharge of the debt. If the plaintiff was unable to redeem because of the shortage of capital, was not the shortage of capital the controlling and proximate cause of the loss of the property? In any event there is no room here for the application of the rule that financial disability may be a consideration in plaintiff's favor, and this is so even regardless of the corporate character of the plaintiff.

III. Taking the view most favorable to L.R.A.1917F.

the plaintiff of the contract with Schaper and the alleged breach thereof, it was a promise to loan money. The nature of the contract was such that the breach of it left the parties as it found them. If the plaintiff had sued Schaper for the breach, it could have recovered nothing but nominal damages. It was expressly so held in *Thorp v. Bradley*, 75 Iowa, 50, 39 N. W. 177. In the cited case the defendant was alleged to have agreed to loan money for the purpose of enabling the plaintiff to redeem real estate, and to have breached such agreement, whereby the plaintiff lost his right of redemption. It was held that only nominal damages could be recovered. To the same effect is *Lamb v. Buker*, 34 Neb. 488, 52 N. W. 285. If there could be no recovery against Schaper for the breach of such agreement, how could there be a recovery against the defendant for unintentionally causing such breach? The holding in the cited cases is that the damages claimed were remote and speculative, and not proximate. And such is the situation herein.

IV. In view of the conclusion reached on other features of the case, it becomes unnecessary for us to consider the claim that the verdict was excessive further than to announce our conclusion thereon. We think the verdict was shockingly excessive.

We may say also that if we were able to adopt the plaintiff's general theory of liability, we should have to say that the evidence was of very doubtful sufficiency. The evidence which we have set forth above is the main support of the verdict. The best that could be said for it is that it is a gossamer thread. It relates wholly to matters that are and were within the breast of the witnesses. It was incapable of test or disproof save by the contemporaneous conduct of the witnesses. Such conduct of the witnesses was glaringly contradictory to their testimony. The magnitude of the verdict is equaled only by the tenuity of the evidence.

We hold that the damages, if any, which accrued against the defendant were those only which arose proximately out of the injury to the plant by the flooding of the cellar, whether such injury was temporary or permanent; that there was no separate and divisible injury to the right of redemption as distinguished from the injury to the property, and to the ownership thereof, and to the right of possession; that the damages claimed for alleged interference with the contract with Schaper and the resulting loss of the property through the failure to redeem were remote and speculative, and not proximate. These conclusions have the support of the following additional authorities: *Dubuque Wood & Coal Asso.*

v. Dubuque, 30 Iowa, 176; Georgia v. Keph-
ford, 45 Iowa, 48-50; Harrison v. Berkley,
1 Strobb. L. 525, 47 Am. Dec. 578; Alabama
Power Co. v. Keystone Lime Co. 191 Ala.
58, 67 So. 833-836, Ann. Cas. 1917C, 878;
Brink v. Wabash R. Co. 160 Mo. 93, 53
L.R.A. 811, 83 Am. St. Rep. 459, 60 S. W.
1058; Gregory v. Brooks, 35 Conn. 446, 95
Am. Dec. 278; Byrd v. English, 117 Ga. 192,

64 L.R.A. 94, 43 S. E. 419; Sawyer v. Com.
182 Mass. 245, 59 L.R.A. 726, 727, 65 N.
E. 52.

It follows from these conclusions that the
trial court should have directed a verdict
for the defendant. The judgment below is
accordingly reversed.

All the Justices concur.

**Annotation—Compensation for right of redemption where property is
taken in condemnation proceedings.**

The question of who as among the
many possible claimants is entitled to
the compensation in condemnation pro-
ceedings where property subject to the
right of redemption is taken or injured
is not here considered. As between the
person who has the right to redeem and
the condemnor, can the former have a
right to compensation separate from
that allowed for loss of, or injury to,
the property? This is the only question
here annotated; but it is necessary to
discuss the right of the mortgagee and
purchaser to compensation, as an inci-
dent to the discussion of the rights of
the mortgagor or owner.

The court in *WISSMATH PACKING CO.
v. MISSISSIPPI RIVER POWER CO.* ante,
790, holds that the right to redeem is
necessarily an incident to ownership of
the property that is subject to redemp-
tion; hence, the owner of the right of
redemption is not entitled to compensa-
tion except as he is entitled thereto as
owner of the property.

Looking at the question from the prac-
tical standpoint, more especially that of
the condemnor, it appears that there
could be no other answer than the one
the court has given. If the condemnor
should be obliged, as it probably would
be in most cases, to pay full compensa-
tion to the purchaser, another compen-
sation for the "right to redeem" would
evidently impose an unjust burden upon
it.

The theory upon which the court based
its decision is sound. In respect to mort-
gaged land before sale, it is quite clear
that the mortgagor must base his claim
to compensation upon ownership while
the mortgagee claims upon his lien, the
latter never taking more than the mort-
gage debt. The foreclosure sale could
not well change the situation during the
period of redemption, since both the
legal title and the right to redeem from
the lien remain in the mortgagor. So,
irrespective of the question of who gets
the compensation, it seems quite clear
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that the mortgagor, if he takes at all,
takes by virtue of his ownership. There
are no cases in which compensation for
the right to redeem was allowed inde-
pendently of that allowed for injury to
the property. The principle that the
mortgagor takes, when he does take, by
virtue of his ownership incidentally runs
through all of the cases, a few of which
are here cited: *Whiting v. New Haven*
(1877) 45 Conn. 303; *Stopp v. Wilt*
(1899) 177 Ill. 620, 52 N. E. 1028;
Hagerstown v. Groh (1905) 101 Md. 560,
61 Atl. 467, 4 Ann. Cas. 943; *Farnsworth
v. Boston* (1878) 126 Mass. 1; *Cam-
bridge v. Fifield* (1879) 126 Mass. 428;
Wood v. Westborough (1885) 140 Mass.
403, 5 N. E. 613; *Bennett v. Minneapolis
& P. R. Co.* (1889) 42 Minn. 245, 44 N.
W. 10; *Boutelle v. Minneapolis* (1894) 59
Minn. 493, 61 N. W. 554; *Thompson v.
Chicago, S. F. & C. R. Co.* (1892) 110
Mo. 147, 19 S. W. 77; *Utter v. Richmond*
(1889) 112 N. Y. 610, 20 N. E. 554; *Re
Rochester* (1892) 136 N. Y. 83, 19 L.R.A.
161, 32 N. E. 702; *Astor v. Hoyt* (1830)
5 Wend. (N. Y.) 603; *Sherwood v. New
York* (1860) 11 Abb. Pr. (N. Y.) 347;
Home Ins. Co. v. Smith (1882) 28 Hun
(N. Y.) 296; *Youngs v. Stoddard* (1898)
27 App. Div. 162, 50 N. Y. Supp. 475;
Bolton v. Seaman's Bank (1904) 99 App.
Div. 581, 91 N. Y. Supp. 122; *Van Loan
v. New York* (1905) 105 App. Div. 572,
94 N. Y. Supp. 221; *Re New York* (1907)
118 App. Div. 117, 103 N. Y. Supp. 180;
Re Schott (1913) 159 App. Div. 824, 145
N. Y. Supp. 18; *Re Sea Beach R. Co.*
(1907) 148 N. Y. Supp. 1080, affirmed in
(1907) 121 App. Div. 907, 106 N. Y.
Supp. 1144, which is affirmed in (1909)
196 N. Y. 533, 89 N. E. 1112; *Re Woods
Run Ave.* (1910) 43 Pa. Super. Ct. 475;
Aggs v. Shackelford County (1892) 85
Tex. 145, 19 S. W. 1085; *Gray v. David-
son* (1914) 78 Wash. 482, 139 Pac. 219.

A specific application of the principle
is made by the cases holding that under
a statute or charter which provides that
notice of the condemnation proceedings

shall be given to the owners of the land, notice must be given to the mortgagor: *Whiting v. New Haven* (1877) 45 Conn. 303; *South Park v. Todd* (1884) 112 Ill. 379; *Parish v. Gilmanton* (1840) 11 N. H. 293; *Gurnsey v. Edwards* (1853) 26 N. H. 224; *Bright v. Platt* (1880) 32 N. J. Eq. 362. This is not an exhaustive list of cases, the few here cited merely supporting the theory that the mortgagor must take as owner.

And the mortgagor must be made a party to a suit in equity by the mortgagee asking that the fund be applied to the payment of the mortgage debt. *Hagerstown v. Groh* (1905) 101 Md. 560, 61 Atl. 467, 4 Ann. Cas. 943.

The mortgagor as owner is entitled to the fund in condemnation proceedings for injuries to the land if the mortgagee's security is not weakened. *Stopp v. Wilt* (1899) 177 Ill. 620, 52 N. E. 1028.

And the mortgagor cannot be deprived of the fund by a release of all claims for damages filed by the mortgagee since the filing of such waiver does not entitle the condemnor to credit the amount of damages in reduction of the mortgage debt. *Brainard v. Boston & N. Y. C. R. Co.* (1859) 12 Gray (Mass.) 407 (Semble).

In *Commercial Nat. Bank v. Johnson* (1897) 16 Wash. 536, 48 Pac. 267, it was held that the purchaser at a foreclosure sale upon his own mortgage, of land in-

jured by a taking under eminent domain proceedings, must assert his claims to the fund before the time for redemption expires, or lose the same, since the mortgagor with the right to redeem is entitled to notice of the purchaser's intention in respect to the fund.

Damages for injuries to abutting property caused by a change in the street grade should be paid to the mortgagee or his assigns where the award is made after the foreclosure sale to the mortgagee, and there is no redemption, although the proceeding to grade the street was commenced before the sale. *Moritz v. St. Paul* (1893) 52 Minn. 409, 54 N. W. 370.

In *Dollar Sav. Fund & T. Co. v. Bellevue* (1911) 230 Pa. 240, 79 Atl. 496, it was held that the mortgagee had an equitable right, as against the mortgagor, to participate in the distribution of the award to the extent of the mortgage debt, the property having been sold on foreclosure after being injured by the taking under eminent domain proceedings so much that it brought only a fractional part of the mortgage debt. It will be observed that the mortgagor claimed the award not by reason of his right to redeem, but on the ground that he owned the property at the time it was injured. This contention was not disputed, but the mortgagee's equitable lien upon the fund was upheld. J. W. M.

LOUISIANA SUPREME COURT.

MRS. MABEL C. BARBER

v.

LOUISIANA RAILWAY & NAVIGATION
COMPANY, Appt.

(—La. —, 76 So. 199.)

Master and servant — engine pilot — form.

1. A railroad company is not guilty of negligence in using a "stub pilot" instead of a "long-nose pilot," both kinds being used on standard railroads.

For other cases, see *Master and Servant*, II. a, 4, d, (3), in *Dig. 1-52 N. S.*

Headnotes by SOMMERVILLE, J.

Note. — The question whether furnishing for servant's use an article in general use is the measure of the master's duty is discussed in the notes to *Wiita v. Interstate Iron Co.* 16 L.R.A.(N.S.) 128, and *Dean v. Central City Light & P. Co.* 27 L.R.A.(N.S.) 181. L.R.A.1917F.

Same — style of locomotive.

2. A railroad company is not guilty of negligence in using a light locomotive, sufficient, however, to pull its passenger train. For other cases, see *Master and Servant*, II. a, 4, d, (3), in *Dig. 1-52 N. S.*

Same — test.

3. The proper size of a locomotive is determined by the tonnage to be pulled, and not by its ability to knock animals off of the track, without leaving the rails.

For other cases, see *Master and Servant*, II. a, 4, d, (3), in *Dig. 1-52 N. S.*

Statute — constitutionality — when determined.

4. The constitutionality of a law will not be considered unless specially pleaded. For other cases, see *Pleading*, III. b, in *Dig. 1-52 N. S.*

As to duty of railroad to remove obstruction on right of way interfering with look-out from train, see note to *Chesapeake & O. R. Co. v. Mason*, L.R.A.1916F, 130.

As to excessive or inadequate damages for death, see note in L.R.A.1916C, 820.

Evidence — judgment between other parties.

5. It was error to admit in evidence before the jury the record of another suit brought by another plaintiff against the same defendant to recover damages for a similar accident at a different time and place.

For other cases, see Evidence, XI. k, in Dig. 1-52 N. S.

Master and servant — obstruction on railroad.

6. A railroad company should not allow to remain upon its right of way any obstructions not necessary to the exercise of its franchise, such as weeds, bushes, hedges, trees, and the like.

For other cases, see Master and Servant, II. a, 4, d, (2), in Dig. 1-52 N. S.

(June 11, 1917.)

APPEAL by defendant from a judgment of the Judicial District Court for the Parish of Caddo in plaintiff's favor in an action brought to recover damages for the death of her husband, alleged to have been caused by defendant's negligence. Modified and affirmed.

The facts are stated in the opinion.

Messrs. Wise, Randolph, Rendall, & Freyer, for defendant:

A master is not bound to furnish the safest and best appliances, but his obligation is met when he furnishes such as are reasonably safe and suitable for the purpose in view.

Simon v. Black Lake Lumber Co. 127 La. 1071, 54 So. 354; *Dill v. C. L. Smith Lumber Co.* 130 La. 363, 57 So. 1006.

Where the employer does what is commonly and generally done by persons or corporations in the same line of business, he is not guilty of actionable negligence.

Travis v. Kansas City Southern R. Co. 121 La. 887, 46 So. 909; *Elliott, Railroads*, 2d ed. § 1274.

Plaintiff must establish with reasonable certainty defendant's fault and the connection between the same and the injury.

Rohr v. New Orleans Gaslight Co. 136 La. 546, 67 So. 361.

Messrs. Blanchard & Smith and James G. Palmer for appellee.

Sommerville, J., delivered the opinion of the court:

Walter J. Barber, plaintiff's husband, a locomotive engineer on one of defendant's trains going south from Shreveport to New Orleans, was mortally injured about 2 A. M. on September 17, 1914, at or near a private crossing in a lane in the parish of Avoyelles by the derailment of the train, caused by the locomotive striking and running over a

mule. Barber survived about twenty hours, dying in a sanitarium in Shreveport.

His widow, in behalf of herself and two minor children, one a boy sixteen years of age, and the other a girl, thirteen years old at the time of their father's death, sued the defendant company for \$30,000 damages for his sufferings and death. The grounds of alleged negligence on the part of the defendant company may be briefly stated as follows:

(1) The locomotive pulling the train was too light for the service required of it.

(2) That the said locomotive was equipped with a stub pilot instead of the safer long-nose pilot.

(3) That the right of way was obstructed by weeds, bushes, and trees so high as to prevent the engineer and fireman from seeing the animal in time to avert the collision.

Defendant, answering, admitted the alleged employment, accident, and death, but specially denied all negligence on its part, and specially pleaded that the accident was unavoidable, and happened through the risk of the employment and service, which, under the law, are assumed by the engineer, or was caused by the negligence of the engineer or fireman, his fellow servant, in not keeping a proper lookout, and through no fault of the defendant. Defendant, further answering, pleaded in the alternative contributory negligence of the engineer and fireman, his fellow employee, in not keeping a proper lookout.

After a lengthy trial a verdict was rendered in favor of the plaintiff for \$15,000, itemized as follows:

(1) For physical pain and mental anguish suffered by the deceased, \$5,000.

(2) For grief and sorrow and mental anguish suffered by plaintiffs by reason of the death of deceased, \$2,500.

(3) For the loss by plaintiffs of the love and companionship of the deceased, \$2,500.

(4) For the loss of support and maintenance, \$5,000.

Defendant has appealed from the judgment.

Counsel for the defendant call our attention to two bills of exceptions taken by them to the rulings of the district judge during the progress of the trial.

Plaintiff offered a witness to prove that the engine in question was the same engine on which Frank Wright, engineer, was killed some time before the accident complained of in this case, to which counsel for the defendant objected on the ground of irrelevancy and the injection into this case of other and different matters calculated to prejudice the jury against the defendant.

The bill further recites that Wright's

widow did not bring any suit against the defendant; but the fireman, Moses Samuels, did bring a suit, which was still pending in the district court for the parish of Caddo, and the witness having stated that some of the information he got in relation to said matters was from said fireman, counsel for plaintiff introduced the petition and answer in the said suit, which was objected to by the defendant on the same grounds, all of which objections were overruled for the following reasons: "Per curiam: Not having the stenographer's notes of evidence before me, cannot say whether facts are correctly stated. Whatever evidence was let in was on the theory of notice to defendant that bushes on the right of way were dangerous."

In the petition in the Samuels suit it was alleged that the engineer ran over a cow and the engine was derailed in the parish of Natchitoches on July 12, 1913, and, as a consequence, that the said Samuels was badly scalded and burned.

The said petition charged that the pilot was worn, dangerous, and unsafe, that the track was not fenced where the collision occurred, and that the right of way was grown up in bushes and underbrush, behind which the said cow was concealed, not more than 7 or 8 feet from the track of said company.

It does not appear that the trial judge charged the jury that the evidence was admitted for the restricted purpose set forth in his per curiam. And we think that no evidence was necessary to inform defendant's foreman and others that animals straying on defendant's right of way might hide in the bushes thereon, and thence come suddenly on the track immediately in front of some passing locomotive.

It goes without saying that the allegations of negligence in the petition of Samuels, denied under oath, as they were, in the answer of the defendant, constituted no evidence whatever of the truth of such allegations against the defendant. Such allegations were res inter alios acta as to the present controversy, and should have been excluded, as calculated to mislead the untrained mind of the average juror.

The second bill of exceptions was taken to the charge of the judge to the jury: "That the doctrine of the assumption of risk and defense of fellow servants' negligence has been abrogated under the laws of Louisiana and could not be considered as a defense," referring to Act 187 of 1912, p. 333, reading in part as follows: "That assumption of risks by an employee, or the negligence of a fellow servant shall not be a defense to an action for damages for personal injury, but may be considered by L.R.A.1917F.

the court in determining the measure of damages: Provided, that the provisions of this act shall apply only to public service corporations."

Counsel for the defense objected to the charge on the ground that said act was unconstitutional, which objection was properly overruled for the reason that the defendant had made no attack on the act in its proceedings. *State v. De St. Romes*, 26 La. Ann. 753.

We have carefully perused the evidence in this case, and find no evidence of moment to sustain the charge that the locomotive was unsafe, because too light. The size of a locomotive is regulated by the tonnage to be hauled, and not by its capacity to knock animals off the track.

As to the second charge, we find a difference of opinion among railroad men as to the comparative safety of a "stub pilot" and a "long-nose pilot;" but the evidence is clear to the effect that the former is now used on most of the standard roads, and is gradually supplanting the latter. An assistant superintendent of the Baldwin Locomotive Works testified that 75 per cent of the pilots on engines in use are "stub pilots," and that they are as safe or safer than the long-nosed ones. The defendant uses both kinds. This ground of negligence is not sustained by the preponderance of the evidence.

The third and last ground is, in substance, that the mule was hidden and secreted by the weeds, bushes, and trees on said right of way, and that it suddenly emerged therefrom, and entered upon the track just in front of the engine operated by Barber, and "upon striking said mule at full speed the said engine turned over," and as a result thereof "thereby badly scalding Barber and causing his death." The accident happened at about 2 o'clock A. M. We do not know what Barber saw. He said to the conductor, "John, I struck a mule," and nothing more.

William Anderson, the colored fireman, testified that when the locomotive struck the mule he had just finished shoveling coal into the furnace; that the first intimation he had of the accident was "the engine jumping on the ties;" that Barber blew no whistle for the crossing; and that there was nothing to keep Barber from seeing the mule in the lane, which crossed the track at right angles, if he had been looking. Yet he testified that up to the time he began to shovel coal, which was about 200 or 300 yards from the place of the accident, he was on the watch, and that he had a clear view of the locality, and that no mule was then in sight. If this witness for the defendant, who had been on the

lookout, while seated at his proper place in the cab, failed to see the mule, then the deceased engineer was not able either to see it, if it was on the roadway, from his seat in the cab. It is quite clear from all of the evidence in the record that the deceased engineer did not see the mule on the track in time to stop or slacken the train and to avoid the accident which resulted in his death.

The only question for discussion is whether the engineer should have seen the mule on the track in time to have avoided the accident, or to have lessened his injuries, or whether the accident was entirely unavoidable, and defendant not responsible therefor.

Plaintiff alleges that the defendant company permitted its right of way, and particularly that portion where the wreck occurred, to be grown up in weeds, bushes, and trees of such height and density as to cover and conceal an animal that might wander thereon, and to obstruct it from the view of the engineer and fireman running an engine along the track, and that on the night the deceased received the injuries which resulted in his death a mule suddenly emerged from these weeds, bushes, and trees, which extended up the railroad track for some distance; that the view of the mule was obstructed from the deceased and the fireman on account of the weeds, bushes, and trees until it was too late for the deceased to use any precaution to avoid the collision; that the mule ran on the track in front of the fast-moving engine, causing the wreck and the injury in question, all through the fault and the neglect of the defendant.

Both plaintiff and defendant offered witnesses to prove the condition of the roadway as to weeds, bushes, and trees at and near the road crossing where the accident occurred. The preponderance of the evidence is in favor of the plaintiff to the effect that the bushes and trees were thick, and had grown from 2 to 14 feet in height. Witnesses for the defendant testified that the bushes and willows were from 8 to 10 feet in height, and of sufficient thickness to hide an animal said to be 3½ feet high.

Both sides on their briefs admit that the mule was in the lane which crossed the track at right angles, and seemed to have come from that end of the lane which was on the left-hand side of the locomotive; so that the engineer might not have seen the animal as quickly as the fireman might have if the latter had not been engaged in shoveling coal at the moment.

It is argued on behalf of the defendant that the roadbed is elevated, and, the trees being in barrow pits, that the engineer, L.R.A.1917F.

seated in the cab, had a clear view of the roadway and track regardless of the trees.

The roadmaster of the defendant, testifying on its behalf, said that the right of way had not been cut for at least a year, and that the willows and bushes were from 8 to 10 feet high. The trainmaster and supervisor of defendant company also testified that the willows were about 10 feet high.

Competent evidence in the record shows that the trees were on the roadbed, and so close to the moving train that they came in contact with the cars as they passed by. The evidence is quite conclusive to the effect that, while there were no obstructions growing at the immediate intersection of the railroad and the dirt road, obstructions were growing at the place of the accident, near the intersection, and that they were of such a nature as to prevent the engineer from having a clear view of the roadway and track at night, with the aid of the headlight, and from seeing a stray animal going through the lane and entering upon the track at a sufficient distance ahead to avert a collision.

Defendant's witnesses testified that the deceased was a competent and capable engineer, and that he was considered conscientious and careful. Evidence shows that he did not sound any alarm before the wreck occurred, which evidences the fact that he did not see the animal in time to give an alarm. Testimony in the record is that he was at his post of duty, and it follows that a condition existed which kept him from seeing the animal until the train was in the act of striking it, and that he could not take any precautionary measures to avert the accident.

A railroad company owes to the members of its train crew, and to the traveling public generally, the duty of keeping its right of way clear from unnecessary obstructions, to the extent that, should such obstructions become the proximate cause of an injury to either employee or passenger, the company is responsible for such damages as are sustained.

In the case of *Ortolano v. Morgan's L. & T. R. & S. S. Co.* 109 La. 909, 33 So. 914, where the defendant had placed a gate which obstructed the view of the engineer, and a young child was injured because of said obstruction, the court says: "The existence of that condition of things might exonerate the engineer personally from blame for not seeing the child, but it could not be set up as a defense by the defendant company. It had no right itself to place obstructions upon or near its line in such manner as to intercept the view of the engineer, and leave part of its track . . . with-

out a lookout and unguarded. If physical conditions should be such as unavoidably to bring about a situation of that character, the company could be called upon by every means and instrumentality in its power to minimize the danger. . . . If the gate referred to in the testimony was an obstruction to the view, the defendant, having erected it, and having control over it, should have removed it either entirely, or to another place."

The duty is imposed upon a railroad to provide for the safety of its employees, as well as of its passengers, so far as that is practicable by the exercise of human care and foresight. It is bound to see that the road is in good order; that the engines are properly constructed and furnished; that the cars are strong and fitted for the accommodation of passengers; that the running gear is, so far as the closest scrutiny can detect, perfect in its character; and that there are no obstructions on or near the track which prevent the engineer on duty from seeing persons or animals who may suddenly enter upon the track and cause derailment of the cars, or other accident. They may not suffer animals to endanger the life of passengers and crew any more than a defective rail or axle.

In the case of *Donnegan v. Erhardt*, 119 N. Y. 468, 7 L.R.A. 527, 23 N. E. 1051, the New York court of appeals says: "Experience shows that animals may stray upon a railroad track, and that, if they do, . . . a train may come in collision with them, and be wrecked; adequate measures, reasonable in their nature, must be taken to guard against such danger."

In the case of *Fordyce v. Jackson*, 56 Ark. 594, 20 S. W. 528, the court of Arkansas says: "If the fireman had kept a lookout, the presumption is he would have discovered the animal in time to avert the accident, unless prevented by the trees and bushes which some of the witnesses say grew near the track at that point. But, if prevented by that cause, it would have offered no excuse for the company, as before stated."

Thompson on Negligence, vol. 2, § 1507, states the rule substantially as follows: A railroad company should not allow to remain upon its right of way any obstructions not necessary to the exercise of its franchise, such as weeds, bushes, hedges, trees, and the like.

There was no evidence offered in support of the plea of contributory negligence.

The deceased was a man in good health, thirty-nine years of age, with a life expectancy of nearly twenty-nine years. He was earning \$150 per month. He was scalded by the escaping steam from the overturned locomotive, and he lived for L.R.A.1917F.

twenty hours, in much agony, although he was under the influence of narcotics for a part of the time. He left a widow and two children, who are claiming damages for his suffering and death. The jury allowed plaintiff \$5,000 "for physical pain, mental anguish, and for the awe of impending death suffered and experienced by the deceased." The pain and injury suffered by the deceased must have been extreme, although tempered perhaps by narcotics; but, in our opinion, the award of \$5,000 is too high. It should be reduced to \$2,000. The other items specified by the jury will not be disturbed, as there is no manifest error in connection therewith.

Defendant argued that the \$2,500 allowed by the jury "for grief, sorrow, and mental anguish suffered by plaintiffs," and the \$2,500 allowed "for the loss of the companionship of their husband and father," were for one and the same thing. But the companionship of a husband and father cannot be correctly said to be the same as the "grief, sorrow, and mental anguish" suffered by the widow and children of a husband and father.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended by reducing the judgment for \$15,000 to \$12,000, and as thus amended it is affirmed, with costs of appeal to be paid by the appellee.

Petition for rehearing denied June 30, 1917.

MASSACHUSETTS SUPREME JUDICIAL COURT.

WILLIAM D. T. TREFRY

v.

ELIOT E. PUTNAM.

SAME

v.

SUSAN E. GARFIELD.

(— Mass. —, 116 N. E. 904.)

Tax — income — sale of stocks.

1. Constitutional power to tax incomes

Note. — As to income tax on dividends declared after but paid from earnings accrued before act went into effect, see annotation following this case, post, 814.

The question whether extraordinary dividends, declared in cash or stock, including stock rights, constitute income or capital, as affecting the respective rights of life tenants and remaindermen, is considered at length in the notes to *Holbrook v. Holbrook*, 12 L.R.A.(N.S.) 768; *Newport Trust Co. v. Van Rensselaer*, 35 L.R.A.(N.S.) 563; and *Re Osborne*, 50 L.R.A.(N.S.) 510.

includes authority to levy a tax on the gains realized by the sale by one not in the business of dealing in such property of intangible personal property, such as corporate stocks.

For other cases, see Taxes, VI. a, in Dig. 1-52 N. S.

Same — different classes of property.

2. Income derived from purchase and sale of corporate stock is of a different class from that derived from dividends on such stock, within the meaning of a constitutional provision authorizing taxes at different rates upon the income derived from different classes of property.

For other cases, see Taxes, VI. b, in Dig. 1-52 N. S.

Same — sale of right to subscribe for stock.

3. Gains derived by a stockholder from the sale of rights to subscribe for new shares of stock to be issued by the corporation are taxable as income.

For other cases, see Taxes, VI. a, in Dig. 1-52 N. S.

Same — stock dividends.

4. Stock and cash dividends declared and paid after the Income Tax Law goes into effect, out of profits earned before that time, are taxable to the stockholder as income.

For other cases, see Taxes, VI. a, in Dig. 1-52 N. S.

(June 28, 1917.)

R EPORT by the Supreme Judicial Court for Suffolk County for the opinion of the full bench, of petitioners for mandamus to compel return of taxable incomes under the Income Tax Law. Petitions granted.

The facts are stated in the opinion.

Messrs. Henry C. Attwill, Attorney General, and William Harold Hitchcock, Assistant Attorney General, for petitioner:

The privilege of buying and selling securities and other intangible property is a proper subject for legislative regulation, and thus a legitimate basis for an excise.

Opinion of Justices, 196 Mass. 603, 85 N. E. 545.

The constitutionality of taxes upon these classes of income, when levied proportionally and reasonably, has never been questioned.

Opinion of Justices, 220 Mass. 613, 108 N. E. 570; Wilcox v. Middlesex County, 103 Mass. 544.

Profits are taxes entirely without reference to whether the taxpayer is engaged in the business of dealing in any such property or not.

Black, Income Taxes, § 239.

The tax imposed by § 5 (b) is not a tax on income derived from property.

Wilcox v. Middlesex County, supra.

The right to subscribe for stock is taxable. L.R.A.1917F.

Atkins v. Albree, 12 Allen, 359; Hyde v. Holmes, 198 Mass. 287, 84 N. E. 318.

The extra cash dividend is taxable.

Gray v. Hemenway, 212 Mass. 239, 98 N. E. 789, s. c. 206 Mass. 126, 138 Am. St. Rep. 377, 92 N. E. 31; Hyde v. Holmes, supra; Lyman v. Pratt, 183 Mass. 58, 66 N. E. 423; Davis v. Jackson, 152 Mass. 58, 23 Am. St. Rep. 801, 25 N. E. 21.

Messrs. Warren, Garfield, Whiteside, & Lamson, and Robert Walcott for respondents.

Rugg, Ch. J., delivered the opinion of the court:

The 44th amendment to the Constitution of this commonwealth, approved and ratified by the people in November, 1915, is in these words: "Full power and authority are hereby given and granted to the general court to impose and levy a tax on income in the manner hereinafter provided. Such tax may be at different rates upon income derived from different classes of property, but shall be levied at a uniform rate throughout the commonwealth upon incomes derived from the same class of property. The general court may tax income not derived from property at a lower rate than income derived from property, and may grant reasonable exemptions and abatements. Any class of property the income from which is taxed under the provisions of this article may be exempted from the imposition and levying of proportional and reasonable assessments, rates and taxes as at present authorized by the Constitution. This article shall not be construed to limit the power of the general court to impose and levy reasonable duties and excises."

The inquiry raised on this record chiefly concerns the meaning of "income" as that word is used in the grant of power to the general court to "impose and levy a tax on income."

The Constitution of Massachusetts is a frame of government for a sovereign power. It was designed by its framers and accepted by the people as an enduring instrument, so comprehensive and general in its terms that a free, intelligent, and moral body of citizens might govern themselves under its beneficent provisions through radical changes in social, economic, and industrial conditions. It declares only fundamental principles as to the form of government and the mode in which it shall be exercised. Certain great powers are conferred and some limitations as to their exercise are established. The original Constitution and all its amendments together form one instrument. It is to be interpreted in the light of the conditions under which it and its several parts were framed, the ends which

it was designed to accomplish, the benefits which it was expected to confer, and the evils which it was hoped to remedy. It is a grant from the sovereign people, and not the exercise of a delegated power. It is a statement of general principles, and not a specification of details. Amendments to such a charter of government ought to be construed in the same spirit and according to the same rules as the original. It is to be interpreted as the Constitution of a state, and not as a statute or an ordinary piece of legislation. Its words must be given a construction adapted to carry into effect its purpose.

The cases at bar raise four main questions:

(1) Are excesses of gains over losses in the purchase and sales of intangible personal property by one not engaged in the business of dealing in such property taxable as income?

(2) Are gains derived from the sale of rights to subscribe for new shares of stock to be issued by an existing corporation taxable as income?

(3) Is a stock dividend declared and issued by a corporation after the statute went into effect, out of an accumulation of profits earned and invested in its business before the statute was enacted, taxable as income?

(4) Is a cash dividend declared and paid after the statute went into effect, out of profits earned before the statute took effect, taxable as income?

1. We proceed to the discussion of the first main question.

Pursuant to the grant of power given by the 44th amendment, the Income Tax Law (General Acts 1916, chap. 269) was enacted. It is provided by § 5 that:

"Income of the following classes received by any inhabitant of this commonwealth, during the calendar year prior to the assessment of the tax, shall be taxed as follows:

" . . . (c) The excess of the gains over the losses received by the taxpayer from purchases or sales of intangible personal property, whether or not the said taxpayer is engaged in the business of dealing in such property, shall be taxed at the rate of 3 per cent per annum. . . ."

The act took effect so as to include the income of the calendar year 1916. The tax commissioner issued a bulletin to be used in the preparation of income tax returns, giving the "Approved Valuation" of stocks on January 1, 1916. No question has been raised as to the accuracy of this valuation. By the express terms of § 7 of the Income Tax Act the value of the intangible personal property on January 1, 1916, if owned by the taxpayer on that date, and its value on the date acquired, in the event of pur-

chase after that date, is made the basis of computation for determining gains and losses.

The defendant Putnam on January 1, 1916, owned certain shares of stock in corporations which he sold during the calendar year 1916 at sums in excess of the prices given in the "Approved Valuation" bulletin, so that the net profits realized exceeded his total losses. He also bought certain stocks during the year 1916 and sold them during the same year at a profit. It is contended on his behalf that these gains do not constitute "income" within the meaning of that word in the 44th amendment.

The 44th amendment was adopted by the general court and by it proposed to the people after prolonged study and at the end of various efforts under the grant of power to tax contained in chapter 1, § 1, art. 4, of the Constitution to establish a general and extensive income tax. Numerous resolves of the legislature have been passed from time to time, extending over many years, providing for the investigation of the subject of taxation by special commissions and committees. The reports from these sources were voluminous, and most, if not all of them, suggested some form of tax on incomes from investments. Advisory opinions to the general court or one of its branches by the justices of this court, touching particular phases of the matter, are to be found in *Opinions of Justices*, 195 Mass. 607, 84 N. E. 499, id. 208 Mass. 616, 94 N. E. 1043, id. 220 Mass. 613, 108 N. E. 570. All the schemes thus proposed either were not acceptable to the legislature or appeared to be in conflict with the grant of the power to tax contained in the Constitution. It became necessary to declare unconstitutional one statute of this general nature. *Perkins v. Westwood*, 226 Mass. 268, 115 N. E. 411. The adoption and ratification of the 44th amendment under these circumstances renders imperative the inference that the word "income" was there used with the purpose of setting at rest any doubt about the full and complete power of the legislature to deal with "income" as a subject of taxation. That word was employed to express a comprehensive idea. It is not to be given a narrow or constricted meaning. It must be interpreted as including every item which, by any reasonable understanding, can fairly be regarded as income. One purpose of the amendment was to avoid, with reference to anything rightly describable as "income," the requirement of chapter 1, § 1, art. 4, of the Constitution, that property taxes must be "proportional . . . upon all . . . estates lying" within the commonwealth, and to enable income to be taxed at a rate not "proportional" to all other

property, and to exempt from other taxation the property from which such income arises.

"Income," like most other words, has different meanings, dependent upon the connection in which it is used and the result intended to be accomplished. One purpose of its use in the 44th amendment doubtless was to distinguish property flowing out of an original investment from that which, in its inherent nature, is permanent investment, already subject to the ample taxing power of chapter 1, § 1, art. 4. But that is not its exclusive signification in the amendment. In its ordinary and popular meaning, "income" is the amount of actual wealth which comes to a person during a given period of time. At any single moment a person scarcely can be said to have income. The word in most, if not all, connections, involves time as an essential element in its measurement or definition. It thus is differentiated from capital or investment, which commonly means the amount of wealth which a person has on a fixed date. Income may be derived from capital invested or in use, from labor, from the exercise of skill, ingenuity, or sound judgment, or from a combination of any or all of these factors. One of the most recent of its definitions is "the gain derived from capital, from labor, or from both combined." *Stratton's Independence v. Howbert*, 231 U. S. 399, 415, 58 L. ed. 285, 292, 34 Sup. Ct. Rep. 136, 140. Doubtless it would be difficult to give a comprehensive definition which can be treated as universal and final. It is common speech for one to say that he made so much money during a particular twelve months, and to mean thereby that he had increased his wealth to that amount. Such a remark, made by one not engaged permanently or intermittently in business or any gainful occupation, naturally means that, by casual purchases or sales of property, made in the exercise of good judgment, he has augmented the total value of his property. The decisive word in the 44th amendment is "income." That is a word which not only had been much discussed by legislators and in the press in connection with taxation, but which also is in everyday use. The common meanings attached to it by lexicographers, therefore, have weight in determining what the people may be supposed to have thought its signification to have been when voting for the amendment. It is defined as that "gain . . . which proceeds from labor, business, or property, commercial revenue or receipts of any kind, including wages or salaries, the proceeds of agriculture or commerce, the rent of houses or the return on investments;" and also as "the amount of money coming to a person or corporation within a specified L.R.A.1917F.

time, whether as payment for services, interest or profit from investment." Its usual synonyms are "gain," "profit," "revenue." It is used in this sense also by writers upon taxation and economics.

The gains and profits made as a result of carrying on a business of buying and selling goods had been held to be taxable as income under the tax law long before the adoption of the 44th amendment. *Wilcox v. Middlesex County*, 103 Mass. 544. It there was recognized that such income might accrue in part from goods purchased before the period of time for which the income was to be reckoned. Gain made in the conduct of a business which consists of making purchases and sales generally is recognized as income. Of course, one engaged in the business of buying and selling intangible personal property was equally subject to taxation on gains derived therefrom under the law as it was before 1916. Such incomes had been taxed for many years immediately before the adoption of the amendment. It hardly can be thought that the people, in conferring the power to tax incomes, intended to perpetuate for all time a distinction between incomes derived from a business of buying and selling property, on the one side, and the profits realized by one not engaged in such business, but occasionally and casually, and not as a business, making purchases and sales, on the other side, and to grant to their representatives authority to tax the one and to deny them authority to tax the other. In some connections profits of this kind have been held to be income. *Park's Estate*, 173 Pa. 190, 33 Atl. 884.

The Federal Income Tax Law of 1913 may be presumed to have been more or less familiar to the members of the general court and the people during the discussion accompanying the adoption of the 44th amendment. The phrase of that law (chapter 16, § II. B, of the Acts of Congress approved October 3, 1913 [38 Stat. at L. 167]), is significantly broad and inclusive: "The net income of a taxable person shall include gains, profits, and income derived from . . . dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property . . . or gains or profits and income derived from any source whatever."

The mind of the ordinary legislator and voter would naturally infer from these words that gains like those here in question would be subject to the Federal Income Tax. That act was passed under the 16th Amendment to the United States Constitution, which authorized a tax only on "incomes." It is matter of common

knowledge that, under the Federal Income Tax Act, an income tax was levied upon gains derived from purchases and sales similar to those here in question, and that the right to do so was asserted by the revenue officers of the United States. Presumably this was known by the members of the legislatures of 1914 and 1915, by which the 44th amendment was agreed to, and by the people who approved and ratified it. It is not pertinent to inquire here whether that interpretation of the United States income tax ultimately will be sustained. See *Gray v. Darlington*, 15 Wall. 63, 21 L. ed. 45; *Gauley Mountain Coal Co. v. Hays*, 144 C. C. A. 408, 230 Fed. 110; *Lynch v. Turrish*, 149 C. C. A. 649, and cases cited at 660, 236 Fed. 653. Compare *Stanton v. Baltic Min. Co.* 240 U. S. 103, 60 L. ed. 546, 36 Sup. Ct. Rep. 278; *Von Baumbach v. Sargent Land Co.* 242 U. S. 503, 525, 61 L. ed. 460, 472, 37 Sup. Ct. Rep. 201; *Brushaber v. Union P. R. Co.* 240 U. S. 1, 60 L. ed. 493, L.R.A. 1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713. The relevant fact is that the right to levy such a tax on gains of this kind as an income tax was asserted by the Federal authorities and generally acquiesced in by the taxpayer as bearing upon what scope shall be given to the word "income," contemporaneously used in the 44th amendment.

If the word "incomes" or the words "gain, profit, and income" had been used, it hardly would be contended that the intentment of the amendment was not comprehensive. But in the framing of constitutions words naturally are employed in a compendious sense as expressive of general ideas rather than of the fine shades of close distinctions. The simple and dignified diction of our Constitution does not readily lend itself to technical and narrow definition. Terse statement of governmental principles in plain language, and not amplification in the delicate niceties of words, characterizes its composition.

The fair and almost irresistible conclusion from all these considerations is that the word "income" in the 44th amendment has a generic meaning and includes gains, profits, and revenues.

The gains received from sales of stocks come within the definitions of "income" heretofore stated. They are derived from the application of sagacity to the use of capital in making purchases and resales at an advance. The transactions could not be carried out except by the use of capital, and the profit is derived directly from the capital in combination with skill in selecting the time for purchase and for sale.

It is true that in some other connections L.R.A.1917F.

profits and gains arising from the increase in value of investments and realized by sale are treated as a part of the principal, and not as income. That is so of trust estates. But, as has been pointed out, it is not true where business is conducted which consists of making sales and purchases. *Williams v. Milton*, 215 Mass. 1, 11, 102 N. E. 355; *Wilcox v. Middlesex County*, supra.

A very different question would arise if the attempt were made to tax as income the increase in value of the capital investment in intangibles which had accrued to the owner from a date of purchase long anterior to the enactment of the tax act. Such a construction of a statute would not be adopted except as the imperative result of unequivocal words, and even then serious questions might arise as to the validity of such an act. See *Gray v. Darlington*, 15 Wall. 63, 21 L. ed. 45; *Bailey v. New York C. & H. R. R. Co.* 106 U. S. 109, 114, 27 L. ed. 81, 83, 1 Sup. Ct. Rep. 62; *McCoach v. Minehill & S. H. R. Co.* 228 U. S. 295, 300, 57 L. ed. 842, 844, 33 Sup. Ct. Rep. 419. That would be an attempt to tax as income an increment in value of the capital investment which had occurred and been realized in possession prior to the taking effect of the tax law. It might be regarded as an effort to convert into income that which already had become capital. See *Mitchell Bros. Co. v. Doyle* (D. C.) 225 Fed. 437. That is not the situation in the case at bar. The Income Tax Act, according to the express provisions of § 7 and as interpreted by the commissioner in its application to these defendants, is to be levied only on such increases in values as have been realized by sales within the year, using as the basis of value in instances where stock was owned by the taxpayer on January 1, 1916, the fair cash value at that time. Thus the income as ascertained for tax purposes is the annual income in its strict sense. It is a direct apportionment of the increment from this source to the year in which it was received and converted into cash. See *Doyle v. Mitchell Bros. Co.* L.R.A.1917E, 568, 149 C. C. A. 106, 235 Fed. 686; *Biwabik Min. Co. v. United States*, 242 Fed. 9, and *Cleveland, C. C. & St. L. R. Co. v. United States*, 242 Fed. 18, each decided by the circuit court of appeals for the sixth circuit on May 8, 1917. Therefore no question either of statute interpretation or constitutionality is raised in the cases at bar as to an attempt to tax gains on the value of property which have not been realized by sale, and which would be known in common speech as mere paper profits, and nothing to that point is here decided.

The argument against the validity of the tax as likely to cause confusion in keeping accounts of trustees and others, and in making divisions and apportionments, is based merely on conveniences, and cannot be regarded as of much weight. Illustrations were put in argument and readily can be imagined of instances where hardship may be wrought by this decision. But that is likely to be true of every general rule of law and particularly of tax statutes.

These reasons lead to the conclusion that the tax upon gains in excess of losses arising from sales of stock during the year 1916 is a tax upon income, and not upon principal.

In reaching this conclusion we are not unmindful of decisions of other jurisdictions more or less apparently at variance. See, for example, *Gray v. Darlington*, 15 Wall. 63, 21 L. ed. 45; *Stevens v. Hudson's Bay Co.* 101 L. T. N. S. 96, 25 Times L. R. 709; *Tebrau (Johore) Rubber Syndicate v. Farmer*, 47 Scot. L. R. 816; *Lynch v. Turrish*, 149 C. C. A. 649, 236 Fed. 653, and cases there collected; *Lynch v. Hornby*, 149 C. C. A. 657, 236 Fed. 661. But the grounds upon which this judgment rests are such as to render unnecessary a critical examination of those decisions. They relate to other statutes enacted under constitutional provisions different from those of the 44th Amendment.

The word "income" is susceptible of a meaning sufficiently broad to include gain of the kind and from the sources here in question. The circumstances under which the 44th amendment was adopted are of persuasive force in requiring the conclusion that it was the purpose of the people to include within its scope everything that by reasonable intendment can be said to be income.

The Income Tax Act does not violate the provisions of the 44th amendment so far as concerns this item of income. It does not levy a tax at a different rate upon incomes derived from the same class of property. The rate levied upon gains from the sales of intangible personal property is 3 per cent (§ 5 [c]), while that upon the dividends from stock and interest on bonds and notes is 6 per cent (§ 2). But these two sources of income do not belong to the same class. When a classification is made of property for purposes of taxation, the question is, as was said in *Nicol v. Ames*, 173 U. S. 509, 521, 43 L. ed. 786, 793, 19 Sup. Ct. Rep. 522, 527, "whether there is any reasonable ground for it, or whether it is only and simply arbitrary, based upon no real distinction, and entirely unnatural." A classification will not be declared L.R.A.1917F.

void as unreasonable "unless . . . plainly and grossly oppressive and unequal, or contrary to common right." *Oliver v. Washington Mills*, 11 Allen, 268, 279. The tax upon interest and dividends is levied upon a return which comes to the owner of the principal security without further effort on his part. The tax upon excess of gains over losses in the purchases and sales of intangible personal property is levied not upon income derived from a specific property, but from the net result of the combination of several factors, including the capital investment and the exercise of good judgment and some measure of business sagacity in making purchases and sales. Gain derived in this way, to express it in "summary and comprehensive form, . . . is the creation of capital, industry, and skill." *Wilcox v. Middlesex County*, 103 Mass. 544. It is not the production of capital alone, and does not arise solely from a simple investment.

The question was somewhat argued at the bar whether the tax authorized by the 44th amendment and levied by the instant statute is wholly a property tax, as was said in *Opinion of Justices*, 220 Mass. 613, 623-625, 108 N. E. 570, *Perkins v. Westwood*, 226 Mass. 268, 115 N. E. 411; *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 429, 581, 39 L. ed. 759, 819, 15 Sup. Ct. Rep. 673, s. c. 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912; or whether in some aspects and applications it may be an excise (*Springer v. United States*, 102 U. S. 586, 602, 26 L. ed. 253, 259; *Brushaber v. Union P. R. Co.* 240 U. S. 1, 16, 17, 60 L. ed. 493, 501, L.R.A.1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713; *Flint v. Stone Tracy Co.* 220 U. S. 107, 150, 152, 55 L. ed. 389, 413, 414, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; *Glasgow v. Rowse*, 48 Mo. 479, 491; *Waring v. Savannah*, 60 Ga. 93, 100; *Drexel v. Com.* 46 Pa. 31, 40). It is not necessary to do more than to refer to 220 Mass. 623 to 627, 108 N. E. 570, for it is plain that the 44th amendment modified the provisions of chapter 1, § 1, art. 4 of the Constitution to the effect that property taxes must be proportional, so that the legislature now has power to levy taxes upon whatever rightly may be held to be "income" at different rates upon income derived from different classes of property, provided there is uniformity in rate upon incomes from the same classes of property. It follows that in this connection the rule stated in *Gleason v. McKay*, 134 Mass. 419, and *O'Keefe v. Somerville*, 190 Mass. 110, 112 Am. St. Rep. 316, 76 N. E. 457, 5 Ann. Cas. 684, to the effect that no valid excise can be

imposed upon the exercise of a natural right, has no relevancy.

2. The second question is whether gains derived from the sale of rights to subscribe for new shares of stock to be issued by a corporation are taxable as income.

The respondent Putnam received during 1916 proceeds from the sale of rights, declared in that year, to subscribe to shares of new stock in corporations in which he was a stockholder previous to 1916.

The same reasons which already have been stated, as to the right to treat gains in excess of losses from purchases and sales of intangible personal property as subject to an income tax, lead to the conclusion that gains arising from the sale of rights to subscribe for new stock issued by corporations may also be treated as income by the general court for purposes of taxation under the 44th amendment. Such rights are themselves a species of intangible property. They come to the stockholder as a gratuity. They are a new thing of value which he did not possess before. The amount for which he sells them is a gain. In the management of trusts as between a life tenant and remainderman rights to subscribe for stock (*Atkins v. Albree*, 12 Allen, 359, 361; *Davis v. Jackson*, 152 Mass. 58, 61, 23 Am. St. Rep. 801, 25 N. E. 21) and stock dividends (*D'Ooge v. Leeds*, 176 Mass. 558, 560, 57 N. E. 1025; *Rand v. Hubbell*, 115 Mass. 461, 15 Am. Rep. 121) are regarded as capital, and not as income, in this commonwealth. The rule of this commonwealth, to the effect that, as between life tenant and remainderman, stock dividends are treated as capital, and not as income, perhaps may have grown up in part, at least, by reason of its convenience, and it appears to be widely adopted. *Gibbons v. Mahon*, 136 U. S. 549, 34 L. ed. 525, 10 Sup. Ct. Rep. 1057. But, however that may be, it is manifest that there is no inherent necessary and immutable reason why stock dividends should always be treated as capital. This is apparent because in several jurisdictions they are treated either in whole or in part as income, and not as capital. *Re Osborne*, 209 N. Y. 450, 50 L.R.A.(N.S.) 510, 103 N. E. 723, 823, Ann. Cas. 1915A, 298. See *McLouth v. Hunt*, 154 N. Y. 179, 39 L.R.A. 230, 48 N. E. 548; *Robertson v. De Brulatour*, 188 N. Y. 301, 80 N. E. 938; *Lowry v. Farmers' Loan & T. Co.* 172 N. Y. 137, 64 N. E. 796; *Pratt v. Douglas*, 38 N. J. Eq. 516, 541; *Earp's Appeal*, 28 Pa. 368; *Holbrook v. Holbrook*, 74 N. H. 201, 203, 204, 12 L.R.A.(N.S.) 768, 66 Atl. 124; *Pritchitt v. Nashville Trust Co.* 96 Tenn. 472, 33 L.R.A. 856, 38 S. W. 1064; *Hite v. Hite*, 93 Ky. 257, 19 L.R.A. 173, 40 Am. L.R.A.1917F.

St. Rep. 189, 20 S. W. 778; *Thomas v. Gregg*, 78 Md. 545, 44 Am. St. Rep. 310, 28 Atl. 565; *Goodwin v. McGaughey*, 108 Minn. 248, 122 N. W. 6; *Soehnlein v. Soehnlein*, 146 Wis. 330, 339, 131 N. W. 739. The same is true of our rule (which prevails also at least in the Federal and English courts. See *Gibbons v. Mahon*, 136 U. S. 549, 567, 34 L. ed. 525, 530, 10 Sup. Ct. Rep. 1057; *Bouche v. Sproule*, L. R. 12 App. Cas. 385, 56 L. J. Ch. N. S. 1037, 57 L. T. N. S. 345, 36 Week. Rep. 193), to the effect that rights to subscribe for new stock which have a market value are to be attributed to principal, and not to income. Some other states hold the value of such rights to be income, and not principal. *Wiltbank's Appeal*, 64 Pa. 256, 3 Am. Rep. 585. See *Lord v. Brooks*, 52 N. H. 72. It seems impossible to say, when a kind of gain is in many states held, even as between life tenant and remainderman, to be income, and not capital, that the word "income," used in an amendment to the Constitution adopted for the express purpose of enabling a tax to be levied broadly on all that rightly may be described as income, should be construed as excluding such gains simply because this court has held that it was not income in a single branch of law, while numerous other courts have held the contrary even upon that point. However strong such an argument might be when urged as to the interpretation of a statute, it is not of prevailing force as to the broad considerations involved in the interpretation of an amendment to the Constitution, adopted under the conditions preceding and attendant upon the ratification of the 44th amendment.

The rights to subscribe for stock, when sold and converted into cash, rightly may be treated as taxable as a gain on the sale of intangibles under § 5 (c) of the Income Tax Act. These rights commonly are represented by certificates and pass by indorsement. They are a species of intangible property. They are not regarded ordinarily as a profit from the prosecution of the business, but are an inherent and constituent part of the shares. *Atkins v. Albree*, 12 Allen, 359, 361; *Hyde v. Holmes*, 198 Mass. 287, 293, 84 N. E. 318. Their sale resulted from an exercise of judgment to that effect on the part of the stockholder. They are indistinguishable in principle from a sale of the stock itself, and gains derived from sales of such rights fall within the same class of income. The statute in this regard is not in conflict with the amendment.

The question whether rights to subscribe for stock, which are exercised by sub-

scription, are taxable as income, is not raised on this record and is not decided.

3. The third question is whether a stock dividend, declared and paid after the statute went into effect, out of profits earned before it took effect, is taxable as income. The respondent Garfield received during 1916 a stock dividend declared in that year on shares of stock in corporations owned by her before that time.

The stock dividends in the Garfield Case were declared out of an accumulation of earnings which, before 1916, had been invested in permanent additions to the plants of the corporations involved. It is urged that these earnings, therefore, had become a part of capital before 1916, and hence cannot, in the nature of things, be taxed as income. It is true that, in cases of this sort arising between life tenant and remainderman, the fact that the surplus of a corporation has been used in permanent increases of the property devoted to the business of the corporation is oftentimes of significance. *Minot v. Paine*, 99 Mass. 101, 111, 96 Am. Dec. 705; *Hemenway v. Hemenway*, 181 Mass. 406, 410, 63 N. E. 919. But upon this point the inquiry is as to the intention of the legislature as manifested by the words it has used. Those pertinent in this connection are in § 2b, where are subjected to the tax "dividends on shares in all corporations and joint-stock companies . . . [with exceptions not here material]. . . . No distribution of capital, whether in liquidation or otherwise, shall be taxable as income under this section; but accumulated profits shall not be regarded as capital under this provision." That which originally had been earnings in the case at bar had never been distributed as a cash dividend or in any other form. Its use had been such as to add to the value of the capital. It doubtless had increased that value prior to 1916. But the act of the corporation in 1916 was, in substance, a distribution of certificates of title to represent this increment of value with all the advantages that might flow therefrom. It was the issuance to the stockholder of a new thing of value transferable, transmissible, and salable separate and apart from that which before he had possessed. "Accumulated profits," as used in the statute, are words of sufficiently comprehensive scope to include profits which had been earned and invested as had those here in question. The words "accumulated profits" are used as the antithesis of "distribution of capital." The latter would include payment of a part of the capital investment sold and returned to the shareholders, whereby the capacity of the corporation to carry on

business was impaired or depleted. See, for example, *Lynch v. Hornby*, 149 C. C. A. 657, 236 Fed. 661. Other illustrations might be put. But the words "distribution of capital" do not readily lend themselves to an issue of new stock, which, in its last analysis, represents surplus earnings of the corporation for the time being applied to increase of plant, and which are intended to be continued to that use. In essence the thing which has been done is to distribute a symbol representing an accumulation of profits, which, instead of being paid out in cash, is invested in the business, and thus its durable assets augmented. In this aspect of the case the substance of the transaction is no different from what it would be if a cash dividend had been declared, with the privilege of subscription to an equivalent amount of new shares. The stock dividend was declared strictly out of an accumulation of earnings applied to business uses, and not out of increased market value of capital investment. See *Thayer v. Burr*, 201 N. Y. 155, 94 N. E. 604. That which he had before was a fractional interest in the property of the corporation. So far as concerned the accumulation of profits, there was a possibility that they might be paid out in whole or in part as a cash dividend by authority of the corporation. By the issue of the stock dividend that possibility is gone, and the stockholder now has evidence of a permanent interest in the corporate enterprise of which he cannot be deprived. It is a thing different in kind from the thing which the stockholder owned before. From the viewpoint of the stockholder, he has received in the form of dividend in stock a thing with which theretofore he could have no tangible dealings. The certificates for the new shares of stock representing the stock dividend may have a materially greater value than the less tactile right to a share in the accumulated profits which he had before. The fact that the surplus had been accumulated before the Income Tax Law went into effect is not of consequence in this particular. The thing of value which is taxed as income, namely, the dividend in stock, did not come into his possession or right to possession until the year for which he is taxed. It is this thing of value which is taxable at the time when it comes into his right possession. *Edwards v. Keith*, L.R.A. —, —, 145 C. C. A. 298, 231 Fed. 110; *Van Dyke v. Milwaukee*, 159 Wis. 460, 146 N. W. 812, 150 N. W. 509. The contention that stock dividends are not taxable as income, because in this commonwealth they are treated as capital, and not as income, as between life tenant and

remainderman, has been disposed of by what has been said already in discussing the second question here raised as to the taxability as income of rights to subscribe for new shares of stock.

The stock dividends, so far as regards the source from which they come to the stockholder, and the impassive nature of his receipt of them, are derived from the same class of property from which are derived ordinary dividends, and rightly may be classified together under § 2 of the Income Tax Act. The two should be taxed as they are in the statute, at the same rate.

So far as there may be anything at variance with this conclusion in *Lynch v. Turkish*, 149 C. C. A. 649, 236 Fed. 653, we are constrained not to follow it. See in this connection, *Southern P. Co. v. Lowe* (D. C.) 238 Fed. 847.

Therefore, in this particular the Income Tax Act is not in conflict with the requirements of the 44th amendment as to uniformity of rates on incomes derived from the same class of property.

4. The fourth question is whether a cash dividend declared and paid after the statute took effect, out of profits earned before it was enacted, is taxable as income.

The respondent Putnam received an extra cash dividend of 33½ per cent on certain shares of corporate stock owned by him before 1916, which was declared out of undistributed earnings accrued before March, 1913.

It is the general and long-established rule in this commonwealth that cash dividends received on corporate stock are to be treated as income, and not as capital. *Talbot v. Milliken*, 221 Mass. 367, 108 N. E. 1060; *Gray v. Hemenway*, 223 Mass. 293, 111 N. E. 713. There is no reason in

the circumstances of the case at bar for varying that rule. The present case is well within the scope of these decisions. A stockholder has no individual interest in the profits of a corporation until a dividend has been declared. The accumulation of a surplus does not of itself entitle stockholders to a dividend. *Smith v. Hurd*, 12 Met. 371, 385, 46 Am. Dec. 690; *New York, L. E. & W. R. Co. v. Nickals*, 119 U. S. 296, 30 L. ed. 863, 7 Sup. Ct. Rep. 209; *Humphreys v. McKissock*, 140 U. S. 304, 35 L. ed. 473, 11 Sup. Ct. Rep. 779; *United States Radiator Corp. v. State*, 208 N. Y. 144, 152, 46 L.R.A.(N.S.) 585, 101 N. E. 783. The extra cash dividend was declared out of surplus earnings which had accumulated during twenty-three years prior to March 1, 1913. Although it was large and had been accumulating for a long time, it was not the less a cash dividend. It came to the shareholder as his individual property for the first time when declared and paid in 1916. It was not, in substance or effect, a distribution of capital. Moreover, it is expressly provided in the Income Tax Law (§ 2) that "no distribution of capital, whether in liquidation or otherwise, shall be taxable as income under this section: but accumulated profits shall not be regarded as capital under this provision."

Manifestly it was not intended hereby to change the general rule recognized in numerous cases in addition to those heretofore cited.

The decision upon the first three main questions is by a majority of the court, and is unanimous upon the fourth question. It follows that in each case the entry must be:

Peremptory writ of mandamus to issue.

Annotation—Income tax on dividends declared after but paid from earnings accrued before act went into effect.

As to constitutionality of income tax acts, see notes to *Alderman v. Wells*, 27 L.R.A.(N.S.) 864, and *State ex rel. Bolens v. Frear*, L.R.A.1915B, 569. And as to income tax on sales of property, see annotation to *State ex rel. Bundy v. Nygaard*, L.R.A.1917E, 563; and as to determining income from timber lands for purposes of taxation, see annotation to *Doyle v. Mitchell Bros. Co.* L.R.A.1917E, 568.

The weight of authority, numerically at least, is to the effect that dividends declared after, but paid from earnings earned before, an act under which they are sought to be taxed as income went into effect, constitute income for the year L.R.A.1917F.

when declared and paid, but there has been some expression of opinion to the contrary. The question is, of course, one largely of statutory construction, and because of the varying phraseology and circumstances most of the decisions are reconcilable.

In Wisconsin, under the Income Tax Act of that state in effect January 1, 1911, which provided that "there shall be assessed, levied, collected, and paid a tax upon incomes received during the year ending December 31, 1911," it has been expressly held (*Van Dyke v. Milwaukee* (1914) 159 Wis. 460, 146 N. W. 812, 150 N. W. 509) that stock dividends are income, and that dividends declared

and distributed during 1911 out of surplus on hand prior to January 1, 1911, were taxable as income for 1911. This decision was upon the ground that it was immaterial when the dividends were earned by the corporation as long as they were declared and paid during 1911, since, as a stockholder acquires no right to corporate money until it is distributed in the form of a dividend, it cannot be regarded as income until so distributed. And see *State ex rel. Pfister v. Widule* (1917) — Wis. —, 163 N. W. 641, which is to the same effect.

And under the Massachusetts Income Tax Act of 1913, which provides that gains or profits and income "derived from any source whatever" shall be taxed, it has been held (*TREFFY v. PUTNAM*, ante, 806) that both stock and cash dividends declared and paid after the act went into effect, out of proceeds earned before that time, are taxable to the stockholder as income of the year when declared and paid. This, it will be remembered, was upon the theory that it is the thing of value which comes into right of possession that is taxable, and that the dividends became such when declared, and not until then. And, as regards the cash dividends, the conclusion was also aided by the express provision of the statute to the effect that accumulated profits shall not be regarded as capital within the meaning of the provision that no distribution of capital shall be taxed as income.

So, in Ohio, under the Act of March 12, 1831, which levied a tax on dividends declared by banks, it has been held (*State v. Franklin Bank* (1840) 10 Ohio, 91) that the tax applied to dividends declared after the act became effective, regardless of the fact that the profits so divided accrued before the passage of the act.

And similar conclusions have been reached under the Federal Income Tax Act of 1913, the provisions of which, however, as shown *infra*, have been materially modified by the Federal Act of March 8, 1916. Thus, in *Southern P. Co. v. Lowe* (1917) 238 Fed. 847, where a corporation declared a dividend in 1914, payable out of surplus which accrued before 1909, it was held that it was taxable under § II. B of the Act of 1913, which imposed a tax upon "the entire net income arising or accruing from all sources during the preceding calendar year," as income accruing to the stockholder during 1914, the court refuting the contention that the moneys

paid in dividends came from surplus earnings which were in fact an addition to and a part of the capital of the company, and adopting the theory that, since a stockholder has no interest in the profits of the corporation until a dividend has been declared, a dividend from previous profits constitutes income of the year when declared and received. So, in *Towne v. Eisner* (1917) 242 Fed. 702, the court adopting the theory that no legal right to a dividend vests in a stockholder until it has actually been declared, and that the question of taxation as income wholly turns on the new rights which the stockholder gets by the declaration of the dividend, held that stock dividends paid after the Act of 1913 went into effect, out of a surplus earned prior to that time, were taxable as representing "gains, profits, and income" within the meaning of such act. But, in connection with this interpretation of the Federal Act of 1913, see *Lynch v. Turrish* (1916) 149 C. C. A. 649, 236 Fed. 653, and *Lynch v. Hornby* (1916) 149 C. C. A. 657, 236 Fed. 661, in both of which it was held that dividends received by a stockholder in 1914, from the proceeds of a sale of corporate property representing gains in value made previous to 1913 could not be regarded as "income, gains, or profits" taxable in 1914, the receipts being a mere change of capital, and the dividends representing a distribution of capital assets rather than of gains or profits within the meaning of the act. However, the court in the *Turrish* Case did use language which cannot be reconciled with some of the foregoing decisions, for it was declared that Congress, in enacting the tax law under consideration, clearly intended to leave and did leave all the income, gains, and profits which had accrued or arisen prior to the time when the act went into effect free from income tax, and as absolutely the property of stockholders as was any of their original capital or property. In fact, in discussing and rejecting the contention of counsel for the tax collector that, because paragraph B of the act provided that the income of a taxable person should include all gains, profits, and income derived from "any source whatever," all surplus or undivided profits included in any dividends received after March 1, 1913, although they accrued and arose prior to that date, are subject to the tax, the court expressly stated that the decision in *Van Dyke v. Milwaukee* (Wis.) su-

pra, had not proved persuasive. But the cases of *Lynch v. Turrish* and *Lynch v. Hornby* both involved a question of liability for an additional or super tax (an additional tax imposed upon income, including dividends, where same was large enough to come within the amount specified in the act), as provided for in § II. A, subdivision 2, of the Act of October 3, 1913, and in this connection it is of interest that the Treasury Department, by T. D. 2274, and under date of December 22, 1915, expressly ruled that both cash and stock dividends paid from net earnings or established surplus or undivided profits constituted income for the year in which such dividends were received, "without regard to the period in which the profits or surplus were earned, or the period during which they were carried as surplus or undivided profits in the treasury or on the books of the corporation." This ruling expressly modified T. D. 2163 of February 18, 1915, which laid down a different rule for stock dividends. And the inconsistent language used in the *Turrish* and *Hornby* Cases was expressly referred to in *Towne v. Eisner* (Fed.) supra.

But where the tax is in the nature of an excise tax, as upon a franchise to do business, and the dividends declared during the year are made simply the measure of the annual value of the franchise upon which the tax is to be annually paid, dividends paid during a given year out of the surplus acquired prior to the passage of the act cannot be regarded as income for that year, for the purpose of the tax. See *People v. Albany Ins. Co.* (1883) 92 N. Y. 453, construing N. Y. Laws 1880, chap. 542, as amended by Laws 1881, chap. 361.

And under one of the earlier Federal Excise Tax Acts it was ruled that where the tax provided for is an annual income tax, and its subject is the interest paid and profits earned by the company for each year, and year by year, both by the express letter of the law and its necessary implication, the tax is not laid on any funds which came into being before the time prescribed in the act. It was expressly so stated in *Bailey v. New York C. & H. R. R. Co.* (1882) 106 U. S. 109, 27 L. ed. 81, 1 Sup. Ct. Rep. 62, in holding that a scrip dividend declared by a railroad company as of profits which had been earned at some previous time was taxable under § 122 of the Internal Revenue Act of 1862, as amended in 1864, only upon that part accruing after the L.R.A.1917F.

act was passed; and that where a company declared a dividend in 1868 of profits accruing during the previous fifteen years, it was taxable upon $\frac{1}{15}$ of same only. In so holding it was said that it was admissible to go back for the purpose of assessing a tax upon a proper fund which had accrued during a previous year and had escaped taxation, but that the tax so imposed would be for the omitted year, and that, as the dividend in question did not purport to be a dividend as of earnings of the company during the year in which the tax was assessed, or indeed for any particular year, or series of years, it was competent for the company to show, in an action brought to recover a tax paid upon the whole dividend, what amount of the earnings of the company, accruing from 1862 to 1868, was represented by and included in the dividend, and that that amount alone being subject to the tax, recovery could be had of all in excess thereof which had been exacted and paid. But when a corporation has declared a dividend as of earnings of the current year, it has been held that it is estopped to maintain that, by mistake, such dividend was drawn from its capital and surplus earned in former years. Thus, in *Central Nat. Bank v. United States* (1890) 137 U. S. 355, 34 L. ed. 703, 11 Sup. Ct. Rep. 126, affirming (1885) 24 Fed. 577, where a bank declared a dividend as of earnings for the current year, it was held that the liability of the bank for a tax on same under § 120 of the Internal Revenue Act of June 30, 1864, as amended July 13, 1866, which provided that a tax of 5 per cent should be paid on "all dividends" in scrip or money thereafter declared due to stockholders as a part of the earnings, income, or gains of a bank, depended solely upon the question whether the dividend was in fact declared due and payable to the stockholders; and that if a bank in good faith and by mistake made a declaration of dividends when in fact there were no current earnings to pay same, the mistake could not be corrected by the courts in an action brought to recover the tax, and that in fact no proof that no current earnings by the bank had in fact been made was admissible in such an action for the purpose of avoiding the tax, since the law conclusively assumes in such a case that a dividend declared and paid as currently earned was a dividend so earned. This rule was also recognized in *Bailey*

v. New York C. & H. R. R. Co. (U. S.) supra.

In connection with the question whether or not the Federal Income Act of September 8, 1916, applies to dividends declared after, but paid from earnings earned before, that date, it is worthy of note that Congress in this act expressly added a proviso (not included in the earlier act) to the effect that the term "dividends," as used in the title defining income, should be held to mean any distribution made or ordered to be made by a corporation out of its "earnings or profits accrued since March 1,

1913, and payable to its shareholders, whether in cash or in stock of the corporation," which stock dividend shall be considered income to the amount of its cash value. Act September 8, 1916, pt. I., § 2a. This addition to the act would seem to indicate that dividends of the character under consideration in this annotation are now taxable provided they accrued since March 1, 1913, and that dividends representing profits and surplus accruing prior to that date cannot be taxed as income as of years when declared and paid to the stockholders. G. J. C.

NEBRASKA SUPREME COURT.

AGNES JACQUITH

v.

EDGAR H. MASON, Admr., etc., of Sherman Saunders, Deceased, et al., Appts.

(99 Neb. 509, 156 N. W. 1041.)

Corporation — president as trustee.

1. The president of a corporation, who is also a director and stockholder, is not only the agent of the corporation, but is also in many respects a trustee for the stockholders as such.

For other cases, see *Corporations*, IV. g, 4, in Dig. 1-52 N. S.

Same — notice as to value of stock.

2. It is the duty of such president and manager of the corporation, who learns that the entire stock of the corporation can be sold at a certain favorable price, and disposes of his own stock accordingly, to inform other stockholders who he knows are anxious to dispose of their stock, and if he fails to do so, but purchases their stock at a less price and immediately sells it at a profit, he will be liable to such stockholders for the profit so realized.

For other cases, see *Corporations*, IV. g, 4, in Dig. 1-52 N. S.

Same — copurchaser — liability.

3. In such case, one who, with knowledge of all the conditions, joins with such president in purchasing the stock and realizing profit thereon, will be also liable.

For other cases, see *Corporations*, IV. g, in Dig. 1-52 N. S.

Evidence — sufficiency.

4. Evidence indicated in the opinion is

Headnotes by SEDGWICK, J.

Note. — The duty of an officer or director of a corporation toward one from whom he purchases stock is treated in the annotation following *Shaw v. Cole Mfg. Co. L.R.A. 1916B, 708*; and see later cases, *Dawson v. National L. Ins. Co. L.R.A.1916E, 878*, and *Pool v. Camden, L.R.A.1917E, 988. L.R.A.1917F.*

found sufficient to support the findings and judgment.

For other cases, see *Evidence*, XII. in Dig. 1-52 N. S.

(March 4, 1916.)

APPEAL by defendants from a judgment of the District Court for Douglas County in plaintiff's favor in an action brought to recover the profit realized by defendants' decedents from a sale of stock purchased by them from plaintiff. Affirmed.

The facts are stated in the opinion.

Messrs. Gurley, Woodrough, & Fitch, for appellant Mason:

There is no such confidential relation between the president of a company and a stockholder who has her stock in the hands of a broker for sale, as requires the president of the company to give notice to the stockholder that someone else will probably make a better bid on the stock than he makes.

Hooker v. Midland Steel Co. 215 Ill. 444, 106 Am. St. Rep. 170, 74 N. E. 445; *Krumbhaar v. Griffiths*, 151 Pa. 223, 25 Atl. 64; *Haarstick v. Fox*, 9 Utah, 110, 33 Pac. 251; *Crowell v. Jackson*, 53 N. J. L. 656, 23 Atl. 426; *Walsh v. Goulden*, 130 Mich. 531, 90 N. W. 406; *Tippecanoe County v. Reynolds*, 44 Ind. 509, 15 Am. Rep. 245.

Mr. Duncan M. Vinsonhaler for appellant Sunderland.

Messrs. McGilton, Gaines, & Smith, for appellee:

A director or officer of a corporation cannot take an unfair advantage of the stockholder in the purchase of his stock.

Oliver v. Oliver, 118 Ga. 362, 45 S. E. 232; *Strong v. Repide*, 213 U. S. 432, 53 L. ed. 860, 29 Sup. Ct. Rep. 521; *Stewart v. Harris*, 69 Kan. 498, 66 L.R.A. 261, 105 Am. St. Rep. 178, 77 Pac. 277, 2 Ann. Cas. 873; *Barber v. Martin*, 67 Neb. 445, 93 N. W. 722.

Sedgwick, J., delivered the opinion of the court:

Some time prior to October, 1909, this plaintiff, being the owner of 201 shares of the face value of \$100 each of the capital stock of the Underwriters' Insurance Company, placed the same in the hands of Burns, a stockbroker, for sale. Afterwards Burns sold the stock for \$75 a share. Soon afterwards the stock was sold to one Montgomery for \$110 a share. Plaintiff began this action in the district court for Douglas county against William C. Sunderland and Sherman Saunders, alleging that Sunderland was a stockholder, director, and president of the Nebraska Underwriters' Insurance Company, and that he, acting through and joining with Saunders, fraudulently purchased the plaintiff's stock for \$75 a share to enable them to transfer the whole capital stock to Montgomery at \$110 a share. She asked for a judgment against the defendants for the difference between \$75 and \$110 a share. Sunderland answered that the facts in the petition failed to state a cause of action against him, coupled with a general denial of all the allegations in the petition. Saunders denied generally all of the allegations of the petition. While the action was pending, both Saunders and Sunderland died, and Maria B. Sunderland, executrix, was substituted for the defendant Sunderland, and Edgar H. Mason as administrator was substituted for the defendant Saunders. The trial in the district court resulted in a verdict and judgment in favor of the plaintiff for the amount asked for, \$7,035, and interest, amounting to \$8,020.13.

The defendants contend that the evidence is not sufficient to support the verdict, that the verdict and judgment are contrary to law, and that the court erred in certain instructions given to the jury. The briefs are not a compliance with rule 12 (94 Neb. xi. 148 N. W. ix.). The parties do not agree as to the evidence, and, in making their respective statements as to the substance of the evidence, they do not always refer "with particularity by question and page to the evidence in the record supporting the contention made." The latter part of the rule, relating to the statement of the propositions of law relied upon and the authorities supporting them, is not carefully observed. Sunderland and Saunders were partners, carrying on a business distinct from that of the insurance company. The plaintiff's husband was recently deceased, and in his lifetime he had been the owner of this stock and somewhat interested in the affairs of the company, and for several years no dividend had been paid to the plaintiff on her stock. This was all the information that the plaintiff had in regard to the probable

value of the stock, and because she was receiving no dividends thereon she thought it was necessary to sell the stock. She authorized the broker to sell it at \$75 a share. She testified that some time before the transaction complained of she had a conversation with the president Sunderland in regard to the dividends, but was given no information in regard to the condition of the company nor the probable value of the stock. Mr. Montgomery had some stock in the company, and, together with his partner, Funkhauser, was largely interested in a rival company. It would appear that from the evidence the jury might have found that the defendant Sunderland, on the 8th of October, 1909, went to the office of Montgomery and Funkhauser, in Chicago, with a view to negotiation as to the capital stock of the insurance company, and learned that Montgomery would purchase the entire stock of the Underwriters' Insurance Company and pay \$110 a share therefor, and that thereupon Sunderland contracted his stock at that price. It was not inconsistent with the evidence that he gave Montgomery to understand that the remainder of the stock could also be purchased at that price, and that it was because of that understanding that he was able to sell his own stock. A few days later, after Mr. Sunderland's return, Mr. Love, who was an acquaintance of Sunderland and Saunders and had some stock in the insurance company, contracted with the broker Burns for the plaintiff's stock at \$75 a share. The plaintiff thereupon signed a blank assignment of the stock and delivered it to Mr. Love, and the stock was afterwards found to be assigned to Mr. Saunders and to be on deposit in the United States National Bank of Omaha, as collateral security for the sum of \$15,000, about the amount that was paid for the plaintiff's stock. Afterwards Mr. Saunders, within a few days, sold the stock to Montgomery.

The defendants contend that the evidence will not warrant the finding that Sunderland and Saunders were interested in the purchase of plaintiff's stock. Mr. Love testified that he was himself trying to get a controlling interest in the company, and evidently desired the jury to believe that he bought plaintiff's stock with that in view, and that when he found he could not succeed in getting a controlling interest in the company he sold a one-half interest in the stock to Mr. Saunders for the price that he had paid plaintiff. He testified that he sold a half interest in the stock to Saunders, and said that he would have been "stuck" if "they" had not bought the stock from him, indicating that some third party was inter-

ested in the deal. Mr. Saunders' testimony is inconsistent with the idea that Love alone bought the stock for his personal interest.

Saunders testified:

Q. That is, before the 14th of October, you and Mr. Love were entering into negotiations for the purchase of the stock of the Nebraska Underwriters' Insurance Company?

A. Yes, sir.

Q. You were acting together in the matter?

A. Yes, sir.

Q. And this stock was purchased from Mrs. Jacquith, in which you and Mr. Love were together in that transaction?

A. Yes, sir.

Q. And while you didn't furnish, at the time, one half of the money, you became obligated, and furnished your half of it?

A. Yes, sir.

There is direct evidence that Mr. Sunderland stated that himself and Love and Saunders had planned together to buy the whole stock of the company, and there are many circumstances in the evidence indicating that, when Sunderland learned that the entire stock could be sold to Montgomery for \$110 a share, he communicated this fact to his business partner, Saunders, and they, through Mr. Love, procured the plaintiff's stock with the purpose of selling it to Montgomery with Sunderland's own stock. The books of Sunderland and Saunders show that Sunderland participated in the profits that were realized on the plaintiff's stock.

It is insisted: "The defendant Sunderland might have lawfully purchased the plaintiff's stock himself or through an agent or in any other manner, regardless of his information at the time of purchase, so long as he was not guilty of actively misleading her in respect thereto."

This court in *Barber v. Martin*, 87 Neb. 445, 93 N. W. 722, stated the following as a general proposition of law: "The general manager of a corporation, in effectuating a sale of the entire capital stock of his company, acts as the agent of all the stockholders, and he cannot receive and retain a secret compensation from the vendee for effectuating the contract of sale."

This is a little stronger than was necessary under the facts in that case. It appears that the trial court had instructed the jury: "You are instructed that the sole questions for you to determine in this case from the evidence are (1) Did the defendant Barber, in selling said eighteen shares of stock, which originally belonged to the plaintiff, act as her agent and representative? If he did not, you need not consider

the case any further, but return a verdict for defendant."

If this instruction was not strictly accurate in view of the facts developed in that case, the error, if any, was prejudicial to the plaintiff, and not to the defendant, and so it may justly be said that, so far as the consideration of that case is concerned, the instruction was not erroneous, requiring a reversal.

The supreme court of Kansas has had occasion to discuss quite at large a similar question, and declare the law to be: "The managing officers of a corporation are trustees not only in relation to the corporate entity and the corporate property, but they are also, to some extent and in many respects, trustees for the corporate shareholders. . . . The fact that the directors and managing officers of a corporation are quasi trustees for the stockholders does not prohibit them from dealing with the latter. The only restriction is that in such dealing their conduct be fair, open, and above reproach. Because of the trust relation and better opportunities afforded for acquiring information, before any director or managing officer of a corporation, having a knowledge of the condition of its affairs, can rightfully purchase the stock of one not actively engaged in the management, he must inform such stockholder of the true condition of affairs." *Stewart v. Harris*, 69 Kan. 498, 66 L.R.A. 261, 105 Am. St. Rep. 178, 77 Pac. 277, 2 Ann. Cas. 873.

As applied to the facts in that case, the court approved of the following language in the instructions of the trial court: "You are instructed that the president or other managing officer of a corporation doing business as a bank stands in relation of a trustee to all the stockholders who are not themselves engaged in the active management of the bank, and, before any managing officer of a bank who is acquainted with its condition and affairs can rightfully purchase the stock of such bank from stockholders who are not actively engaged in the management and operation of the bank, such managing officers must inform such stockholders of the true condition of the bank and its affairs and assets, and must give to such stockholders all the information affecting the value of the stock which such managing officer himself possesses."

In the opinion the court referred to the case of *Tippicanoe County v. Reynolds*, 44 Ind. 509, 15 Am. Rep. 245, as the leading authority holding a contrary view. The fact that that decision was rendered by a divided court was mentioned, and it was then said: "The rule laid down has met with much criticism. The position taken

leaves the stockholders' interest in the corporation and all matters affecting its value wholly in the charge and keeping of the managing officers of the corporation, and leaves the stockholders their legitimate prey. We cannot give the sanction of our approval to the views there expressed."

Other courts have refused to state the rule as strongly for the plaintiff as this. The supreme court of Georgia considered a case in one respect more nearly identical with the case at bar. That court declared the rule to be: "Where a director purchases shares from a stockholder at 110, concealing the fact that there is a contemplated sale of the entire plant of the company, which makes the stock worth 185, the concealment of such material fact entitles the shareholder to rescind the sale, or to other appropriate relief." *Oliver v. Oliver*, 118 Ga. 362, 45 S. E. 232.

Mr. Justice Lamar in the opinion of the court discusses very clearly the relation which a director bears to any regular stockholder: "But the fact that he is trustee for all is not to be perverted into holding that he is under no obligation to each; the fact that he must serve the company does not warrant him in becoming the active and successful opponent of an individual stockholder with reference to the latter's undivided interest in the very property committed to the director's care. . . . No process of reasoning and no amount of argument can destroy the fact that the director is, in a most important and legitimate sense, trustee for the stockholder. *Jackson v. Ludeling*, 21 Wall. 616, 22 L. ed. 492; 2 Pom. Eq. Jur. 2d ed. § 1090. Not a strict trustee, since he does not hold title to the shares; not even a strict trustee who is practically prohibited from dealing with his cestui que trust; but a quasi trustee as to the shareholder's interest in the shares.

. . . If, however, the fact within the knowledge of the director is of a character calculated to affect the selling price, and can, without detriment to the interest of the company, be imparted to the shareholder, the director, before he buys, is bound to make a full disclosure. In a certain sense the information is a quasi asset of the company, and the shareholder is as much entitled to the advantage of that sort of an asset as to any other regularly entered on the list of the company's holdings."

If the jury in the case at bar believed that the president and manager of the corporation had found an opportunity to dis-

pose of all the stock of the corporation at a price beyond its supposed value, and had disposed of his stock at that price, knowing that the purchaser expected to take all of the remaining stock, and through his partner and a third person procured the stock of the plaintiff at a much less price with the purpose and intention of disposing of the same as he had already disposed of his own, knowing at the time that the stockholder from whom he so purchased was not familiar with public transactions, was wholly unacquainted with the condition of the corporation, the value of the stock, or the opportunity to sell the same, the jury would be justified in finding a verdict for the plaintiff.

The objection that the stock was not really worth more than the plaintiff obtained for it does not appear to have any merit. The condition was the same as though the president had ascertained that the property of the company could be sold at such a price as to make the value of the stock at \$110 a share. The defendant knew that the stock could be sold for that amount, and apparently it was upon the understanding that all of the stock would be so sold that the defendant was enabled to make so advantageous a sale of his own stock.

There is perhaps a slight variance between the allegations of the petition as amended and the proof, but this slight variance is not made a subject of discussion in the briefs, and under the circumstances the case should be determined upon the evidence as submitted to the jury. The instructions of the court to the jury are severely criticized. It may be said that these instructions do not as clearly present the case to the jury under the evidence as might be desired; but, so far as we have observed, any defect in the instructions in that regard would not result in prejudice to the defendant, but rather to the plaintiff herself. The instructions given by the court are quite lengthy and somewhat involved, and the proper limits of this opinion will not admit of a detailed discussion of them. It does not appear from the record that the defendants offered proper instructions setting forth their theory of the case.

We have found no error in the record that requires reversal, and the judgment of the district court is affirmed.

Letton, J., not sitting.

Petition for rehearing denied.

PENNSYLVANIA SUPREME COURT.

JOSEPH A. JACKSON et al.

v.

ARTHUR J. MYERS, Guardian, etc., of
Lillian M. Jackson et al., Appt.

(— Pa. —, 101 Atl. 341.)

Tax — inheritance — interest subject to lien.

1. The tax is imposed upon the decedent's estate, and not on the interest of the heirs, by a statute declaring that all estates passing from any person who may die seized or possessed thereof shall be subject to a tax of a certain amount upon every hundred dollars of clear value of the estate.

For other cases, see Taxes, V. a, in Dig. 1-52 N. S.

Same — sale of interest of heir — who bears inheritance tax.

2. Where the inheritance tax is by statute imposed upon decedent's estate, and not on the interest of the heirs, it must fall on the purchaser, and not on the heirs, under a contract selling the right, title, and interest of the heirs for a stipulated price, without any deduction whatever, title to be in fee, good and marketable, without encumbrances.

For other cases, see Contracts, II. d, 2, a, in Dig. 1-52 N. S.

(March 12, 1917.)

APPPEAL by defendant from a judgment of the Court of Common Pleas No. 5, for Philadelphia County, in plaintiffs' favor, in an action brought to recover a collateral inheritance tax which was alleged to have been included in the purchase price of certain real estate, and paid by the vendee when it should have been paid by the heirs of the intestate. **Reversed.**

The facts are stated in the opinion.

Mr. James W. Laws for appellant.

Messrs. John G. Kaufman, Albert T. Bauerle, and V. Gilpin Robinson, for appellees:

The party who inherits an estate owes the collateral inheritance tax.

Com. v. McGahey, 40 Pittsb. L. J. N. S. 527; Mellon's Appeal, 114 Pa. 564, 8 Atl. 183; Martin's Estate, 19 Pittsb. L. J. N. S. 145.

Note.—A search has not disclosed any other case passing upon the liability for the inheritance tax, as between a vendor and purchaser of an interest in an estate, under the circumstances disclosed in JACKSON v. MYERS.

The nature of an inheritance tax is discussed generally in Re McKennan, 33 L.R.A. (N.S.) 606.

The personal liability of an executor or administrator for a succession tax is discussed in the note to Re Meyer, L.R.A. 1915C, 615.
L.R.A.1917F.

Mestrezat, J., delivered the opinion of the court:

This is a rule for judgment for want of a sufficient affidavit of defense. The rule was made absolute, and the defendant has appealed.

George W. Jackson died intestate, unmarried, and without issue, leaving to survive him Joseph A. Jackson, a half brother, Bessie A. Jackson Curtis, a half sister, and Joseph Jackson Restein and James Restein, sons of a deceased half sister, who are the plaintiffs in this action. He also left surviving him two nieces, Lillian M. Jackson and Ariel K. Jackson, minor children of a deceased brother of the whole blood, Daniel W. Jackson; and their guardian, Arthur J. Myers, is the defendant. Prior to the institution of this suit the parties had been for some time involved in litigation, and in order to effect a compromise and settle the differences between them they entered into a contract by which the guardian of the two minor children, the defendant in this action, agreed, subject to the approval of the orphans' court, to sell to the plaintiffs, who agreed to buy, "all the right, title, and interest of the said minors of, in, and to the estate of George W. Jackson, deceased, real and personal, for the sum of \$40,000 in cash, without any deduction whatever, . . . title to be in fee simple, good and marketable, and such as will be insured by any reputable trust company, subject only to such encumbrances as appear by" two bills in equity filed in the court of common pleas of Philadelphia county, and two ground rents. The sale was of an interest in both real and personal property. The guardian applied to the orphans' court for leave to make sale of his wards' interest in the real and personal estate of George W. Jackson, deceased, upon the terms contained in the agreement, and the court being of the opinion that the sale of the minors' interest for the sum of \$40,000 was to their advantage, a decree was entered approving the report of the examiner and master, recommending that the guardian be authorized and empowered to sell the interest of his wards in the property. The collateral inheritance tax upon the estate of George W. Jackson, deceased, was not paid at the time the settlement was made, and the guardian refused to pay it, claiming that, under the agreement and the order of the orphans' court authorizing the sale, he was not required to pay the tax. The plaintiffs contended that the guardian should pay the tax, that it was a lien upon the interest of the minors in the estate which the plaintiffs had purchased, and that, under the terms of the agreement, the defendant was required to pay it. The plaintiffs hav-

ing previously agreed to sell the property to another purchaser, and in order to avoid liability for breach of their contract, accepted the deed from the guardian and paid under protest the sum of \$40,000 without deducting the tax. In a subsequent partition proceeding in the estate of George W. Jackson, deceased, some real estate was sold, and from the proceeds the commonwealth collected the collateral inheritance tax; the amount due upon the share of the estate conveyed to the plaintiffs being \$2,085.21. This suit was instituted by the plaintiffs to recover this sum.

The facts are set out in detail in the statement and affidavit of defense. The single question involved is whether, under the contract of sale, the plaintiffs or the defendant should pay the collateral inheritance tax on that part of the estate of George W. Jackson, deceased, in which the defendant's wards had an interest, which was sold by the defendant to the plaintiffs. The plaintiffs claim that the tax was a debt due from the defendant's wards, heirs of the decedent, and that it was a lien on the estate of the decedent which, under the terms of the agreement, the defendant was required to satisfy and remove, and the plaintiffs, having been compelled to pay the tax in order to convey the property unencumbered to a purchaser, are entitled to be reimbursed for the amount of the tax paid by them. The defendant denies the right of the plaintiffs to recover, on the ground that he sold to the plaintiffs and conveyed only the right, title, and interest of the minors in the estate of George W. Jackson, deceased, for the net sum stipulated, and that this interest was limited to such property as remained after the collateral inheritance tax was paid upon the estate. The learned court below held that the defendant was liable for the tax, inasmuch as the agreement to sell stipulated in terms that the title should be good and marketable and such as would be insured by any reputable trust company, subject only to such encumbrances as were specifically excepted in the agreement.

The act of assembly imposing the payment of a collateral inheritance tax provides that "all estates . . . passing from any person who may die seised or possessed of such estates [to collateral heirs] . . . shall be and they are hereby made subject to a tax of \$5 on every \$100 of the clear value of such estate or estates." The executors and administrators and their sureties are only discharged from liability for the tax with which they are charged when they have paid it, and the tax is made a lien on the estate until it is settled and satisfied. The register of wills L.R.A.1917F.

is made the agent of the commonwealth for the collection of the tax, and he is authorized to enforce payment of a collateral inheritance tax against real or personal property by proceedings in the orphans' court.

It will be observed that the statute imposes the tax on the estate of the decedent. It becomes a lien and is fastened upon the estate from the moment of the decedent's death, and must be discharged by payment before the estate passes to the collateral heir. It is levied on the estate in the hands of the personal representative, who, with his sureties, is made liable for its payment. The state becomes a preferred beneficiary under the act imposing the tax, and it is entitled to its share of the estate before the claims of heirs or devisees can be recognized or satisfied. The latter take only such part of the decedent's estate as remains after the payment of the tax, which is not levied upon the inheritance or the legacy, but, as already observed, upon the estate of the decedent. What passes to the heir or devisee, and to which he acquires title, is the portion of the estate remaining after the payment and satisfaction of the collateral tax.

This interpretation of the statute imposing the collateral inheritance tax is sustained by the decisions of this court. In *Strode v. Com.* 52 Pa. 181, a leading case on the subject, the question was whether that part of a decedent's estate passing to collaterals, which consisted of bonds of the United States that were exempt by law from state taxation, was liable to collateral inheritance tax. We held that the collateral inheritance tax is not levied on a specific article, but on the estate of the decedent, and that therefore it is not a tax upon the bonds, but upon the estate of which they are a part. In delivering the opinion Mr. Chief Justice Woodward said (52 Pa. 188): "The mistake of the learned counsel for the plaintiff in error consists, we conceive, in treating this as a tax on the government bonds, when it is really a tax upon a decedent's estate, dying without lineal heirs. . . . That estate passed into the hands of the executor for administration, and is taxed in his hands as an estate. The law takes every decedent's estate into custody, and administers it for the benefit of creditors, legatees, devisees, and heirs, and delivers the residue that remains, after discharging all obligations, to the distributees entitled to receive it."

Finnen's Estate, 196 Pa. 72, 74, 46 Atl. 260, 270, was an appeal from an assessment of collateral inheritance tax. In delivering the opinion Mr. Chief Justice Green said: "That which the legatee gets and keeps is

the aggregate sum bequeathed, less the amount of the tax. The tax must be retained by the person who has the decedent's property in charge. It is therefore not a tax upon the property or money bequeathed, but a diminution of the amount that otherwise would pass under the will or other conveyance, and hence that which the legatee really receives is not taxed at all. It is that which is left after the tax has been taken off. It is only imposed once, and that is before the legacy has reached the legatee and before it has become his property."

The learned Chief Justice then cites with approval *Strode v. Com.* supra, and quotes part of the opinion of the court below in that case, which we affirmed, wherein it is said that the tax is "a restriction upon the right of acquisition by those who, under the law regulating the transmission of property, are entitled to take as beneficiaries without consideration. The state is made one of the beneficiaries. It lays its hands upon estates under such circumstances, and claims a share, and whether the share is exacted as a tax or duty or whatever else, or the machinery employed in levying an ordinary tax is adopted or not, it is of no consequence."

Orcutt's Appeal, 97 Pa. 179, is then cited as holding the same doctrine.

The Collateral Inheritance Tax Law of the state, as thus interpreted, did not impose a lien upon the interest of the defendant's wards in Jackson's estate. The failure of the learned court to observe the distinction, clearly pointed out in the authorities above cited, between a lien on the estate of the decedent and on the interest of the defendant's wards in that estate, led it to the erroneous conclusion that the tax was a lien, within the meaning of the contract of sale, which the defendant was required to discharge. The estate of George W. Jackson, deceased, did not pass to the collateral heirs until the tax had been paid. If Jackson's representative delivered the personal estate to the beneficiaries before the payment of the tax, the statute unmistakably fixed him for it. If the heirs took possession of the real estate, the tax being unpaid, it was subject to the statutory lien, but the residue after payment of the lien was discharged from the payment of the tax, and their title was only to that part of the estate "which is left after the tax has been taken off." In selling their right, title, and interest in and to the estate of the decedent, the defendant's wards could sell only the part of the estate left after the payment of the tax. It was that title which they were required to make good, marketable, and such as would be insured by a reputable trust company. If there

were no encumbrances against it, the plaintiffs could not complain. The lien reported by the trust company was against Jackson's estate, and not against the part of his estate to which the heirs succeeded.

In construing a contract which is ambiguous or contains apparently repugnant clauses, the court should consider the negotiations leading to its formation, its subject-matter, the consideration, the circumstances under which the parties contract, and the objects to be accomplished. Interpreting the contract in the present case in the light of the circumstances and under a proper construction of the Collateral Inheritance Tax Law, we are clear the parties intended that the plaintiffs should pay the defendant, as stated in the agreement, "\$40,000 in cash, without any deduction whatever." The parties had been engaged in much litigation over their rights to the decedent's property, and both sides desired that it should be ended. The title of the minors to the property was attacked and they were without means to carry on litigation. If this attack had been successful, they would have been penniless. There were many reasons why the other parties also should desire an end of the litigation. The story of their disputes and disagreements is a long one, and is told in detail in the pleadings. It was under these circumstances that the contract of sale of the minors' interest in the estate of the decedent was entered into, and which, it was supposed, would end the existing feuds. The contract fixed by clear and explicit language what the plaintiffs were to pay and what the defendant was to receive for the interest of the minors in the property. It was "\$40,000 in cash, without any deduction whatever." The negotiations between the parties and the construction put upon the agreement by the orphans' court when it granted the guardian the authority to sell clearly show that this provision of the contract unmistakably carried out the intention of the parties. The master appointed by the orphans' court reported, *inter alia*, as follows: "The substance of this agreement (so far as the minors' interests are concerned) is that the guardian shall sell, and the other parties to said agreement shall buy, the entire interest of the minors in the estate of George W. Jackson, deceased, for the net sum of \$40,000 in cash."

Other parts of his report also show that he interpreted the contract as providing for a net consideration of the stipulated sum, and hence he reported that the sale contemplated by the agreement "for the sum of \$40,000 would be for the best interests of the minors." The petition presented to the orphans' court for leave to make the

sale was joined in by the plaintiffs and it was therein set forth, *inter alia*, that the plaintiffs had offered in writing to purchase the minors' interest in the property "for the sum of \$40,000 in cash," with the provision that "all adverse claims set up against said minors' estate in all the above proceedings" should be taken care of by the purchasers, and that all cost and expenses "shall be assumed by said purchasers, and said minors' estate entirely relieved therefrom." It is therefore difficult to see how "any deduction whatever" can be made from the stipulated purchase price without infringing the contract of sale. It is true that the contract required the title to be good and marketable, and provided against encumbrances, but, so far as the record discloses, the title is good and marketable, and the only alleged encumbrance against the title of the minors is the collateral

inheritance tax levied against the estate of the decedent. We must assume that the parties dealt with full knowledge of the law, and therefore knew that the estate of George W. Jackson, deceased, passing to the minors, was subject to a collateral inheritance tax, which was a lien and must be paid before the minors received and could convey it. With this knowledge, the plaintiff contracted to pay the defendant \$40,000 in cash, without any deduction whatever," for their interest in the estate. The natural and necessary inference is that the parties meant what their contract clearly imports; that the stipulated price was to be paid without deducting the collateral inheritance tax. We think, therefore, that the case must be ruled against the plaintiffs on a proper interpretation of the contract.

The judgment of the court below is reversed, with a procedendo.

WASHINGTON SUPREME COURT.
(In Banc.)

N. H. ST. GERMAIN and Wife, Appts.,
v.

BAKERY AND CONFECTIONERY WORKERS' INTERNATIONAL UNION, NO. 9, OF SEATTLE, WASHINGTON, et al.,
Respondts.

(— Wash. —, 166 Pac. 665.)

Injunction — against picketing.

1. Members of a labor union may be enjoined from maintaining pickets in front of a place of business to intimidate the proprietors of the business and patrons seeking to trade there.

For other cases, see *Injunction*, I. d, in *Dig.* 1-52 N. S.

Damages — injury to business — diminution of receipts.

2. Substantial damages cannot be recovered for injury to a business merely upon proof of diminution of gross receipts without anything to show the effect on profits. For other cases, see *Evidence*, XII. k, in *Dig.* 1-52 N. S.

Parties — voluntary association.

3. An unincorporated labor union may be made a party to an action to enjoin the commission of illegal acts on its behalf by its members and bound by the judgment entered in the action.

For other cases, see *Labor Organizations*, in *Dig.* 1-52 N. S.

(Holcomb, J., dissents.)

(July 17, 1917.)

Note. — The subject of picketing is treated in the notes to *Jensen v. Cooks' & Walters' Union*, 4 L.R.A.(N.S.) 302, and *Langell v. Collingwood*, 50 L.R.A.(N.S.) 412. L.R.A.1917F.

APPEAL by plaintiffs from a judgment of the Superior Court for King County granting them partial relief only, in an action brought to enjoin defendants from picketing in front of plaintiffs' place of business, from annoying their customers, and for damages. Reversed.

The facts are stated in the opinion.

Messrs. Halverstadt & Clarke and Piles & Halverstadt for appellants.

Messrs. Thomas Byron MacMahon and Preston & Thorgrimson, for respondents: The strike was justifiable from a legal standpoint, as likewise the declaration of unfairness and the giving to it of publicity.

Roddy v. United Mine Workers, 41 Okla. 621, L.R.A.1915D, 789, 139 Pac. 126; Kemp v. Division No. 241, 255 Ill. 213, 99 N. E. 389, Ann. Cas. 1913D, 347; National Protective Asso. v. Cumming, 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369; Reynolds v. Davis, 17 L.R.A. (N.S.) 162, note; De Minico v. Craig, 42 L.R.A.(N.S.) 1048, note.

That part of the decree permitting two pickets to parade in front of each of plaintiffs' places of business, in silence, to bear signs stating only that plaintiffs were unfair to union labor, and so to arrange their marching as not to interfere with travel or with egress or ingress to and from their place of business, and permitting the distribution of cards bearing the statement that they were unfair to union labor, was not erroneous.

Beck v. Railway Teamsters' Protective

For other questions arising from industrial disputes, see L.R.A. Indexes under titles, "Conspiracy" and "Labor Organization."

Union, 118 Mich. 407, 42 L.R.A. 407, 74 Am. St. Rep. 421, 77 N. W. 13; *Vegehn v. Guntner*, 167 Mass. 92, 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077; *O'Neil v. Behanna*, 182 Pa. 236, 38 L.R.A. 382, 61 Am. St. Rep. 702, 37 Atl. 843; *George Jonas Glass Co. v. Glass Bottle Blowers' Assn.* 77 N. J. Eq. 219, 41 L.R.A.(N.S.) 445, 79 Atl. 262; *Purvis v. Local No. 500, U. B. C. J.* 214 Pa. 348, 12 L.R.A.(N.S.) 642, 112 Am. St. Rep. 757, 63 Atl. 585, 6 Ann. Cas. 275; *Goldberg, B. & Co. v. Stablemen's Union*, 149 Cal. 429, 8 L.R.A.(N.S.) 460, 117 Am. St. Rep. 145, 86 Pac. 806, 9 Ann. Cas. 1219; *Pierce v. Stablemen's Union*, 156 Cal. 70, 103 Pac. 324; *Union P. R. Co. v. Ruef*, 120 Fed. 102; *Atchison, T. & S. F. R. Co. v. Gee*, 139 Fed. 582; *Franklin Union v. People*, 220 Ill. 355, 4 L.R.A.(N.S.) 1001, 110 Am. St. Rep. 248, 77 N. E. 176; *Barnes v. Chicago Typographical Union*, 232 Ill. 424, 14 L.R.A.(N.S.) 1018, 83 N. E. 940, 13 Ann. Cas. 54; *Searle Mfg. Co. v. Terry*, 66 Misc. 265, 106 N. Y. Supp. 436; *Karges Furniture Co. v. Amalgamated Woodworkers' Local Union*, 165 Ind. 421, 2 L.R.A.(N.S.) 788, 75 N. E. 877, 6 Ann. Cas. 829; *Gray v. Building Trades Council*, 91 Minn. 171, 63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 Ann. Cas. 172; *Minnesota Stove Co. v. Cavanaugh*, 131 Minn. 468, 156 N. W. 638; *Everett Waddey Co. v. Richmond Typographical Union*, 105 Va. 188, 5 L.R.A.(N.S.) 792, 53 S. E. 273, 8 Ann. Cas. 798; *St. Louis v. Gloner*, 210 Mo. 502, 15 L.R.A.(N.S.) 973, 124 Am. St. Rep. 750, 109 S. W. 30; *W. & A. Fletcher Co. v. International Assn. of Machinists*, — N. J. Eq. —, 55 Atl. 1077; *Beaton v. Tarrant*, 102 Ill. App. 124; *Pope Motor Car Co. v. Keegan*, 150 Fed. 148; *Iron Molders' Union v. Allis-Chalmers Co.* 20 L.R.A.(N.S.) 315, 91 C. C. A. 631, 166 Fed. 45; *Aluminum Castings Co. v. International Molders' Union*, 197 Fed. 221; *Tri-City Central Trades Council v. American Steel Foundries*, 161 C. C. A. 578, 238 Fed. 728; *Sinsheimer v. United Garment Workers*, 77 Hun, 215, 28 N. Y. Supp. 321; *Cohen v. United Garment Workers*, 35 Misc. 748, 72 N. Y. Supp. 341; *Butterick Pub. Co. v. Typographical Union*, 50 Misc. 1, 100 N. Y. Supp. 292; *J. F. Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 21 L.R.A.(N.S.) 550, 98 Pac. 1027, 16 Ann. Cas. 1165; *Lindsay & Co. v. Montana Federation of Labor*, 37 Mont. 264, 18 L.R.A.(N.S.) 707, 127 Am. St. Rep. 722, 96 Pac. 127.

Mount, J., delivered the opinion of the court:

This action was brought to enjoin the defendants from picketing in front of the plaintiffs' places of business in the city of Seattle, and from annoying and harassing

the plaintiffs' customers as they were entering or leaving the plaintiffs' places of business, and for damages. The case was tried to the court. No findings of fact were made, but the court at the conclusion of the trial entered a decree as follows:

"It is ordered, adjudged, and decreed that Percy Wood, William T. McGuerin, T. H. Bolton, and Guida Axtheim, individually and as associates under the name and style of Bakery and Confectionery Workers' International Union, No. 9, of Seattle, Washington, and all persons associated with said individuals as said Bakery and Confectionery Workers' International Union No. — of Seattle, Washington, and Harry Mitchell, Frank Guilke, and William H. Fraser, individually and associated together under the name and style of Cooks' and Assistants' Union, Local No. 33, and all persons associated with them under such name, and Edward Schutt, and their and each of their agents and employees, be and they hereby are enjoined and restrained from congregating in front of plaintiffs' place of business at No. 409 Pike street and No. 1515-1517 Pike place, each in the city of Seattle, King county, Washington, from talking to anyone while in front of either of plaintiffs' said places of business in any way reflecting on plaintiffs' business or on the manner of conducting the same, from saying anything while in front of either of plaintiffs' said places of business concerning plaintiffs' employing members of the Japanese race or Chinamen, from stating that plaintiffs' business is conducted in a dirty manner, from the use of the word 'scab' or 'scabs,' while in front of plaintiffs' places of business, from laying hands upon or touching anyone while in front of either of plaintiffs' said places of business, with intent to in any way cause such person not to trade with or enter the said stores of plaintiffs. But such injunction shall not run against said unions as entities.

"It is further ordered, adjudged, and decreed that said defendants may, if they desire, place and maintain two pickets in front of each of plaintiffs' said places of business, and that said pickets may wear a badge or scarf having on the same the words, 'St. Germain's Bakeries and Restaurants Unfair to Organized Labor,' or words to that effect, but nothing more; that said pickets at plaintiffs' store No. 409 Pike street shall walk on the outer curb of the sidewalk, and at plaintiffs' place of business at No. 1515-1517 Pike place shall walk in the center of the sidewalk, and if the crowds in front of plaintiffs' said places of business are such at any time that said pickets cannot walk in the middle of the sidewalk they shall cease picketing until conditions are

such that they can walk in the middle of the sidewalk.

"It is further ordered, adjudged, and decreed that said defendants may use cards such as plaintiffs' Exhibit A, introduced in evidence in this cause, but they are perpetually enjoined and restrained from throwing or leaving any of them in plaintiffs' said places of business.

"It is further ordered, adjudged, and decreed that plaintiffs do have and recover their costs and disbursements herein to be taxed of and from Percy Wood, William T. McGuerin, and Guida Axtheim, individually, and of each of them, and of Harry Mitchell, Frank Guilke, and William H. Fraser, individually, and of each of them, and of Edward Schutt."

The cards referred to in this decree were cards about 3 inches square, and contained the words: "St. Germain Bakeries, Public Market and 409 Pike street, unfair to organized labor."

The plaintiffs have appealed from all that part of the decree beginning with, and following, the words, in the first paragraph, "but such injunction shall not run against said unions as entities."

There is no material dispute in the facts, which are, in substance, as follows:

The respondent unions are voluntary associations of bakers and cooks, respectively. The respondents Wood and McGuerin are president and business agent, respectively, of the respondent bakers' union, and members of it. Respondents Bolton and Axtheim are members of that union. The respondents Mitchell, Guilke, and Fraser are president, business agent, and secretary, respectively, of the cooks' union. The respondent Schutt does not belong to either union, but was paid for his participation in picketing the appellants' places of business. The appellants have been engaged in the bakery and dairy lunch business in Seattle for about sixteen years. They had two stores in the city of Seattle, one at No. 409 Pike street and the other in the Pike place market. The store in the Pike place market fronts on one of the most crowded streets in the city of Seattle. The appellants, prior to April 29, 1916, employed only union bakers. They were then employing a cook by the name of Paulsen, who was a member of the Cooks' Union, but was delinquent in his dues. In the early part of April, 1916, Mr. McGuerin and Mr. Guilke, representing their respective unions, called upon the appellants and demanded that they employ only union men, and stated that if the appellants did not discharge Mr. Paulsen the union bakers in their stores would be called out. The appellants refused to comply with this re-

quest, the union bakers and cooks left the employment of the appellants, and thereupon pickets were stationed in front of both stores of the appellants. These pickets wore white coats, with the words, "St. Germain's bakery employs nonunion labor," on the front, and on the back of these coats appeared the words, in black letters, "Low wages, long hours, seven days per week."

These pickets went on duty about 11:30 o'clock in the morning, and continued until the stores were closed in the evening. At the beginning, the pickets marched back and forth directly in front of the doors of the places of business of the appellants. There was evidence to the effect that they jostled customers entering and leaving the stores. Upon Saturday, May 6th, pickets to the number of forty or fifty congregated in front of the Pike place store, and, while the street was badly crowded, packed the recesses in which the doors were set, and prevented customers from entering the store. Upon several occasions, cards about three inches square, with the words, "St. Germain's bakeries unfair to organized labor," were scattered upon the street and in the store. Prospective purchasers, desiring to enter the store, were called "scabs." Prospective purchasers, entering and leaving the store, jostled certain of the picketers. Policemen were called upon on two different occasions to prevent trouble. One arrest was made, but the person arrested was not prosecuted.

It is insisted by counsel for the respondents that upon the trial of the case the rightfulness, wrongfulness, or unlawfulness of the strike was not entered into, and it is also insisted that the case was tried upon the assumption that the respondents were justified in calling the strike, and that the only question presented to the lower court, and the only one which should be presented here, is whether the acts of the respondents, following the strike, and while they were in such combination, were such as to entitle the appellants to equitable relief. We shall assume, for the purpose of this case, that the respondents were justified in calling the strike. The reason for the strike is material only as tending to show the animus of the respondents in picketing the places of business of the appellants.

The question, then, for decision is, as stated by counsel for the respondents: Were the acts of the respondents in picketing the places of business of the appellants justified in law, and are the appellants remediless to restrain picketing by the respondents in the manner provided for by

the part of the decree appealed from, or for any purpose? The decisions upon this question are not altogether in harmony. The rule is generally stated (24 Cyc. 834) as follows: "While it has been held that the mere stationing of persons near the premises of another for the mere purpose of observing and obtaining information, for the purpose of conveying information to persons seeking or willing to receive the same, or for the purpose of using orderly and peaceful persuasion with those willing to listen, does not in itself constitute intimidation, if done in a peaceful manner, the rule has been repeatedly laid down that the keeping of patrols in front of or about the premises of the employer, accompanied by violence, or any manner of coercion to prevent others from entering into or remaining in his service, will be enjoined.

The doctrine that there may be a moral intimidation which is illegal, announced by the supreme court of Massachusetts, was among the first judicial steps taken in this country toward overturning the rule permitting peaceable picketing laid down in the first clause of this paragraph, and was a forerunner of the later rule that there can be no such thing as peaceable picketing, and consequently that all picketing is illegal. Picketing will be enjoined as a continuing injury to business, notwithstanding it may be punishable as a crime, and the right to injunction against it has been based upon the ground that the aggrieved person is entitled to protection of his 'probable expectancy,' which is defined as the right to enjoy a free and natural condition of the labor market. . . . It has been repeatedly held that boycotts, in the sense of organized attempts to coerce a person or party into compliance with some demand by combining to abstain, or compel others (against their will) to abstain, from having any business relations with him, are unlawful and will be enjoined. To justify the granting of an injunction, it is not necessary that actual violence shall have been used by defendants. It is sufficient that the means used are threatening and intended to overcome the will of others, and prevent customers from dealing with, and laborers from working for, the complainant. Intimidation, coercion, or threats of injury to person or property are, however, necessary to justify an injunction against a boycott; and it is necessary that the complainant shall have some established business which may be injured in order to enable him to maintain the bill."

This seems to sum up, generally, the condition of the law upon the subject of picketing, and the rule there stated is supported by numerous authorities cited in L.R.A.1917F.

the footnotes. In the note to *Underhill v. Murphy*, a Kentucky case, reported in 4 Ann. Cas. 780, the annotator says: "A court of equity has jurisdiction to enjoin picketing, intimidation of employees, and acts of violence, where they are likely to cause irreparable injury to the employer's business and property, though the acts sought to be restrained are punishable as criminal offenses [citing a number of cases]. One of the leading cases on the general subject of the jurisdiction of equity to restrain by injunction unlawful interference with business and property rights by strikers, notwithstanding the fact that the acts restrained are punishable as criminal offenses, is that of *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900."

But, whatever the rule may be elsewhere, this court in the case of *Jensen v. Cooks' & Waiters' Union*, 39 Wash. 531, 4 L.R.A. (N.S.) 302, 81 Pac. 1069, where this exact question was under consideration, said: "The vital question at issue, however, it seems to us, is a simple one and easy of solution. Clearly the acts of the appellants and defendants, as set forth in the complaint, are illegal and may be restrained by an injunction. It is true that a man, not under contract obligations to the contrary, has the right to quit the service of another at any time he sees fit, and may lawfully state, either publicly or privately, the grievances felt by him which gave rise to his conduct. And that right, which one man may exercise singly, many may lawfully agree, by voluntary association, to exercise jointly. But one man singly, or any number of men jointly, having no legitimate interests to protect, may not ruin the business of another by maliciously inducing his patrons and other persons not to deal with him. Men cannot lawfully jointly congregate about the entrance of one's place of business, and there, either by persuasion, coercion, or force, prevent his patrons and the public at large from entering his place of business or dealing with him. To destroy his business in this manner is just as reprehensible as it is to physically destroy his property. Either is a violation of a natural right, the right to own, and peaceably enjoy, property."

The respondents seek to distinguish that case from the one at bar by reason of the fact that in that case there was a demurrer to the complaint, and the facts were admitted, while in the case at bar the facts were disputed, and the case was tried out upon the merits. We think there is no merit in this distinction. Here the case was tried upon the merits, but the facts, as shown by the record, are clear, to the effect that the grievance of the

respondents was that St. Germain's bakeries and stores were unfair to organized labor. The respondents for that reason maintained pickets on the sidewalk in front of the appellants' places of business. The only object of maintaining these pickets was to intimidate these appellants and their patrons. There could have been no other object, because the union laborers had been called out. They were not working there, and, in order to require these appellants to employ union labor, the respondents sought to, and did, intimidate the public from entering the stores and dealing with the appellants. Whether these facts were alleged in a complaint which was undenied, or were proven upon a trial, makes no difference. Whether the picketing was peaceable or otherwise, under the facts in this case, is entirely immaterial, because the sole object of the respondents was to intimidate, not only the public, but also these appellants, and force them to enter into a contract which they were unwilling to enter into. The books are full of cases to the effect that "the right to carry on a lawful business without obstruction is a property right, and its protection is a proper object for the granting of an injunction." *Nashville, C. & St. L. R. Co. v. McConnell* (C. C.) 82 Fed. 65; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881; *Purvis v. Local No. 500, U. B. C. J.* 214 Pa. 348, 12 L.R.A.(N.S.) 642, 112 Am. St. Rep. 757, 63 Atl. 585, 6 Ann. Cas. 275.

In *Commercial Bindery & Printing Co. v. Tacoma Typographical Union*, 85 Wash. 234, 147 Pac. 1143, this court said: "To destroy a business is not different from the destruction of physical property. If employees may be intimidated while in their employment, the business of the employer may be destroyed. It is as much the duty of the court to restrain conduct which will have the effect of destroying the business as it is to prevent the destruction of physical property."

See also *Jones v. Leslie*, 61 Wash. 107, 48 L.R.A.(N.S.) 893, 112 Pac. 81, Ann. Cas. 1912B, 1158; *Huntworth v. Tanner*, 87 Wash. 671, 152 Pac. 523.

In *Huntworth v. Tanner*, we said (87 Wash. at page 684): "The holdings of this court are strictly in accord with the idea that the right to peacefully pursue an avocation is more than a personal right."

In the case of *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064, the Supreme Court of the United States said: "But the fundamental rights of life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitu-

tional law which are the monument showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth 'may be a government of laws and not of men.' For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

The idea upon which picketing by any means cannot be sustained is that it intimidates the public from entering into the place and doing business with a person before whose store or place of business a line of guards is stationed. Where a line of guards, consisting of one or more, is stationed in front of a place of business, everyone knows that such guard is there for the purpose of intimidating and preventing the public from dealing with the person whose place of business is picketed. That this is contrary to the spirit of our institutions, and the right to conduct a lawful business in a lawful way, without molestation of other persons, needs no argument to sustain it. 16 R. C. L. p. 453. The cases are numerous to that effect.

In *Pierce v. Stablemen's Union*, 156 Cal. 70, 103 Pac. 324, the supreme court of California said: "A picket, in its very nature, tends to accomplish, and is designed to accomplish, these very things. It tends to, and is designed by physical intimidation to, deter other men from seeking employment in the places vacated by the strikers. It tends, and is designed, to drive business away from the boycotted place, not by the legitimate methods of persuasion, but by the illegitimate means of physical intimidation and fear. Crowds naturally collect; disturbances of the peace are always imminent and of frequent occurrence. Many peaceful citizens, men and women, are always deterred by physical trepidation from entering places of business so under a boycott patrol. It is idle to split hairs upon so plain a proposition, and to say that the picket may consist of nothing more than a single individual, peacefully endeavoring by persuasion to prevent customers from entering the boycotted place. The plain facts are always at variance with such refinements of reason."

In *Barnes v. Chicago Typographical Union*, 232 Ill. 424, 14 L.R.A.(N.S.) 1018, 83 N. E. 940, 13 Ann. Cas. 54, it was said: "There have been a few cases where it was held that picketing by a labor union of a

place of business is not necessarily unlawful if the pickets are peaceful and well-behaved; but if the watching and besetting of the workmen is carried to such a length as to constitute an annoyance to them or their employer, it becomes unlawful. But manifestly that is not a safe rule, and furnishes no fixed or certain standard of what is lawful or unlawful. Any picket line must result in annoyance, both to the employer and the workmen, no matter what is said or done; and to say that the court is to determine by the degree of annoyance whether it shall be stopped or not would furnish no guide, but leave the question to the individual notions or bias of the particular judge. To picket the complainants' premises was in itself an act of intimidation, and an unwarrantable interference with their rights."

In the case of *Goldberg, Bowen & Co. v. Stablemen's Union*, 149 Cal. 429, 8 L.R.A. (N.S.) 460, 117 Am. St. Rep. 145, 86 Pac. 806, 9 Ann. Cas. 1219, where it was averred in the complaint that pickets were stationed in front of plaintiff's place of business, with intent to threaten and intimidate customers of the plaintiff, and defendants threatened to, and did, keep these representatives and pickets, bearing placards and transparencies, and by that means intimidated customers from entering said place of business, it was said: "It cannot be successfully contended that the said acts of defendants, committed immediately in front of plaintiff's place of business as aforesaid, could not in the nature of things have had the effect of intimidating plaintiff's patrons, and, as it is averred that they did have that effect, the fact of such intimidation must, for the purposes of this case, be considered as established; and such acts, having such effect, undoubtedly interfered with and violated plaintiff's constitutional right to acquire, possess, defend, and enjoy property."

In the case of *Union P. R. Co. v. Ruef* (C. C.) 120 Fed. 102, it was said: "This 'picketing' has been condemned by every court having the matter under consideration. It is a pretense for 'persuasion,' but is intended for intimidation. Gentlemen never seek to compel and force another to listen to the act of persuasion. To stop another on the street, get in his road, follow him from one side of the street to another, pursue him wherever he goes, stand in front of his residence, is not persuasion. Intimidation cannot be defined. Neither can fraud be defined. But every person knows whether his acts are fraudulent, and he knows whether his acts are intimidating."

In the case of *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497, 42 L.R.A. 1917F.

L.R.A. 407, 74 Am. St. Rep. 421, 77 N. W. 13, it was said: "To picket complainants' premises in order to intercept their teamsters or persons going there to trade is unlawful. It itself is an act of intimidation, and an unwarrantable interference with the right of free trade. The highways and public streets must be free to all for the purposes of trade, commerce, and labor. The law protects the buyer, the seller, the merchant, the manufacturer, and the laborer in the right to walk the streets unmolested. It is no respecter of persons, and it makes no difference, in effect, whether the picketing is done 10 or 1,000 feet away."

The authorities are numerous to the same effect. By authority, therefore, as well as by reason, the opinion of this court in *Jensen v. Cooks' & Waiters' Union*, supra, is amply sustained. That case is controlling of the facts in this case, and it was therefore the duty of the trial court to grant the injunction prayed for.

Appellants insist that they are entitled to damages. The record shows, beyond dispute, that there was a large falling off in the appellants' business immediately after pickets were stationed in front of the premises, and, while it is plain that the appellants are entitled to recover the damages they have suffered by reason of the unlawful picketing, we find nothing in the record upon which to base a judgment for any substantial amount. We find nothing in the record showing what the profits of the business were. The average gross receipts for many months prior to the picketing complained of amounted to more than \$4,000 per month. Thereafter the average receipts amounted to little more than \$1,000 per month. But, without a showing of the profits which the appellants made, a judgment for damages cannot be based upon average receipts. We are of the opinion that, under the facts, the trial court should have granted nominal damages.

In the decree, the costs were awarded against certain of the respondents, but not against the unions, which were really the instigators, and controlled the picketing, and caused the damage in the case. It is argued by the respondents that costs cannot be awarded against the unions, because the unions are not incorporated bodies, but are mere voluntary associations. It is alleged in the complaint that these unions are voluntary organizations, that the membership thereof is in the neighborhood of 500, and is so large that it is impracticable to bring all the members thereof before the court, and the officers, therefore, only, are made parties, without bringing all of the members of the unions before the court.

In the case of *Branson v. Industrial Workers*, 30 Nev. 270, 95 Pac. 354, a Nevada case, it was held that in an action in equity against a voluntary unincorporated organization, where the members comprising the same were numerous, such organizations might be made parties to an action, where a few of the members thereof were made defendants for the purpose of representing the organization, and in that case it was held proper to enter judgment against the organization, as well as against the individual parties who were named as defendants in the case. That case is a learned discussion of the question, and, we think, is conclusive. It became the duty of the court, therefore, to enter a judgment for damages and costs against all of the respondents.

The judgment appealed from is reversed, and the cause remanded, with instructions to the lower court to grant an injunction, as prayed for, against all of the respondents, and against all other persons acting by, through, or under them, and for nominal damages, and for the costs in this court, as well as in the court below.

Main, Webster, Morris, and Parker, JJ., concur.

Holcomb, J., dissenting:

The good faith of the strike in this controversy is not in question. An examination of the decree set forth in the majority opinion shows that all malevolent, intimidating, and coercive acts were enjoined. Under the terms of the decree there could be no congregating about, and no intimidation, coercion, or annoyance of either employees or prospective employees or patrons of the places of business.

This case was tried on facts, and the facts and the law support the decree entered. Notwithstanding what was said in *Jensen v. Cooks' & Waiters' Union*, 39 Wash. 531, 4 L.R.A.(N.S.) 302, 81 Pac. 1069, where was sustained a complaint which, among other things, alleged congregating about the business entrance, and illegal, coercive, and intimidative acts, and injuries and damages resulting therefrom, and although the court in passing upon the allegations of the complaint made the observations quoted in the majority opinion, those observations were not entirely pertinent to the question there involved, were not necessary, and part of them are manifestly mere obiter.

The law and the equities of this case seem to me to be settled by the very great weight of authority contrary to the decision of the majority. One of the leading cases on this question, and one which has been often cited by other courts, is that of *Karges Furniture* L.R.A.1917F.

Co. v. Amalgamated Woodworkers' Local Union, 165 Ind. 421, 2 L.R.A.(N.S.) 788, 75 N. E. 877, 6 Ann. Cas. 829. In that case, as a threshold proposition, it was held that a trade union, consisting of an unincorporated association of artisans, cannot be sued in its company name, in the absence of statute authorizing it, but must be sued in the name of all the individual members thereof. In this state we have no statute authorizing voluntary associations either to sue or to be sued, and hence these unions were not proper parties to this suit, and could not be held liable either generally or for the costs. The principal proposition determined in that case was, as stated in the syllabus:

"Members of a trade union, consisting of employees under no contractual restraint, may lawfully combine and by prearrangement quit their employment in a body, to secure from their employers an advance in wages, shorter hours, or any other legitimate benefit, though they know at the time that such action will be attended with injury to their employers' business, provided the strike is carried on in a lawful manner, and free from force, intimidation, and false representation."

"A trade union during a strike may appoint pickets, or a committee, to visit the vicinity of factories, to take note of the persons employed, and secure by lawful means their names and places of residence, for the purpose of peaceful visitation and solicitation by means other than threats, intimidation, etc."

In the course of the decision in that case these observations were made: "A tradesman, singly or in combination with others, may lawfully advertise his goods, or undersell, solicit, and win the customers of his rival, knowing that he is thereby ruining the latter's business. This is competition, and is what the law commends as 'the life of trade.' In such case one loses his property by the acts of his neighbor, but it is *damnum absque injuria*. But the contest must be a fair and honest one. If the same tradesman, singly or with others, advertises his goods, or undersells, solicits, and wins away the customers of his rival by false representations, intimidation, or artifice, not to better himself, but to injure his rival, he has committed an actionable wrong. [Authorities.] . . . Whatever one man may do all men may do, and what all may do singly they may do in concert, if the sole purpose of the combination is to advance the proper interests of the members, and it is conducted in a lawful manner. [Authorities.] . . . It is argued that the maintenance of pickets at the plaintiff's factory was an unlawful in-

interference with its business, and that the appointment of, instruction to, and the receiving of daily reports from, such pickets constituted all participating members of the union civil conspirators. Whether picketing is lawful or unlawful depends in each particular case upon the conduct of the pickets themselves. . . . Under no circumstances have pickets the right to employ force, menaces, or intimidation of any kind in their efforts to induce nonstriking workmen to quit, or to prevent those about to take the strikers' places to refrain from doing so; neither have they the right, as pickets or otherwise, to assemble about the working place in such numbers or in such manner as to impress workmen employed, or contemplating employment, with fear and intimidation. [Authorities.] . . .

The law, having granted workmen the right to strike to secure better conditions from their employers, grants them also the use of those means and agencies, not inconsistent with the rights of others, that are necessary to make the strike effective. This embraces the right to support their contest by argument, persuasion, and such favors and accommodations as they have within their control. The law will not deprive endeavor and energy of their just reward, when exercised for a legitimate purpose and in a legitimate manner. [Authorities.]

. . . The decided cases are not in harmony with respect to the right to persuade, but the clear weight of authority is to the effect that so long as a moving party does not exceed his absolute legal rights, and so does not invade the absolute rights of another, he may do as he pleases, and may persuade others to do like him. [Authorities.]"

In *Iron Moulders' Union v. Allis-Chalmers Co.* 20 L.R.A.(N.S.) 315, 91 C. C. A. 631, 166 Fed. 45, decided by the circuit court of appeals of the seventh circuit (Grosceup, Baker, and Seaman, judges), portions of a decree entered by the district judge below, enjoining the members of the union from in any manner directly interfering with, hindering, obstructing, or stopping the business of complainant, or its agents, servants, or employees in the maintenance, conduct, management, or operation of its business, and enjoining them from using persuasion, and from enforcing, maintaining, or aiding in illegal boycott against the company, its agents, or employees, and from endeavoring to illegally induce people not to deal with the company, its agents, and employees, were among other things in the decree vacated; and a provision of the decree enjoining the strikers from congregating upon or about the company's premises, or the sidewalk, streets,

alleys, or approaches adjoining or adjacent to, or leading to the premises, and from picketing the complainant's places of business, etc., was modified by the circuit court of appeals so as to provide only for injunction against such congregating in such places, and picketing in a threatening or intimidating manner. The court quoted with approval the *Karges Furniture Co.* Case above cited, and a great number of other cases by both state and Federal courts, and in the course of the decision observed: "But attempts to injure each other, by coercing members of society who are not directly concerned in the pending controversy to make raids in the rear, cannot be tolerated by organized society, for the direct, the primary, attack is upon society itself. And for the enforcement of these mutual rights and restraints organized society offers to both parties equally all the instrumentalities of law and of equity. With respect to picketing, as well as persuasion, we think the decree went beyond the line."

The above case was followed but very recently in *Tri-City Central Trades Council v. American Steel Foundries* (in the circuit court of appeals, seventh circuit, decided December 6, 1916) 151 C. C. A. 578, 238 Fed. 728. In the course of this decision these arguments were made: "The right to strike to secure higher wages and improved conditions of labor is too firmly established to necessitate further elucidation. From the record here we can reach no other conclusion than that the object of this strike was to secure for plaintiff's employees the November wage scale of the union. Nothing appears in the record to indicate that this was not in good faith, or to raise the suspicion that the strike was a mere cloak to cover a deliberate purpose to interfere with the plaintiff's conduct of its business, or to injure and destroy its business and property. The purpose being lawful, . . . picketing may be employed, as this court has held,"—citing and quoting the *Allis-Chalmers Case*. It was concluded that "in so far as the decree restrains all picketing and all persuasion and all interference with the plaintiff's free and unrestrained control of its plant and the operation of its business it transcends the limit of proper restraint, and should be modified so as to eliminate therefrom any restraint of defendants from doing lawful acts as indicated herein."

It was ordered that the decree be modified to conform to the decree in the *Allis-Chalmers Case*. The opinion in the above case cited the following cases and authorities in support of these views: *Allis-Chalmers Case* and *Karges Furniture Co. Case*,

supra; 7 Labatt, Mast. & S. p. 8364; Everett Waddey Co. v. Richmond Typographical Union, 105 Va. 188, 5 L.R.A.(N.S.) 792, 53 S. E. 273, 8 Ann. Cas. 798; Re Heffron, 179 Mo. App. 639, 162 S. W. 652; Jones v. Maher, 62 Misc. 388, 116 N. Y. Supp. 180; Jones v. Van Winkle Gin & Mach. Works. 131 Ga. 336, 17 L.R.A.(N.S.) 848, 127 Am. St. Rep. 235, 62 S. E. 236; Pope Motor Car Co. v. Keegan (C. C.) 150 Fed. 148. See also Foster v. Retail Clerks' International Protective Asso. 39 Misc. 48, 78 N. Y. Supp. 860; Butterick Pub. Co. v. Typographical Union, 50 Misc. 1, 100 N. Y. Supp. 292; Searle Mfg. Co. v. Terry, 56 Misc. 265, 106 N. Y. Supp. 438; Gray v. Building Trades Council, 91 Minn. 171, 63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 Ann. Cas. 172; Minnesota Stove Co. v. Cavanaugh, 131 Minn. 458, 155 N. W. 638; Beaton v. Tarrant, 102 Ill. App. 124; J. F. Parkinson Co. v. Building Trades Council, 154 Cal. 581, 21 L.R.A.(N.S.) 550, 98 Pac. 1027, 16 Ann. Cas. 1165; Lindsay & Co. v. Montana Federation of Labor, 37 Mont. 264, 18 L.R.A.(N.S.) 707, 127 Am. St. Rep. 722, 96 Pac. 127. All these decisions are by courts of very high repute and authority.

Upon the reasoning of the foregoing authorities, I am impelled to dissent from the majority opinion, and to hold that the decree of the lower court should in all respects be affirmed.

Chadwick, J., concurring:

I am not prepared to admit, as suggested in the dissenting opinion, that "the law and equities of this case have been settled by the great weight of authority" in favor of the respondents. There are some cases holding that picketing, so long as it does not partake of the character of an active intimidation by word, or force of arms, is lawful, but the trend of all modern authority is to the contrary; for, from the very nature of things, a court cannot say to men nursing grievances that thus far thou shalt go with the law in thine own hands, and no further. To so hold makes the law as weak as human nature is when acting under the passion of numbers, whereas it should be fixed in its principles, without compromise as to degree, when applied to a like state of facts. No court can lay down a rule fixing a boundary where the right ends and wrong begins, when the facts are not in being and acts are prospective and within the keeping of men who are acting upon their own judgment of the limit of their authority, albeit they are nominally moving under an order of the court.

The Jensen Case settles this controversy; but if it were not so, there is sufficient au-

thority to be found in Jones v. Leslie, 61 Wash. 107, 48 L.R.A.(N.S.) 893, 112 Pac. 81, Ann. Cas. 1912B, 1158. In that case we have the same case presented from the side of the employee. We held that an employer who had discharged a workman could not blacklist his employee. When an employer assumes to take the law in his own hands, and to say to the employing world that the one whom he has discharged has offended in some way against him and for that reason alone should not be employed by others, his act is declared to be violative of the "sense of right and justice." The court, speaking through Judge Dunbar, whose broad conception of the rights of men was never questioned, said: "This presents a case here which is purely a question of law. It would be well to remember, in the beginning, that it is fundamental that a man has a right to be protected in his property. This was the doctrine of the common law; is, and always has been, the law in every civilized nation. It is, of necessity, one of the fundamental principles of government; the protection of property being largely one of the objects of government. For the protection of life, liberty, and property, men have yielded up their natural rights and established governments. Is, then, the right of employment in a laboring man property? That it is, we think, cannot be questioned. The property of the capitalist is his gold and silver, his bonds, credit, etc., for in these he deals and makes his living. For the same reason, the property of the merchant is his goods. And every man's trade or profession is his property, because it is his means of livelihood, because through its agency he maintains himself and family and is enabled to add his share towards the expenses of maintaining the government. Can it be said, with any degree of sense or justice, that the property which a man has in his labor, which is the foundation of all property, and which is the only capital of so large a majority of the citizens of our country, is not property, or, at least, not that character of property which can demand the boon of protection from the government? We think not. To destroy this property, or to prevent one from contracting it or exchanging it for the necessities of life, is not only an invasion of a private right, but is an injury to the public, for it tends to produce pauperism and crime. This relief has been granted to employers in many forms. Workmen have been enjoined from collecting about the employer's place of business for the purpose of ridiculing his employees, with a view of causing them to stop work; and many other demonstrations of the same character and purpose have

been enjoined, of course on the theory that it was an unlawful act. To deny the same relief to the employee under similar circumstances would be a reproach to the law. . . . It is an excellent rule of action to refrain from interference with the affairs of others, and especially if the motive actuating such interference is to work injury to others."

That statement of the law is enough to close this controversy. Picketing is notice to the world that organized labor has blacklisted an employer. If it be wrong for the employer to take from the one who labors his capital, which is his right to offer his services in the market for labor, it is equally as wrong for the laborer, acting either individually or collectively, whether by peaceful or violent methods,—for experience teaches us that either way invites breaches of the peace,—to take from the employer the right to pursue his business unrestrained, so long as he does not violate the law of the land. The gist of the case does not lie in the manner in which either side proceeds to redress its wrongs, but the test is to be found in answer to the question whether under any set of circumstances a court of equity should affirm the ex parte judgment of a person or body of men acting extrajudicially, and put in his hand, or their hands, whether employer or employee, a roving commission to go out and redress a wrong, either real or fancied, in their own way.

Barring a few of the cases referred to in the minority opinion, I know of no instances in the history of jurisprudence where it has ever been contended that a man, whoever and whatever he may be, could be harassed at the will of another, whose sole right to interfere with the lawful conduct of that other rested in a difference of opinion upon a question which the law had not assumed to settle or define. Take the case at bar: Appellants were observing the laws of the land, and of the unions. They employed union labor and paid union wages. Because they refused to discharge a cook, who had been vouched for by the union, but who was delinquent in his dues to it, they are condemned as unfair, they are blacklisted, their place is picketed, their peace is molested, and their business seriously interrupted and impaired. To do these things is the purpose of the respondents, thus coercing obedience to their demands, upon penalty of ruin. This can be as effectually done by the so-called "peaceful" method as by violence. In the Jones Case the employer did no more

than to peacefully "notify" and "threaten" to withdraw patronage.

Appellants' offense seems to be that they have refused to make of themselves agents for the collection of dues. The right of the union to compel one of its own members to pay dues may be admitted; but it does not follow that it can compel another to become a party, either directly or indirectly, to its internal controversies, or condemn him by star chamber methods, or by judgments rendered in its secret councils. Upon such methods the law, which is no more than the expression of that fairness which should exist between man and man, ought to frown. We have condemned trial and condemnation by the employer; by the same rule we are bound to condemn trial and condemnation by the employee. The Jones Case is a complete answer to the argument put forth in the minority opinion, and emphasizes the fact that neither the employer nor the laborer can take the law in his own hands; that if the one comes to this court seeking to restrain the other he must in turn submit to the same rule when his adversary comes asking for the injunctive processes of the court. This is but another way of saying that legal principles apply, without reference to the calling or occupation of men. In more homely but more expressive phrase, "it is a poor rule that won't work both ways."

"To deny the same relief to the employee [employer] under similar circumstances would be a reproach to the law." Jones v. Leslie, *supra*.

ELLIS, Ch. J., concurring:

The authorities generally on the question here presented are hopelessly divided. But the question is no longer an open one in this state. There is no material difference between the facts established by the proofs here and those admitted by the demurrer in the cases of Jensen v. Cooks' & Waiters' Union, 39 Wash. 531, 4 L.R.A.(N.S.) 302, 81 Pac. 1069. As I read it, this decision is in perfect accord with that in the Jensen Case. To me, it seems that the two cases cannot be soundly distinguished either in law or in fact. So long as that decision stands, it is binding on this court.

I am therefore constrained to concur with the majority.

Fullerton, J.:

I concur, for the reason stated by Chief Justice Ellis.

ALABAMA SUPREME COURT.

LEON H. WATKINS, Appt.,
v.
HOTEL TUTWILER COMPANY.

(— Ala. —, 76 So. 302.)

Innkeeper — money left for safe-keeping — embezzlement — liability.

1. An innkeeper is not liable as such for the loss of money through embezzlement which is entrusted, without compensation, to one in charge of its desk, for safe-keeping, by a guest who pays his bill and departs from the inn, intending to return in a few days, until which time he leaves his baggage in the baggage room of the inn.

For other cases, see Innkeepers, III. b, in Dig. 1-52 N. S.

Trial — question of law — sufficiency of evidence.

2. The question of the negligence of a guest in depositing money for safe-keeping with one in charge of the desk when leaving the hotel for a few days cannot be decided as matter of law where he had been in the hotel for a week, had never seen the man to whom he gave the money before, and had paid his bill to another man a short time before depositing the money.

For other cases, see Trial, II. c, 8, e, in Dig. 1-52 N. S.

(June 7, 1917.)

APPEAL by plaintiff from a judgment of the City Court of Birmingham in favor of defendant in an action brought to recover money deposited by plaintiff at defendant's hotel. Affirmed.

Statement by Mayfield, J.:

Appellant is a resident of Birmingham, Alabama, and is there practising his profession. On or about Christmas, 1915, appellant and his wife became guests of the appellee hotel company, which is doing business in the city of Birmingham, and is one of the leading hotels or public inns in the state. Appellant and his wife remained guests of appellee for about a week. On New Year's Day, 1916, they decided to leave the hotel temporarily, and to make a visit to relatives and friends in the city of Opelika, Alabama. To this end, at about 9 or 10 o'clock A. M., on January 1, 1916, they vacated their room in the hotel, had all their baggage, except that which they desired to take with them to Opelika, carried down to the baggage room of the hotel, and had the porter check it for them, stating to him and the clerk that they would return

to the hotel within a few days, and that they desired the hotel to keep the baggage for them until their return. Appellant then paid his bill for the week, or whatever time he had been appellee's guest, and he and his wife entered their automobile and drove down, several blocks, to appellant's office, to adjust a few matters before leaving the city for their visit to Opelika. Appellant and his wife, after attending to the matters at his office, motored back to the hotel. They approached the desk of the hotel, and found a man behind the desk, apparently acting as clerk; but he was not the man who was acting as clerk when appellant paid his bill and had his trunks checked, a short time before. When appellant approached, the man behind the desk turned the hotel register around, as if for appellant to register. Appellant then informed this man that he did not desire to register; that he had been a guest, and had paid his bill a short while ago, and had his trunks checked; that he was going to leave the hotel for a short visit, but would return as a guest within a few days; and that he desired to leave some money until his return. The man behind the desk replied: "All right; we will be glad to keep it for you. Here is an envelop; please put the name and amount on it."

The man behind the desk then counted the money, taking about eight minutes in which to do so, and sealed up the envelop, and gave appellant a receipt therefor. Appellant says that during all this time of depositing the money and counting it, there being \$1,900, there was present no other person than the two, appellant and the man behind the desk, whom appellant did not know, and who did not know appellant, but that appellant thought him to be the appellee's clerk, though he was not the man to whom he had paid his bill a short while before. Appellant was not acquainted with the clerk, or with any of the office force, and had no dealings with any of them, except as above recited. The man behind the desk, to whom appellant delivered the money, proved not to be the clerk or the cashier, or an officer of the hotel, but to be a man by the name of Clark, who was allowed by appellee to stay around the office a great deal, and often behind the desk, assisting in looking after the mail and checking baggage for the guests of the hotel. Clark was not employed by the hotel, but was allowed to stay there and make what he received in the way of tips from the guests and patrons of the hotel. Clark never delivered the money to the Hotel Company, but embezzled or stole it, and was convicted and sentenced to the penitentiary therefor.

Within a few days appellant and his wife

Note. — As to liability of innkeeper for effects left by departing guest who intends to return, see annotation following this case, post, 839.

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did return to Birmingham, and went to appellee Hotel Company, for the purpose of registering as guests, but did not do so. They had supper in appellee's café, and after supper went out in town, to see if their rooms or apartments had been furnished and put in order, at which place, when it was so fitted up for them, they intended to live. Their apartments they found not to be completely fitted up, but partially so, and they concluded to spend the night there, which they did, without returning to the hotel. On the next day, however, appellant did go back to the hotel, and there asked for his money, the \$1,900 left there. He was informed by appellee that the money was not there and could not be found, and that Clark, the man with whom he left it and who signed the receipt, was no longer there or in the employ or in the hotel of appellee. On the next day after this, appellant sent for his trunks, which were delivered; but he has never received his money, and brings this suit to recover it of appellee.

The complaint in all contained seven counts. Some of the counts sought to charge the appellee as a hotel keeper or an innkeeper, on the theory that appellant was at the time of the loss of the money actually a guest of appellee. Other counts sought to charge appellee as a hotel or innkeeper, on the theory, not that appellant was actually a guest at the time of the loss, but that he had been such, shortly before, and had left his baggage at the hotel, with the intention to soon return and renew his relation of guest, and that appellee was informed of these facts, and, with knowledge thereof, received his baggage and money, and was therefore liable to him for their loss, just as if the relation of host and guest had actually existed. Other counts, or one, at least, sought to charge appellee, not as a public hotel or innkeeper, but as a gratuitous bailee; that appellee was guilty of such negligence as to render it liable for the loss or theft of appellant's money by Clark, who, plaintiff was led to believe, was appellee's agent for the purpose of receiving appellant's money for safe-keeping by appellee during appellant's absence from the hotel. The trial court gave the affirmative charge as to all the counts seeking to charge appellee as a public hotel or innkeeper, but submitted to the jury the questions whether appellee was liable as a gratuitous bailee, and whether it was liable as for actionable negligence in and about the loss or theft of appellant's \$1,900 so left with Clark. The jury found for the defendant on this last theory, and plaintiff appeals.

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Messrs. Percy, Benner, & Burr and D. K. McKaney, for appellant:

If a person after becoming a guest at an inn goes away for a brief period, leaving his property, but intending to return, he is to be considered as still continuing a guest; and if his property is lost during his absence the innkeeper is liable.

McDonald v. Edgerton, 5 Barb. 560.

The liability of an innkeeper begins from the moment he receives the goods of an intended guest, and the innkeeper is liable even though the goods were stolen before the owner became a guest.

Eden v. Drey, 75 Ill. App. 104; Rockwell v. Proctor, 39 Ga. 105; Maloney v. Bacon, 33 Mo. App. 501; Becker v. Haynes, 29 Fed. 441; Strauss v. County Hotel & Wine Co. L. R. 12 Q. B. Div. 27, 53 L. J. Q. B. N. S. 25, 49 L. T. N. S. 601, 32 Week. Rep. 170, 48 J. P. 69, 13 Eng. Rul. Cas. 121; Buckle v. Probasco, 58 Mo. App. 49; Labold v. Southern Hotel Co. 54 Mo. App. 567; Houser v. Tully, 62 Pa. 92, 1 Am. Rep. 390; Curtis v. Murphy, 63 Wis. 4, 53 Am. Rep. 242, 22 N. W. 825; Sasseen v. Clark, 37 Ga. 242; Dickinson v. Winchester, 4 Cush. 114, 50 Am. Dec. 760.

Defendant was responsible for the acts of Clark.

Coskery v. Nagle, 83 Ga. 696, 6 L.R.A. 483, 20 Am. St. Rep. 333, 10 S. E. 491; Richards v. London, B. & S. C. R. Co. 7 C. B. 839, 137 Eng. Reprint, 332, 6 Eng. Ry. & C. Cas. 49, 18 L. J. C. P. N. S. 251, 13 Jur. 986; Wilkins v. Earle, 44 N. Y. 172, 4 Am. Rep. 655; Zimmermann v. Murphy, 131 Ill. App. 56; Rockwell v. Proctor, 39 Ga. 105; Houser v. Tully, 62 Pa. 92, 1 Am. Rep. 390; Curtis v. Murphy, 63 Wis. 4, 53 Am. Rep. 242, 22 N. W. 825.

A hotel keeper is liable for the goods of a guest for a reasonable time after the departure of the guest,—time being determined by all the circumstances of the case.

Adams v. Clem, 41 Ga. 65, 5 Am. Rep. 524; Clarke v. Ball, 34 Colo. 223, 2 L.R.A. (N.S.) 100, 114 Am. St. Rep. 154, 82 Pac. 529, 19 Am. Neg. Rep. 91; Baehr v. Downey, 133 Mich. 163, 103 Am. St. Rep. 444, 94 N. W. 750, 14 Am. Neg. Rep. 84; Maxwell v. Gerard, 84 Hun, 537, 32 N. Y. Supp. 849; Kaplan v. Titus, 64 Misc. 81, 117 N. Y. Supp. 944.

One who takes refreshment at an inn becomes a guest of the inn.

22 Cyc. 1076; McDonald v. Edgerton, 5 Barb. 560; Kopper v. Willis, 9 Daly, 460; Read v. Amidon, 41 Vt. 15, 98 Am. Dec. 560; Bennett v. Mellor, 5 T. R. 273, 101 Eng. Reprint, 154, 2 Revised Rep. 593, 13 Eng. Rul. Cas. 118; Overstreet v. Moser, 88 Mo. App. 72; Orchard v. Bush [1898] 2 Q. B. 284, 67 L. J. Q. B. N. S. 650, 78 L. T.

N. S. 557, 14 Times L. R. 425, 46 Week. Rep. 527.

The question of whether the defendant was guilty of such negligence as to make him liable as a gratuitous bailee should have been submitted to the jury. The care required of a gratuitous bailee depends upon the circumstances of each particular case.

Colyar v. Taylor, 1 Coldw. 372, 1 Am. Neg. Cas. 825; Miles v. International Hotel Co. 167 Ill. App. 440; Ross v. Daugherty, 127 Ill. App. 572; Preston v. Prather, 137 U. S. 611, 34 L. ed. 790, 11 Sup. Ct. Rep. 162, 1 Am. Neg. Cas. 599; Chicago Hotel Co. v. Baumann, 131 Ill. App. 324; Levi v. Missouri, K. & T. R. Co. 157 Mo. App. 536, 138 S. W. 699; Bean v. Ford, 65 Misc. 481, 119 N. Y. Supp. 1074.

Where one does not actually become a guest of the hotel, the liability of a gratuitous bailee arises.

Watson v. State, 70 Ala. 13, 45 Am. Rep. 70; Hatchett v. Gibson, 13 Ala. 587.

Where the facts are undisputed, the question of the negligence of a guest contributing to the loss of his property by theft is for the court, and not for the jury.

Lanier v. Youngblood, 73 Ala. 587.

Messrs. Tillman, Bradley, & Morrow, for appellee:

Where the owner of the baggage does not become a guest of the hotel, he cannot recover, although he intended at the time to become a guest.

Tulane Hotel Co. v. Holohan, 112 Tenn. 214, 105 Am. St. Rep. 930, 79 S. W. 113, 2 Ann. Cas. 345, 15 Am. Neg. Rep. 719; Oxford Hotel Co. v. Lind, 47 Colo. 57, 28 L.R.A.(N.S.) 495, 107 Pac. 222, 18 Ann. Cas. 983.

No matter on what theory this case is considered, the action must have as a support evidence that the deposit of the money with Clark was, in legal effect, a delivery to the Hotel Company. It was not such unless they had authorized Clark, either expressly or by implication, to accept, under the conditions then existing, as its agent and for itself, the money.

Booth v. Litchfield, 201 N. Y. 466, 35 L.R.A.(N.S.) 710, 94 N. E. 1078; Arcade Hotel Co. v. Wiatt, 44 Ohio St. 32, 58 Am. Rep. 785, 4 N. E. 398; Carter v. Hobbs, 12 Mich. 52, 83 Am. Dec. 762; Gelley v. Clerk, Cro. Jac. 188, 79 Eng. Reprint, 164; Grinnell v. Cook, 3 Hill, 485, 38 Am. Dec. 663; Bennett v. Mellor, 5 T. R. 274; 101 Eng. Reprint, 154, 2 Revised Rep. 593, 13 Eng. Rul. Cas. 118; Mateer v. Brown, 1 Cal. 221, 52 Am. Dec. 303, 7 Mor. Min. Rep. 156; Tulane Hotel Co. v. Holohan, supra; Miller v. Peeples, 60 Miss. 819, 45 Am. Rep. 423; L.R.A.1917F.

O'Brien v. Vaill, 22 Fla. 627, 1 Am. St. Rep. 219, 1 So. 137; Oxford Hotel Co. v. Lind, supra; Curtis v. Murphy, 63 Wis. 4, 53 Am. Rep. 242, 22 N. W. 825; Whitmore v. Haroldson, 2 Lea, 312.

Assuming that the Hotel Company (and not Clark) was the gratuitous bailee, the Hotel Company would not be liable for the embezzlement of the money by Clark, if it exercised ordinary care and diligence in his employment.

Taylor v. Downey, 104 Mich. 532, 29 L.R.A. 92, 53 Am. St. Rep. 472, 62 N. W. 716; Lyons v. Martin, 8 Ad. & El. 512, 112 Eng. Reprint, 932, 3 Nev. & P. 509, 7 L. J. Q. B. N. S. 214; Stevens v. Woodward, L. R. 6 Q. B. Div. 318, 50 L. J. Q. B. N. S. 231, 44 L. T. N. S. 153, 29 Week. Rep. 506, 45 J. P. 603; Foster v. Essex Bank, 17 Mass. 479, 9 Am. Dec. 168, 1 Am. Neg. Cas. 502; Merchants Nat. Bank v. Guilmartin, 88 Ga. 797, 17 L.R.A. 322, 15 S. E. 831; Haggerty v. Flint & P. M. R. Co. 59 Mich. 366, 60 Am. Rep. 301, 26 N. W. 639; Sutherland v. Ingalls, 63 Mich. 620, 6 Am. St. Rep. 332, 30 N. W. 342; Mechem, Agency, 740, 741.

Mayfield, J., delivered the opinion of the court:

The duties and obligations of public hotel and innkeepers to their guests are in the main imposed by law. As to most of these duties and obligations, there is no need of a special contract between the parties. When the relation of host and guest is established, the rights and duties of both parties are at once fixed by law, and remain fixed so long only as the relation continues, in the absence of a binding contract to effect different results. Since the obligation of the public hotel or innkeeper to his guest in the main is created by and depends upon the law, and not the will of the parties, the nature of the obligation must depend upon the law that creates it; and the law may vary in many of the different jurisdictions. While there is some difference among various jurisdictions as to the extent of the liability of the innkeeper as for the loss of the goods of his guest while they are *infra hospitium*, the great number, including this court, has held that the innkeeper is liable for the goods of his guest, lost in the inn, unless the loss was due to the act of God, to that of a public enemy, or to that of the owner. Innkeepers are to this extent, therefore, insurers of the goods of their guests, and for such as are lost while under the protection of the inn must make restitution, except as above stated. This strict rule, to which public innkeepers and carriers are held, as for loss of or injury to the goods of their guests

or patrons, is justified on the ground of public policy; and, being so strict, it ought not to be extended beyond the reasons which called it forth and justify its maintenance. Loss of a guest's goods by theft on the part of the innkeeper's servants, while the goods are in the protection or custody of the inn, will charge the innkeeper, under the rule, or even if they are stolen from the inn by a stranger, unless the owner of the goods be in some way responsible for the presence of the stranger in the hotel. The authorities seem to be much divided on the question of liability for loss by a fire unavoidable on the part of the innkeeper or that of the owner. This phase, however, is not here important.

The responsibility is not confined to any particular kind of goods, but extends to money and to all other classes of personal property brought by the guest to the inn and used by, or suitable to the use of, the guest. There are, however, some exceptions made by certain of the courts and jurisdictions, unnecessary here to be noticed. All public boarding or lodging houses, and all boarders and lodgers at public houses, do not fall within these strict rules of liability and rights, applied to public inns and hotels, and to their guests. An ordinary boarder, and a guest at a public inn or hotel, may have different rights as to the loss of their property; but this distinction is of no importance here.

This strict liability which the law imposes upon innkeepers terminates when the relation of host and guest terminates, even though the property of the guest remain in the inn. The relation, with its strict liability, however, may and does continue during the mere temporary absence of the guest from the inn. The length of time during which the absence may continue without terminating the relation is not fixed by law; the question of its duration in a given case is important only as evidence to determine whether the relation of host and guest continues during the interim. In order for this relation to continue during the guest's absence from the inn, however, the law does prescribe certain conditions, which must be fulfilled:

First. There must be on the part of the guest an *animus revertendi*, which must be known to the innkeeper, or he must be properly chargeable therewith.

Second. The intent must be to return within a reasonable time.

Third. The liability to compensate the innkeeper, on the part of the guest, must continue during the absence. The right of the host to charge the guest is the criterion of the former's strict liability as host to the latter.

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When the guest pays his bill and departs, the strict liability does not cease at once, but continues for a reasonable time within which to remove the baggage; and if the host undertakes to deliver the baggage to a common carrier thereof, the strict liability continues until the delivery is made.

If the host receive the goods of the guest, to keep after the relation has ceased, the former is not liable therefor as a hotel or innkeeper, but only as an ordinary bailee for or without pay, as the case may be, even though he agree to receive and forward the goods.

It therefore follows, under the undisputed facts of this case, that appellee could not be charged with the strict liability of host to guest, for loss of the latter's money deposited with Clark on the occasion in question. The case most like the one in question, which we have seen, is that of *Hays v. Turner*, 23 Iowa, 214. Another case very similar is that of *Miller v. Peoples*, 60 Miss. 819, 45 Am. Rep. 423. Still another case somewhat similar is that of *Glenn v. Jackson*, 93 Ala. 342, 12 L.R.A. 382, 9 So. 259. In each and all of these cases, under similar circumstances, the hotel or innkeeper was held not to be liable under the strict rule as such keeper, because the relation of host and guest had ceased when the loss occurred.

Appellant, however, relies upon a dictum in the opinion of Coleman, J., speaking for the court, in the case of *Glenn v. Jackson*, supra, to make the appellee in this case liable as a hotel keeper. The facts in the two cases are different, in that the departing guest in that case did not notify the host of his intention to return within a few days, though he had the intent, and did so return. The dictum, however, does not support the contention to the extent of holding that a mere agreement, on the part of the host or his clerk, to keep baggage until the guest returns, would make the host liable under the strict rule of hotel or innkeeper, which the law fixes, instead of liable merely by virtue of the special agreement or contract so to keep it,—that is, as an ordinary bailee. In the *Glenn v. Jackson* Case the hotel keeper was held not liable in any capacity, because the departing guest left his baggage in the care and charge of the porter personally, that the porter did not represent the hotel in receiving the baggage, and that the doctrine of respondeat superior did not apply.

All the authorities—both the textbooks and the decisions of courts—hold that, to continue the relation of host and guest after the latter has paid his bill to the time of leaving, and departed, the guest must be liable as such during his absence. Here

the plaintiff admits that he caused his baggage to be put into and kept in the baggage room during his absence, and that he paid his bill in order not to be liable as a guest while away. This, of course, terminated the relation, and released appellee from the strict rule of liability fixed by law upon public hotel and innkeepers. While a liability may still exist as for the loss or theft of moneys or goods of a departing guest, left with the servants or agents of the host, against appellee in the case at bar, yet it is not the liability of a hotel or innkeeper, but that only of an ordinary bailee.

The trial court instructed the jury that, if they found that the loss of plaintiff's money was proximately caused by his own negligence in intrusting it to Clark, on the occasion and in the manner shown by the evidence, they should find for the defendant. No exception was reserved to this part of the oral charge; but the plaintiff did ask written instructions to the jury that they could not find the plaintiff to have been guilty of contributory negligence in leaving or depositing his money with Clark. This instruction was refused. The law is well settled that, if the guest's goods are lost or injured on account of his own wrong or negligence, the innkeeper is not liable therefor. It is an application of the familiar maxim that no man shall profit by or take advantage of his own wrong. *Beale v. Posey*, 72 Ala. 323; *Lanier v. Youngblood*, 73 Ala. 587. In fact, one of the exceptions which the law has ingrafted upon the strict liability rule against hotel or innkeepers is that the host is not liable as for losses occasioned by the owner of the goods, the guest.

We cannot agree with appellant that the issue of plaintiff's fault or negligence, contributing to the loss, was not a question of fact for the jury; that is, that there is no evidence in this case which would warrant or authorize the jury to infer that plaintiff was guilty of negligence in depositing or leaving his money with Clark. In the first place, the evidence is practically without dispute that Clark was not the clerk, register, or treasurer of the Hotel Company, and that in fact and in law he had no real authority to bind the defendant by receiving plaintiff's money as he did. It is very true that, if defendant held this man out to the public or to the plaintiff as being invested with such authority, defendant will not be heard to deny or dispute his authority, as the public, or one of the public, has acted on such apparent authority to his own detriment; but we cannot say, under all the evidence in this case, that plaintiff was guilty of no fault or negli-

gence in dealing with Clark, on the occasion in question, as the clerk, register, or cashier of defendant, and therefore as possessing the authority to take the deposit and charge the defendant with the custody thereof. Plaintiff had been a guest at this hotel for a week before he made the deposit. He had had the opportunity, therefore, to know who were the clerks, registers, or cashiers of the hotel, and what relation, if any, Clark occupied toward the hotel. True, this alone might not be sufficient to charge him absolutely with such knowledge; but it was a circumstance for the consideration of the jury in determining this question. It was also without dispute that plaintiff, on the same morning and just a short while before he made the deposit, requested his bill and paid his money therefor to another and a different man than the one to whom he subsequently paid the \$1,900 as a deposit. It could be well said that the hotel might have two or more persons authorized to so receive deposits; yet this was a circumstance to put plaintiff on inquiry, before depositing \$1,900 with a man whom he did not know, whom he says he never saw before, and whom he knew was not the man to whom he had paid his bill. There were other circumstances, not necessary to mention, but having evidential weight with other evidence; and upon consideration of the whole evidence we are of the opinion that the trial court properly submitted to the jury this question, and properly declined to instruct peremptorily thereon.

Counsel for appellant insist that the question whether or not the Hotel Company should be held as a gratuitous bailee should have been submitted to the jury. As we understand the record, this was the only question submitted to the jury by the trial court.

The trial court properly gave the affirmative charge as to the counts seeking to charge the defendant as an innkeeper, and properly instructed the jury that, under all the evidence, the relation of host and guest had terminated before the deposit was made. The mere fact that plaintiff and defendant both contemplated renewing that relation within a few days, and that the latter received the goods or money to keep until the relation should be renewed, would not be sufficient to charge defendant as an innkeeper, but only as a gratuitous bailee. So this question must have been submitted to the jury; there was, under the charge of the court and under the plaintiff's own evidence, no other question to be submitted.

The only theory upon which the defendant could be held liable, as we have before said, is that it was a gratuitous bailee, and that by virtue of having held out Clark as

its agent to receive the deposit in question, and that plaintiff was not guilty of any fault or contributory negligence in making the deposit with Clark. We are unable to find any other theory upon which the plaintiff could have recovered, or any other disputed issue that could have been submitted to the jury. The undisputed evidence shows that Clark was not, in fact, the agent of defendant to receive the deposit, and that the defendant did not in fact receive it; but if the defendant held Clark out to the public and to the plaintiff as having such authority, then defendant might be as liable as if Clark in fact had had such authority. This question, and that of the plaintiff's contributory negligence, were the only issues of fact as to which there was dispute, or as to which different inferences might be drawn by the jury,—as we read the record,—which were submitted to the jury.

From what we have said, it follows that there was no error in the giving of any of defendant's requested charges, nor in the refusal of any of those requested by plain-

tiff. The plaintiff, of course, failed to prove either of the counts which alleged that the agent or servant who received the money had authority from defendant to receive it, and, in so doing, was acting within the line and scope of his authority. The only theory, as we have said before, upon which the defendant could be held liable, was that it was guilty of actionable negligence in allowing Clark to receive the deposit, and in inducing plaintiff to believe that Clark did have authority from defendant to receive it. None of the counts as to which the affirmative charge was given sought to recover on this theory, nor did any of the counts, so far as that is concerned; but the trial court did submit the case to the jury under the sixth count, and of course plaintiff cannot complain as to this error, as it was in his favor.

We find no reversible error in the record, and the cause is affirmed.

Anderson, Ch. J., and Somerville and Thomas, JJ., concur.

Annotation—Liability of innkeeper for effects left by departing guest who intends to return.

As to duty of innkeeper as to effects of one who has left without intention of returning as a guest, see notes to Oxford Hotel Co. v. Lind, 28 L.R.A. (N.S.) 495, and Carol v. Kenney, L.R.A. 1916F, 234.

As to liability of innkeeper for loss of baggage or effects of one making free use of inn, see note to Parker v. Dixon, L.R.A. 1916E, 534.

Many other questions relating to the liability of innkeepers are treated in notes cited in L.R.A. Indexes under the title, "Innkeepers."

The rule is well established that, to continue the relation of host and guest after the latter has departed there must be an animus revertendi, and the intention must be to return within a definite and reasonable time.

So, in harmony with WATKINS v. HOTEL TUTWILER Co. ante, 834, though there may be an animus revertendi, if there is no liability to compensate the innkeeper, the relation of innkeeper and guest is not continued so as to make the former liable for effects left with him by the guest until his return.

Thus, in *Gelley v. Clerk* (1606) Cro. Jac. 188, 79 Eng. Reprint, 164, it was held that one who leaves an inn, stating that he will return in two or three days, ceases to be a guest in the interim, L.R.A. 1917F.

where no profit accrues to the innkeeper for such effects as may be left until the guest returns.

And one who paid his bill with the exception of 25 cents, and departed with the statement that he would return in three or four days, was held in *Hays v. Turner* (1867) 23 Iowa, 214, to have ceased to be a guest. The court stated that "the property lost was goods—dead goods—and the same rule does not obtain as if it had been a horse or the like. For in the latter case the host would still have had 'benefit by the continuance of the horse with him.' In the former he would have 'no benefit, and therefore the host should not be charged with a loss in the absence of the guest.'"

Also in *O'Brien v. Vaill* (1886) 22 Fla. 627, 1 Am. St. Rep. 219, 1 So. 137, it was held that the relation of innkeeper and guest had ceased where the latter paid his bill and departed, though he expressly stated that he would return in seven or eight days.

And see *Whitemore v. Haroldson* (1879) 2 Lea (Tenn.) 312, which is to the effect that one who paid his bill and left, intending to return shortly, but was unexpectedly delayed for several weeks, had ceased to be a guest to whom the innkeeper would be liable for

money deposited with the clerk, while still a guest.

But as a profit accrued to the innkeeper during the absence of a guest, the relation of innkeeper and guest was held, in *Day v. Bather* (1863) 2 Hurlst. & C. 14, 159 Eng. Reprint, 6, 9 Jur. 440, 32 L. J. Exch. N. S. 171, 8 L. T. N. S. 205, 11 Week. Rep. 575, to have continued so as to render the innkeeper liable for an injury to the horse of the guest, left at the inn until his return, although when he departed the guest stated that he would return the following Monday, but he in fact did not return for a fortnight, and the evidence did not disclose whether the injury occurred before or after the date of the guest's intended return.

In *McElwaine v. Balmoral Hotel Co.* (1891) *Montreal L. Rep.* 7 S. C. 139, it was held that while a hotel keeper who keeps a guest's baggage during his absence, giving a receipt or check therefor, continues his liability as hotel keeper for such baggage, yet he will not be liable for its value if it is lost or destroyed by inevitable accident.

Temporary absence.

A temporary absence during the day will not sever the relation of innkeeper and guest. *Sand's Case* (1698) 1 Salk. 145, 91 Eng. Reprint, 134; *Drope v. Theyar* (1650) Popham, 178, 79 Eng. Reprint, 1274; *White's Case* (1653) *Dyer*, 158b, 73 Eng. Reprint, 343.

So, one will still continue to be a guest at an inn, although he may take an occasional meal elsewhere or be absent over night, if there is an obligation to pay until the room is given up. *McDaniels v. Robinson* (1854) 26 Vt. 316, 62 Am. Dec. 574.

And a guest who goes out to see the town, intending to return to the inn before he leaves for home, is to be considered a guest in the interim so as to hold the innkeeper liable for an overcoat left at the inn. *McDonald v. Edgerton* (1849) 5 Barb. (N. Y.) 562.

And in *Brown Hotel Co. v. Burekhardt* (1899) 13 Colo. App. 59, 56 Pac. 188, it was held that the relation of innkeeper and guest did not cease so as to relieve the innkeeper from liability as such, for loss of a trunk, where the guest paid his bill only for the purpose of getting a draft cashed, so that he might have some ready money for a contemplated

day's trip, and it was understood between him and the innkeeper that he intended to return that afternoon (and he did so return) and retain the same room, and he gave no order whatever for the removal of his baggage.

In *Grinnell v. Cook*, 3 Hill (N. Y.) 485, 38 Am. Dec. 663, the court, as dictum, said: "If a traveler leave his horse at the inn and then go out to dine or lodge with a friend, he does not thereby cease to be a guest, and the rights and liabilities of the parties remain the same as though the traveler had not left the inn and if the owner leave the inn and go to another town, intending to be absent two or three days, it seems that the same rule holds good so far as relates to property for the care and keeping of which the host is to receive a compensation; but it is otherwise in relation to inanimate property from which the host derives no advantage, and if that be stolen during such absence of the guest, the innkeeper will not be answerable."

But the relation of innkeeper and guest ceases where the guest pays his bill to avoid liability for the day, although he intended to return that night. *Miller v. Peeples* (1883) 60 Miss. 819, 45 Am. Rep. 423. The court said that "the relation of guest and innkeeper was intentionally ended by the act of the guest who paid his bill and had his name stricken from the register of guests for the purpose of freeing himself from liability as a guest, and he could not thereafter, and while he was not a guest, claim the rights of one as to the baggage he left behind him. The expectation thereafter to become a guest did not continue the relation terminated at his instance and for his advantage by settling his account for entertainment. An innkeeper is chargeable as such because of the profit derivable from entertaining. The right to charge is the criterion of the innkeeper's liability."

So, also, one who engaged a room only, "to dress and change my clothes before going to a friend," and who, although given a key, did not use it, was held in *Lynar v. Mossop* (1875) 36 U. C. Q. B. 230, to have ceased to be a guest when he departed to go to his friend's house, although he afterward stated that he had intended to return, his intention not having been imparted to the innkeeper.

J. H. B.

GEORGIA SUPREME COURT.

AUGUSTA BASEBALL ASSOCIATION,
Plff. in Err.,
v.
THOMASVILLE BASEBALL CLUB.

(— Ga. —, 93 S. E. 208.)

Contract — monopoly — transfer of ball player — public policy.

The release by a baseball club of the services of a ball player under contract with it, to another club, in consideration of a certain sum of money, is not illegal as being opposed to public policy, nor as amounting to a contract for involuntary servitude of the player.

For other cases, see *Contracts*, III. c, 1, in Dig. 1-52 N. S.

(August 18, 1917.)

ERROR to the Superior Court for Richmond County to review a judgment in plaintiff's favor in an action brought to recover the amount alleged to be due on a promissory note. **Affirmed.**

Statement by **Evans, P. J.**:

The Thomasville Baseball Club, a corporation, brought an action against the Augusta Baseball Association, a corporation, on a promissory note, a copy of which was attached to the petition. The defendant filed a plea which was stricken on demurrer, and judgment was rendered by the court for the plaintiff for the amount sued for. The defendant excepted. The plea stricken by the court averred that the consideration of the note was the purchase of one Davenport, a baseball player, as appears from the following contract:

The National Association of Professional Baseball Leagues.

Official Sales Agreement for Purchase or Sale of Players by National Association Clubs.

This agreement, made and entered into this 18th day of February, 1915, by and between the Thomasville Baseball Club, party of the first part, and the Augusta Baseball Club, party of the second part, witnesseth, that the said Thomasville Baseball Club, party of the first part, does hereby sell and release the services of player P. M. Davenport of the aforesaid party of the second part, under the following conditions: [All conditions and every detail of the transac-

Headnote by **EVANS, P. J.**

Note.—As to assignment or release of the right to a third person's services, see annotation following this case, post, 842. L.R.A.1917F.

tion are here set forth.] That the purchase price of said player shall be the sum of two hundred dollars (\$200), payable on the 15th day of July, 1915, the said sum being represented by a certain promissory note made by the party of the second part, payable to the order of party of the first part on said July 15, 1915. Both parties to this agreement further agree to abide by all the rules of the national board of the National Association, governing the purchase and sale of players by and between National Association Clubs. It is further agreed that a copy of this agreement be filed in the office of the secretary of the National Association within ten days of date hereof.

In testimony whereof, we have hereunto set our hands the day and year first above written.

R. G. Mays, President,
Party of the First Part,
E. G. Kalfleisch, President,
Party of the Second Part.

It was averred that the contract for the sale of the services of Davenport was illegal and violative of the 13th Amendment of the Constitution of the United States, and ¶ 17 of the Bill of Rights of the Constitution of Georgia, prohibiting involuntary servitude.

Messrs. **James S. Bussey, Jr., and A. R. Williamson**, for plaintiff in error:

A contract founded on an illegal consideration cannot be enforced, and bills and notes are not excepted from the operation of this rule, but, when founded on such considerations, as between the immediate parties and their privies, are always void.

8 C. J. p. 241; *Benson v. Dublin Warehouse Co.* 99 Ga. 303, 25 S. E. 645; *Exchange Nat. Bank v. Henderson*, 139 Ga. 260, 51 L.R.A.(N.S.) 549, 77 S. E. 36; *Smith v. Ice Delivery Co.* 8 Ga. App. 767, 70 S. E. 195; *Nunez Gin & Warehouse Co. v. Moore*, 10 Ga. App. 350, 73 S. E. 632; *Strickland v. Farmers Supply Co.* 14 Ga. App. 661, 82 S. E. 161; *International Agri. Corp. v. Spencer*, 17 Ga. App. 649, 87 S. E. 1101.

Mr. Paul T. Chance for defendant in error.

Evans, P. J., delivered the opinion of the court:

It was perfectly legal for the Thomasville Club to contract with Davenport to play baseball as a member of its team. Such a contract is one to perform service as a ball player. The right of the Thomasville Club to assign its contract without the consent of Davenport is not a question in this case. So far as the record discloses,

Davenport, upon being released from the Thomasville Club, rendered acceptable service to the Augusta Club. Although the language of the contract of release, which is the consideration of the note, may be a little confusing and contradictory, enough appears from the instrument to establish its true character. The manifest purpose and intent of the two baseball clubs was that one should release to the other its right of contract to the services of one of its players. If the ball player consented to this arrangement and contracted with the Augusta Ball Club to perform services for it, we do not think the contract of release violative of the mandate against involuntary servitude in the Federal and state Constitutions.

This case is unlike that of *Pitts v. Allen*, 72 Ga. 69, where it appeared that one of the parties paid the fine of a negro man convicted of a misdemeanor, and hired him to the other party to the contract in consid-

eration of the note sued on. The court held that this transaction was violative of constitutional prohibitions against imprisonment for debt and against involuntary servitude. The contract between the parties contemplated the sale of the services of the negro man for the purpose of collecting a debt which the negro owed the payee of the promissory note. In the present case the consideration of the contract is not to reimburse the releasing club for any indebtedness due to it by the ball player. The releasing club relinquishes its contractual right to the services of a player in its employment to the other club, in consideration of a certain sum. We do not think such a transaction illegal as being against public policy or as being a contract of involuntary servitude.

Judgment affirmed.

All the Justices concur.

Annotation—Assignment or release of the right to a third person's services.

This note purposely excludes cases treating of the transferability of apprenticeship or his services to another employer; the same may be said of paupers.

As to the assignability of contract hiring out convicts, see note to *Topeka v. Boutwell*, 27 L.R.A. 608.

As to the assignability of an executory contract to perform particular work, as distinguished from a contract for personal services, or a contract of sale, see note to *Atlantic & N. C. R. Co. v. Atlantic & N. C. Co.* 23 L.R.A.(N.S.) 223.

As to assignability of construction or building contract, see note to *Johnson v. Vickers*, 21 L.R.A.(N.S.) 359.

It will be observed that in *AUGUSTA BASEBALL ASSO. v. THOMASVILLE BASEBALL CLUB*, ante, 841, where the sale or release of the services of a baseball player was held valid, the purchasing club set up the invalidity of the transaction in an action by the seller on a promissory note given for the release in question, and the player offered no objection to the sale or release, but rendered acceptable service to the purchaser; the employer's right to assign the contract without the player's consent was not a question in the case.

In *Younce v. Broad River Lumber Co.* (1908) 148 N. O. 34, 61 S. E. 624, it was held that plaintiff alone had the right to object to the assignment of the contract for his services, and having assented thereto, the assignee became L.R.A.1917F.

bound thereby and liable for its breach. The court stated that while it is the general rule that rights when coupled with liabilities under an executory contract for personal services, or under contract otherwise involving personal credit, trust, or confidence, cannot be assigned, this limitation on the assignability of contract only arises or exists for the benefit of the other party; and if such party assents to the assignment, the position can no longer be insisted on.

Standard Sewing Mach. Co. v. Smith (1915) 51 Mont. 245, L.R.A. —, —, 152 Pac. 38, holding that an employer cannot assign a contract binding an agent for the sale of sewing machines, which requires him to guarantee his sales and be responsible for collection, differs from the foregoing cases, as the action was between the assignee and the agent, and the sureties upon the latter's bond.

Under Kentucky acts permitting the assignment of "bonds, bills, and promissory notes for the payment of money or property," a note to be discharged in whole or in part in personal services is not assignable. *Force v. Thomason* (1822) 2 Litt. (Ky.) 166; *Halbert v. Deering* (1823) 4 Litt. (Ky.) 9; *Henry v. Hughes* (1829) 1 J. J. Marsh. (Ky.) 453.

In *Chapin v. Longworth* (1877) 31 Ohio St. 421, an employee brought an action against the employer and his assignee to recover money due on contract. The court stated that an execu-

tory contract for personal services, to be paid for as performed, cannot be assigned by the employer, unless the employee assents to the substitution of the assignee as employer; and an allegation that, subsequent to the agreement of the employer to assign, the employee rendered the same service for the assignee during part of the time embraced by the contract, and received compensation from him at the rate therein specified, does not show such substitution.

As a general rule, a contract for the performance of personal duties or services is unassignable so as to vest in the assignee the right to the services.

Thus, in *Globe & R. F. Ins. Co. v. Jones* (1902) 129 Mich. 664, 89 N. W. 580, one contracted to represent an insurance company as a general agent for a definite period; thereafter the company was merged with another, forming another company; at the time the contract was made there was in force a New York statute authorizing the merger and providing that all the rights of the merging corporation shall be deemed transferred to the new corporation and that the new corporation shall succeed to all the obligations of the merging corporation. It was held that the merger was a breach of the contract, notwithstanding the presumption that the agent contracted with knowledge of the statute authorizing the merger. "Everyone knows," says the court, "that insurance companies, like individuals, differ in reputation and methods of doing business. An insurance agent of large experience might be quite willing to act as state agent for one insurance company, when he would not be willing to work for another upon any terms. He has a right to say for whom he will work, and under a contract to work for one company he cannot be required to work for an entirely different company."

A contract of hiring, being personal in its nature, was, in *Redheffer v. Leathe* (1884) 15 Mo. App. 12, held not assignable. In this case a person contracted to serve a copartnership for a certain period, and during the period of the contract this firm was dissolved, the business being turned over to another firm which continued the same business. The court said that when the old firm was dissolved, they voluntarily disabled themselves from carrying out the contract on their part; their dissolution was ipso facto a termination of it. The court also observed that the fact that the members of the old firm desired

the employee to continue to work for the new firm to the end of the year, under the terms of the contract, and he declined to do so, did not alter his right to recover that portion of the reserve wages which he had earned. The contract was personal in its nature. It cannot possibly be adduced that a contract extending over several months, by which one agrees to render daily personal services as a wageworker, is assignable. A conclusive answer to such an argument is that it may make all the difference in the world to a serving man who his master is. Not only may there be an important element of choice in respect of the master whose orders he must obey and whose temper he must accommodate, but there may be a like element in respect of solvency, differences in the work to be done, and in many other matters which might be suggested. Such a contract would make every contract of hiring a contract of peonage.

Where one contracted to give theatrical performances for a certain time exclusively for a certain person, at any place the latter might direct, it was held in *Hayes v. Willio* (1872) 4 Daly (N. Y.) 259, that the latter could not assign his rights under the contract to another person, so as to give the latter the right to prevent the person who had contracted to serve from giving performances for other persons.

In *Board of Education v. State Bd. of Edu.* (1911) 81 N. J. L. 211, 81 Atl. 163, affirmed in (1913) 85 N. J. L. 384, 91 Atl. 1068, one was employed to teach in a certain township, a portion of which thereafter became a separate school district, and the question whether the new school district was bound by the contract was submitted by that district to the state superintendent of public instruction and state board of education, and brought before the court on certiorari. As to the contention that the contract with the teacher was personal property which passed to the board of education controlling the new school district, the court said: "It is not consistent with the general principles of our law to hold that a contract for personal services is assignable, so that the assignee may command the labor of one who has never agreed to serve him. The assignability of another man's labor was permitted in some parts of the country prior to the adoption of the 13th Amendment to the Federal Constitution. This former right conflicts with the views of this subject

that have prevailed for nearly fifty years, and with the decision of our court of errors and appeals in the recent case of *Schlessinger v. Forest Products Co.* 78

N. J. L. 637, 30 L.R.A.(N.S.) 347, 138 Am. St. Rep. 627, 76 Atl. 1024."

J. D. C.

KANSAS SUPREME COURT.

SHAWNEE MILLING COMPANY

v.

KANSAS POSTAL TELEGRAPH-CABLE COMPANY, Appt.

(— Kan. —, 166 Pac. 493.)

Telegraph — receipt of message by telephone — effect.

1. Where a telegraphic message is dictated over a telephone and is thus received by a telegraph company for transmission, it will not be presumed that any preferential or discriminatory service in violation of law is intended, and the message will be considered as if it were written on the ordinary blank forms furnished by the telegraph company, and the company's liability for an error in transmission is neither greater nor less nor different than if the message were delivered in the usual and more formal mode of sending telegrams.

For other cases, see Telegraphs, II. a, 3, in Dig. 1-52 N. S.

Same — limitation of liability.

2. In conducting its intrastate business a telegraph company may make reasonable stipulations limiting its liability, but in the absence of positive or permissive statutes governing the subject, the reasonableness of any such stipulation is a question for judicial determination.

For other cases, see Telegraphs, II. d, in Dig. 1-52 N. S.

Same — reasonableness.

3. A stipulation limiting a telegraph company's liability in damages for an error in transmission of a telegram, to a mere return of the rate exacted for sending it, is unreasonable.

For other cases, see Telegraphs, II. d, in Dig. 1-52 N. S.

Same — code message.

4. Where a telegram is partly in code, but bears enough plain English on its face to apprise the telegraph company that it is a business message, and the company's manager in charge where the telegram was received knew it was a business message, although he did not know its details, the

company was charged with sufficient notice of its importance, and with notice that a failure to transmit the message correctly would probably lead to consequential damages, and the telegraph company is liable therefor.

For other cases, see Telegraphs, II. c, in Dig. 1-52 N. S.

Same — sufficiency of proof.

5. The damages attendant on a failure to transmit a business message examined, and held to be certain and proximate, and that a recovery can be had thereon.

For other cases, see Damages, III. b, in Dig. 1-52 N. S.

(July 7, 1917.)

APPEAL by defendant from a judgment of the District Court for Shawnee County in plaintiff's favor in an action brought to recover damages for loss alleged to have been caused by an error in the transmission of a code message. Affirmed.

The facts are stated in the opinion.

Mr. Edwin E. Brookens, for appellant:

The alleged loss is of an un contemplated, remote, contingent, and speculative character, for which the telegraph company would not be liable in any event under the common-law measure of damages.

Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718.

Recovery cannot be had for error in transmitting an unintelligible, unexplained, and unreported cipher message.

Hadley v. Baxendale, 9 Exch. 354, 156 Eng. Reprint, 150, 2 C. L. R. 517, 23 L. J. Exch. N. S. 179, 18 Jur. 358, 2 Week. Rep. 302, 5 Eng. Rul. Cas. 502; *Postal Telegraph Co. v. Lathrop*, 131 Ill. 575, 7 L.R.A. 474, 19 Am. St. Rep. 55, 23 N. E. 583; *Primrose v. Western U. Telegraph Co.* 154 U. S. 1, 38 L. ed. 883, 14 Sup. Ct. Rep. 1098.

If this plaintiff can recover, every other plaintiff, use whatever code it may, has the same right, and the grossest kinds of fraud are invited. Public policy says it cannot be done.

Abeles v. Western U. Telegraph Co. 37 Mo. App. 554; *Fergusson v. Anglo-American Telegraph Co.* 178 Pa. 377, 35 L.R.A. 554, 56 Am. St. Rep. 770, 35 Atl. 979; *Cain v. Western U. Telegraph Co.* 89 Kan. 797, 133 Pac. 874; *King v. Western U. Telegraph Co.* 81 Kan. 223, 105 Pac. 449; *McQuilkin v. Postal Telegraph Cable Co.* 27 Cal. App. 698, 151 Pac. 21; *Johnson v. Western U. Telegraph*

Headnotes by DAWSON, J.

Note.—As to contract for telegrams not written on company's blank, see annotation following this case, post, 848.

As to validity of limitation of liability of telegraph company for unreported messages, see notes to *Western U. Telegraph Co. v. Milton*, 11 L.R.A.(N.S.) 561; *Strong v. Western U. Telegraph Co.* 30 L.R.A.(N.S.) 409; and *Western U. Telegraph Co. v. Dant*, L.R.A.1915B, 685. L.R.A.1917F.

Co. 79 Miss. 58, 89 Am. St. Rep. 584, 29 So. 787; Beatty Lumber Co. v. Western U. Teleg. Co. 52 W. Va. 410, 44 S. E. 309.

Assuming that the defendant is liable under the circumstances, it cannot be liable for more than the cost of transmitting the message.

Primrose v. Western U. Teleg. Co. 154 U. S. 1, 38 L. ed. 883, 14 Sup. Ct. Rep. 1098; Western U. Teleg. Co. v. Coggin, 13 C. C. A. 231, 32 U. S. App. 245, 68 Fed. 137; Candee v. Western U. Teleg. Co. 34 Wis. 471, 17 Am. Rep. 452; 37 Cyc. 1688; 27 Am. & Eng. Enc. Law, 1062; Jones, Teleg. & Teleph. Cos. §§ 406, 531; Crowell, Electricity, §§ 588, 593, 602; Joyce, Electric Law, 2d ed. § 955; Thompson, Electricity, § 358; Bennett v. Western U. Teleg. Co. 129 Iowa, 607, 106 N. W. 13; Kenyon v. Western U. Teleg. Co. 100 Cal. 454, 35 Pac. 75; Western U. Teleg. Co. v. Clifton, 68 Miss. 307, 8 So. 746; Johnson v. Western U. Teleg. Co. 79 Miss. 58, 80 Am. St. Rep. 584, 29 So. 787; Western U. Teleg. Co. v. Adams Mach. Co. 92 Miss. 849, 47 So. 412; Beatty Lumber Co. v. Western U. Teleg. Co. 52 W. Va. 410, 44 S. E. 309; Western U. Teleg. Co. v. Hall, 124 U. S. 444, 31 L. ed. 479, 8 Sup. Ct. Rep. 577; Cannon v. Western U. Teleg. Co. 100 N. C. 300, 6 Am. St. Rep. 590, 6 S. E. 731; Smith v. Western U. Teleg. Co. 83 Ky. 104, 4 Am. St. Rep. 126; Clark Mfg. Co. v. Western U. Teleg. Co. 152 N. C. 157, 27 L.R.A. (N.S.) 643, 67 S. E. 329; Fergusson v. Anglo-American Teleg. Co. 178 Pa. 377, 35 L.R.A. 554, 56 Am. St. Rep. 770, 35 Atl. 979; Hughes v. Western U. Teleg. Co. 114 N. C. 70, 41 Am. St. Rep. 782, 19 S. E. 100; Williams v. Western U. Teleg. Co. 136 N. C. 82, 48 S. E. 559, 1 Ann. Cas. 350; Crane v. Western U. Teleg. Co. — Tex. Civ. App. —, 152 S. W. 444; Kolliner v. Western U. Teleg. Co. 126 Minn. 122, 52 L.R.A. (N.S.) 1180, 147 N. W. 961; Kennon v. Western U. Teleg. Co. 126 N. C. 232, 35 S. E. 468; Smith v. Western U. Teleg. Co. 80 Neb. 395, 114 N. W. 288; Beaupre v. Pacific & A. Teleg. Co. 21 Minn. 155; Bailey v. Western U. Teleg. Co. 97 Kan. 619, 156 Pac. 716, 99 Kan. 7, 160 Pac. 985; Kirsch v. Postal Teleg. Cable Co. 100 Kan. 250, 164 Pac. 267.

Mr. Edwin D. McKeever also for appellant.

Messrs. Robert Stone and George T. McDermott, for appellee:

The message being telephoned in, there were no contract provisions which would bind the sender.

Cain v. Western U. Teleg. Co. 89 Kan. 797, 133 Pac. 874; Joyce, Electric Law, 2d ed. § 718; Jones, Teleg. & Teleph. Cos. §§ 423, 424; Carland v. Western U. Teleg. Co. L.R.A.1917F.

118 Mich. 369, 43 L.R.A. 280, 74 Am. St. Rep. 394, 76 N. W. 762; Bowie v. Western U. Teleg. Co. 78 S. C. 424, 59 S. E. 65; Western U. Teleg. Co. v. Douglass, 104 Tex. 66, 133 S. W. 877; Western U. Teleg. Co. v. Parham, — Tex. Civ. App. —, 152 S. W. 819; Western U. Teleg. Co. v. Todd, 22 Ind. App. 701, 54 N. E. 446; 37 Cyc. 1684, 1694, 1695; Gore v. Western U. Teleg. Co. — Tex. Civ. App. —, 124 S. W. 977; Western U. Teleg. Co. v. Buchanan, 67 Tex. Civ. App. 212, 129 S. W. 850; Markley v. Western U. Teleg. Co. 159 Iowa, 557, 141 N. W. 443; Harris v. Western U. Teleg. Co. 121 Ala. 519, 77 Am. St. Rep. 70, 25 So. 910; Western U. Teleg. Co. v. Uvalde Nat. Bank, 97 Tex. 219, 65 L.R.A. 805, 77 S. W. 603, 1 Ann. Cas. 573; Western U. Teleg. Co. v. Powell, 94 Va. 268, 26 S. E. 828; Beasley v. Western U. Teleg. Co. 39 Fed. 181; Pearsall v. Western U. Teleg. Co. 44 Hun, 532, 124 N. Y. 256, 21 Am. St. Rep. 662, 26 N. E. 534; Western U. Teleg. Co. v. Pruett, — Tex. Civ. App. —, 35 S. W. 78; McGehee v. Western U. Teleg. Co. 169 Ala. 109, 53 So. 205, Ann. Cas. 1912B, 512; Western U. Teleg. Co. v. Timmons, — Tex. Civ. App. —, 136 S. W. 1169; Beggs v. Postal Teleg.-Cable Co. 159 Ill. App. 247, 258 Ill. 238, 101 N. E. 612, 5 N. C. C. A. 650.

If a telegraph company accepts a message in cipher, it is under the same obligation to transmit it correctly as any other message.

Western U. Teleg. Co. v. Eubanks, 100 Ky. 591, 36 L.R.A. 711, 66 Am. St. Rep. 361, 38 S. W. 1068, 1 Am. Neg. Rep. 244; Postal Teleg. & Cable Co. v. Wells, 82 Miss. 733, 35 So. 190; Beggs v. Postal Teleg.-Cable Co. supra; Markley v. Western U. Teleg. Co. 159 Iowa, 557, 141 N. W. 443.

A mistake in transmission which is unexplained amounts to gross negligence for which the company is liable.

Western U. Teleg. Co. v. Crall, 38 Kan. 679, 5 Am. St. Rep. 795, 17 Pac. 309; Western U. Teleg. Co. v. Howell, 38 Kan. 685, 17 Pac. 313; Russell v. Western U. Teleg. Co. 57 Kan. 230, 45 Pac. 598; Sprague v. Missouri P. R. Co. 34 Kan. 347, 8 Pac. 465; Joshua L. Bailey & Co. v. Western U. Teleg. Co. 227 Pa. 522, 43 L.R.A. (N.S.) 502, 76 Atl. 736, 19 Ann. Cas. 895; Western U. Teleg. Co. v. Nagle, 11 Tex. Civ. App. 539, 32 S. W. 707.

When the company admits it knew a business deal was being carried on, it becomes liable for damages reasonably and proximately following, whether it knew what the damages were to be or not.

37 Cyc. 1752.

Dawson, J., delivered the opinion of the court:

The plaintiff recovered a judgment for damages against the defendant for an error in the transmission of a telegram delivered orally by telephone for forwarding to a firm of grain dealers in Wichita. The telegram was partly in code. It reads:

Topeka, Kansas, August th, 1914.

Wagner Grain Co. Wichita, Kansas. Per-fume have book fluting accursed debating Kansas City basis boundary.

Shawnee Mfg. Co.

The telegram was an acceptance of an offer of 10,000 bushels of wheat. The code word for such a purchase was "fluting." It was erroneously transmitted to read "flirting," which meant 6,000 bushels. The more or less proximate consequences of this error occasioned this lawsuit.

One of the defenses of the telegraph company was that the telegraphic message was received for transmission as an unrepeatable telegram, and that the terms and conditions for the receipt and transmission of such messages were those set forth on its regular blank forms for telegrams, parts of which read:

"The Postal Telegraph-Cable Company (Incorporated) transmits and delivers the within telegram subject to the following terms and conditions: To guard against mistakes or delays, the sender of a telegram should order it repeated; that is, telegraphed back to the originating office for comparison. For this, one half the unrepeatable telegram rate is charged in addition. Unless otherwise indicated on its face, this is an unrepeatable telegram and paid for as such, in consideration whereof it is agreed between the sender of the telegram and this company as follows:

"1. The company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery, of any unrepeatable telegram, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for nondelivery, of any repeated telegram, beyond fifty times the sum received for sending the same, unless specially valued; nor in any case for delays arising from unavoidable interruption in the working of its lines; nor for errors in cipher or obscure telegrams."

It will thus be seen that the telegraph company has two principal schedules of rates, one for unrepeatable messages in which its liability for errors in transmission was limited to the amount received by it for sending the message, and a rate 50 per cent higher for repeated messages, in which its

liability for erroneous transmission was stipulated in advance to be fifty times the sum paid for the service. These rates must be filed with the Public Utilities Commission, and may not be departed from by the telegraph company without the assent of that tribunal; and all discrimination and preferences in rates or service are forbidden by the Public Utilities Act. Gen. Stat. 1915, chap. 97; Laws 1911, chap. 238, §§ 3, 10, 12, 20, 30. The service performed by the defendant must be held to have been in pursuance of its regular corporate business, and it should be assumed that no discriminatory or preferential service was being extended to plaintiff when the defendant received plaintiff's message by telephone for transmission to Wichita. It must be considered as if the plaintiff had formally written the message in the usual way on regular blanks furnished by the company. That telegraph companies frequently accept messages by dictation over a telephone is well known. It would be harsh to say that any illegal preference forbidden by § 8401 of the General Statutes of 1915 is intended in so doing. Nor would it be just to hold that in extending this apparently harmless courtesy the telegraph company thereby places itself in a less favorable position or assumes a greater responsibility than it does when it receives for transmission telegrams written in the usual way with the usual conditions attached. Nevertheless, if this practice is to be regarded as a general one, carrying a different rate or subjecting the telegraph company to a different degree of responsibility, a uniform schedule of rates and charges for such service and the regulations pertinent thereto should be filed with the Public Utilities Commission, and subject to its approval; and such rates and service are invalid until they are so filed, and when formally promulgated, they may not be departed from with impunity. Gen. Stat. 1915, §§ 8398, 8400, 8416; State ex rel. Caster v. Kansas Postal-Telegraph Cable Co. 96 Kan. 298, P.U.R.1915E, 222, 150 Pac. 544; Mollohan v. Atchison, T. & S. F. R. Co. 97 Kan. 51, L.R.A. —, —, P.U.R.1916C, 537, 154 Pac. 248.

The court is of opinion that, in the absence of a distinct schedule of rates applying to telegrams delivered for transmission by telephone, the case is governed by the conditions attaching to the usual and more formal mode of transacting its corporate business.

The telegraph company is liable, if at all, according to the terms of its contract of service, unless that contract is an unreasonable limitation of its liability for negligence. It was pleaded that the message

was received for transmission as an unrepeated message. The plaintiff's general denial traversed this, as well as the other allegations of the answer, but there is seemingly no contention that the case should turn upon whether the telegram was to be transmitted as a repeated or an unrepeated message, nor is it intimated that it was transmitted as a repeated message "especially valued" according to the rates and terms for transmission of such messages.

Is this particular limitation of liability a reasonable one? This question is settled as to interstate messages. *Bailey v. Western U. Tele. Co.* 97 Kan. 619, 623, 156 Pac. 716, id. 99 Kan. 7, 160 Pac. 985; *Kirsch v. Postal Tele. Cable Co.* 100 Kan. 250, 164 Pac. 267. The case at bar involves only an intrastate telegraph message, and we have no state statute specifically authorizing common carriers to limit their common-law liability as does the Carmack Amendment (36 Stat. at L. chap. 309, pp. 539, 554, Comp. Stat. 1916, § 8584), and telegraph companies are somewhat analogous to carriers; but we do have a statute giving countenance to such limitation by railroad carriers upon the order or approval of the Public Utilities Commission (Gen. Stat. 1915, § 8435). There is certain language in the Public Utilities Act which seems to recognize the telegraph company's right to limit its liability. The schedules, classifications, rates, rules, and regulations for telegraph service must be reasonable and just, and the commission may amend or alter them. Gen. Stat. 1915, §§ 8390, 8408. Any matter concerning such public service business which is unreasonable, unjust, discriminative, must be investigated and corrected. § 8416. The requirement that telegraph companies file their rates with the commission, and the section which fixes as legal maxima the rates in vogue on January 1, 1911 (§ 8358), and the unchallenged exaction and maintenance of those rates, and upon the conditions attaching thereto in the telegraph company's contracts of service, are potent reasons for recognizing reasonable limitations of liability of the telegraph company as valid and binding. Of course, the Public Utilities Commission has nothing directly to do with the legal liabilities of telegraph corporations on questions of damages, but so far as their liabilities enter into the cost of conducting their business, those liabilities are a proper element of consideration in rate making. The telegraph rates are based, in part, upon the legal consequences which attach to the service. If a higher degree of responsibility attaches to the service, a greater rate must be exacted. It has been held in this state that a common carrier (without a per-

missive statute) cannot impose a condition exempting him from liability for his own negligence, and a telegraph company is so much like a carrier that its liability for negligence should be governed by similar principles, yet reasonable limitations of liability other than those which do not seek to excuse its gross negligence have been upheld (*Russell v. Western U. Tele. Co.* 57 Kan. 230, 233, 45 Pac. 508), while stipulations restricting liability to an insignificant sum where the negligence was gross have been disregarded (*Western U. Tele. Co. v. Crall*, 38 Kan. 679, 5 Am. St. Rep. 795, 17 Pac. 309).

Here the stipulated limitation is for a return of the cost of the message, probably 25 or 40 cents. All the annoyance, delay, business inconvenience, and financial damage so commonly attendant on a telegraph company's failure to perform its self-assumed public service are limited to an insignificant trifle. Here the actual damage was \$265. The stipulated reparation is a few dimes. With all due deference to the great judicial tribunals which have countenanced and enforced this stipulation, and which we have been likewise constrained to enforce in interstate matters, we cannot give our independent assent that such a limitation is reasonable. It is unreasonable, and it will not be applied in intrastate business, where this court would have to assume the responsibility of giving countenance to it.

In *Jones on Telegraph & Telephone Companies*, 2d ed. 1916, § 377, where most of the pertinent decisions are included in a footnote, it is said: "The validity of the stipulations in the blank form by which these companies have attempted to exonerate themselves for all losses caused by errors made in the transmission or delays in delivering messages, except the amount received for sending, unless the message is ordered to be repeated, has been variously viewed by the courts, some of which hold them to be valid, yet the weight of authority is that they are void and unenforceable. The latter courts considered these stipulations as a mere device for avoiding liabilities for acts of their own negligence or wilful wrongs. As has been seen, they cannot enforce any regulation or contract by means of which they may relieve themselves for any losses caused by their own negligence or that of their servants. Any rule which seeks to relieve them from exercising their employment with diligence, skill, and integrity contravenes public policy as well as the law; and whenever they attempt to avoid these duties, they do so at the expense of and injury to their patrons."

Turning to other phases of this case it is urged that the plaintiff's damage was

of such a remote and speculative character that the telegraph company should not be held liable therefor. It was shown to be a custom of the grain and milling trade that where no reply to an acceptance of an offer to sell is received, a confirmation of the bargain is understood. The addressee had offered to sell 10,000 bushels. The plaintiff's telegram was an acceptance. The telegram as transmitted was an acceptance for 6,000 bushels, an amount the addressee could fill. If the telegram had been correctly transmitted, it would have been an acceptance of the offer of 10,000 bushels, an amount the addressee could not supply; but by another custom of the trade the addressee would have immediately notified the sender of the telegram so that he could have protected himself by buying elsewhere. Since no notification was received from the addressee of his inability to fill the order for 10,000 bushels, and that he could only fill it to the extent of 6,000 bushels, the plaintiff's loss is the difference in the market price of the 4,000 bushels which he had to procure elsewhere to supply his trade. This matter seems intricate and involved, no doubt, but its intricacy lies in the highly complex manœuvres of the grain and milling trade, not in the legal principles which govern liability for default. The law is simple enough, and once the weird necromancy and cabalistic symbols of the milling markets are understood, the damages are seen to be certain, proximate, and a recovery seems proper. We see no analogy between this case and *King v. Western U. Tele. Co.* 81 Kan. 223, 105 Pac. 449, where the plaintiff could only show that if his telegram had been delivered, he might have bought some wild horses, and might later have sold them at a profit. There was never even the shadow of a legal claim for damages in that case. Here there was an offer to sell, an acceptance, an erroneous transmission of the acceptance, a consequent failure of customary modification of the offer when it could not be completely filled, and a resultant loss which the injured party would have not suffered if the telegram had been correctly transmitted, since on notification of inability to fill the order, it could have

readily been filled by purchase on the open market elsewhere.

Defendant cites many other decisions in telegraph cases, the gist of them being that damages cannot be recovered for failure to properly transmit telegrams which merely deprive the sender or addressee of an opportunity to make a contract or to close a bargain, and with the consequent prevention of possible profits which would have been realized if the telegram had been properly transmitted, and if pursuant thereto the bargain had been closed, and if it had turned out profitably according to the aggrieved party's expectations. But none of these bear any close analogy to the present case.

It is urged that, the message being in code and unexplained, a recovery cannot be had, following *Hadley v. Baxendale*, 9 Exch. 354, 156 Eng. Reprint, 150, 2 C. L. R. 517, 23 L. J. Exch. N. S. 179, 18 Jur. 358, 2 Week. Rep. 302, 5 Eng. Rul. Cas. 502, and the American authorities which follow the doctrine announced in that case. But code messages in the milling and grain business are common, and are known by the telegraph companies to be important. In this case, the message was only partly in code and the manager of the telegraph company admitted that he knew it was a business message; and even to one unfamiliar with the grain dealer's code the message disclosed that something or other involved in the grain and milling business was booked on Kansas City basis. That was all the defendant needed to know about it, to charge it with notice that a failure to transmit the message correctly would probably lead to serious consequences. *Western U. Tele. Co. v. Collins*, 45 Kan. 88, 10 L.R.A. 515, 25 Pac. 187; *Cain v. Western U. Tele. Co.* 89 Kan. 797, 804, and citations, 133 Pac. 874; *American U. Tele. Co. v. Daugherty*, 89 Ala. 191, 7 So. 660; *Western U. Tele. Co. v. Harris*, 19 Ill. App. 347; *Western U. Tele. Co. v. Nagle*, 11 Tex. Civ. App. 539, 542, 32 S. W. 707. See also *Western U. Tele. Co. v. Tyler*, 74 Ill. 168, 24 Am. Rep. 279; 37 Cyc. 1753.

The judgment is affirmed.

All the Justices concur.

Annotation—Contract for telegrams not written on company's blank.

I. Telegrams on blanks of another company, 848.

II. Messages written on blank paper, 849.

III. Telegrams given by telephone or orally, 849.

The earlier cases on this question are discussed in the note to *Western U. Tele. Co. v. Waxelbaum*, 56 L.R.A. 741. L.R.A.1917F.

I. Telegrams on blanks of another company.

Supplementing note in 56 L.R.A. 741.

One who used the blank of another company on which to write his message was held bound by the conditions printed upon the back of the blank used, in *Jacob v. Western U. Tele. Co.* (1904) 135 Mich. 600, 98 N. W. 402, the court

stating that "it is immaterial by whom these regulations were made. It is clear that they were agreed to. To say that they were not is in effect to say that no request was made to defendant company to send this telegram at all, because it was written on a blank of the Postal Company."

In *Young v. Western U. Teleg. Co.* (1902) 65 S. C. 93, 43 S. E. 448, one who wrote his message upon the blank of another company was held bound by the conditions therein stated, the court stating that, "if he wrote the message on a blank of the Postal Telegraph Company and delivered it to the defendant to be forwarded, it must be conclusively presumed that he did not intend to enter into a contract with the Postal Telegraph Company, but with the defendant. If he did not intend to enter into a contract with the Postal Telegraph Company, its name may be regarded as struck out of the blank. When he delivered to the defendant a written message on a form in which he directed it to send a message subject to the terms and conditions printed on the back thereof, and which he, in express terms, agreed to, he was as much bound by the stipulations therein, when the message was accepted by the defendant, as if he had used one of its blanks."

II. Messages written on blank paper.

Supplementing note in 56 L.R.A. 742.

The contract existing in the case of a message written on a blank piece of paper, and so accepted for transmission, was held not to have incorporated therein a stipulation on the regular blank, limiting the liability of the company, in *Western U. Teleg. Co. v. Schade* (1917) 137 Tenn. 214, 192 S. W. 924. The court states that there was nothing which showed that it was accepted under conditions that would incorporate, as a part of the carrier's contract, the limitation clauses that might appear in print on the back of the telegraph blanks in general use.

III. Telegrams given by telephone or orally.

Supplementing note in 56 L.R.A. 745.

The court in *SHAWNEE MILL Co. v. KANSAS POSTAL TELEG.-CABLE Co.* ante, 844, in holding that a telegraphic message dictated over a telephone, and thus received by a telegraph company for transmission, would be considered as if it had been written on the ordinary blank form furnished by the telegraph company, and the company's liability

for an error in transmission the same as if the message had been delivered in the usual and more formal mode of sending telegrams, gives considerable weight to the fact that the telegraph company had filed its schedules with the Public Utilities Commission and that under the law the rates therein specified could not be departed from by the telegraph company without the assent of that tribunal, and that all discrimination and preferences in rates or service were forbidden by the Public Utilities Act. To hold that the sender of a message which is telephoned to the telegraph company is not subject to the stipulation governing telegrams written on the blanks of the company would be to give the sender of a message so communicated to the telegraph company a preference, and the court states that it will not be presumed that any preferential or discriminatory service or violation of the law was intended.

It thus appears that the statutory regulation of rates had a controlling influence upon the determination of the contract relations between the telegraph company and the sender of messages. The effect of such a statutory regulation has arisen in connection with the right to waive or extend the time stipulated in the carrier's contract for making claim or bringing suit against the carrier. This question is discussed in the note to *Ray v. Missouri, K. & T. R. Co.* L.R.A.1916D, 1046. See also the later case of *Wall v. Northern P. R. Co.* L.R.A.1917C, 433.

In the case of messages received over a telephone or orally, it has been urged that the agent of the telegraph company is the agent of the sender of the message for the purpose of writing it down. Some cases have sustained this contention. Thus, in *Markley v. Western U. Teleg. Co.* (1913) 159 Iowa, 557, 141 N. W. 443, a case involving the liability of the telegraph company for the negligence of its agent in receiving a message over the telephone, the court, in holding the operator the agent of the telegraph company in so receiving a message, states: "The defendant is not bound to keep a telephone in its office, over which messages may be sent to it to be forwarded. If it does so, it must be held to the exercise of reasonable care in thus receiving messages. It had the right to require all tendered messages to be in writing, and to make such reasonable rules as might be necessary for its own protection and for the accurate care of its business; but, in the absence of any showing that there were such rules,

which were known to the sender of the message, it must be presumed that the use of the telephone was a means permitted by it to be employed in receiving messages for forwarding. So permitting it, if there was negligence on the part of its agent in receiving the message, such would be the negligence of the defendant." In *Western U. Teleg. Co. v. Jackson* (1909) 163 Ala. 9, 50 So. 316, the local operator of a telegraph company was held to be the agent of the sender of a message in writing the message, where the sender could neither read nor write and at his request the operator wrote the message for him on one of the defendant's blanks and took the sendee's address from an envelope which the sender handed her. Accordingly, the telegraph company was held not liable for a mistake made by the operator in writing the message, or in deciphering the address from the letter handed her for that purpose.

If the agent of the telegraph company is the agent of the sender for the purpose of writing the message, and such message is written on a regular blank, it seems clear that the stipulations on the blank would be binding upon the sender, so far as the stipulations are valid. In other words, if it is determined that the representative of the telegraph company is the agent of the sender, the binding effect of the stipulation is determined. Thus, in *Western U. Teleg. Co. v. Prevatt* (1907) 149 Ala. 617, 43 So. 106, the local operator for a telegraph company was held the agent of the sender of a message, where the sender, who could neither read nor write, asked the operator to write and send the message for him, whereupon the message was written on a blank provided for the purpose by the telegraph company, as the sender dictated, and was reread to him after it was so written. Accordingly, the sender was held bound by the stipulations on the telegraph blank.

One who telephoned a message to the local agent when the agent was off duty was held bound by a stipulation requiring notice of claim in a limited time, in the regular blank of the telegraph company on which the local agent transcribed the message when she reached the office, where the message written on the blank was introduced as the basis of the action by the sender against the telegraph company, the court stating that by introducing such evidence the sender adopted the message written by the local agent on the regular blank. *Simpson v. Western U. Teleg. Co.* (1916) L.R.A. 1917F.

104 S. C. 393, 89 S. E. 321. It is stated in this case that, if the sender had relied upon the verbal message over the telephone, "a different question might have arisen."

If the agent of the telegraph company is the agent of the sender for the purpose of writing the message, the principle that the act of the agent is the act of the principal applies, and the telegram cannot be said to be one not written on the blank of the company by the person by whom it is sent. Strictly speaking, the foregoing cases dealing with messages delivered orally or by telephone are not therefore within the scope of this note, and the note does not purport to deal exhaustively with cases of this class. Where it is determined or assumed that the representative of the telegraph company is not the agent of the sender, or where the question of agency is not urged, the distinctive question treated in this note arises as to the contract between the company and the sender.

A stipulation in a telegraph company's blanks that no responsibility regarding messages attaches to the company until the same are presented and accepted in one of its transmitting offices, and that if a message is sent to such office by one of the company's messengers he acts for that purpose as agent of the sender, is not binding upon one who does not write his message on a blank of the telegraph company and who has no knowledge of the stipulation. *Mims v. Western U. Teleg. Co.* (1908) 82 S. C. 247, 64 S. E. 236. In this case the sender of the message had dictated it to a child who wrote it in a memorandum book and took it to the telegraph office, where she read it to the agent. The agent in this case was held to be the agent of the telegraph company, and not the agent of the sender of the message.

In *Gore v. Western U. Teleg. Co.* (1910) — *Tex. Civ. App.* —, 124 S. W. 977, it is stated that "the law seems to be well settled that a telegraph company which accepts a message by telephone cannot claim that the conditions in its printed forms are applicable, where it is accustomed to receive such messages. It is also held in such cases that the agent of the company is not the agent of the sender." The rule of this case is followed in *Western U. Teleg. Co. v. Parham* (1913) — *Tex. Civ. App.* —, 152 S. W. 819.

In *Bowie v. Western U. Teleg. Co.* (1907) 78 S. C. 424, 59 S. E. 65, in the case of a message sent to the company

by telephone the company relied on a stipulation in its message blank to exempt it from liability for any mistake in the transmission, to the effect that "no responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices; and if a message is sent to such office by one of the company's messengers, he acts for that purpose as the agent of the sender." The trial judge charged the jury that "if a message is received at the office of a telegraph company over a telephone, and is transmitted by the telegraph company to the sendee, it is presumed to be properly delivered to and accepted by the telegraph company for transmission." The supreme court, in discussing the liability of the telegraph company under such a situation, states "there was no evidence that the sender assented to the stipulation or knew it was written on the company's blank, or that he intended or expected the message to be written on the blank. In the absence of such evidence, we can see no ground whatever for the company to say a delivery and acceptance over a telephone kept in its office was not a proper delivery. Certainly, the defendant has no right to complain when the circuit judge, assuming that there might be some evidence bringing the stipulation home to the sender, in response to the defendant's request, charged, if the regulation on the message blank was reasonable, and brought to the knowledge of the sender, he would be bound by it, and the company would incur no liability in reference to the telegram until it had been presented and accepted at one of its transmitting offices, unless the company had seen fit to waive the regulations by inviting or encouraging the sender or the public to deliver to it messages in some other way."

It was held in *Western U. Tele. Co. v. Douglass* (1911) 104 *Tex.* 66, 133 S. W. 877, that a stipulation in a telegraph company's blank on which a message communicated to it by telephone was written by its agent was not binding upon the sender, who had no knowledge of the stipulation and to whom nothing was said thereof, the court stating: "As the case stands upon the evidence in the record, it appears that the defendant's agent received the message as telephoned, without mention of the stipulation and without any evidence of knowledge of its existence on the part of the sender, and the law is that such an unknown provision is not binding either as a part of L.R.A.1917F.

the contract for the transmission of the messages, or as a regulation of the company."

In *Western U. Tele. Co. v. Uvalde Nat. Bank* (1903) — *Tex. Civ. App.* —, 72 S. W. 232, there was held to be no error in the court's refusal to admit in evidence the stipulations on the back of the message that the telegraph company should not be liable in case of delays arising from unavoidable interruption in the working of its line, and also that the company was made the agent of the sender, without liability, to forward any message over the line of any other company when necessary to reach its destination, the court stating that such stipulations could not, in view of the testimony, constitute any defense to the cause of action. The court then adds: "Besides, it appears that appellee had not signed or agreed to such stipulations, appellant's agent having written the message on the blank where they were stipulated, which appellee never saw, signed, or agreed to." It seems, however, in this case, that the sender of the message did write the message on the blank of a private telegraph company upon which was printed, "Send the following message subject to the rules of Western Union Telegraph Company," the message being transmitted a short distance by the private telegraph company to the Western Union, and by it transmitted to its destination.

In *Western U. Tele. Co. v. Buchanan* (1910) 61 *Tex. Civ. App.* 212, 129 S. W. 850, the telegraph company was held liable for negligence in transmitting a message received over the telephone, but there was no question as to the contract relation existing between the company and the sender of the message.

W. A. E.

MICHIGAN SUPREME COURT.

NETTIE N. CLARK, Admr., etc., of Milton Stocum, Deceased,

v.

DETROIT & MACKINAC RAILWAY COMPANY, Plff. in Err.

(— Mich. —, 163 N. W. 964.)

Evidence — presumption — due care — negligence of defendant.

1. The presumption that one drowned by

Note. — As to duty and liability of owner of boat livery see annotation following this case, post, 860.

As to right of the mother to recover for

the sinking of a boat was in the exercise of due care is not sufficient to support a finding of negligence on the part of the owner of the boat who let it to him.

For other cases, see Evidence, II. h, 2, in Dig. 1-52 N. S.

Livery — duty of one letting rowboats.

2. One letting rowboats at a pleasure resort is not bound to furnish boats that will float and sustain their passengers when capsized.

Parties — right to maintain action for death.

3. A woman divorced from her husband and by statute obliged to support her minor child, to whose earnings she is entitled, may maintain an action to recover for its wrongful death.

For other cases, see Death, II. b, in Dig. 1-52 N. S.

Evidence — condition of other boats.

4. Upon the question of negligence in letting a defective rowboat evidence of the condition of other boats belonging to the lessor and examined after the loss of the one let is not admissible.

For other cases, see Evidence, XI. k, in Dig. 1-52 N. S.

(Kuhn, Ch. J., and Moore and Bird, JJ., dissent.)

(July 30, 1917.)

ERROR to the Circuit Court for Arenac County to review a judgment in plaintiff's favor in an action brought to recover damages for the death of her intestate for which defendant was alleged to be responsible. Reversed.

The facts are stated in the opinion.

Messrs. Henry & Henry and James McNamara for appellant.

Mr. William C. Cook, for appellee:

Testimony as to the condition of other boats then offered to the public was admissible as a circumstance from which the inference might be drawn as to the probable condition of said boat 22,—its weight being for the jury.

Alpern v. Churchill, 53 Mich. 613, 19 N. W. 549; Barnowsky v. Helson, 89 Mich. 523, 15 L.R.A. 33, 50 N. W. 989; La Fernier v. Soo River Lighter & Wrecking Co. 129 Mich. 606, 89 N. W. 353; Peklenk v. Isle Royale Copper Co. 187 Mich. 644, 153 N. W. 1068; Lincoln v. Detroit & M. R. Co. 179 Mich. 189, 51 L.R.A.(N.S.) 710, 146 N. W. 405; Bannigan v. Woodbury, 166

Mich. 496, 132 N. W. 77; Williams v. Lansing, 152 Mich. 169, 115 N. W. 961.

It was defendant's duty to properly inspect and keep its boats in a reasonably safe state of repair.

Howe v. Chicago, K. & S. R. Co. 139 Mich. 638, 103 N. W. 185, 18 Am. Neg. Rep. 145; Logan v. Agricultural Soc. 156 Mich. 537, 121 N. W. 485; Wormsdorf v. Detroit City R. Co. 75 Mich. 472, 13 Am. St. Rep. 453, 42 N. W. 1000.

Where there are no eyewitnesses to an accident, it may be presumed, in the absence of any evidence to the contrary, that the deceased used ordinary care and caution.

Gilbert v. Ann Arbor R. Co. 161 Mich. 73, 125 N. W. 745; Richardson v. Detroit & M. R. Co. 176 Mich. 413, 142 N. W. 832, reaffirmed in 182 Mich. 209, 148 N. W. 397; La Fernier v. Soo River Lighter & Wrecking Co. 129 Mich. 605, 89 N. W. 353.

Deceased had a right to rely upon the representation of defendant's agent, that this boat "22" was large enough for four persons.

Cousineau v. Muskegon Traction & Lighting Co. 145 Mich. 317, 108 N. W. 720, 20 Am. Neg. Rep. 576; Blakeley v. White Star Line, 154 Mich. 635, 19 L.R.A.(N.S.) 772, 129 Am. St. Rep. 496, 118 N. W. 482; The New York, 93 Fed. 495; The Indrapura, 112 C. C. A. 351, 190 Fed. 711.

The matter of divorce does not change the legal rights of the parents.

Yost v. Grand Trunk R. Co. 163 Mich. 564, 31 L.R.A.(N.S.) 519, 128 N. W. 784, Ann. Cas. 1912A, 988; Black v. Michigan C. R. Co. 146 Mich. 573, 109 N. W. 1052.

Ostrander, J., delivered the opinion of the court:

Four young persons, two boys and two girls, were drowned in Saginaw Bay June 17, 1912. They were Milton Stocum, sixteen years old, Ion Lincoln, Nellie Salmon, and Eva Oulette, also minors. They were riding in a rowboat which belonged to and had been hired of the defendant at Linwood Park, a resort owned and operated by defendant, to which in summer it ran daily excursion trains. Those named and others, with their teachers, went to the park on one of defendant's trains for a school picnic. The boys had twice before been out upon the waters of the bay in the boat, the second time with two other girls. Upon the third excursion upon the water they were seen at some distance from shore and called to dinner by one of the teachers, and waved a response to the call. Two others, who were rowing out, met them as they were returning to shore. In some manner, for some reason, they soon there-

the death of an infant, see notes in 31 L.R.A.(N.S.) 519, and L.R.A.1916E, 124.

Many phases of the general question suggested in the fourth syllabus are treated in notes cited in L.R.A. Indexes under the title, "Evidence," subtitles, "Relevancy and materiality," and "Similar acts and facts." L.R.A.1917F.

after disappeared, and were not again seen alive. Their bodies were recovered a few days later. A floating seat board, air tank, and oar were found, which it is claimed were a part of the boat. This suit is brought by the mother and administratrix of the estate of Milton Stocum, who alleges in her declaration that defendant is liable for the injury suffered by the said Nettie N. Clark, mother, and Irwin Stocum, father, of the deceased intestate, on account of his death.

It is alleged in the plaintiff's declaration, after stating the general relations which existed between plaintiff's decedent and others in the same party and the defendant, that plaintiff's decedent, because of his tender years, was unable to judge, in hiring or using a boat for rowing purposes, the dangers arising from the condition and repair of the boat, its carrying capacity, from going upon the water without a skilled oarsman to handle the boat, from the leaky condition of the particular boat, the leaky condition of air bulkheads or tanks attached to the boat, from the rotten condition of the boat and of the strip of wood around the inner side thereof, to which were attached the seats with screw nails, and which held the air tanks in place, from overloading the boat, from going upon the water when a high sea was running, or from a momentary squall of wind. She says, therefore, that it became the duty of defendant to provide a reasonably safe and seaworthy boat; to provide for a prudent and careful inspection of it before renting it; to maintain the ends, sides, and bottom of said boat free from holes and leaks, that the same be water tight; to maintain the strip of wood around the inner side of said boat, to which were attached the prow and stern seats, including the air tanks, free from rot and other defects, thereby making said seats and air tanks secure and fast with screw nails to prevent the same from falling or pulling out in the event the said boat capsized while being rowed upon the water; to maintain the air tanks free from leaks and holes, preventing water entering them, should the boat for any reason ship water or be capsized; to refrain from renting boats to children of immature age without providing competent oarsmen to accompany them; to refrain from allowing a boat to be loaded with more persons than its rated carrying capacity; to refrain from allowing plaintiff's decedent and his companions to go out upon the water in the boat at a time when the wind was off shore and the sea running high; and to have provided a competent beach patrol whilst its boats were in use upon said dangerous water. It is alleged that defendant negli-

gently omitted, or failed to perform, such several duties, and that the boat "without warning wrecked and fell to pieces upon said water, at a distance of about three-quarters of a mile out from shore, throwing said plaintiff's intestate and his said three companions into the water, at the same time causing said prow and stern seats, including the air bulkheads or tanks (being the nonsinkable device used in the construction of said boat) to pull loose and out, owing to the rotten condition of the strip of wood to which the same were attached with screw nails, and drift away and sink, causing said steel boat hull to sink beneath the surface of the water, whereby plaintiff's intestate and his said three companions were drowned in said water."

The personal representative of young Lincoln also instituted a suit against this defendant, which upon a trial was determined in favor of the defendant upon the opening statement of counsel for plaintiff. Upon error, the judgment of the circuit court was reversed and a new trial granted. *Lincoln v. Detroit & M. R. Co.* 179 Mich. 189, 51 L.R.A.(N.S.) 710, 146 N. W. 405. Upon the last trial the Lincoln Case and the Stocum Case were tried practically as one case, and submitted to the same jury. There was a verdict returned for each plaintiff, and a separate judgment entered for each. A reference to the opinion of this court above referred to will disclose that it was concluded that upon the statement of plaintiff's counsel it could not be determined as matter of law that defendant was not, in some of the respects alleged, negligent, and that, upon the same statement, the presumption was that plaintiff's decedent exercised due care,—a presumption sufficient to permit recovery if negligence of defendant was made out.

Plaintiff declares that the persons entitled to the personal estate of the intestate are herself and Irwin Stocum, his father, who "were entitled to the services and earnings of decedent until he arrived at the age of twenty-one years." The testimony is that plaintiff and said Irwin Stocum are divorced, she having remarried; that the last information she had was that Stocum was alive; that Milton never lived with his father, nor contributed to his support, and had not been maintained by his father, and did give all of his earnings to his mother, the plaintiff. Defendant says of this situation that the father was, in law, entitled to the earnings of his son, and is the person entitled to be appointed administrator, and the sole person for whose benefit this suit could be maintained. 3 Comp. Laws, §§ 10,427, 10,428. The statute provision is that the amount recovered in such an action

shall be distributed to the persons and in the proportions provided by law in relation to the distribution of personal property left by persons lying intestate, and the limit of recovery is the amount of the pecuniary injury suffered by the persons entitled to the award. Over objection, testimony was admitted to the effect that Milton Stocum was very bright, with a very kind, cheerful, and sweet disposition—obedient.

There were thirteen boats at the resort, numbered. The boats numbered 21, 22, 23, 24, 25, and 26 were bought at one time,—in August, 1905,—and 21, 22, and 23 were of the same size. Made by the Michigan Steel Boat Company of Detroit, Michigan, they were known as “B 14-foot square stern special livery boats.” They were 14 feet long, 44 inches wide amidships, and 14 inches deep amidships; height of bow 22 inches, and of stern 24 inches. The shells, or hulls, are described in the catalogue introduced in evidence in the following language: “In considering the construction of our steel hulls, bear in mind that they are not stamped or pressed; they are made of heavily galvanized steel (made to order for us), cut in regular pattern strips, lock seamed and welded together by pneumatic hammers. The seams are rolled the same as steel is rolled from the billet, thus retaining its original rigidity and strength. The seams in each of our boats are placed 4 inches apart and have four thicknesses of steel, which run from bow to stern, acting as a steel girder encircling the hull and making it practically impossible for same to leak or come apart. They are not bulky and heavy, as are the smooth skin boats, which have no force to resist the waves, or any other object with which they might come in contact, and they are not built with the exposed rivets, as are the above-mentioned boats, so that it is only a question of time when the water and weather will wear the rivets away, and then the boat will rust, and leaks will spring when the boat receives a hard knock. It stands to reason that boats built with the concealed rivets and the lock seam can resist the waves and can stand knocks and jars, as the seams protect the hull and, the rivets being concealed, the water and weather cannot wear them away. All bolts, rivets, and screws in our boats are heavily galvanized. Every Michigan steel boat is equipped, bow and stern, with air-tight compartments, which pass a rigid hot-water test, and are incased and not visible; therefore nothing can injure these air tanks, and each boat carries sufficient of these to insure the boat being absolutely nonsinkable,—in fact, any Michigan steel boat filled with water will support its occupants.”

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The sterns of the boats were wood; there were three wooden seats, as well as a small wooden deck at the bow; and, running longitudinally, strips of wood, some of them used as flooring. The rear seat, like the other seats, was lower than the gunwale of the boat, and lower than the stern, which showed several inches above the seat. The boat in question was numbered 22. Plaintiff claims it was not seaworthy; defendant, that no proper testimony tends to prove it was unseaworthy, and that much testimony relating to the condition of other boats was improperly admitted to prove the condition of the particular boat.

Stated very briefly, the testimony relating to the condition of boat No. 22 was that of George Walmsley, who testified that on the Sunday previous to the loss of the boat he rented a boat from the defendant, went out with it upon the bay, and while in the boat he marked certain initials upon the back seat. The seat board found after the catastrophe in question here, and claimed to have been in boat No. 22, was produced, and the witness identified the initials found upon it. He was out, he said, from a half to three-quarters of an hour. Asked to describe the condition the boat was in, he testified that it was in an unfit condition, was pulled apart “in back, and there was rusty screws pulled out of the wood. The rear seat was loose, and in right back of the rear seat is where the boat pulled apart,—spread apart at the top.” What he describes is that, by sitting in the center of the boat, facing the stern, there could be and was seen above the seat a space between the side of the boat and the board which made the back to the seat on the left-hand side. He testified that when the man who was with him sat in the back seat, it did not leak. When the witness sat there, “I was heavier than what he was, it was down lower in the water, and the water splashing up came in, not a great quantity, but there was water coming in.” He further testified that he “took hold of the side and kind of pulled in on it, and it seemed to be pretty weak;” and that the sides of the boat went and came when the oars were used. He went ashore, he said, because he thought the boat was unsafe; that there was a small amount of water got into the boat; that the water was not very rough, and was not smooth. He further testified that by sitting in the center seat he could see that the boat at the stern was spread apart under the rear seat; he should judge it was opened up,—“I could see about an inch,” so that if the water raised to within an inch of the seat, it could pour right in. On cross-examination he admitted, what is obvious, that he could

not sit in the center of the boat and see the condition of the stern of the boat below the rear seat, and did not see it, and that because he saw the corners above the rear seat somewhat open he assumed that the opening extended below the seat. The boat had been used some by defendant's agent for two days before June 17th.

The two boys who used this boat on the afternoon in question, and who lost their lives, were twice out upon the bay with the boat before making the trip when the boat was lost. After they had once been out with the boat, they invited two girls, one of them a teacher, to go upon the water with them, and they did go. Lincoln sat in the middle seat and rowed the boat. Milton Stocum sat upon the bow seat, and the two girls occupied the back seat. They went out a half a mile, "more or less," and were out about forty minutes. The teacher, Miss Tebeau, testified that the boys rocked the boat and splashed water upon them, rocking the boat until it dipped water from both sides; Milton Stocum standing up in the front part of the boat and rocking it. She was frightened, and asked the boys to take her back to shore, and that shortly after they did return to shore, when these two young ladies got out, and the boys then took in two other girls, who were with them when all were lost. There was no water in the boat when these young ladies first named went out with the boys, but before they returned there was enough water in the boat so that their feet and dresses were wet. The other young lady testified that, while she did not try to upset the boat, she, with the boys, rocked it as hard as she could, getting enough water in the boat to get wet, rocking it so that it dipped water. On cross-examination by plaintiff's attorney, this testimony was given:

Q. And the boat stayed on top of the water all the way until you got in?

A. The boat stayed on top of the water.

Q. You gave it a good thorough test, then?

A. Yes, sir.

It has been stated that in the course of the trial a seat, assumed to be the back seat of boat No. 22, and an air tank, assumed to be the air tank which was under that seat, were produced. Testimony was introduced tending to prove that there were screws in the back seat which had evidently been at some time imbedded in wood and had been pulled out or loosened, there being particles of wood in the threads of the screws. One or more witnesses expressed the opinion that the condition of the particles of wood adhering to the screws indi-

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cated that the wood was rotten. Nothing had been done to boat No. 22 by way of overhauling or repairing for the season of 1912. Witnesses were permitted to testify that after the loss of the boat No. 22 they examined other boats belonging to defendant, used in its boat livery, and to describe to the jury the condition of those boats. Of this testimony the learned trial judge in his charge to the jury said: "Now, lest we forget it, I want to say right here there was some evidence, introduced and submitted to you, tending to show what the condition of some of the other boats was that lay on the beach, a day or two after this unfortunate drowning occurred. I admitted that evidence with considerable reluctance, because you can see how dangerous it is for you to judge of the condition that one boat was in by the condition of another boat that happened to lay there. You all, as prudent and careful men, will see that that is dangerous, if you should say that because a boat was found on the beach in a certain condition, this boat that was lost was in a similar condition. But there was testimony in the case tending to show that these boats probably were all in the same condition. And so I said to counsel that evidence should go in, and I should deem it my duty to caution you as to the weight you should give it. I am not saying that you should not give it weight; that is for you to say. But I am cautioning you that it is of a different class of evidence, so far as the weight is concerned, than that of someone who had made an examination of this particular boat. And in determining the weight you will give that, you must consider the testimony offered by the defendant as to the condition of these boats, and as to when this boat and other boats like it were repaired, and so on."

The testimony as to the condition of other boats did not tend to prove that the other boats were in one condition, but rather that they were in various conditions as to repair.

Defendant asked the circuit judge to direct a verdict for the defendant, because there was no evidence of defendant's negligence. Various other requests to charge were proposed on the part of the defendant and appellant, some of which were refused; the principal complaint being that the court refused to instruct the jury that it was not incumbent upon defendant's agent to see that the rented boat was not overloaded, and, akin to this, the request to charge that, if the boat was overloaded, that was the fault of the young men who invited others to use it with them. Error is assigned upon the refusal of the court to

instruct that the occasion of the death of plaintiff's intestate was conjectural or speculative. Error is assigned, also, upon the charge as given, and upon the refusal to set aside the verdict and grant a new trial. It is well enough, in considering this case, to say in the beginning that the case is not made complex by alleging that defendant owed to plaintiff's decedent and his companions a multitude of duties, setting them out and alleging that each of them was breached. The case is really a very simple one, if confined to the facts which the evidence tends to prove. The allegation of a multitude of duties, and the breach of them, in an attempt to meet any and every possible contingency which the evidence might present, and almost all conceivable causes for the tragedy, is not condemned, and shows the careful pleader; but the apparent necessity for it, the uncertainty of the cause so indicated, betrays the idea, which will force itself upon anyone who reads the record, that not inferences from known facts, and not presumptions, but pure conjecture alone, connects the alleged negligence of defendant and the death of these young people.

In the case developed there is no rough water, although the water was not perfectly smooth, no particular wind, no overloaded boat, no hiring of the boat to immature and tender youths. Lincoln was a high school graduate; Stocum was sixteen years old. There is no testimony tending to prove that either was not perfectly at home in a rowboat; none that Lincoln, who so far as is known did the rowing, was not a capable oarsman. The ability of the boys, or of Lincoln, to navigate the boat, is demonstrated, as well as the fact that the boat did, and could, safely carry four persons. There is no testimony which tends to prove that the hull of the boat was infirm, or that the boat leaked. The seats may have been loosened, or imperfectly fastened; but in use the boat was proven to be safe with the load which it carried. As a witness for defendant, the owner of a similar boat, testified, and as is matter of common knowledge, it makes no difference about the wood "as long as the shell on the outside of the boat is whole, as long as there is a seat there to sit down on, and no leakage alongside of the shell, it is perfectly safe." Except the stern and, possibly, a small part at the bow, and a keel, the wood in the boat was all inside of the hull, or shell, and might all of it have been removed without affecting the safety of the hull.

Lincoln and Stocum, after rocking the boat so as to give it some load of water, L.R.A.1917F.

were not themselves affected with any evidence of infirmity in the boat. At no time were they seen or heard to give signals as if in trouble. Quite the contrary. The witness who found the hull to be flexible, yielding when he pulled upon its sides and when the oars were used, discovered only what most persons know who ever have used a metal boat, or one of any material built with laps, whether the laps ran longitudinally or latitudinally of the boat. This boat, after the demonstration described, disappeared with its passengers. By all rules of probability, by all natural inferences from known facts, it ought to have come safely to shore, if properly managed, and if the passengers behaved as circumstances required. It is assumed that the boat sank. But what made it sink? What room is there for inference based upon established facts? Clearly, there is none; established facts supporting conclusively no theory of destruction, but supporting best the inference, based upon demonstration, that the cause was not the infirmity of the boat. What may be conjectured? Plainly, several things. Some of the occupants of the boat attempted to exchange seats? The young men indulged in another rocking of the boat? Experience has proven these to be, each of them, common enough causes for capsizing boats and death by drowning. What right—logically—has one to say rather that the boat collapsed, supported as it was by water, or that it suddenly sprung a leak?

It is said that, no one having seen the boat when it disappeared, it is presumed that those on board her were using due care. Indulging this presumption, it is argued, we are left to find the cause of the catastrophe in the condition of the boat. This is not necessarily so, and if it was so, the known condition of the boat refutes such a conclusion. It is, however, more reasonable to say that we have certain phenomena to consider, and if we include among them the said presumption, it is still from all of them that we must determine, if we can, why the boat and its occupants disappeared. The presumption is not conclusive, and does not operate to bar consideration of all known facts. In the absence of evidence pointing to one cause rather than another, so long as the cause was plainly conjectural, it was proper to prove, as accounting, as well as anything which had been proven, for the disappearance of the boat, that the young men who were in it had indulged, a few moments earlier, in a pastime which was calculated to capsize the boat. In any event, the presumption referred to is indulged only to

relieve a plaintiff from an inference of negligence, and not to supply evidence of the negligence of a defendant. It remains that, when last seen, and for a long time before, the boat was performing its duty, was demonstrably a sound and safe craft.

It may be said, and there is in the brief suggestion to the effect, that if the boat from any cause capsized it would then be of importance to have seats and air tanks safely and soundly attached to the boat. This may be admitted, since a hull which would not sink when filled with water might also support for some time, in certain conditions, persons thrown into the water. This consideration should not divert attention from the true question to be determined. Once it is assumed that the boat was capsized, did not by its own infirmity cause the hazard and crisis following its capsizing, plaintiff has failed in this action. Negligence and consequent liability of defendant is not, and cannot be upon this record, predicated of failure to furnish a boat which when capsized would float supporting in the water, four clinging passengers. Perfectly secure and seaworthy rowboats will sink when filled with water. A frightened person in the water will drag down and be lost with wreckage which would have supported a fearless person. Defendant did not undertake to furnish a nonsinkable boat, if, indeed, there is any, except self-bailing boats, which can be called nonsinkable.

The facts established at the trial are not the facts stated by counsel and considered by the court in *Lincoln v. Detroit & M. R. Co.* 179 Mich. 189, 51 L.R.A.(N.S.) 710, 146 N. W. 405, although it is probable that the trial court believed the decision in that case required this one to go to a jury. In my opinion, the court should have

instructed the jury that negligence of defendant was not made out, and that, if in any respect found to have been negligent, it was purely conjectural whether the loss of the boat and of the lives was the result of its negligence.

The conclusion I have stated disposes of the case, and requires a reversal of the judgment. It is not deemed proper to refuse plaintiff a new trial, although upon this record there can be no recovery. If a new trial is had, some questions arising upon this record are likely to again arise. As to the right of the mother of decedent to maintain the action, it is settled in *Yost v. Grand Trunk R. Co.* 163 Mich. 564, 31 L.R.A.(N.S.) 519, 128 N. W. 784, Ann. Cas. 1912A, 988. The testimony of the condition of other boats, examined after the loss of the particular boat, ought to have been excluded, its admission being error. A reason for its exclusion has been given. A further one is that little, if any, of it tended to prove the boats to be in a leaky or unseaworthy condition. Error was not avoided by a caution as to the weight to be given to the evidence. The weight of evidence is for the jury.

Stone, Steere, and Brooke, JJ., concur with **Ostrander, J.**

Kuhn, Ch. J., dissenting:

The negligence of the defendant became a question of fact for the jury upon the record here presented, for the reasons stated in my opinion in the case of *Lincoln v. Detroit & M. R. Co.* — Mich. —, 163 N. W. 969, handed down herewith. The judgment should be affirmed.

Moore and Bird, JJ., concur with **Kuhn, Ch. J.**

1 The opinion referred to is as follows:

This case is before us the second time, a verdict directed for the defendant having been reversed on the former appeal and a new trial granted. *Lincoln v. Detroit & M. R. Co.* 179 Mich. 189, 51 L.R.A.(N.S.) 710, 146 N. W. 405. A second trial was had, which resulted in a disagreement of the jury. On the third trial, by agreement of the parties, the facts as stated in the former opinion of this court, as written by Mr. Justice Stone, were accepted as proven and read into the record. They are as follows: "The defendant owns and operates a railway system running from Pinconning, Bay county, to Linwood, in said county, and elsewhere. It owns in connection with its railway system a pleasure resort, located along its right of way at its station of Linwood, which resort is contiguous to the waters of Saginaw bay. In connection with

this summer resort it operates and controls certain amusement features; to wit, stands, bathing, boating, and other devices for the amusement of the public, for profit. On June 17, 1912, plaintiff's intestate, a boy sixteen years of age, was a passenger for hire on excursion rates from his home in Pinconning to said summer resort to attend a school children's picnic thereat. Upon his arrival at said resort he secured a ticket from the defendant's ticket agent for the use of one of the defendant's rowboats. He presented the ticket to another agent of defendant, who had the boats in charge, and obtained a certain boat, known as 'D. & M. Ry. Co. No. 22,' from the boat tender, which was a 14-foot steel rowboat. The boat was obtained by plaintiff's decedent for the purpose of taking a row on the waters of the bay in company with three companions about the same age. Soon after

leaving the landing the children were lost sight of, and it was afterwards discovered that they had been drowned. The action was brought under what is termed the Death Act to recover the pecuniary damages which it is claimed the father and mother have sustained by the death."

Deceased had just graduated from high school, and a few days previous to the accident oral arrangements had been made whereby he was to go into the business, with his grandfather, of raising and selling cattle. It was a partnership arrangement, and each was to get half of the profits of the business. There were no eyewitnesses of the accident, but when the young people were last seen in the boat the waters of the bay were calm. Miss Grace McKay, one of the teachers, went to the edge of the beach to call them in to dinner, and while she could not distinguish their faces, she knew who were in the boat. When she called, they waved back to her, and she assumed that as they were turning they were coming into shore, and paid no further attention to them.

As to the condition of boat No. 22 on the day of the accident and a few days before the witnesses disagree. Two witnesses for the plaintiff testified that the boat was unsafe and out of repair. After the accident, a seat board, oars, and air tank were found. Witness Walmsley said that he had the boat out the Sunday prior to the 17th, and found it to be in an unsafe condition, and by sitting in the center seat it was pulled apart in back, and there were rusty screws pulled out of the wood, and he was able to identify the seat board which was found, because he had marked upon it his initials at the time he had it out. Other witnesses testified that they had observed no defect in the boat on the day before and on the day of the accident, when they were out in it. Captain Cotter, who found the parts of the boat, testified with reference to the parts that he found as follows: "I put them away, and took care of them for some time. At the time the seat board was found, I think there were some screw nails in it on the champered edge. I examined them a little; it looked as though they were pulled out of it,—soft wood of some kind. The wood that still stuck to the screws, would naturally be soft, or they would not pull out. It looked as though it was rotten. I do not know how many screws were in the seat board at that time. I think there was one or two, or more. I searched Saginaw bay for two weeks for the Detroit & Mackinac Company, to find the boat; I never found a thing that belonged to the boat proper; I found stuff that came out of the boat, the clothing, and things like that. It is so long ago I have forgotten what the clothing consisted of; there were coats, neckties, and collars, and handkerchiefs. I turned the stuff over to somebody. I did not know any of the people. I think I am quite familiar with the construction of boats. I use wooden boats in my livery L.R.A.1917F.

business. After I got possession of the air tank, my attention was called to the fact of there being a little water in it, because I could shake it around, and I was wondering how the water got in there."

By agreement between the parties and the consent of the court, this suit and the suit of Nettie M. Clark, administratrix of the estate of Milton Stocum, deceased, were tried together before the same jury, and the proofs, except upon the question of damages, were substantially the same. The jury rendered separate verdicts, and a special question submitted to them,—“Did either Lon Lincoln or Milton Stocum, or either of the girls with them at the time of the accident, do any act by way of rocking the boat whereby the boat capsized?”—was answered, “No.” At the close of plaintiff’s proofs counsel for the defendant moved for a directed verdict on the ground that the plaintiff had not proved any damages, and that there was no evidence of negligence on the part of the defendant. This motion was denied, and at the close of the trial a verdict was rendered for the plaintiff in the sum of \$1,500 as damages. Thereupon a motion for a new trial was made, which was also denied by the court.

The first assignment of error relates to the admission of certain testimony concerning the disposition and characteristics of the plaintiff’s intestate. Witnesses were allowed to testify that as to his disposition he was kindly and pleasant, and that he was obedient to his teachers and parents, and that his habits were good, and that he gave the valedictory to the graduates of his class. We see no harm in the admission of this class of testimony, as it had a proper bearing on the question of damages, under the authority of *Black v. Michigan C. R. Co.* 146 Mich. 568, 109 N. W. 1052.

Other assignments of error relate to the admission of testimony as to the condition of other boats belonging to the defendant and used by it at the resort, as a result of an examination made within a few days after the accident. It is contended that there is no evidence showing the comparative age of the thirteen boats which comprised the boat livery operated by the defendant company, nor the comparative use or condition of these boats. Mr. Kurzrock, defendant’s agent, who had charge of the boats for the season of 1912 and for several seasons before that time, testified in a general way that they all appeared to be in the same condition as to repair and general appearance, and that they all looked as if they were of the same age. The admission of this testimony was one of the grounds urged to the trial court in the motion for the new trial, and the learned judge, in denying this motion, said in part, with reference to this question: “On the decision of this question of fact rests largely the rights of the parties. It is unknown and in dispute. It is incapable of proof by the production of the boat. Must we not, then, resort to inference? And if another fact

can be established by proof which may be used as a basis of inference to the fact in dispute, may we not use it for that purpose? If we concede it to be a fact that these other boats were in a state of repair similar to the one lost, can it be said that evidence of their condition would not raise a fair inference as to whether or not this boat was safe and seaworthy when hired to these boys? If so, then the fact that such similar condition was in dispute renders such evidence only less strong in degree. It will be noticed that the jury were expressly cautioned as to the weight to be given to this testimony. In the charge they were instructed: 'Now, lest I forget it, I want to say right here, there was some evidence introduced and submitted to you tending to show what the condition of some of the other boats was that lay on the beach a day or two after this unfortunate drowning occurred. I admitted that evidence with considerable reluctance, because you can see how dangerous it is for you to judge the condition that one boat was in by the condition of another boat that happened to lie there. You all, as prudent, careful men, will see that that is dangerous, if you should say that, because a boat was found on the beach in a certain condition, this boat that was lost was in a similar condition. But there was testimony in the case tending to show that these boats probably were all in the same condition, and so I said to counsel that evidence should go in, and I should deem it my duty to caution you as to the weight you should give it. I am not saying that you should not give it any weight; that is for you to say. But I am cautioning you that it is of a different class of evidence, so far as the weight is concerned, from that of someone who had made an examination of this particular boat. And in determining the weight you will give it you must consider the testimony offered by the defendant as to the condition of these boats, and as to when this boat and other boats like it were repaired, and so on.' While it is true, as claimed by counsel for defendant, that these boats may have been subjected to more and longer service since purchase or repair, yet it was defendant's duty to have all its boats in a reasonable state of repair, and the fact that those examined by the witness were not, if true, might, it seems to me, under the evidence, be considered by the jury, along with the other testimony submitted, in determining the probable condition of the boat on the day in question. Another thought that presents itself to me is this: The defendant relied on the presumption that, in the absence of evidence to the contrary, this boat was safe and seaworthy. If the boat cannot be produced, was not plaintiff entitled to show the condition of other boats used in the same place and for the same purpose, as tending to rebut such a presumption? There is considerable doubt in our minds whether the proof as to the comparative condition of these boats was sufficient to

warrant the introduction of this testimony; but, in view of the fact that the judge in his charge cautioned the jury as to this evidence, and that there was other competent evidence before the jury as to the unseaworthy condition of the boat in question, we are not prepared to say that the admission of this testimony should be held, under the circumstances of this case, to be prejudicial error.

It is also contended that, because of the understanding which had been arrived at between Ion Lincoln, his grandfather, and his father, relative to the future earnings of Ion, that he had been emancipated, and that therefore there was no question of damages for the jury. The agreement had not been reduced to writing, and was to be concluded after the day's outing, at which time Ion was drowned. The details had not been closed, and, in fact, no definite understanding or agreement had been arrived at. Whether or not he was emancipated was left to the jury as a question of fact by the judge in the charge, which in our opinion properly submitted the question. See *Reeder v. Moore*, 95 Mich. 597, 55 N. W. 436; *Freeman v. Shaw*, 173 Mich. 262, 139 N. W. 66; *Black v. Michigan C. R. Co.* supra; *Yost v. Grand Trunk R. Co.* 163 Mich. 564, 81 L.R.A.(N.S.) 519, 128 N. W. 784, Ann. Cas. 1912A, 988.

It is also urged that a verdict should have been directed for the defendant, because the proofs did not establish negligence on its part, and because the evidence shows that the cause of the accident is entirely conjectural. This question was considered by this court in its previous decision (*Lincoln v. Detroit & M. R. Co.* 179 Mich. 189, 51 L.R.A.(N.S.) 710, 146 N. W. 405), and we there said: "In the absence of such testimony [that of a living witness to the drowning], the presumption is that he and his companions were in the exercise of due care, which presumption is sufficient to permit recovery if negligence is shown on the part of the defendant [citing cases]. We cannot say as matter of law that the defendant was not guilty of any of the alleged negligence." It is plaintiff's claim, and there was evidence in support of it, when the young men applied to the defendant's agent for the use of a boat, that they asked for a boat large enough for four, and that he gave them the boat in question, although witnesses testified that the boat was not suitable for four persons, but was rather a two-passenger boat. We are of the opinion that there was sufficient evidence of the negligence on the part of the defendant to warrant the submission of the case to the jury.

We are also satisfied that the charge of the court fairly presented to the jury the claims of the respective parties, and that the instructions of law with reference to them were proper. We have been unable to find any prejudicial error in this record, and therefore would affirm the judgment.

Annotation—Duty and liability of owner of boat livery.

Generally as to liability of one maintaining place of amusement to which the public is invited, for safety of persons visiting the premises, see annotations to *Williams v. Mineral City Park Asso.* 1 L.R.A.(N.S.) 427; *Higgins v. Franklin County Agri. Soc.* 3 L.R.A.(N.S.) 1132; *Blakeley v. White Star Line*, 19 L.R.A.(N.S.) 772; *Greene v. Seattle Athletic Club*, 32 L.R.A.(N.S.) 713; *Wodnik v. Luna Park Amusement Co.* 42 L.R.A.(N.S.) 1070, and *Johnson v. Hot Springs Land & Improv. Co.* L.R.A.1915F, 689.

As to duty of bailor and bailee respectively as to repair of subject of bailment for use, see annotation to *Williamson v. Phillipoff*, 52 L.R.A.(N.S.) 412.

The court in *CLARK v. DETROIT & M. R. Co.* ante, 851, does not discuss at length the question of the duty owed by the defendant company in carrying on its boat livery, but decides that upon the evidence in that case, which left the cause of the drowning wholly conjectural, a verdict should have been directed for the defendant. It was, however, held that the defendant was not bound to furnish an unsinkable boat, or one that would when capsized support the former occupants. The same conclusion was reached in *Lincoln v. Detroit & M. R. Co.* (1917) — Mich. —, 163 N. W. 969, although the court was divided in both of these cases. On a former appeal of the *Lincoln Case* (1914) 179 Mich. 189, 51

L.R.A.(N.S.) 710, 146 N. W. 405, it was held that, in the absence of testimony of living witnesses as to the drowning, the presumption was that the deceased and his companions were in the exercise of due care, and that this presumption was sufficient to permit a recovery if negligence on the part of the defendant was shown; and it was there held that it could not be said as a matter of law from the evidence that the defendant was not guilty of negligence.

The proprietor of a boat livery undoubtedly owes those dealing with him the duty of exercising ordinary care to furnish boats that are reasonably safe for the purpose for which they are to be used. The situation is closely analogous to that of a keeper of a livery stable. The question of the duty of a livery-stable keeper as to the character of the horse furnished is covered in the note to *Conn v. Hunsberger*, 25 L.R.A.(N.S.) 372, where it is stated that a liveryman, though not an insurer of the suitability of the horse let, is nevertheless bound to exercise the care of a reasonably prudent man to furnish a safe horse, and one that is fit and suitable for the purpose of the hiring.

In view of the want of other authority upon the question under annotation the reported case is of especial interest and value.

J. T. W.

MINNESOTA SUPREME COURT.

GEORGE J. LEWIS, Appt.,
v.

FREIDA FRANCE, Respnt.

(— Minn. —, 163 N. W. 656.)

Husband and wife — wife's liability for rent.

Under Gen. Stat. 1913, § 7146, making the husband and wife "jointly and severally liable for all necessary household articles and supplies furnished to and used by the family," the wife is not liable for the rent of the family home leased to her husband. For other cases, see *Husband and Wife*, I. b, in Dig. 1-52 N. S.

(June 29, 1917.)

Headnote by DIBELL, C.,

Note. — As to what constitute family expenses or necessities within statute rendering wife or her property liable therefor, see annotation following this case, post, 861.
L.R.A.1917F.

APPEAL by plaintiff from a judgment of the District Court for Lincoln County in defendant's favor in an action brought to recover house rent. Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. Louis P. Johnson and Todd. Fosnes, Sterling, & Nelson, for appellant:

House rent is necessary household articles and supplies for which the wife is liable within the meaning of § 7146 of the General Statutes of the state of Minnesota.

Skillman v. Wilson, 146 Iowa, 601, 140 Am. St. Rep. 295, 125 N. W. 343; *Vest v. Kramer*, — Iowa, —, 44 L.R.A.(N.S.) 1032, 114 N. W. 886; *Dodd v. St. John*, 22 Or. 250, 15 L.R.A. 717, 29 Pac. 618; *McCartney & Sons Co. v. Carter*, 129 Iowa, 20, 3 L.R.A.(N.S.) 145, 105 N. W. 339; *Frost v. Parker*, 65 Iowa, 180, 21 N. W. 507; *Phillips v. Kirby*, 73 Iowa, 278, 34 N. W. 855; *Voss v. Myott*, 141 Iowa, 506, 21 L.R.A.(N.S.)

277, 120 N. W. 58; *Illingworth v. Burley*, 33 Ill. App. 394; *May v. Smith*, 48 Ala. 483.

Mr. J. N. Johnson, for respondent:

The term "necessary household articles and supplies" refers to things of necessity within the dwelling,—in the house,—and its distinguishing features are that the phrase "household articles" refers to furniture and things of a permanent nature, and the word "supplies" refers to food and such things as are consumed in the use thereof.

The necessity of the expenditure is immaterial; the only criterion being whether it was incurred for, on account of, and to be used in, the family.

Smedley v. Felt, 41 Iowa, 588; *Hudson v. King Bros.* 23 Ill. App. 118.

Dibell, C., filed the following opinion:

Action to recover for the rent of a house. There was judgment for the defendant and the plaintiff appeals.

The house was rented by the plaintiff to the husband of the defendant, and was occupied as the family home. The defendant was not a party to the renting and is not liable on a contract of her making. If liable at all she is liable because of Gen. Stat. 1913, § 7146, which provides: "No married woman shall be liable for any debts of her husband, nor shall any married man be liable for any torts, debts, or contracts of his wife, committed or entered into either before or during coverture, except for necessities furnished to the wife after marriage, where he would be liable at common law. But where husband and wife are living together, they shall be jointly and severally liable for all necessary household articles and supplies furnished to and used by the family."

The specific inquiry is whether the legislature, in using the words "necessary household articles and supplies furnished to and used by the family," meant to impose upon the wife liability for the rent of a house leased to her husband and occupied by them as their home.

In Illinois, under a statute making the

wife liable for "the expenses of the family and of the education of the children," it is held that the wife is liable for the rent of the family home leased to her husband. *Illingworth v. Burley*, 33 Ill. App. 394; *Harrison v. Hill*, 37 Ill. App. 30; *Houghteling v. Walker* (C. C.) 100 Fed. 253; *Walker v. Houghteling*, 46 C. C. A. 512, 107 Fed. 619. The same result is reached in Colorado under a statute using the same language. *Straight v. McKay*, 15 Colo. App. 60, 60 Pac. 1106. In Iowa, under a like statute, the question was suggested but left undecided. *Schurz v. McMenamy*, 82 Iowa, 432, 48 N. W. 806. Under a statute of Missouri making the wife's separate property liable "for any debt or liability of her husband created for necessities for the wife or family" it was held that the wife was liable for the rent of the home. *Dougherty v. McClelland*, 192 Mo. App. 498, 182 S. W. 766. No cases involving claims for rent from jurisdictions other than these are cited. Illustrations of the wife's statutory liability in various situations are easily accessible, but do not call for discussion here. See 21 Cyc. 1231; 13 R. C. L. p. 1194, §§ 225-228; 26 Century Dig. Husband and Wife, § 130; 10 Decen. Dig. Husband and Wife, § 151; notes in 33 L.R.A. (N.S.) 426; 21 L.R.A. (N.S.) 277; and 15 L.R.A. 717.

There is a clear distinction between the words "necessary household articles and supplies furnished to and used by the family" and the words "expenses of the family." The latter are of more extensive application. The resemblance between our statute and that of Missouri is very considerable and we do not fail to observe it. It is our judgment that the legislature, in providing that the wife should be liable for "necessary household articles and supplies furnished to and used in the family," did not intend to make her liable for the rent of the home leased to her husband. If it had intended such result it would have used words of more extensive meaning. The defendant is not liable and the judgment is right.

Judgment affirmed.

Annotation—What constitute family expenses or necessities within statute, rendering wife or her property liable therefor.

This subject was treated in the notes to *Dodd v. St. John*, 15 L.R.A. 717, *Vose v. Myott*, 21 L.R.A. (N.S.) 277, and *Houck v. La Junta Hardware Co.* 32 L.R.A. (N.S.) 939, and the cases therein cited are not set out again in this note; but references to the places in the earlier L.R.A. 1917F.

notes where they may be found are inserted under the proper headings.

As to liability of married woman for necessities purchased by her, see notes to *Clark v. Tenneson*, 33 L.R.A. (N.S.) 426, and *Bell v. Rosignol*, L.R.A. 1915D, 1184.

As to liability of estate of married woman for funeral expenses, see notes in 6 L.R.A.(N.S.) 917; 37 L.R.A.(N.S.) 754; and 52 L.R.A.(N.S.) 1154.

Sustenance.

The sustenance of the family is a necessary. *Gray v. Marshall* (1890) 12 Ky. L. Rep. 103, 13 S. W. 913.

And the expense thereof is a "family expense." *Chamberlain v. Townsend* (1914) 72 Or. 207, 142 Pac. 782, 143 Pac. 924.

See also under this head, *Vose v. Myott* (1909) 141 Iowa, 506, 21 L.R.A.(N.S.) 277, 120 N. W. 58 (cited in note in 21 L.R.A.(N.S.) 277).

Wearing apparel.

Clothing for the wife and her husband is a necessary. *Gray v. Marshall* (Ky.) supra.

Dress goods, shoes, stockings, and undergarments are included in the term "family expenses." *Meier & F. Co. v. Mitlehner* (1915) 75 Or. 331, 146 Pac. 796.

And a lace waist was held to be a "family expense" in *Ross v. Johnson* (1906) 125 Ill. App. 65.

For other cases see *Neasham v. McNair* (1897) 103 Iowa, 695, 38 L.R.A. 847, 64 Am. St. Rep. 202, 72 N. W. 773; *Hyman v. Harding* (1896) 162 Ill. 357, 44 N. E. 754; *Hudson v. Sholem* (1896) 65 Ill. App. 61; and *Gilman v. Matthews* (1904) 20 Colo. App. 170, 77 Pac. 366,—(cited in note in 21 L.R.A.(N.S.) 277); and *Hudson v. King Bros.* (1887) 23 Ill. App. 118, and *Marquardt v. Flaughner* (1882) 60 Iowa, 148, 14 N. W. 214,—(cited in note in 15 L.R.A. 719).

Rent.

The rent of a house occupied by the family is a debt for a necessary. *Bergen v. Forsythe* (1856) 17 B. Mon. (Ky.) 551.

And comes within the term "family expense." *Harrison v. Hill* (1890) 37 Ill. App. 30.

And in *Barnett v. Marks* (1897) 71 Ill. App. 673, a wife was held liable therefor, although a portion of the dwelling was sublet by her husband.

But in *Schurz v. McMenamy* (1891) 82 Iowa, 432, 48 N. W. 806, the rent for a time during which the dwelling was not actually occupied by the family was held not to be a family expense.

In *Wright v. Merriwether* (1874) 51 Ala. 183, it was held that a wife's statutory separate estate was liable for the rent of a house, necessary for the family and suitable to its condition, under a L.R.A.1917F.

statute making such estate liable for articles of comfort and support of the household, suitable to the degree and condition in life of the family, and for which the husband would be responsible at common law.

But the wife was held not liable for the rent of the family home in *LEWIS v. FRANCE*, ante, 860, under a statute making her liable for all necessary household articles and supplies furnished to and used by the family.

A debt for the rent of a hotel leased by a wife to make money, and not as a means of support for herself and family, is not a debt for a necessary. *Crow v. Shacklett* (1897) 18 Ky. L. Rep. 908, 38 S. W. 692.

In *Dougherty v. McClelland* (1915) 192 Mo. App. 498, 182 S. W. 766, it was held that a demand for damages for breach of a lease of an apartment as a family residence, measured by the rental for the unexpired part of the term after the vacation of the apartment by the tenant, was not upon a debt of her husband for necessities for the family, within the meaning of a statute making a wife's separate property liable therefor. There is, however, a dictum in this case to the effect that a debt of the husband for the rent would be one for necessities within the statute.

See also *Houghteling v. Walker* (1900) 100 Fed. 253, and *Straight v. McKay* (1900) 15 Colo. App. 60, 60 Pac. 1106,—(cited in note in 21 L.R.A.(N.S.) 277); and *Illingworth v. Burley* (1889) 33 Ill. App. 394 (cited in note in 15 L.R.A. 718), and *Hecht v. Gitch* (1891) 82 Iowa, 596, 48 N. W. 988 (cited in note in 15 L.R.A. 719).

Purchase or improvement of real property.

The purchase of a house is a necessary, if the purchase is reasonable, considering the wife's estate and rank in society. *McKee v. Hays* (1887) 9 Ky. L. Rep. 288.

But the purchase by a husband and wife of a city home for \$7,000, in order to educate their children, is not a necessary. *Herr v. Lane* (1899) 20 Ky. L. Rep. 1950, 50 S. W. 545.

Nor is the construction of an addition to a house upon the wife's land a necessary, where it is not essential to the comfort or shelter of the family. *Pell v. Cole* (1859) 2 Met. (Ky.) 252.

Interest on a mortgage upon a house owned by the wife is not a debt for a necessary, where she does not owe the mortgage debt, and the house is not occu-

pied by the family, and she has other property sufficient for their support. *Watts v. Turner* (1901) 23 Ky. L. Rep. 279, 62 S. W. 878.

A smokehouse, carriage house, and fencing are not necessities. *Lee v. Campbell* (1878) 61 Ala. 12.

Nor are tin gutters, pipes, etc., used in the erection of a house on the wife's land. *Ridley v. Hereford* (1880) 66 Ala. 261.

Household articles.

A sewing machine is a necessary. *Singer Mfg. Co. v. Harned* (1881) 79 Ky. 279.

Sheets, pillow slips, and table linen are included in the term "family expenses." *Meier & F. Co. v. Mittlehner* (1915) 75 Or. 331, 146 Pac. 796.

For other decisions under this heading, see *Houck v. La Junta Hardware Co.* (1911) 50 Colo. 228, 114 Pac. 645 (cited in note in 32 L.R.A.(N.S.) 940); *McDaniels v. McClure* (1909) 142 Iowa, 370, 120 N. W. 1031, and *Hudson v. Sholem* (1896) 65 Ill. App. 61,—(cited in note in 21 L.R.A.(N.S.) 277); and *Smedley v. Felt* (1875) 41 Iowa, 588; *Frost v. Parker* (1884) 65 Iowa, 180, 21 N. W. 507; and *Finn v. Rose* (1861) 12 Iowa, 565,—(cited in note in 15 L.R.A. 719).

Liquors and tobacco.

Pipes, tobacco, and cigars are not necessities. *Bradley v. Murray* (1880) 66 Ala. 269.

And in *O'Neil v. Cardina* (1912) 159 Iowa, 78, 44 L.R.A.(N.S.) 1175, 140 N. W. 196, a wife was held not liable for beer as for a family expense.

Services and needs of domestics.

See *Campbell v. Heuer* (1908) 139 Ill. App. 631 (cited in note in 32 L.R.A.(N.S.) 940); *Perkins v. Morgan* (1906) 36 Colo. 360, 85 Pac. 640 (cited in note in 21 L.R.A.(N.S.) 277); and *Von Platen v. Krueger* (1882) 11 Ill. App. 627 (cited in note in 15 L.R.A. 719); and *Pippin v. Jones* (1875) 52 Ala. 161 (cited in note in 15 L.R.A. 721).

Medical services.

Medical services furnished to minor children are necessities within such a statute. *Evans v. Noonan* (1912) 20 Cal. App. 288, 128 Pac. 794.

When a husband is actually a part of the family, living with it as such, and is temporarily helpless and incapacitated by illness, his maintenance and support, including necessary medical attendance, come fairly within the rule of the statute which makes the wife liable, as surety, for necessities furnished the family. L.R.A.1917F.

Leake v. Lucas (1902) 65 Neb. 359, 62 L.R.A. 190, 91 N. W. 374, 93 N. W. 1019.

See also *Skillman v. Wilson* (1910) 146 Iowa, 601, 125 N. W. 343 (cited in note in 32 L.R.A.(N.S.) 940); *Blackhawk County v. Scott* (1900) 111 Iowa, 190, 82 N. W. 492; *Featherstone v. Chapin* (1901) 93 Ill. App. 223; *Russell v. Graumann* (1905) 40 Wash. 667, 82 Pac. 998, 5 Ann. Cas. 830; *Murdy v. Skyles* (1897) 101 Iowa, 549, 63 Am. St. Rep. 411, 70 N. W. 714; and *Mueller v. Kuhn* (1895) 59 Ill. App. 353,—(cited in note in 21 L.R.A.(N.S.) 277); and *Schrader v. Hoover* (1890) 80 Iowa, 243, 45 N. W. 734; *Walcott v. Hoffman* (1889) 30 Ill. App. 77; *Younkin v. Essick* (1889) 29 Ill. App. 575; *Cole v. Bentley* (1887) 26 Ill. App. 260; *Glaubensklee v. Low* (1888) 29 Ill. App. 408; *Blachley v. Laba* (1884) 63 Iowa, 22, 50 Am. Rep. 724, 18 N. W. 658,—(cited in note in 15 L.R.A. 719); *Delaware County v. McDonald* (1877) 46 Iowa, 170 (cited in note in 15 L.R.A. 720); and *May v. Smith* (1872) 48 Ala. 485 (cited in note in 15 L.R.A. 721).

Attorney's services.

The services of an attorney employed by a wife to obtain a decree for the sale of her land should be considered as necessities, where the conversion of the land into money is necessary to her comfort. *McKee v. Sypert* (1886) 6 Ky. L. Rep. 519.

See, in addition to the foregoing case, *Fitzgerald v. McCarty* (1881) 55 Iowa, 702, 8 N. W. 646 (cited in note in 15 L.R.A. 719).

Business.

The term "family expenses" was held in *Chamberlain v. Townsend* (1914) 72 Or. 207, 142 Pac. 782, to mean the expenses for the immediate sustenance and comfort of the family, and not to contemplate expenses incurred in the management of a business conducted by either spouse, or by both of them, and therefore not to include the cost of pruning their orchard and performing other tasks about their farm. This case was affirmed upon a rehearing upon another point in (1914) 72 Or. 214, 143 Pac. 924.

Supplies used in keeping a hotel as a business of profit, and not as a mere means of support, are not necessities. *Harris v. Dale* (1869) 5 Bush (Ky.) 61.

A wife's separate estate is not liable for supplies procured by her to keep a boarding house, under a statute subjecting such estate to liability for expenses incurred "for the support of the family," although such supplies were used in sup-

porting the table at which she and her family ate with the boarders. *Clark v. Hay* (1887) 98 N. C. 421, 4 S. E. 190.

But in *Allen v. Long* (1897) 19 Ky. L. Rep. 488, 41 S. W. 17, a mule bought to prepare land to plant and cultivate a crop for the support of the family was held a necessary.

See also *Martin Bros v. Vertres* (1906) 130 Iowa, 175, 106 N. W. 516, and *Staver Carriage Co. v. Beaudry* (1907) 138 Ill. App. 147, —(cited in note in 21 L.R.A. (N.S.) 277); and *McCormick v. Muth* (1878) 49 Iowa, 536; *Russell v. Long* (1879) 52 Iowa, 250, 3 N. W. 75, and

Dunn v. Pickard Bros. (1887) 24 Ill. App. 423,—(cited in note in 15 L.R.A. 719).

Miscellaneous.

Newspapers are not a necessary. *Bradley v. Murray* (1880) 66 Ala. 269.

Nor is the purchase of a substitute for the husband in the Federal Army, drafted during the Civil War, a necessary. *Ford v. Teal* (1870) 7 Bush (Ky.) 156.

See also other cases cited in notes in 15 L.R.A. 717; 21 L.R.A. (N.S.) 277; and 32 L.R.A. (N.S.) 940. G. V. I.

NEW YORK COURT OF APPEALS.

RICHARD S. GILPIN, Appt.,

v.

COLUMBIA NATIONAL BANK, Resp't.

(220 N. Y. 406, 115 N. E. 982.)

Bank — collecting agent — liability to owner.

The holder of a note delivered to a bank for collection cannot maintain an action against its correspondent to which it sends the note for that purpose, for its negligence in making presentation and protest, although the correspondent promises him that it will attend to the matter in response to his personal request.

For other cases, see Banks, IV. b, 1, in Dig. 1-52 N. S.

(Chase, Cardozo, and Pound, JJ., dissent.)

(April 6, 1917.)

A PPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Fourth Department, reversing a judgment of a Trial Term for Erie County in his favor in an action brought to recover damages for the alleged negligence of defendant in failing to make due and sufficient presentation of a promissory note for payment. Affirmed.

The facts sufficiently appear in the opinion.

Messrs. Aaron Fybush and Frank O. Ferguson, for appellant:

The bank's negligence is a plain conclusion of law from the undisputed facts.

National Revere Bank v. National Bank,

Note. — The rights and remedies of an owner of commercial paper who has delivered the paper to a bank for collection, against under- and sub-agents employed by the bank in making the collection, are discussed in subdivision XXI. p. 663, of the note to *Brown v. People's Bank*, 52 L.R.A. (N.S.) 608. L.R.A.1917F.

172 N. Y. 102, 64 N. E. 799; *First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320, 33 Am. Rep. 618, s. c. 89 N. Y. 412; *Montgomery County Bank v. Albany City Bank*, 7 N. Y. 460; *Ayrault v. Pacific Bank*, 47 N. Y. 570, 7 Am. Rep. 489; *Kirkham v. Bank of America*, 165 N. Y. 132, 80 Am. St. Rep. 714, 68 N. E. 753; *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276, 28 L. ed. 722, 5 Sup. Ct. Rep. 141; *Mechanics Bank v. Merchants Bank*, 6 Met. 13; *Negotiable Instruments Law*, §§ 116, 130, 132, 133; *Dan. Neg. Inst.* § 654; *Story, Promissory Notes*, § 243; *Freeman v. Boynton*, 7 Mass. 483; *Woodbridge v. Brigham*, 13 Mass. 556; *Parker v. Stroud*, 98 N. Y. 379, 50 Am. Rep. 685.

Messrs. Kenefick, Cooke, Mitchell, & Bass, for respondent:

There is absolutely no evidence of the facts upon which the plaintiff's claim of negligence is based.

Ward v. Sire, 52 App. Div. 443, 65 N. Y. Supp. 101; *Hilliker v. Rueger*, 219 N. Y. 334, 114 N. E. 391.

The defendant was the agent of the Sovereign Bank of Canada as a matter of law on the undisputed facts, and therefore owed no duty to the plaintiff in the premises.

1 *Morse, Banks & Bkg.* 4th ed. § 272; 1 *Dan. Neg. Inst.* 5th ed. § 344; *Magee, Banks & Bkg.* 2d ed. § 285; *Banks and Banking*, 7 C. J. 606, 607, 624; *Banks*, 3 R. C. L. § 252; *McBride v. Illinois Nat. Bank*, 138 App. Div. 339, 121 N. Y. Supp. 1041, 163 App. Div. 417, 148 N. Y. Supp. 654; *Brown v. People's Bank*, 59 Fla. 163, 52 L.R.A. (N.S.) 608, 52 So. 719; *Izzo v. Ludington*, 79 App. Div. 272, 79 N. Y. Supp. 744, affirmed in 178 N. Y. 621, 70 N. E. 1100; *Held v. Caldwell-Easton Co.* 97 App. Div. 301, 89 N. Y. Supp. 954; *Inman v. F. N. Burt Co.* 124 App. Div. 73, 108 N. Y. Supp. 210; *Anderson v. New York & H. R. Co.* 132 App. Div. 183, 116 N. Y. Supp. 954; *Hugel v. Habel*, 132 App. Div. 327, 117 N. Y. Supp. 78.

The trial court erred in refusing to permit the defendant to prove what it did and all that it did in respect to presenting the note for payment and demanding payment of the maker.

Ogden, Neg. Inst. p. 144; Bank of Utica v. Smith, 18 Johns. 230; Bowen v. Newell, 5 Sandf. 326; Minor v. Mechanics Bank, 1 Pet. 80, 7 L. ed. 61; Mills v. Bank of United States, 11 Wheat. 431, 6 L. ed. 512; Mechanics Bank v. Merchants Bank, 6 Met. 13; Sahlien v. Bank of Lenoire, 90 Tenn. 222, 16 S. W. 373; Kilgore v. Bulkley, 14 Conn. 362; Bank of Columbia v. Fitzhugh, 1 Harr. & G. 239; Renner v. Bank of Columbia, 9 Wheat. 587, 6 L. ed. 167; Albert v. State Bank, 78 Misc. 56, 138 N. Y. Supp. 237; Customs and Usages, 12 Cyc. 1059; 1 Morse, Banks & Bkg. 4th ed. §§ 9, 221, 223; Banks and Banking, 7 C. J. 612; 1 Dan. Neg. Inst. 5th ed. §§ 658-662; Shaw v. Jacobs, 21 L.R.A. 440, note.

Collin, J., delivered the opinion of the court:

The action is to recover the damages caused by the alleged negligence of the defendant in that it did not duly present to the maker for payment a promissory note, bearing indorsements, owned by the plaintiff. See *Gilpin v. Savage*, 201 N. Y. 167, 34 L.R.A. (N.S.) 417, 94 N. E. 656, Ann. Cas. 1912A, 861. While several grounds are cogently urged by the respondent as sustaining the reversal of the judgment of the trial term by the appellate division, we have decided to declare a single ground for our affirmance of the reversal.

The defendant is a national bank at Buffalo, New York. In July, 1907, it received by mail from a bank of Toronto, Canada, the promissory note which became due July 30, 1907, and was payable at number 507 Prospect avenue, of the city of Buffalo. The plaintiff had delivered the note, indorsed by him payable to the order of the Canadian Bank, for collection to that bank, which in pursuance of such purpose indorsed it payable to the order of and forwarded it for collection to the defendant. In the forenoon of July 30, 1907, the plaintiff presented at the defendant, to its cashier, a letter of the Canadian bank introducing the plaintiff, and said to him that he owned the note and wanted it duly presented and protested in case it was not paid, and the indorser held, as he had found out that the maker was not financially good. The cashier replied that "he would attend to it and do it." The actual presentment of the note by the defendant was not sufficient to charge the indorser. *Gilpin v. Savage*, supra. On July 30, 1907, the protest fees on the note were charged by the defendant to the Canadian bank, which

subsequently paid them. On that day the defendant wrote the Canadian bank as follows:

"Your B. C. R. [bill sent for collection] 899, \$3,000.00, due to-day, in which Mr. Gilpin is interested, is being protested for nonpayment. Mr. Gilpin has instructed us that, if the item is not paid to-morrow, that we are to turn same over to our attorney for immediate suit. As we observe that you have indorsed the item without recourse, we will instruct our attorney to communicate direct to Mr. Gilpin any pertinent matters which may arise. If the foregoing meets with your approval, please confirm, and, if not, we would request that you wire us promptly to-morrow so as to intercept the action we propose to take."

By a reply dated July 31st the Canadian bank stated it would be satisfactory to it for the defendant "to communicate direct to Mr. Gilpin concerning this note." The defendant forthwith delivered the note to its attorney with instructions to bring suit upon it in the name of the plaintiff here, and the Canadian bank confirmed such action. At the close of the evidence the trial court refused to direct a verdict for the defendant and gave the defendant an exception. The jury were charged that, if the defendant, in whatever it did on July 30th about presenting the note, was the representative of the Canadian bank, it was not liable to the plaintiff. The defendant excepted to the submission to the jury as a question whether or not the defendant was the agent of the plaintiff. The exceptions mentioned were well founded.

The defendant is not liable to the plaintiff unless the conversation between them on July 30th created between them the relation of principal and agent. Originally, beyond question the Canadian bank was the agent of the plaintiff and the defendant was the agent of the Canadian bank, engaged by it, on its own account, to aid it in the collection of the note. Therein the Canadian bank alone would become liable to the plaintiff on account of the negligence of itself or the defendant, its agent, in presenting for payment and protesting the note. *Ayrault v. Pacific Bank*, 47 N. Y. 570, 7 Am. Rep. 489; *Corn Exch. Bank v. Farmers' Nat. Bank*, 118 N. Y. 443, 447, 7 L.R.A. 559, 23 N. E. 923; *Montgomery County Bank v. Albany City Bank*, 7 N. Y. 459; *St. Nicholas Bank v. State Nat. Bank*, 128 N. Y. 26, 13 L.R.A. 241, 27 N. E. 849; *National Revere Bank v. National Bank*, 172 N. Y. 102, 107, 64 N. E. 799; *Kirkham v. Bank of America*, 165 N. Y. 132, 80 Am. St. Rep. 714, 58 N. E. 753; *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276, 28 L. ed. 722, 5 Sup. Ct. Rep. 141. Unless the

conversation between the plaintiff and defendant was adequate to create between them the relation of principal and agent in the matter of the collection of the note, the question as to the existence of the relation was not for the jury. The conversation was not thus adequate. It did not contain, expressly or through implication, any authority to the defendant from the plaintiff or any proposition and acceptance between them. The defendant had from the Canadian bank complete and valid authority and obligation, which the plaintiff neither took from nor added to, to do all the plaintiff desired and asked. The conversation did not to any extent affect or alter the situation or relation of the parties. The plaintiff recognized the agency of the defendant for the Canadian bank, created by the delivery and receipt between them of the note for collection, and the obligation of the defendant springing from the agency, and the continuance of the relation and the duty. The defendant simply acknowledged the agency and declared it would fulfil the obligation. When the plaintiff left the de-

fendant the relations, the situations, and the duties of the parties, were precisely as they were before plaintiff and defendant met. We cannot realize in or from the conversation any effect upon the liabilities or obligations between the Canadian bank and the plaintiff, between the defendant and the Canadian bank, or upon the absence of any privity or relation between the defendant and the plaintiff. The natural and reasonable effect of the conversation was the plaintiff received a certain and authentic assurance that the defendant received and had from the Canadian bank the note for collection, and would without question attend to its presentation and protest.

The order should be affirmed, with costs in all courts, and judgment absolute directed against appellant on the stipulation.

Hiscock, Ch. J., and McLaughlin and Andrews, JJ., concur.

Chase, Cardozo, and Pound, JJ., dissent.

CALIFORNIA SUPREME COURT. (In Banc.)

RE ESTATE OF NANCY J. EMART, Deceased.

(— Cal. —, 165 Pac. 707.)

Will — execution — presence of witnesses.

The witnesses must be present at the same time properly to attest a will under a statute providing that the subscription to every will must be made in the presence of the attesting witnesses or be acknowledged by the testator to them.

For other cases, see Wills, I. b, in Dig. 1-52 N. S.

* (Angellotti, Ch. J., and Sloss, J., dissent.)

(June 1, 1917.)

A PPEAL by contestants from an order of the Superior Court for Monterey County refusing to revoke the probate of the will of Nancy J. Emart, deceased. Reversed.

The facts are stated in the opinion.

Mr. Arthur L. Levinsky, for appellants:

Under the laws of the state of California a document purporting to be a will, which is signed by one witness at one time, and by another witness at another time, and not

signed by said witnesses in the presence of each other, is not a valid will.

Cartery's Estate, 56 Cal. 470; Toomes's Estate, 54 Cal. 509, 35 Am. Rep. 83; Re McCabe, 68 Cal. 519, 9 Pac. 554; Re Comassi, 107 Cal. 1, 28 L.R.A. 414, 40 Pac. 15; Walker's Estate, 110 Cal. 387, 30 L.R.A. 460, 52 Am. St. Rep. 104, 42 Pac. 815; Re Silva, 169 Cal. 116, 145 Pac. 1015; Re Cullberg, 169 Cal. 365, 146 Pac. 888; Hull v. Hull, 117 Iowa, 738, 89 N. W. 979.

Messrs. Hudson, Martin, & Jorgensen, for respondents:

Where there is no provision expressly requiring that the witnesses sign in the presence of each other, the witnesses may attest separately, and such a formality is required only in cases where the statute requires it by clear, unambiguous, and explicit language.

Moore v. Spier, 80 Ala. 129; Rogers v. Diamond, 13 Ark. 474; Payne v. Payne, 54 Ark. 415, 16 S. W. 1; Gaylor's Appeal, 43 Conn. 82; Re Porter, 9 Mackey, 493; Webb v. Fleming, 30 Ga. 808, 76 Am. Dec. 675; Flinn v. Owen, 58 Ill. 111; Hull v. Hull, 117 Iowa, 738, 89 N. W. 979; Chase v. Kittredge, 11 Allen, 49, 87 Am. Dec. 687; Grimm v. Tittman, 113 Mo. 56, 20 S. W. 664; Cravens v. Faulconer, 28 Mo. 19; Welch v. Adams, 63 N. H. 344, 56 Am. Rep. 521, 1 Atl. 1; Grubbs v. Marshall, 11 Ky. L. Rep. 870, 13 S. W. 447; Re Clark, — N. J. —, 52 Atl. 222; Re Diefenthaler, 39 Misc. 765, 80 N. Y. Supp. 1121; Watson

Note.—As to necessity that attesting witnesses to a will be present at the same time, see annotation following this case, post, 872.
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v. Hinson, 162 N. C. 72, 77 S. E. 1089, Ann. Cas. 1915A, 870; Simmons v. Leonard, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280; Green v. Crain, 12 Gratt. 252; Smith's Will, 52 Wis. 543, 36 Am. Rep. 426, note, 8 N. W. 616, 9 N. W. 665; Hoyasadt v. Kingman, 22 N. Y. 372; Cook v. Parsons, Prec. in Ch. 184, 24 Eng. Reprint, 89, 2 Vern. 429, 23 Eng. Reprint, 875; Jones v. Lake, cited in 2 Atk. 176, 26 Eng. Reprint, 510; Re Burns, 88 App. Div. 611, 84 N. Y. Supp. 554; Johnson v. Johnson, 106 Ind. 475, 55 Am. Rep. 762, 7 N. E. 201; Jauncey v. Thorne, 2 Barb. Ch. 40, 45 Am. Dec. 424; Hogan v. Grosvenor, 10 Met. 54, 43 Am. Dec. 414; Ela v. Edwards, 16 Gray, 91; Re Dougherty, 168 Mich. 281, 38 L.R.A. (N.S.) 164, 134 N. W. 24, Ann. Cas. 1913B, 1300; Fleishman's Estate, 1 Cal. Prob. Dec. Anno. (Cal.) 18; Dewey v. Dewey, 1 Met. 349, 35 Am. Dec. 367; Eelbeck v. Granberry, 3 N. C. (2 Hayw.) 232, 2 Am. Dec. 624; 29 Am. & Eng. Enc. Law, 223, 224; Lane's Appeal, 57 Conn. 182, 4 L.R.A. 45, 14 Am. St. Rep. 94, 17 Atl. 926; Walker's Estate, 110 Cal. 387, 30 L.R.A. 460, 52 Am. St. Rep. 104, 42 Pac. 815; Willis v. Mott, 36 N. Y. 486; Re Carey, 14 Misc. 486, 36 N. Y. Supp. 817; Barry v. Brown, 2 Dem. 309; Lyman v. Phillips, 3 Dem. 459.

Henshaw, J., delivered the opinion of the court:

Contest after probate was instituted against the will of Nancy J. Emart, deceased. The court refused to revoke the probate of the will, and this appeal followed. The facts stipulated were "that one of the attesting witnesses to said will attested said will in the forenoon of the day upon which the same was executed, and that the other attesting witness to said will attested the same upon the afternoon of said day, and that the said attesting witnesses did not sign their names or attest the said will in the presence of each other."

Further, that "the two attesting witnesses signed their names as witnesses at the end of the will at testatrix' request and in her presence."

Testatrix subscribed her will in the presence of one of the witnesses, and acknowledged the subscription to the other attesting witness, declaring that the instrument was her will.

The single question presented is whether, under this evidence, there was a legal compliance with our law touching the acknowledgment and publication by the testatrix of her will. That law is found in § 1276 of the Civil Code, and is as follows: "Every will . . . must be executed and attested as follows: . . . 2. The subscription L.R.A.1917F.

must be made in the presence of the attesting witnesses, or be acknowledged by the testator to them to have been made by him or by his authority."

The case is one of first impression, and the question by no means free from doubt. Properly to resolve it requires a brief consideration of this branch of the great Statute of Frauds. The 5th section of the Statute of Frauds (29 Car. II. chap. 3) required that all devises and bequests of lands or tenements should be in writing and signed by the party so devising the same, and should be attested and subscribed in the presence of the devisor and of three or four credible witnesses. The construction put upon this statute was that it did not in terms require that the attestation and subscription should be made at the same time and in the presence of the assembled witnesses, and such continued to be the rule of English decision until the statute itself was changed. This construction, thus given at a very early day, was adhered to with great uniformity, though the judges frequently voiced their protests against the construction as being unsound and as opening the door to the very frauds which the statute designed to prevent; it being said that in the requirement of acknowledgment before three or four witnesses it was manifestly designed that the acknowledgment should be of a quasi public character, and that there was less likelihood that fraud could be perpetrated under such solemn circumstances, and more likelihood of an accurate memory, than under the rule which permitted each witness to state that the testator at varying times and under varying circumstances had acknowledged to him and to him alone that the instrument was his will. In addition to this is the consideration that the execution of such a will is not fully complete until it is witnessed or attested. If the will is acknowledged to the one witness on one day and to the second witness months or even years thereafter, both witnesses will not be witnessing or attesting under the same state of facts; that is to say, neither witness could declare that at the time the other witnessed it the testator was apparently free from duress, menace, or undue influence, and was of sound and disposing mind.

Thus, in New York, where by virtue of its language the judges held their statute to be an enactment of the English law with the interpretation which had been put upon it, the learned Chancellor Walworth says in Jauncey v. Thorne, 2 Barb. Ch. 40, 45 Am. Dec. 424: "It was also settled in England, at a very early date, that a will of real estate, attested by three witnesses who, at several times, subscribed their names in the

presence of testator and at his request, was valid, although all the witnesses were never present at the same time. . . . It is at least doubtful whether the decisions upon either of these questions were in conformity with the intention of the framers of the provisions in the statute of Charles relative to the execution of wills of real estate. But they are in conformity with the letter of the statute, which only required that the will should be signed by the testator, but not that such signing should take place in the presence of the attesting witnesses. Nor did the statute, in terms, require the witnesses to attest the will at the same time, and in the presence of each other, but only that the will should be attested by three witnesses who should subscribe the same in the presence of the testator."

By force of these considerations the time came when the English Parliament believed this statute to require remodeling, and it was remodeled in the Wills Act. 1 Vict. chap. 26. That act prescribed: "That no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence—and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

This became the law of England in 1837, and, with certain modifications not necessary here to consider, has continued to be the expression of the English law. In 1860, in *Hoysradt v. Kingman*, 22 N. Y. 372, the court of appeals of New York was called upon to determine whether or not a will had been duly executed under the provisions of the statutes of New York under the circumstances here presented; that is to say, the subscription and the publication or acknowledgment had been made before the witnesses at different times. Great pressure of argument was brought to bear upon the court, seeking to have it adopt a construction in consonance with the Wills Act, *supra*. The court of appeals said: "Our statute, passed a few years earlier, does not contain the language which so plainly settles the question in the English act. It declares that every will shall be executed and attested in the following manner: '1. It shall be subscribed by the testator at the end of the will; 2. Such subscription shall be made by the testator in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made

to each of the attesting witnesses; 3. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his last will and testament; 4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will, at the request of the testator.' 2 Rev. Stat. 63, § 40." (Some of these words have been placed in italics for convenient comparison with the language of our own statute.)

The court held that the language of the New York statute was in manifest harmony with the decisions governing the same matter under the earlier statute of Charles. It is perhaps unnecessary to add that in most of the older states the Statute of Frauds of Charles II. was enacted as the state's own statute of frauds, either in precise terms or in all material substance. Therefore the decisions of those states, sound in themselves, will throw but little light upon this consideration, where the conclusion must be reached by an interpretation of the peculiar language of our own statute. But, to illustrate, the presence of the subscribing witnesses at the same time, in the presence of the testator, is not required in Tennessee under a law which simply declares that "the instrument must be subscribed by two witnesses, neither of whom are interested" (*Simmons v. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280); nor in Connecticut, where the law requires that "the will shall be in writing, subscribed by testator and attested by three witnesses, all of them subscribing in his presence" (Gaylor's Appeal, 43 Conn. 82); nor in Indiana, where the law requires that "the will shall be 'attested and subscribed in the presence of testator and two or more competent witnesses'" (*Johnson v. Johnson*, 106 Ind. 475, 55 Am. Rep. 762, 7 N. E. 201); nor in Wisconsin where the statute law is identical with that of Indiana (*Smith's Will*, 52 Wis. 543, 36 Am. Rep. 426, note, 8 N. W. 616, 9 N. W. 665); nor in Illinois, where the law requires that the will be "subscribed in his (testator's) presence and at his request by at least two witnesses" (*Flinn v. Owen*, 58 Ill. 111); nor in Georgia, where the requirement is that the will be "attested and subscribed in the presence of the testator by three or more competent witnesses" (*Webb v. Fleming*, 30 Ga. 808, 76 Am. Dec. 675). We need not multiply these instances. Enough have been given to show, as has been said, that they can afford us little of value in the present difficulty, and illustrate merely that the legislatures of these states and their courts, in following the statutes, have in substance adopted the language of the Statute of Frauds of

Charles II., and the interpretation which the English courts put upon that statute. In this connection perhaps it is proper to refer to one additional case, that of *Green v. Crain*, decided in Virginia in 1855 (12 Gratt. 252). The language of the Virginia statute taken from the Victorian Wills Act required a signing by the testator and that "the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses present at the same time." The facts were that the testator signed and acknowledged the instrument in the presence of one of the attesting witnesses, and subsequently acknowledged the instrument in the presence of the other attesting witness, the first attesting witness being also present. The case in its facts differs from the present case in that there both the witnesses were present at the time the acknowledgment was made to the second witness; while here the two witnesses were never at the same time in the presence of the testator for the purpose of receiving his acknowledgment. The court of Virginia reasoned that the requirement means "that the relation of 'presence' shall exist between the testator and the witnesses and does not require that the relation of 'presence' should exist between the witnesses themselves," and the court repudiates the decisions of the English courts holding the contrary construction of the Wills Act of Victoria. Of this case it need only be said that its reasoning is far from convincing. In conclusion upon this general discussion it will suffice to point out that the legislatures of some, even of the older, states, have in their wisdom adopted the requirements of the Victorian Wills Act (*Ludlow v. Ludlow*, 36 N. J. Eq. 597; *Roberts v. Welch*, 46 Vt. 164; *Re Claffin*, 75 Vt. 19, 58 L.R.A. 261, 52 Atl. 1053); while in Connecticut its legislature enacted in 1875 a statute of wills in all essentials like the Victorian act, and subsequently, in 1885, modified its law to read as above quoted (*Lane's Appeal*, 57 Conn. 182, 4 L.R.A. 45, 14 Am. St. Rep. 94, 17 Atl. 926).

With this brief review we may come to the history of our own Wills Law. It first appears upon the books in the Statutes of 1850, p. 177. It is there declared (§ 3) that "no will . . . shall be valid, unless it be in writing, and signed by the testator . . . and attested by two or more competent witnesses subscribing their names to the will, in the presence of the testator."

Manifestly this language from the statute of 1850 is susceptible of and would be given the construction placed upon the Statute of Frauds of Charles II. In 1870 commissioners were appointed by authority of L.R.A.1917F.

law to draft a complete system of Codes for this state. The work of the original commission, before the Codes were adopted, was subjected to revision and review by two other Code commissions, and as a result of their labors this significant fact appears: The first Code commissioners submitted as their statute of frauds touching the execution of wills a section which they numbered Civil Code, § 1276, and which section was in the identical language of the New York provision above quoted. More than that, the learned commissioners themselves recognized and expressed their indebtedness to the proposed New York Code, upon which they made heavy drafts. These codifiers announced that § 1276 had been taken from § 550 of the proposed New York Civil Code. But our Civil Code first prepared by Commissioners Charles Lindley, John C. Burch, and Creed Haymond was not adopted, as has been said, until it had been repeatedly revised by other men learned in the law, and amongst these men two who sat upon this bench, Honorable Stephen J. Field and Honorable Jackson Temple. Section 1276 of the Civil Code, as enacted in its present form, is the result of their review and their modification of the proposed § 1276. The proposed § 1276 was substantially a re-enactment of the Statute of Frauds of Charles II. If the Code revisionists had desired that the Statute of Frauds of Charles II. should be declared to be our law, no doubt can be entertained but that they would have accepted § 1276 as originally proposed by the first commissioners. At this time (1871 to 1874) the Wills Act of Victoria was and for years had been in existence. These learned jurists well knew it, and it is not easy to avoid the conclusion that when they refused to accept § 1276 in its proposed form, and modified it to its present form, they did so in the belief that the Victorian act was the wiser statute, and therefore the one which this state should adopt. The legislature, concurring in their views, enacted the law in its present form. We have much internal evidence in the language of the statute itself that this view is correct. To illustrate: The phraseology of subsection 1 of § 1276, to the effect that the will "must be subscribed at the end thereof by the testator himself," is language taken bodily from the Victorian act, and not found in the statute of Charles II.

From the language of our statute and this review of its history, we regard the conclusion as unescapable that our law requires the subscription or the acknowledgment to be before the two witnesses present at the same time. And while, as has been said, there is no direct adjudication in this state upon the question, every utterance of this

court is in confirmation of this view. Thus, in *Toomes's Estate*, 54 Cal. 509, 35 Am. Rep. 83, objection was made to the will that it was not duly executed under the provisions of § 1276 of the Civil Code, upon the ground, amongst others, that the subscription was not made in the presence of the attesting witnesses. This court, reviewing the evidence, declared: "Here we have the fact that the testatrix made her mark to the instrument, the declaration that it was her will and testament, made in the presence and hearing of the witnesses, and the fact that the witnesses subscribed the same at her request in her presence, and in the presence of each other. . . . We think this was sufficient."

In *Cartery's Estate*, 56 Cal. 470, amongst the interrogatories submitted to the jury was one: "Whether the subscribing witnesses signed the proposed will in the presence of the deceased and of each other and at his request."

The jury's answer being in the affirmative, the trial court upheld the execution of the will as in accordance with law, and this court declared that this and like interrogatories covered all the issues raised by the contestant. In *Montana*, whose statute is identical with ours, it is declared, quoting from the syllabus of *Re Noyes*, 40 Mont. 178, 105 Pac. 1013: "The statutory formalities of execution, such as the place of the testator's signature, or the fact that he signed or made acknowledgment in the presence of witnesses, or made publication, or that the witnesses properly signed in his presence, and in the presence of each other and at his request, stand as of equal importance, and must be observed."

The answer to respondent's argument that courts should give a liberal construction to the statutory requirements for the due execution of a will is found in *Walker's Estate*, 110 Cal. 390, 30 L.R.A. 460, 52 Am. St. Rep. 104, 42 Pac. 815, and in *Re Seaman*, 146 Cal. 455, 106 Am. St. Rep. 53, 80 Pac. 700, 2 Ann. Cas. 726, and it is sufficient to rest the response upon the discussion of the matter found in those cases.

For the foregoing reasons, the judgment refusing to revoke probate of the will is reversed.

We concur: **Shaw, J.; Lorigan, J.; Melvin, J.**

Sloss, J., dissenting:

I dissent. When the legislature of this state enacted § 1276 of the Civil Code, it was not entering upon a new field of legislation. Statutes governing the making and attestation of wills had long existed in England L.R.A.1917F.

and America, and these statutes had frequently been before the courts for interpretation. The enactments of the American states are based upon one or the other or both of the English acts referred to in the majority opinion, with such modifications as were deemed proper in the respective jurisdictions. As is stated in that opinion, it was the settled construction, under the Statute of Frauds (29 Car. II. chap. 3, § 5), that the witnesses were not required to be present together at the signing or acknowledgment by the testator, or to attest in the presence of each other. *Jauncey v. Thorne*, 2 Barb. Ch. 40, 45 Am. Dec. 424; *Sullivan v. Sullivan*, Ir. L. R. 3 Eq. 299; *Westbeech v. Kennedy*, 1 Ves. & B. 362, 35 Eng. Reprint, 141; *Ellis v. Smith*, 1 Ves. Jr. 11, 30 Eng. Reprint, 205. With the law thus established, there was enacted in 1837 the Wills Act (1 Vict. chap. 26), which provides: "That no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time,—and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

The words "present at the same time" left no room for doubt that the witnesses must be jointly present when the testator makes or acknowledges his signature. One of the obvious purposes of the later statute was to change the old law, which, as I have just said, permitted the testator to acknowledge his signature to the different witnesses at different times. But the concluding clause, relating to the attestation by the witnesses, does not contain the words "at the same time." It merely prescribes that the witnesses shall attest and subscribe in the presence of the testator. Accordingly, even under the Wills Act, the requirement of joint presence of the witnesses was not carried beyond the time of the testator's signing or acknowledging. The prevailing opinion of English courts and text-writers has been that it is not necessary that the witnesses should attest and sign at the same time, or that both should be present during the attestation. The will having been signed or acknowledged in the presence of both, each might attest and sign during the absence of the other. The contrary view, expressed obiter by Lord Brougham in *Casement v. Fulton*, 5 Moore P. C. C. 130, 13 Eng. Reprint, 439, has not been followed. There have been

several decisions that the witnesses need not sign in the presence of each other (Faulds v. Jackson, 6 Notes of Cases Supp. 1; Webb's Case, 1 Deane & S. Eccl. Rep. 1; Cooper v. Bockett, 3 Curt. Eccl. Rep. 648; Sullivan v. Sullivan, Ir. L. R. 3 Eq. 299), and the same construction of the statute has been approved by eminent law writers (1 Williams, Exrs. 93; 6 Sug. Real Prop. St. 342; 1 Jarman, Wills, *85). The Virginia court, in giving the same effect to a statute like the Wills Act (Green v. Crain, 12 Gratt. 252), did not, as the majority opinion says, "repudiate the decisions of the English courts holding the contrary construction." To the contrary, it was in accord with the English courts.

It appears, therefore, that under both English statutes the provision that an act shall be done by two or more witnesses in the presence of the testator does not require that the witnesses do the act at the same time, or in the presence of each other. It is enough if each does the act and if the testator be present on each occasion. The same construction should, on like grounds, apply to a provision, like that of § 1276 of the Civil Code, that the testator perform some act, or make some declaration, "in the presence of" or "to" a given number of witnesses. The necessity for the joint presence of the witnesses during any part of the testamentary act exists only when the statute contains direct and explicit language to that effect, as the Wills Act does when it declares that the signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time.

The American statutes governing the making of wills have uniformly been interpreted in accordance with these views. The legislation in the several states has varied greatly, some of the statutes being modeled on the Statute of Frauds, others following the Wills Act, while some (like our own) embody certain features of each of the English acts, or make additional provisions, like that of declaration that the paper is a will. Where the statute simply provides that a will must be in writing and attested by two or more witnesses subscribing their names thereto in the presence of the testator, or that the will shall be signed or acknowledged in the presence of two witnesses, who shall subscribe the will in the presence of the testator, it has everywhere been held that the witnesses need not be together during the act of signing or acknowledgment on the part of the testator, or during their own attestation. Moore v. Spier, 80 Ala. 129; Gaylor's Appeal, 43 Conn. 82; Re Porter, 9 Mackey, 493; Webb v. Fleming, 30 Ga. 808, 76 Am. Dec. 675; Flinn v. L.R.A.1917F.

Owen, 58 Ill. 111; Hull v. Hull, 117 Iowa, 738, 89 N. W. 979; Grubbs v. Marshall, 11 Ky. L. Rep. 870, 13 S. W. 447; Chase v. Kittredge, 11 Allen, 49, 87 Am. Dec. 687; Cravens v. Faulconer, 28 Mo. 19; Welch v. Adams, 63 N. H. 344, 56 Am. Rep. 521, 1 Atl. 1; Re Clark (Prerog.) — N. J. —, 52 Atl. 222; Watson v. Hinson, 162 N. C. 72, 77 S. E. 1089, Ann. Cas. 1915A, 870; Simmons v. Leonard, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280; Barker v. Hinton, 62 W. Va. 639, 59 S. E. 614, 13 Ann. Cas. 1159; Smith's Will, 52 Wis. 543, 36 Am. Rep. 426, note, 8 N. W. 616, 9 N. W. 665. Two states have or had statutes substantially identical with our own, so far as the question under consideration is concerned, with the single exception that subdivision 2 provides for signature or acknowledgment in the presence of or to "each of" the attesting witnesses. In both of these states it has been held that the witnesses are not required to be present at the same time. Rogers v. Diamond, 13 Ark. 474; Hoyrardt v. Kingman, 22 N. Y. 372, 379. The prevailing opinion takes the position that our Code section is to be given a meaning different from that of the New York statute, for the reason that the provision in force in California does not embody the word "each." I think this argument gives entirely too much weight to what the New York court of appeals itself, in Hoyrardt v. Kingman, terms a "verbal criticism." That court based its conclusion upon the fact that the legislature, with the former statutes and the judgments of the courts upon them before it, drew an act which omitted the significant words of the Wills Act, "present at the same time," thereby plainly indicating that it did not intend to adopt that requirement of the Wills Act. Our own statute also omits these words, and contains nothing of equivalent import. Nevertheless, the majority of this court reaches what seems to me the strange conclusion that our legislature, with the earlier legislation on the subject before it, designed to adopt the rule of the Wills Act. If that was the purpose, it is difficult to see why the clear and unambiguous language of the Wills Act, requiring presence "at the same time," was not copied into our law.

No case is cited, and I have found none, holding that the witnesses must be present together, except where the statute explicitly calls for such unity, as in Connecticut, where it was provided that the will must be attested by three witnesses, "all of them subscribing in his presence and in the presence of each other" (Lane's Appeal, 57 Conn. 182, 4 L.R.A. 45, 14 Am. St. Rep. 94, 17 Atl. 926), or in Vermont, where the statute demanded attestation and subscription by

"three or more credible witnesses in the presence of the testator, and of each other" (*Adams v. Field*, 21 Vt. 256), or in Virginia, under a statute containing the words "two competent witnesses present at the same time" (*Green v. Crain*, supra).

When the legislature of this state enacted § 1276 of the Civil Code, it had before it the history of the earlier English and American legislation and the decisions interpreting that legislation. It adopted some of the provisions of the Wills Act not found in the Statute of Frauds. For example, it provided for the signing by the testator at the end of the will, and for a signing or acknowledgment in the presence of witnesses. But it omitted the clear and definite words of the Wills Act "present at the same time," which alone import into that statute the requirement for a joint presence of the attesting witnesses. As was said by the court of appeals of New York, the inference is irresistible that, if it had been intended to change the settled rule that the witnesses need not be present together at any part of the testamentary act, the change would have been made by incorporating the words which were used to accomplish such change in the legislation of England, or other words of like import. *Hoysradt v. Kingman*, supra. The omission of any express requirement to this effect is convincing evidence that on this point the legislature intended to adopt the rule of the Statute of Frauds rather than that of the Wills Act.

Subdivision 2 of § 1276 provides that the subscription must be made in the presence of the attesting witnesses, or be acknowl-

edged by the testator to them to have been made by him or by his authority. It was so acknowledged in this case. The testatrix acknowledged to the two witnesses that the subscription to the will had been made by her. Subdivision 3 declares that the testator must, at the time of subscription or acknowledgment, declare to the attesting witnesses that the instrument is his will. Mrs. Emart did so declare to both of the subscribing witnesses. There is no more reason for reading into the provisions (subdivisions 2 and 3) referring to the subscription or acknowledgment, and to the declaration to the witnesses, a requirement that both witnesses must be present at the same time, than there was for reading such requirement into the provision of the Wills Act that the witnesses must sign in the presence of the testator.

The question before us is not one of policy; it is one of interpretation merely. There is no inherent or natural right to pass property by will. The privilege is conferred by statute, and the extent and the mode of its exercise are determined by the legislative provision. The courts have not the right to overlook the failure to comply with a single requirement of the statute, whatever their view of its wisdom or necessity. *Walker's Estate*, 110 Cal. 387, 30 L.R.A. 460, 52 Am. St. Rep. 104, 42 Pac. 815. But neither are they justified in reading into the law a demand for the performance of any act or formality not included within its terms. I think just that has been done in this case.

I concur: Angellotti, Ch. J.

Annotation—Wills: necessity that attesting witnesses be present at the same time.

The question as to necessity of the witnesses to a will being present at the same time is determined largely by the terms of the statute. Under the most usual form of statute, merely requiring the will to be signed by the testator and at-

tested by witnesses who shall subscribe their names in the presence of the testator, it is not necessary that the witnesses attest the will in the presence of each other.¹ Some cases have stated it not to be necessary for the witnesses to "sign"

¹ *Hoffman v. Hoffman* (1855) 26 Ala. 535, sustaining a will where the publication was made and the witnesses attested at different times and in the presence of the testator, but not in the presence of each other. The statute is not set out in the opinion, but is stated to be nearly the same as the Statute of 20 Car. II. chap. 3. See the statute set out in *Woodcock v. McDonald*, infra, note 2.

Re Porter (1892) 9 Mackey (D. C.) 493. The statute required the will to be signed by the testator and "attested and subscribed in the presence of the said testator" by the witnesses. The will in question was L.R.A.1917F.

attested by two witnesses, subsequently by a third in the presence of the testator and one of the previous witnesses. This case was reversed by Supreme Court of the United States on other grounds in (1896) 162 U. S. 478, 40 L. ed. 1044, 16 Sup. Ct. Rep. 871.

Notes v. Doyle (1909) 32 App. D. C. 413 (dictum).

Johnson v. Johnson (1886) 106 Ind. 475, 55 Am. Rep. 762, 7 N. E. 201. The statute is not set out, but is stated to be similar to the English Statute of Charles II. The will in question was written and signed by the testator and attested by one of the

or "subscribe" in the presence of each other, apparently treating the "signing" or "subscribing" as synonymous with at-

testation.⁸ It has been argued that, under a statute requiring witnesses to make a will effectual, "each witness ought him-

subscribing witnesses, but not attested by the other until about four months thereafter.

Dewey v. Dewey (1840) 1 Met. (Mass.) 349, 35 Am. Dec. 367. The statute involved in this case was substantially the English Statute of 29 Car. II. chap. 3, § 5, which required that all "devices of land shall be attested and subscribed in the presence of the deviser by three or four credible witnesses." The court stated that, although it had been somewhat changed and the language rendered more concise, the requirement as to the attestation of witnesses was not varied. One of the witnesses to the will involved in this case had attested at a different time from and in the absence of the other two. This case is cited with approval in *Ela v. Edwards* (1860) 16 Gray (Mass.) 91, where it is stated that it is not necessary that the attesting witnesses should "subscribe" their names in the presence of each other.

Eelbeck v. Granberry (1803) 3 N. C. (2 Hayw.) 232, 2 Am. Dec. 624, sustaining a will attested by one witness at the time it was signed by the testator and by another on the next day, upon an acknowledgment of the signature by the testator.

Raudebaugh v. Shelley (1856) 6 Ohio St. 307.

Tucker v. Oxner (1859) 12 Rich. L. (S. C.) 141 (dictum).

Smith's Will (1881) 52 Wis. 543, 36 Am. Rep. 426, note, 8 N. W. 616, 9 N. W. 665. Witnesses need not attest and subscribe a will in the presence of each other under a statute requiring a will to be "attested and subscribed in the presence of the testator by two or more competent witnesses."

Logue v. Stanton (1857) 5 Sneed (Tenn.) 97. A statute provided that a will "shall be signed by him (the testator), or some other person in his presence and by his directions, and subscribed in his presence by two witnesses at least." (Dictum.)

A will attested by the witnesses at different times was sustained in *Dudleys v. Dudleys* (1832) 3 Leigh (Va.) 436, but no question was raised on this point. The case was apparently decided under a statute similar to the Statute of Charles II.

In *Payne v. Payne* (1891) 54 Ark. 415, 16 S. W. 1, a testator, having had his will attested by one witness, took it to a justice of the peace and asked him to sign and certify it in his official capacity. The court disregarded the official certificate attached by the justice, and held the justice a witness to the will and thereupon sustained it, without reference, however, to the witnesses not having been in the presence of each other in making the attestation.

⁸ *Woodcock v. McDonald* (1857) 30 Ala. 411, sustaining a will written by one witness and witnessed by him, and a day or two after witnessed by another witness, to whom the signature was acknowledged, and wit-

nessed by a third witness, as was required for the devise of real estate, about four months after the two witnesses had subscribed their names, the will being produced to the third witness and the signature of the testator acknowledged. The statute required that a will be signed by testator and "attested by three or more respectable witnesses subscribing their names thereto in the presence of" the deviser. Apparently this was the same statute as was involved in *Hoffman v. Hoffman* (1855) 26 Ala. 535.

Moore v. Spier (1895) 80 Ala. 129, stating that a statute requiring a will to be signed by testator and attested by witnesses, "who must subscribe their names thereto in the presence of the testator," does not require the witnesses to sign in the presence of each other.

Gaylor's Appeal (1875) 43 Conn. 82. The statute required a will to be in writing, signed by testator and attested by three witnesses, "all of them subscribing in his (testator's) presence."

Webb v. Fleming (1860) 30 Ga. 808, 76 Am. Dec. 676 (see Georgia statute set out in *RE EMARR*, ante, 866; *Flinn v. Owen* (1871) 58 Ill. 111 (see Illinois statute set out in *RE EMARR*).

Deake's Appeal (1888) 80 Me. 50, 12 Atl. 790. The statute required a will to be "subscribed in his (testator's) presence by three credible attesting witnesses."

Woodstock College v. Hankey (1917) 129 Md. 675, 99 Atl. 962. The statute required the will to be signed by testator and attested "and subscribed in the presence of the said deviser" by credible witnesses.

Hogan v. Grosvenor (1845) 10 Met. (Mass.) 54, 43 Am. Dec. 414 (witnesses had attested at different times; see form of Massachusetts statute, supra); *Ela v. Edwards* (1860) 16 Gray (Mass.) 91.

It is stated obiter in *Chase v. Kittredge* (1865) 11 Allen (Mass.) 49, 87 Am. Dec. 687, that the Massachusetts statute (set forth above) does not require that the witnesses should subscribe in the presence of each other.

Cravens v. Faulconer (1859) 28 Mo. 19. The statute required every will to be signed by testator and to be "attested by two or more competent witnesses subscribing their names to the will in the presence of the testator."

Grimm v. Pittman (1892) 113 Mo. 56, 20 S. W. 665. In this case the testator took his will, already signed, to the store of one of the witnesses; the witness, at the request of the testator, signed as a witness, whereupon the second witness was sent for, and upon his arrival he signed as a witness.

Holyoke v. Sipp (1906) 77 Neb. 304, 109 N. W. 506; *Welch v. Adams* (1885) 63 N. H. 344, 56 Am. Rep. 521, 1 Atl. 1.

In *Re Clark* (1900) — N. J. —, 52 Atl. 222, the fact that one of the witnesses to

self to be able to prove every fact essential to a valid will;" that if the will is not attested in the presence of the witnesses, present at the same time, this cannot be done. But the validity of this argument has been denied.³ Again, it has been argued that the witnesses must attest with reference to one and the same act or declaration of the testator. In answer to this the Iowa court has said: "It seems to be well settled that, in the absence of statute, it is not requisite that the attestation by the two witnesses be in each other's presence; and therefore it is evident that they cannot always be witnesses of exactly the same act or declaration on the part of the testator indicating his acknowledgment of the instrument."⁴

It not being required that the will be attested by the witnesses in the presence of each other, it necessarily follows that it is not necessary that it be attested by both witnesses at the same time, and it has been expressly so held.⁵ It is, of course, possible that the interval may be very brief. The facts as to the attestation are shown in the footnotes.

The statutes construed in the cases previously discussed are, as may be ob-

served, substantially the same, as regards the requirements as to attestation, as the English Statute of Frauds and Perjuries, 29 Car. II. chap. 3, § 5, which provided "that all devises and bequests of any lands or tenements shall be in writing and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses; or else they shall be utterly void and of noneffect." The construction put upon this statute by the English cases is in accord with the doctrine of the American cases; that is, that it is not necessary for the witnesses to be present at the same time.⁶

It will be observed that the statutes involved in the foregoing cases require merely a signing by the testator, there being no express requirement that it be in the presence of the witnesses. Either a signing in the presence of the witnesses, or an acknowledgment by the testator in such presence, is necessary however; this is implied from the requirement that the will be attested by witnesses. Some statutes expressly require

a will signed in the absence of the other is stated not to invalidate the will. The will, however, was held invalid for other reasons.

Watson v. Hinson (1913) 162 N. C. 72, 77 S. E. 1089, Ann. Cas. 1915A, 870; *Simmons v. Leonard* (1891) 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280. See statute set out in *RE EMERT*, ante, 866.

A will that was attested by two of the witnesses at another time than that at which it was attested by the third was held invalid in *Fleming v. Morrison* (1904) 187 Mass. 120, 105 Am. St. Rep. 386, 72 N. E. 499, upon the ground that when it was attested by the one witness the testator did not intend it as his will, but intended it to deceive a beneficiary therein named.

³ *Woodcock v. McDonald* (1857) 30 Ala. 411.

⁴ *Hull v. Hull* (1902) 117 Iowa, 738, 89 N. W. 979.

⁵ *Johnson v. Johnson* (1886) 106 Ind. 475, 55 Am. Rep. 762, 7 N. E. 201.

⁶ *Anonymous* (1741) 2 Atk. 176, note 26 Eng. Reprint, 510, note; *Anonymous* (1682) 2 Ch. Ca. 109, 22 Eng. Reprint, 870, 1 Eq. Cas. Abr. 403, 21 Eng. Reprint, 1134; *Cook v. Parsons* (1701) Prec. in Ch. 184, 24 Eng. Reprint, 89, 2 Vern. 429, 23 Eng. Reprint, 952; *Westbeech v. Kennedy* (1813) 1 Ves. & B. 362, 35 Eng. Reprint, 141.

A will which was not attested by the witnesses in the presence of each other was sustained in *White v. British Museum* (1829) 6 Bing. 310, 130 Eng. Reprint, 1299; but the objection to the validity of this will was upon another ground. L.R.A.1917F.

In *Wright v. Wright* (1831) 7 Bing. 458, 131 Eng. Reprint, 177, 5 Moore & P. 319, 4 Car. & P. 389, a will attested by the witnesses at different times was sustained upon the authority of *White v. British Museum* (Eng.) supra.

It is admitted in *Grayson v. Atkinson* (1752) 2 Ves. Sr. 455, 28 Eng. Reprint, 291, 1 Dick. 158, 21 Eng. Reprint, 229, that so far as the cases have gone "the testator's signing in presence of the witnesses may be at different times." It is stated, however, to be a much greater security against perjury to require all the witnesses to be present at the same time.

In addition to the foregoing English cases, the case of *Ellis v. Smith* (1754) 1 Ves. Jr. 11, 30 Eng. Reprint, 205, has been frequently cited in support of the proposition that the witnesses need not be present at the same time. The question in this case was whether an acknowledgment to the witnesses satisfied the requirements of the Statute of Frauds. In determining this question, it was stated arguendo that, an attestation before the witnesses at different times being good according to the cases, an acknowledgment by the testator must be sufficient, since the testator could not sign each time. It does not appear whether the witnesses in this case attested at the same or different times. The rule that witnesses may attest at different times is criticized, but regarded as settled.

a signing or acknowledgment "in the presence of" the witnesses.

The Kentucky statute involved in *Grubbs v. Marshall*⁷ is practically identical with the California statute involved in *RE EMART*, ante, 866. The Kentucky statute provides that if a will is not wholly written by the testator "the subscription shall be made or the will acknowledged by him in the presence of at least two credible witnesses, who shall subscribe the will with their names in the presence of the testator." The court, after reviewing the evidence in this case, states that it shows that the testator made his mark before acknowledging the will in the presence of the first witness, and some addition to or tracing of the mark in the presence of the second witness. There was some dispute in the evidence, however, as to the making of the mark, but the court concluded that this was immaterial; that, as both of the witnesses testified that "the testator acknowledged the will, respectively, in their presence, we think the law was substantially complied with as to the manner of its execution, for it is not required, nor do we see why it should be treated indispensable, for subscribing witnesses to be present at the same time and place when the will is acknowledged

if it be in fact done in presence of each of them."

The statute involved in *RE EMART* requires the testator to subscribe "in the presence of the attesting witnesses" or acknowledge the will to them. This, the court holds, contrary to the Kentucky decision, requires the presence of the attesting witnesses at the same time. It will be noticed that the will involved in *RE EMART* was neither attested nor subscribed by the witnesses present at the same time. Some language used by the court indicates that it would not be fatal to the validity of the will if the mere act of subscription by the witnesses did not take place in the presence of each other, if the will was subscribed or acknowledged before them, both being present at the same time.

Other statutes require the subscription or acknowledgment to be in the presence of "each" of the attesting witnesses. Under this form of statute it is held that the will need not be attested by witnesses present at the same time.⁸ Other courts have stated that it is not necessary for the witnesses to be present at the same time when they sign or subscribe, apparently treating the "signing" or "subscribing" as synonymous with attestation.⁹

⁷ (1890) 11 Ky. L. Rep. 870, 13 S. W. 447.

⁸ *Hoysradt v. Kingman* (1860) 22 N. Y. 372. In this case the scrivener witnessed the will at the time of signing by the testator; the will was then put into an unsealed envelop and was taken by the testator to another of the witnesses, living a short distance from the first, to whom the testator acknowledged the execution and declared it to be his last will; whereupon the witness signed it at his request and in his presence. This was repeated before the third witness, who lived in the same neighborhood, to whom the testator took the will as soon as the second witness had attested it. See *infra* for form of statute.

An opinion is expressed in *Jauncey v. Thorne* (1846) 2 Barb. Ch. (N. Y.) 40, 45 Am. Dec. 424, after a review of the English cases, that it is not necessary under the original Statute of Charles II. for the witnesses to be present at the same time; but it does not appear that the chancellor gave attention to the New York statute or expressed an opinion as to the rule thereunder.

Re Carey (1895) 14 Misc. 486, 36 N. Y. Supp. 817, affirmed in (1897) 24 App. Div. 531, 49 N. Y. Supp. 32.

Re Diefenthaler (1903) 39 Misc. 765, 80 N. Y. Supp. 1121. A will was subscribed by the testator in the presence of one of the witnesses, who thereupon signed as a witness; a few days thereafter the will was L.R.A.1917F.

presented to the second witness, and acknowledged and thereupon signed by him.

Re Roe (1913) 82 Misc. 565, 143 N. Y. Supp. 999; *Barry v. Brown* (1883) 2 Dem. (N. Y.) 309; *Lyman v. Phillips* (1883) 3 Dem. (N. Y.) 459, affirmed in (1885) 98 N. Y. 267; *Re Potter* (1890) 33 N. Y. S. R. 936, 12 N. Y. Supp. 105.

A will attested by the witnesses at different times was sustained in *Re Levengston* (1913) 158 App. Div. 69, 142 N. Y. Supp. 820, and *Re Bogart* (1884) 67 How. Pr. (N. Y.) 313; but there was no question raised upon this point.

An instrument entirely in the handwriting of the decedent, which was not attested by the witnesses at the same time nor in the presence of each other, was admitted as a will in *Re Palmer* (1904) 42 Misc. 469, 87 N. Y. Supp. 249, without any discussion of the necessity of attesting in the presence of each other.

⁹ *Rogers v. Diamond* (1852) 13 Ark. 474. The statute here requires that the will be signed by testator in presence of each of the attesting witnesses, or acknowledged to each of attesting witnesses, and that there shall be two attesting witnesses, "each of whom shall sign his name as a witness at the end of the will at the request of the testator." The statutory provision in question superseded one which expressly required the witnesses to subscribe their names in the presence of each other. It is here stated: "We think the statute does

The New York statute required that the subscription by the testator be made by him "in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made to each of the attesting witnesses. . . . There shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will, at the request of the testator." The New York court of appeals¹⁰ in discussing this statute refers to the English Statute of Victoria (discussed below), in which it is expressly required that the witnesses shall be present at the same time, and states that, while that statute carefully provides that the attesting witnesses shall be present at the same time, the legislature of New York has been content to abide by the rule that it is not necessary for them to be present at the same time,—a rule which had been established by the adjudications of the courts prior to the enactment of the English statute above referred to. Continuing the court states: "There is nothing in the Revised Statutes equivalent to the language of the new English act in this respect, or which in any way indicates an intention to require the witnesses to attest at the same time. On the contrary, the language, it seems to me, contemplates that the witnesses may attest separately. The words, 'each of the attesting witnesses,' as twice used in the second division of the section, are distributive in their usual signification.

not require a simultaneous attestation, or that the witnesses should subscribe in the presence of each other."

Willis v. Mott (1857) 36 N. Y. 486. The persons signed the will on different days and not in the presence of each other.

Re Engler (1907) 56 Misc. 218, 107 N. Y. Supp. 222.

¹⁰*Hoysradt v. Kingman* (1860) 22 N. Y. 372.

¹¹(1845) 5 Moore, P. C. C. 130, 13 Eng. Reprint, 439. Accordingly, a will was held not properly executed where it was witnessed by one witness at the time it was signed by the testator, and a few hours later by another witness who had been brought for that purpose, and to whom the testator acknowledged his subscription in the presence of both witnesses, the witness first signing also acknowledging his subscription. The court takes the view that a witness to a will cannot acknowledge his subscription so as to validate it.

In accord with this decision a will was held not good where it was signed by mark by the testatrix in the presence of one witness, who thereupon subscribed his name as a witness, and several days thereafter the testatrix acknowledged her will and mark L.R.A.1917F.

The word 'each' is very commonly used in opposition to both or all, for the purpose of showing that the subjects or things spoken of are to be taken separately, and not collectively. The word, it is true, is used inaccurately when applied to the act of signing, but with perfect correctness where it relates to the act of acknowledging." After stating that the rule was well settled that it was not necessary for the witnesses to be present at the same time, the court continues that if the legislature had intended to change that rule, it would have done so by explicit language.

The Statute of 1 Viet. chap. 26, § 9, provides "that no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and subscribe the will in the presence of the testator, but no form of attestation shall be necessary." The 7th section of the Indian Will Act, No. 25, of 1838, which was copied from 1 Viet. chap. 26, § 9, supra, with the single omission of the words "attest and" after "shall" and before "subscribe," came before the privy council in *Casement v. Fulton*¹¹ and it was held that the subscription by the wit-

in the presence of a second witness, the former witness being present also, whereupon the second witness signed. *Allen's Goods* (1839) 2 Curt. Eccl. Rep. (Eng.) 331. A similar decision appears in *Simmonds's Goods* (1842) 3 Curt. Eccl. Rep. (Eng.) 79, where a will signed by the testator in the absence of all the witnesses was after acknowledged in the presence of one witness, who thereupon signed as a witness, and sometime thereafter it was acknowledged in the presence of a second witness, the former witness being present, whereupon the second witness signed.

In *Moore v. King* (1842) 3 Curt. Eccl. Rep. (Eng.) 243, a codicil was held not good where it was attested by one witness at the time of the subscription by the testator, and subsequently acknowledged in the presence of a second witness, the former being present, whereupon the second signed as a witness.

A will attested by one witness at the time of subscription by the testator, in the absence of the other witness, who was then called in and, in the presence of the testator and the former witness, signed as a witness, was held invalidly executed, in *Wyatt v. Berry* L. R. [1893] P. 5 (Eng.)

nesses as well as the signing or acknowledgment by the testator must take place when the witnesses are present together. The court argues: "It is not, perhaps, so important that the witnesses should both sign in each other's presence; nevertheless, it is of importance, for it gives an additional security against fraud or mistake, the signature being an act—the acknowledgment only a word. But be the reason what it may, if the law has said that the witnesses must sign in each other's presence, we are bound; and there can be no reasonable doubt raised that the words of the act amount to this requisition: The testator is to sign or acknowledge in the presence of the witnesses present at the same 'time.' He is not to sign or acknowledge before the witnesses present at different times. But here he has acknowledged before them, present at the same time. Then must the witnesses who subscribe be present at the same time? We think the words admit of no other construction, for it is 'and such witnesses shall subscribe.' Now this forms one sentence with the preceding words, 'present at the same time,' and 'such' must plainly be read,—such present witnesses, or 'such' witnesses so being present at the same time. 'Such' describes not merely the names of the witnesses, but all that is previously enacted respecting them. One quality of these witnesses is their being present at the same time. Therefore we cannot limit the meaning of the large word of reference, 'such,' to the mere names or persons of the witnesses; it must embrace

what had just been said of their presence; it must mean 'the witnesses, etc., present at the same time.' To be sure, a very short end would be made of this controversy, were we to read the enactment as we are called upon to do in the argument, and, stopping short at the early part of the section, we were to suppose that, 'executed in manner hereinafter mentioned,' refers only to the signing or acknowledging by the testator, and not to the attestation of the witnesses. But so extraordinary a construction would also make a short end of the whole provision, and would dispense with the necessity of any witnesses at all, and of any subscription by witnesses, whether in each other's presence or not; for the statute very probably would be confined to the not executing by the testator, and no further invalidity could possibly arise from any want of attestation."

The court in *Casement v. Fulton*, supra, regarded the Indian Statute as practically the same as the Statute of Victoria on the point in question, so that its construction was in effect a construction of the Statute of Victoria. The construction thus put upon the statute has not been followed by the English courts, but wills have been admitted to probate although the witnesses did not subscribe in the presence of each other, if the will was signed or acknowledged when all were present together.¹³

A statute similar to the Statute of Victoria was enacted in Virginia, which provided that "no will shall be valid un-

62 L. J. Prob. N. S. 28, 68 L. T. N. S. 416, 1 Reports, 462, on the authority of *Moore v. King* (Eng.) supra, and *Hindmarsh v. Charlton* (1861) 8 H. L. Cas. 160, 11 Eng. Reprint, 388, 7 Jur. N. S. 611, 4 L. T. N. S. 125, 9 Week. Rep. 521, the court making no mention of the different principles on which these cases were decided.

¹³ *Webb's Goods* (1875) 1 Jur. N. S. (Eng.) 1096, admitting a will to probate where the will, signed by the testatrix was produced in the presence of both witnesses, and the signature thereto acknowledged by the testatrix, whereupon one of the witnesses left the room and in his absence the other subscribed his name as a witness. In a short time the witness that had thus left returned, and in the presence of the testatrix and the witness who had signed also subscribed as a witness.

The unreported case of *Chadwick v. Palmer* is referred to in *Webb's Goods* (Eng.) supra, and it is there stated that Sir H. Jenner Fust said in the *Chadwick* Case that, "according to the decisions of the court since *Casement v. Fulton* (1845) 5 Moore, P. C. C. 130, 13 Eng. Reprint, 439, L.R.A.1917F.

it is not necessary that both the witnesses should subscribe in the presence of each other. If the deceased signs his name in the presence of two witnesses present at the same time, and those two subscribed their names in the presence of the testator, it is a sufficient compliance with the statute."

In *Sullivan v. Sullivan* (1879) Ir. L. R. 3 Eq. 299, a codicil signed by the testator in the presence of two witnesses present at the same time was held valid although the witnesses did not subscribe in the presence of each other, but each did subscribe in the presence of the testator. The court regards the rule as settled in England that witnesses need not sign in the presence of each other.

Casement v. Fulton was heard before the judicial committee of the privy council and the decision was rendered on July 25th, 1845, by Lord Brougham. A little over a month before this, on June 14, 1845, Lord Brougham, speaking for the judicial committee of the privy council in the case of *Faulds v. Jackson* (1845) 6 Notes of Cases Supp. (Eng.) 1, admitted a will to probate

less . . . the signature shall be made or the will acknowledged by him [testator] in the presence of at least two competent witnesses present at the same time; and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary." The Virginia court held a will validly attested under this statute where the scrivener signed the will as a witness before the other witness was called, and was present when the will was acknowledged by the testator to the other witness and signed by the latter.¹⁴ The court reasons that the witnesses were present at the same time, when the will was acknowledged by the testator; that it was not necessary under the statute for the witnesses to subscribe at the same time. The decision of the English court in *Casement v. Fulton* (Eng.) supra, is noted, and the conclusion of that court, that the witnesses must "subscribe" their names in the presence of each other, is disapproved. The facts, however, in the English case, are distinguished from those before the court in the decision in question in this, that in the English case the joint presence of both witnesses was at a time different from and subsequent to that on which

the will was signed and witnessed by one of the witnesses, while in the case at bar the whole transaction occurred at one and the same time, there being no breach of continuity and little, if any, greater interval between the different parts of the transaction than the necessary order of sequence required. In a later case¹⁵ the court states that the principle decided in the *Parramore Case* "is that under our present law a will acknowledged by the testator in the presence of two witnesses present at the same time, who subscribe their names thereto in his presence, the whole being one continuous transaction, occurring at the same time, is well executed, though the witnesses do not subscribe their names in the presence of each other, and though one of them subscribe his in the order of time before the acknowledgment."

The Virginia court in the previous cases emphasized the fact that the subscription of the witnesses, although not made when all were present together, was made as a part of a continuous transaction. In a later case¹⁶ this court sustained a will subscribed by the witnesses not as a continuous transaction.

It has been held in Maryland that the

which was not subscribed by the witnesses in the presence of each other. In *Faulds v. Jackson* the will was signed by the testator in the presence of one witness, who thereupon called a second witness, who subscribed his name as a witness and passed out of the room, whereupon the first witness subscribed. The will is sustained by the judicial committee of the privy council without reference to the necessity that the witnesses sign in each other's presence. The lower court, however, expressly holds that the statute does not require that the witnesses should sign in the presence of one another. The lower court also makes a point of the fact that both witnesses signed after the acknowledgment by the testator in the presence of the witnesses present at the same time.

¹⁴ *Parramore v. Taylor* (1854) 11 Gratt. (Va.) 220. The next day the will was acknowledged before a third witness and the scrivener, and attested by the third witness. The witnesses relied upon, however, are the scrivener and the witness who signed immediately after the execution of the will, as detailed in the text.

¹⁵ *Beane v. Yerby* (1855) 12 Gratt. (Va.) 239. There was urged to be a distinction between this case and *Parramore v. Taylor* (Va.) supra, on the ground that "there was not in the case, as there was in that, any concert among the witnesses, any privity between the testator and them, any continuity of transaction commenced, continued, and ended, between the same par-

ties, the testator and the witnesses. That in that case the two witnesses on whose attestation the will was sustained were convened for the purpose of being witnesses, before the execution of the will was commenced; while here the scrivener subscribed the will as a witness, and then the other two witnesses were successively called in, and subscribed it as such, not before having had any agency in the transaction, nor knowing that they were to be called in for that purpose." In answer to this argument the court states: "From my recollection of the facts in *Parramore v. Taylor*, there is no material difference in this respect between that case and this. If in that case either of the witnesses to the will or the codicil, except Corbin, had any previous knowledge that he would be called on to witness the transaction, the fact was certainly not relied on as one of the grounds of the opinion delivered or judgment rendered therein. Nor do I conceive the fact to be of any importance whatever."

In *Parramore v. Taylor* (Va.) supra, the contention was made that the subscription of each of the attesting witnesses must be made after the signature or acknowledgment by the testator in the simultaneous presence of both, whereas in this case the subscription of one of the witnesses was made before. This contention was denied by the court.

¹⁶ *Beane v. Yerby* (Va.) supra.

¹⁷ *Green v. Crain* (1855) 12 Gratt. (Va.) 252. In this case three days after the exe-

fact that the mere act of signing by the witnesses was not done when all were present does not invalidate the attestation.¹⁷

Some statutes expressly require a will to be subscribed by the witnesses in the presence of each other. A will not so subscribed is not validly attested under such a statute.¹⁸ Even under such a statute it is not necessary that each wit-

ness see the others subscribe, if the witnesses were in a position that they might have seen had they so desired.¹⁹

A will is sometimes held invalid where the witnesses were not present at the same time, not because of this fact, but because the testator failed to acknowledge the instrument to one of the witnesses,²⁰ or because the witnesses did

cution of the will by the testator, he acknowledged the paper to be his will in the presence of one who subscribed as a witness; four days thereafter the testator again acknowledged the paper in the presence of the one who had thus subscribed as a witness and another, who thereupon also subscribed as a witness. The scrivener had subscribed as a witness at the time of the execution of the will, but as he was not again present at any subsequent attestation by another witness, the case is held to rest upon the attestation of the two witnesses above mentioned.

¹⁷ *Moale v. Cutting* (1882) 59 Md. 510. The court here states that the evidence shows that "the testator did not sign the will in the presence of all at once, and the witnesses did not, in fact, write their names all at one and the same time, yet the testator acknowledged his signature and declared it his will to all at once, and those who had before written their names as witnesses then and there reaffirmed the same." The governing statute is not set out.

¹⁸ *Lane's Appeal* (1889) 57 Conn. 182, 4 L.R.A. 45, 14 Am. St. Rep. 94, 17 Atl. 926. The statute required an attestation by three witnesses "all of them subscribing in his (testator's) presence and in the presence of each other." The main question in this case was not as to the meaning of the statute, but as to whether the statute in question applied where another statute was enacted subsequently to the date of the will. The will in question was first signed by the testator in the presence of one witness, subsequently taken to the second witness, and after that to the third, each of whom signed as a witness in the absence of the other two.

Roberts v. Welch (1873) 46 Vt. 164.

In *Bogart v. Bateman* (1906) — N. J. —, 65 Atl. 238, it is stated with reference to the execution of a will, that "the fact that one of the witnesses was not in the same room with the testator and the other witness is clear, and thereupon a burden is imposed upon the proponent to establish that the witness in the adjoining room could see the execution of the will, and that his signature in attestation thereof could be seen by testator and the other subscribing witness." There is no discussion, however, of the necessity of the witnesses subscribing in the presence of each other with the exception of this statement.

In *Nera v. Rimando* (1911) 18 Philippine, 450, it is stated obiter that an attestation is invalid where one of the subscribing witnesses was in a room other than that in

which the testator and the other subscribing witnesses attached their signature, in such a position that he could not see them in the act of signing.

The West Virginia Statute of 1882 required the attesting witnesses to sign in the presence of each other. This was held not to govern the validity of a will executed before its enactment. *Barker v. Hinton* (1907) 62 W. Va. 639, 59 S. E. 614, 13 Am. Cas. 1150.

See *Ludlow v. Ludlow* (1883) 36 N. J. Eq. 597, *infra*.

¹⁹ *Blanchard v. Blanchard* (1859) 32 Vt. 62. In this case it appeared that one of the three attesting witnesses, to the will, though present in the same room when the testator and the other witnesses signed their names to the will, did not actually see one of the other witnesses make his signature he being engaged in looking in another direction at that time. The court states that, if the situation of the parties was such that each of the witnesses might have seen the attestation of the other, it is all that is required. "If they were in the same room and might have seen the attestation of one another, that is held to be an attestation in the presence of the testator and of one another."

As is indicated *supra* from the quotation from the *Blanchard Case*, it was the opinion of the court that the witnesses should be in the same room. In the subsequent case of *Re Clafin* (1902) 75 Vt. 19, 58 L.R.A. 261, 52 Atl. 1053. The question arose whether it was a sufficient compliance with the statute if the witnesses were in the same room. It was held that this alone was not sufficient; that they must have been in such a position that they could see one another sign if they so desired.

A similar question arises as to when a will is attested or subscribed in the presence of the testator, within the meaning of the requirement of the statute that a will must be attested or subscribed in the presence of the testator. This question is discussed in the note to *Re Alfred*, L.R.A. 1916C, 950.

²⁰ *Ludlow v. Ludlow* (1882) 35 N. J. Eq. 480.

But upon appeal in (1883) 36 N. J. Eq. 597, the court of errors and appeals states that the New Jersey law requires a writing intended as a will to be by the testator "declared to be his last will in the presence of two witnesses present at the same time, who shall subscribe their names thereto as witnesses, in the presence of the testator." The court, continuing, says that "the last

not sign in the presence of the testator.²¹ Such cases are not within the scope of this note.

It is the theory of some courts that the subscription by the witnesses must take place after the signing by the testator. There is, however, a dispute as to this. See notes to *Brooks v. Woodson*, 14 L.R.A. 160, and *Re Horn*, 26 L.R.A.(N.S.) 1126, for discussion of this question. Where an acknowledgment by the testator in the presence of the witnesses, instead of his signature, is relied upon, the same question arises. It will be observed that in some of the English and Virginia cases discussed above, the will was signed by one witness, afterwards acknowledged by the testator in the presence of the witnesses present at the same time, then subscribed by the second witness. The acknowledgment by the testator thus has taken place after the signature by one of the witnesses. The Virginia court sustained the validity of such a subscription by the witness while the English court denied it. The question as to the validity of an attestation where a subscription by a witness takes place before an acknowledgment by the testator is not within the scope of this note. It is mentioned here simply to call attention to the bearing it may have upon the question under annotation. It seems clear that an attestation in which one witness signed in the absence of the other, and before the acknowledgment by the testator to the witnesses present at the same time, cannot be sustained in a jurisdiction committed to the doctrine that the witnesses must subscribe after the signature or acknowledgment of the testator to the witnesses, whatever may be the theory as to the necessity that the witnesses subscribe in the presence of each other.²²

clause, relating to the presence of witnesses and the presence of the testator, requires that all shall be together when the signature is made, or the making thereof acknowledged, and when the declaration that it is his will is made."

²¹ *Ragland v. Huntingdon* (1841) 23 N. C. (1 Ired L.) 561.

²² The House of Lords in *Hindmarsh v. Charlton* (1861) 8 H. L. Cas. 160, 11 Eng. Reprint, 388, states it to be settled "that after the will has been signed or acknowledged by the testator in the presence of both the witnesses, there must be the sub-

To restate briefly the conclusion of the courts under the various forms of statutes as to the necessity of the witnesses being present at the same time: (a) Under statutes merely requiring the will to be signed by the testator and attested and subscribed by the witnesses in the presence of the testator it is not necessary for the witnesses to be present at the same time at any part of the attestation. (b) Under statutes requiring the will to be subscribed by the testator or acknowledged by him in the presence of the witnesses, there is a difference of opinion whether the presence of the witnesses at the same time is required, the Kentucky court holding that it is not necessary, the California court holding that it is. If the statute requires the will to be subscribed or acknowledged in the presence of "each" of the witnesses, the witnesses need not be present together, according to the cases which have passed on this form of statute. (c) Under a statute requiring the will to be subscribed or acknowledged by the testator in the presence of the witnesses present at the same time and, requiring such witnesses to subscribe, or attest and subscribe, the will in the presence of the testator, the cases that have passed upon the question in this country require that the witnesses be present at the same time, when the will is subscribed or acknowledged by the testator, but not that the witnesses subscribe in the presence of each other. The later English cases agree with this construction but the subscription by the witnesses was required to be made when they were present together by some of the early English decisions. (d) Under a statute requiring the witnesses to subscribe in the presence of each other, it is necessary for the subscription to take place when the witnesses are present together.

scription of those witnesses in the presence of the testator." Accordingly, an attestation was held invalid where one of the witnesses signed in the absence of the other, and before the acknowledgment by the testator to the witnesses present at the same time, on the ground that the witness subscribed before such acknowledgment, and not on the ground that the witnesses had not subscribed in the presence of each other. See also discussion in *Casement v. Fulton* (1845) 5 Moore, P. C. C. 130, 13 Eng. Reprint, 439. W. A. E.

IOWA SUPREME COURT.

DAN W. HASKELL, Appt.,

v.

L. H. KURTZ COMPANY.

(— Iowa, —, 162 N. W. 598.)

Master and servant — fall of window washer — liability.

One directed to wash windows some distance from the ground, which duty is not within the scope of his employment, who, upon finding the upper sash of a window stuck so that it cannot be lowered to be washed from inside, steps outside on a narrow ledge, holding to the bottom of the upper sash for support, cannot hold the employer liable in case the lower sash falls down and breaks his hold so that he falls to the ground, although the employer was negligent in maintaining the window in the condition in which he found it, in failing to warn him of the danger of going outside, and in failing to supply safety appliances for the work; since, with knowledge of the conditions, he is negligent in attempting to do the work in a dangerous manner.

For other cases, see Master and Servant, II. c. 1, in Dig. 1-52 N. S.

(May 12, 1917.)

A PPEAL by plaintiff from an order of the District Court for Polk County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

Statement by Salinger, J.:

Action to recover damages on account of personal injuries suffered by plaintiff while in the employ of the defendant, alleged to have been due to the negligence of the defendant to which no negligence on part of the plaintiff contributed. A verdict for defendant was directed, and this is an appeal from that order.

Messrs. Woods & Cabbage for appellant.

Messrs. Miller & Wallingford and Oliver H. Miller, for appellee:

The evidence failed to show that defendant had been guilty of any negligence that would support a verdict for plaintiff.

Note.—The general subject of the duty of a master to instruct and warn his servant as to the perils of the employment is discussed in the note to *James v. Rapides Lumber Co.* 44 L.R.A. 33. Many later cases dealing with various aspects of that general question may be found by consulting the L.R.A. Digests under the title, "Master and Servant," subtitle, "Duty to warn or instruct."

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Miller v. Hart-Parr Co. 165 Iowa, 181, 144 N. W. 589; *Campbell v. Illinois C. R. Co.* 124 Iowa, 303, 100 N. W. 30; *Brown v. Hunt & S. Co.* 163 Iowa, 637, 145 N. W. 310; *Cox v. Chicago & N. W. R. Co.* 102 Iowa, 711, 72 N. W. 301; *Lodi v. Maloney*, 184 Mass. 240, 68 N. E. 229; *Demers v. Marshall*, 178 Mass. 9, 59 N. E. 454; *Saunders v. Eastern Hydraulic Pressed-Brick Co.* 63 N. J. L. 554, 76 Am. St. Rep. 222, 44 Atl. 630, 7 Am. Neg. Rep. 90; *Ashcroft v. Davenport Locomotive Works*, 148 Iowa, 420, 126 N. W. 1111; *Dreier v. McDermott*, 157 Iowa, 726, 50 L.R.A.(N.S.) 566, 141 N. W. 315; *Brooks v. W. T. Joyce Co.* 127 Iowa, 266, 103 N. W. 91, 18 Am. Neg. Rep. 78; *Thoman v. Chicago & N. W. R. Co.* 92 Iowa, 196, 60 N. W. 612; *Dolstrom v. Newport Min. Co.* 165 Mich. 309, 130 N. W. 643; *Weed v. Chicago, St. P. M. & O. R. Co.* 5 Neb. (Unof.) 623, 99 N. W. 827; *Heneke v. Ellis*, 110 Wis. 532, 86 N. W. 171; *Groff v. Duluth Imperial Mill Co.* 58 Minn. 333, 59 N. E. 1049; *Daniels v. Covington & C. Elev. R. & Transfer Co.* 23 Ky. L. Rep. 1800, 66 S. W. 187; *Jackson & Suburban Street R. Co. v. Simmons*, 107 Tenn. 392, 64 S. W. 705; *Whitson v. Wrenn*, 134 N. C. 86, 46 S. E. 17; *Hilman Land & Iron Co. v. Littlejohn*, 28 Ky. L. Rep. 983, 90 S. W. 1053, 19 Am. Neg. Rep. 251; *Vianello v. Washington Iron Works Co.* 55 Wash. 552, 104 Pac. 784; *McCormick v. Ottumwa R. & Light Co.* 146 Iowa, 119, 124 N. W. 889; *Bird v. Hart-Parr Co.* 165 Iowa, 542, 146 N. W. 74; *Young v. Burlington Wire Mattress Co.* 79 Iowa, 415, 44 N. W. 693.

The trial court did not err in holding that the plaintiff was guilty of contributory negligence, and in directing the jury to return a verdict for the defendant, and in subsequently entering judgment thereon.

Ibid.

Salinger, J., delivered the opinion of the court:

I. A careful analysis of the errors relied upon for reversal, when made in the light of the whole record, narrows what we have for decision. Concede, for present purposes, that washing windows was not within the scope of the plaintiff's employment. That would not be material if it appeared that he did wash all but one of the windows without injury or danger of injury, and but for his own fault could have washed all in safety. Concede the abstraction that the employer must furnish a safe place to work, must warn and instruct and furnish such proper tools and appliances as are required to avoid the dangers of employment, and that, therefore, abstractly speaking, evidence that there are such tools and appliances should be received. The fact remains

that all but one window was washed in safety, though no instruction or warning was given, and no special safety appliance nor requisite tools furnished. The injury to plaintiff came from a fall while he was washing a particular window. In washing this window he did not pursue the method which he had employed in washing those on which he did his work without injury and in safety. If he had used the same method throughout he would have suffered no injury, though neither warned nor instructed, and though not furnished with special tools or safety appliances.

His complaint narrows to a claim that when he reached the window whose washing led to his injury he was unable to use the methods that had proved safe in washing the other windows, and that his inability to continue the safe method was due to the negligence of the plaintiff, and that his fall is traceable to that negligence of the plaintiff without contribution thereto on his part. Reduced to its lowest terms, his complaint is that said one window was kept in a condition that made it perilous to wash it, in the absence of warning, instruction, and furnishing of proper tools and safety appliances, and that no safe place was provided wherein to do the work of washing said window. It may be conceded again for the sake of argument that the work of plaintiff was not done in a safe place; that a warning would have made plaintiff more careful; and that had he had certain safety appliances he would have suffered no injury, though not warned, and though working in an unsafe place.

But if it be true that plaintiff chose an unsafe work place when he might have refused to work unless furnished a safe one, or true that he was reasonably able to obtain a safe place to work in and chose to work in an unsafe one, or that were it not for his fault he would have suffered no injury, though not warned nor instructed, and though no tools or safety appliances were furnished, then he must fail of a recovery, without inquiry into the fault of defendant.

Ia. Passing these generalities, we address ourselves to the concrete situation. We agree with appellant that when he was directed to wash windows at all, this amounted to an instruction to wash the outside as well as the inside of the sash. When he reached the window whose washing caused his injury he found the upper sash stuck tight with paint, and found or believed himself unable to lower it. If he had been able to lower it he could have washed the outside sash from inside the room, and could have washed it in perfect safety, even as he had by the same method washed others. He

made no attempt to secure any tool to aid him in lowering this sash. What he did do is thus stated by himself: "I saw that I couldn't get it down to reach over from the top, so I assured myself that I could get a good hold of it. The window was in two sashes, which were hung on weights and balanced in such a manner that the upper sash would, or at least should, remain in the position in which it is left until it is moved; and the lower sash when raised would operate in the same manner. To all appearances, the lower sash was normal. I raised it up far enough to climb to a position on the ledge to which I must get to do the work, raising it [the lower sash] as high as it was necessary to climb out."

When he got out he stood on a cement ledge 5 or 6 inches wide, and held onto the lower part of the upper sash with his left hand and worked at the upper sash with rags held in his right hand. He continues: "The lower sash began to slide down, and I was standing and had my hand up, and I couldn't reach it in time to stop it without letting go the hold I had. The window brushed down past my fingers. Until the time it reached the bottom it had pushed my fingers from the upper sash and left me with no purchase, and with but a small space for my feet, and I started to fall, and when I started to fall I fell away from the window, caught myself in time to turn and light on my feet, and that is all I know. The lower sash of the window began to slide down, and I was standing and had my hand up, and I couldn't reach it in time to stop it without letting go the hold I had. I put my fingers under the edge of the upper sash, and that some way this inside window slipped down . . . with my fingers in there between—they were just about touching the glass. Whether or not my fingers did hold the inner sash from coming down depends on what the pressure on the inner sash might be. . . . I did not turn around; I never let go my hold for an instant. I could have let go with one hand and taken hold of the bottom of the window sash, but I didn't do that."

II. Assume, for the sake of argument, that the employer was negligent in keeping the upper sash so that it could be moved down only by the aid of some tool, and in keeping the lower sash in such condition that when raised it would not stay up. On this assumption, plaintiff would have suffered no injury if there had not been this negligence. But if the plaintiff was negligent in going where he did and attempting to do his work from where he placed himself, then the assumed negligence of the employer becomes at once immaterial. That is to say, the plaintiff cannot recover, even though the

defendant was in said respects negligent. The narrow question at this point is whether the plaintiff is guilty of contributory negligence. In essence, his avoidance is:

(1) That the work done by him was without the scope of his employment, which was to work in the shipping room of defendant; (2) as to work outside of that scope, it was the duty of the employer to give him due warning and instructions of perils that plaintiff would or might encounter in doing such work; (3) the employer failed in his duty to furnish proper tools and appliances, which would have safeguarded plaintiff against such perils.

Washing windows was not within the scope of the original employment of the plaintiff. But the naked fact that upon request of the employer an employee consents to do what he was not originally employed to do imposes neither the duty to warn or instruct, nor to furnish safety appliances. This duty does not exist because of change of employment. It arises because the scope of the new employment is of such character as that there should be warning and furnishing of proper tools and safety appliances. If the new employment is not hazardous, needs no special skill or appliances, and involves nothing in the way of danger that is not self-evident to all if there be danger, this duty cannot arise merely because the employment was changed. If one employed to keep books be requested to wrap up groceries, and engages in that work, there is no requirement to warn or instruct against peril, nor to furnish tools and appliances to safeguard against danger. Where there is no danger, or none not as apparent to any employee as it is to his employer, the duty does not arise, because the reasoning that formulated the duty is inapplicable. A request to take on a different employment and acceding thereto makes for the purposes of this rule an original employment. If on an original employment there would have been no duty to warn and to furnish appliances, there is no such duty as to a new employment created by changing a former one by mutual consent. The material thing is not that a different employment was entered into, but the nature of that new employment.

This plaintiff is an adult of more than average intelligence. When he found a window that would not lower, no warning given in advance would have made that fact more patent. No skill or experience was required to bring home to him that he was unable to lower the sash. No advance warning would have made clearer than it was to any human being with ordinary faculties and power to reason that it was dangerous to meet the inability to lower the sash by stepping upon

a 6-inch ledge placed just below the second story of a building. Assume that plaintiff could not foresee that when he did go upon the ledge the lower sash might or would fall. If he had done what he reasonably could do when he found the upper sash immovable, the tendency of the lower sash to drop would not have affected him. His care or want of care must be dealt with at the point when he went upon the ledge, and relied upon the hold on the sashes which he took. While he claims that the offer to furnish him appliances was very limited, it appears that he was told "to get what he needed. He knew where it was." The man sent to work on the same job says, as a witness for plaintiff, that the one who directed them to do the work did not tell them where to get what was needed "because we knew where to get everything that was necessary to wash the windows. We knew what we wanted and got it." It appears, however, that all that they got was a couple of buckets, some rags and towels, some soap, and some Bon Ami. It is conceded the upper sash could have been lowered by some simple instrument usable as a pry or lever, such as an ordinary chisel, and it is answered that plaintiff was not a carpenter. Any adult of average intelligence must be charged with knowing, though not a carpenter, that a sash stuck by paint could be lowered by inserting a simple edged tool where it would act as a lever. We may concede that plaintiff was not negligent in failing to provide himself with such a tool in the beginning. But when he found the condition the upper sash was in, it is doing no violence to reason to hold that he knew without warning or special experience that such a levering would in all probability lower the upper sash so that he might wash it safely as he had others. Why should he have a recovery because he refrained from asking for such a tool, and instead elected to place himself in a dangerous position? Assume that the highest degree of care would have induced the employer to furnish in advance appliances that insure absolute safety in washing these windows. What prevented the plaintiff from refusing to place himself in a self-evident danger instead of demanding such appliances before proceeding further with his work?

We are constrained to hold that one who finds that he cannot lower a window so that he may wash the same from inside the room, deliberately steps upon a ledge 6 inches wide, from which a fall to the street below will work great injury, with no precaution save the hold which plaintiff took, is in no position to recover for an injury which results, even though had there been due care on the part of the employer the

plaintiff would have had no occasion to leave safety on the inside for clearly apparent danger on the outside. We question whether there was any evidence to go to a jury on that the lower sash was in fact negligently hung, but we do not go into that question because we are proceeding, in effect, on the assumption of such defect by making this decision turn upon the presence or absence of contributory negligence.

Almost every conceivable phase of the law of negligence, contributory negligence, assumption of risk, duty to furnish safe place, duty to furnish proper appliances, and duty to give adequate warning, are exhaustively presented by both parties. But there stands out that the verdict was directed because the trial court believed plaintiff had failed to prove that he was free from contributory negligence, and that if this ruling is justified we have no occasion to go beyond so finding. Little in the briefs has been helpful in solving this controlling question, and we have been forced to an independent investigation, which seems to us to sustain the order below, and upon which investigation we find this:

It must appear that the master knew of, or ought to have known of, the danger, and that the servant did not know, and had not equal means with the master of knowing, of such danger by ordinary care. *Crown Cotton Mills v. McNally*, 123 Ga. 35, 51 S. E. 13. One employed to work in a sawmill is not entitled to be warned, unless the employer knows, or should know, that warning is necessary. *Sladky v. Marinette Lumber Co.* 107 Wis. 250, 83 N. W. 514. The duty to warn and instruct even with respect to the use of machinery extends only to those dangers which the master knows, or has reason to believe, the servant is ignorant of. *Stodden v. Anderson*, 138 Iowa, 398, 16 L.R.A.(N.S.) 614, 116 N. W. 116; *McCarthy v. Mulgrew*, 107 Iowa, 76, 77 N. W. 527; *Kerker v. Bettendorf Metal Wheel Co.* 140 Iowa, 209, 118 N. W. 306; *Johanson v. Webster Mfg. Co.* 139 Wis. 181, 120 N. W. 832. We said in *Mericle v. Acme Cement Plaster Co.* 155 Iowa, 692, 136 N. W. 916, that before a master is required to warn a servant, especially an adult, it must appear that the servant, because of his inexperience or otherwise, was without knowledge of the perils about to beset him, and also that the master is aware of such want of information, or has reasonable grounds to believe it is wanting. Failure to give warning and instruction will not base a recovery, unless it appear that the servant had not equal means of knowing with the master. *Harte v. Fraser*, 130 Ill. App. 494; *Pinkley v. Chicago & E. I. R. Co.* 246 Ill. 370, 35 L.R.A.(N.S.) 679, 92 N. E. 896, 1 L.R.A.1917F.

N. C. C. A. 480; *Hendrix v. Vale Royal Mfg. Co.* 134 Ga. 712, 68 S. E. 493; *Ahern v. Amoskeag Mfg. Co.* 75 N. H. 99, 21 L.R.A.(N.S.) 89, 71 Atl. 213. We said in *Hanson v. Hammell*, 107 Iowa, at 176, 77 N. W. 839, the well-settled rule is that if the employee knows, or may reasonably be supposed to know, the dangerous character of the temporary work to which he is called, the employer is not negligent in requiring the work without explaining its character. And we cite *Wormell v. Main C. R. Co.* 79 Me. 397, 1 Am. St. Rep. 321, 10 Atl. 49; *Rummell v. Dilworth, P. & Co.* 111 Pa. 343, 2 Atl. 355, 363; *Cahill v. Hilton*, 106 N. Y. 512, 13 N. E. 339, and *Newbury v. Getchel & M. Lumber & Mfg. Co.* 100 Iowa, 441, 62 Am. St. Rep. 582, 69 N. W. 743. In *McCarthy v. Mulgrew*, 107 Iowa, 76, 77 N. W. 527, the holding is that the duty to warn and instruct does not arise as to dangers known to the servant, or so open and obvious as by the exercise of ordinary care he would have known of. *Kerker v. Bettendorf Metal Wheel Co.* 140 Iowa, 209, 118 N. W. 306, is that where a person of mature years undertakes any employment, the master may assume that he has or claims to have sufficient experience to know and appreciate the dangers ordinarily incident to the undertaking. We say in *Harney v. Chicago, R. I. & P. R. Co.* 139 Iowa, 359, 115 N. W. 886, that unless something suggests to the master that a warning is necessary, he is justified in acting on the assumption that the servant understood the dangers to which he was exposed, and would take appropriate precautions to safeguard himself.

In the case of an adult of apparently usual intelligence, the employer may assume, unless informed to the contrary, that he has common knowledge, and need not give specific warning. *Johanson v. Webster Mfg. Co.* 139 Wis. 181, 120 N. W. 832. In *Whalen v. Rosnosky*, 195 Mass. 545, 122 Am. St. Rep. 271, 81 N. E. 282, plaintiff, a bright boy seventeen years old, employed as an errand boy, was injured while attempting to open some wooden packing cases with a hammer and hatchet, which are proper tools for such work. His employer told him he could get the cover off quicker by hitting the hatchet under the cover than by the method which he was employing. After a few strokes a piece of steel flew off and injured plaintiff's eye; he was given no warning of the danger, but it was held there was no duty to warn because the work was one of the common operations of everyday life, and free from complexity.

There need be no warning against what should be evident to one possessed of ordinary intelligence. So it was held that the

failure to instruct an adult servant of average intelligence as to the manner in which he should use a wrench in screwing nuts on a rod so as to avoid falling in case the wrench should break is not negligence. *Garnett v. Phoenix Bridge Co.* (C. C.) 98 Fed. 192. And so of a failure to inform that a probable result of striking a mass of steel with a sledge hammer might be the flying asunder of particles of steel. *Sabers v. Benjamin Atha & Co.* 75 N. J. L. 307, 68 Atl. 103.

Though there was change of employment, there is no liability for injury resulting from causes open to the observation of plaintiff which it required no special skill and training to foresee were likely to occasion him harm. *Cummings v. Collins*, 61 Mo. 523, approved in *Hanson v. Hammell*, 107 Iowa, at 176, 77 N. W. 839; and see *Cole v. Chicago & N. W. R. Co.* 71 Wis. 114, 5 Am. St. Rep. 201, 37 N. W. 89. There is no case for the plaintiff where his evidence fails to show that the work directed to be done required more skill or knowledge than he possessed. *St. Louis & W. R. Co. v. Austin*, — Tex. Civ. App. —, 72 S. W. 212. Change of employment alone is insufficient. The change is immaterial, unless there are dangers incident to it which, in consideration of his known inexperience or some matter of occult nature, the master should have pointed out to him and did not. *Ft. Smith Oil Co. v. Slover*, 58 Ark. 168, 24 S. W. 106. In *White v. Gwosso Sugar Co.* 149 Mich. 473, 112 N. W. 1125, a laborer in a sugar factory was called from his regular work to aid in raising an iron plate; he and a collaborer lost control of the plate, and a corner passed into the shaft, where it was struck by a descending bucket, injuring the laborer; and it was held that, though the work may have been outside the scope of plaintiff's employment, there was no negligence in failing to warn him of the danger resulting from the plate being struck by the buckets.

In *Meyers v. Bennett Auto Supply Co.* 109 Iowa, 383, 151 N. W. 444, plaintiff had been a competent bricklayer for ten years, and was laying brick and terra cotta over the face of a concrete building. Certain "cups" for electrical fixtures were nailed into the forms; and after the concrete hardened and the forms were removed, four nails protruded in part from the cups. These had to be broken off in order to lay the terra cotta ornaments. Plaintiff came to some of these nails for the first time in his experience, and asked the foreman what to do, and the foreman said, "Take your hammer and knock or cut them off," and nothing else was said. It was not in the line of a brick mason's work to break off nail ends, but plaintiff with his own hammer struck one of the nails, it broke, flew into his eye, and destroyed it, and we hold that the task and the tool were of such elementary simplicity that no duty arose to warn or instruct; "that the broken end of a nail will fly in the direction toward which it is struck is an obedience to the same law that operates upon a piece of concrete or brick under the same circumstances; it was self-evident to any workman, whether skilled or unskilled, and no amount of skill and experience could make it more evident; the employer could have no reason to believe that the plaintiff did not know;" further, "the task and the tool were of elementary simplicity; instruction could have added nothing;" and that the master was under no duty to warn a servant of dangers self-evident to anyone, skilled or unskilled.

It follows from what has been said that the order of the District Court must be affirmed.

Gaynor, Ch. J., and Ladd and Evans, JJ., concur.

Petition for rehearing denied.

NORTH CAROLINA SUPREME COURT.

LYDA GARRETT et al.

v.

SOUTHERN RAILWAY COMPANY

and

PULLMAN COMPANY, App'ts.

(172 N. C. 737, 90 S. E. 903.)

Carrier — sleeping car — duty to protect passenger from robbery.

Note. — As to duty of sleeping or parlor car company to protect passengers from assault, see annotation following this case, post, 888.

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A sleeping car company is liable in damages to a passenger who is assaulted and robbed when attempting to board the car, if the conductor is present and fails to afford assistance.

For other cases, see *Carriers*, II. c, in *Dig.* 1-52 N. S.

(December 19, 1916.)

APPEAL by defendant Pullman Company from a judgment of the Superior Court for Buncombe County in favor of plaintiffs in consolidated actions brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Affirmed.

Statement by Brown, J.:

Two actions, one by Lyda Garrett, plaintiff, and one by her daughter, Pauline, as plaintiff, were instituted in the superior court of Buncombe county to recover damages for a personal injury against the Southern Railway Company and the Pullman Company, and were duly consolidated by consent and tried at May term, 1916, Harding, J., presiding, upon these issues:

(1) Was the Southern Railway Company engaged in operating the train which the plaintiff was about to board at Lexington, Kentucky, on the night of July 6, 1915, as alleged in the complaint? Answer: Yes.

(2) Was the plaintiff Lyda Garrett injured by the negligence of the defendant Southern Railway Company, as alleged in the complaint? Answer: Yes.

(3) Was the plaintiff Lyda Garrett injured by the negligence of the defendant the Pullman Company, as alleged in the complaint? Answer: Yes.

(4) What damage, if any, is the plaintiff Lyda Garrett entitled to recover, as alleged? Answer: \$1,500.

Similar issues were submitted as to Pauline Garrett. In her case the jury assessed the damages at \$2,000. The trial judge set aside the findings of the jury as to the defendant the Southern Railway Company, and rendered judgment against the Pullman Company, from which said defendant appealed.

Messrs. H. T. Wilcoxon and A. Hall Johnston, for appellant:

In order to entitle one to recover for injuries sustained through the negligence of another, it is necessary to allege and prove that the party who is sought to be charged owed the injured party a duty; that there was a neglect to perform this duty; and that such negligence was the proximate cause of the injury.

Emry v. Roanoke Nav. & Water Power Co. 111 N. C. 94, 17 L.R.A. 699, 16 S. E. 18; *Duval v. Pullman Palace Car Co.* 33 L.R.A. 715, 10 C. C. A. 331, 23 U. S. App. 527, 62 Fed. 265, denied in 163 U. S. 684, 41 L. ed. 310, 16 Sup. Ct. Rep. 1200; *Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co.* 139 U. S. 79, 35 L. ed. 97, 11 Sup. Ct. Rep. 490.

Sleeping car companies are not common carriers and their contract with the passenger to furnish additional accommodations does not impose upon them a carrier's liability.

Duval v. Pullman Palace Car Co. 33 L.R.A. 715, 10 C. C. A. 331, 23 U. S. App. 527, 62 Fed. 265, denied in 163 U. S. 684, 41 L. ed. 310, 16 Sup. Ct. Rep. 1200; *Pullman Palace Car Co. v. Gavin*, 93 Tenn. 53, 21 L.R.A.1917F.

L.R.A. 298, 42 Am. St. Rep. 902, 23 S. W. 70; *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. ed. 141, 10 Am. Neg. Cas. 593; *Beale, Innkeepers*, § 341; 9 Cyc. 702; *Atchison, T. & S. F. R. Co. v. Teidt*, 40 L.R.A.(N.S.) 848, 116 C. C. A. 168, 196 Fed. 349; *Williams v. Pullman Palace Car Co.* 40 La. Ann. 87, 8 Am. St. Rep. 512, 3 So. 631; *Campbell v. Seaboard Air Line R. Co.* 83 S. C. 448, 23 L.R.A.(N.S.) 1056, 137 Am. St. Rep. 824, 65 S. O. 628; 4 Elliott, Railroads, 2d ed. § 1616; 2 Hutchinson, Carr. 3d ed. § 1130; *Calhoun v. Pullman Co.* 16 L.R.A.(N.S.) 575, 86 C. C. A. 387, 159 Fed. 387; *Lawrence v. Pullman Palace Car Co.* 144 Mass. 1, 59 Am. Rep. 58, 10 N. E. 723, 8 Am. Neg. Cas. 408; *McCabe v. Atchison, T. & S. F. R. Co.* 109 C. C. A. 110, 186 Fed. 966; *Lemon v. Pullman Palace Car Co.* 52 Fed. 262; *Pleasants v. Raleigh & A. Air-Line R. Co.* 95 N. C. 195; *Turner v. Goldsboro Lumber Co.* 119 N. C. 387, 26 S. E. 23; *Williams v. Southern R. Co.* 119 N. C. 746, 26 S. E. 32; *Martin v. Highland Park Mfg. Co.* 128 N. C. 264, 83 Am. St. Rep. 671, 38 S. E. 876; *Brown v. Chicago, R. I. & P. R. Co.* 2 L.R.A.(N.S.) 105, 72 C. C. A. 20, 139 Fed. 972, 3 Ann. Cas. 251, 19 Am. Neg. Rep. 646; *Putnam v. Broadway & S. Ave. R. Co.* 55 N. Y. 108, 14 Am. Rep. 190; *Fewings v. Mendenhall*, 88 Minn. 336, 60 L.R.A. 601, 97 Am. St. Rep. 519, 93 N. W. 127, 13 Am. Neg. Rep. 346.

Even if found to be joint tort-feasors, the doctrine of primary and secondary liability may arise as between defendants, and their rights after such verdict may be determined in the proper action.

2 Black, Judgm. § 780; *Dillon v. Raleigh*, 124 N. C. 184, 32 S. E. 548; *Raleigh v. North Carolina R. Co.* 129 N. C. 265, 40 S. E. 2; *Howard v. J. H. Harris Plumbing Co.* 154 N. C. 227, 70 S. E. 285; *Brown v. Louisville*, 120 N. C. 701, 78 Am. St. Rep. 677, 36 S. E. 166; *Elliott, Contr.* § 493; *Midkiff v. Lusher*, 27 W. Va. 439; *Marriott v. Williams*, 152 Cal. 705, 125 Am. St. Rep. 92, 93 Pac. 875; *Huddleston v. West Bellevue*, 111 Pa. 110, 2 Atl. 200; *McCool v. Mahoney*, 54 Cal. 491; *Smithwick v. Ward*, 52 N. C. (7 Jones, L.) 64, 75 Am. Dec. 453.

Messrs. J. T. Horney and Jones & Williams, for appellees:

The Pullman Company was liable.

St. Louis, I. M. & S. R. Co. v. Hatch, 116 Tenn. 580, 94 S. W. 671; *Calder v. Southern R. Co.* 89 S. C. 287, 71 S. E. 841, Ann. Cas. 1913A, 902, note, 223 U. S. 740, 56 L. ed. 637, 32 Sup. Ct. Rep. 531; *Hill v. Pullman Co.* 188 Fed. 498; *Pullman Co. v. Norton*, — Tex. Civ. App. —, 91 S. W. 841; *Younglove v. Pullman Co.* 207 Fed. 797; *Pullman Co. v. Custer*, — Tex. Civ. App. —, 140 S. W. 847; *Pullman Co. v.*

Hoyle, 52 Tex. Civ. App. 534, 115 S. W. 315.

Where a verdict is rendered against two defendants in an action *ex delicto*, the setting aside of the verdict as to one defendant and rendition of judgment against the other is not error, each being severally liable for the whole damage.

Illinois C. R. Co. v. Foulks, 191 Ill. 57, 60 N. E. 890; Carper v. Risdon, 19 Colo. 530, 76 Pac. 744; Birkel v. Chandler, 26 Wash. 241, 66 Pac. 406.

Brown, J., delivered the opinion of the court:

The plaintiffs sue to recover damages for negligence upon the part of the defendant in failing to protect them from assault committed by a negro in the railway station at Lexington, Kentucky, while the plaintiffs were passengers upon the Southern Railway and in the care and custody of the Pullman Company. At the conclusion of the evidence, the defendant moved to nonsuit, and excepted to the ruling of the court overruling the motion. The evidence, taken in its most favorable light for the plaintiff, tends to prove that plaintiffs had purchased tickets on the Pullman from Lexington to Asheville, which entitled them to a lower berth. In addition, plaintiffs had the necessary railroad transportation, authorizing them to travel on the railway from Lexington to Asheville. The plaintiff Lyda, accompanied by her sister, who was also a passenger, and her little six-year-old daughter, Pauline, proceeded to the proper Pullman car and placed themselves in charge of its conductor. The sister, Mrs. McClelland, was helped on the car first by the conductor. The said conductor then took the plaintiff's baggage and put it on the Pullman car platform, and as the plaintiff Lyda was handing her six-year-old daughter, Pauline, to the conductor to be put up on the platform, she was assaulted by a negro.

The testimony tends to prove, further, that the negro dragged her and her daughter across two railroad tracks and the station platform and threw the plaintiff Lyda down, and robbed her; that during this time the Pullman conductor remained motionless and made no effort to prevent the robbery or the assault, although the struggle lasted for several minutes. The evidence tends to prove that the conductor was in easy reach, and could have assisted the plaintiff, and could probably have prevented the injuries. The evidence tends further to prove that the child Pauline was dragged along with her mother, very badly frightened, and seriously hurt.

Upon a motion to nonsuit, we must as-
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sume the facts testified to by the plaintiff and her sister to be true, and they must be construed in the light most favorable to the plaintiff, for the jury seems to have been impressed with the truthfulness of their testimony. It is but just to the Pullman conductor to state that he testified that, when the plaintiff Lyda was assaulted, he was 40 feet away from her, and that he heard the scream and saw the man grab at her pocketbook; that he holloed at him, and ran over as quickly as possible to assist her.

It is contended that the defendant is not liable, because it is neither a common carrier nor an innkeeper. It is true that a sleeping car is a place for the reception of travelers, provided generally by the railroads to make traveling over their lines more attractive; but it is not an inn. The question as to whether it is a common carrier has been decided differently in different states. In some few states sleeping car companies are held to be common carriers. In a large majority of states, and by the Federal courts, they are held not to be common carriers. *Blum v. Southern Pullman Palace Car Co.* 1 Flipp. 500, Fed. Cas. No. 1,574; *Lemon v. Pullman Palace Car Co.* (C. C.) 52 Fed. 262.

The better view seems to be that while these companies provide a vehicle for passengers to ride in, and accommodations for their comfort while riding, the railway company, and not the car company, undertakes and is responsible for the transportation, and has entire charge of the journey. Nevertheless it is generally agreed that, however these companies may be classified, it is their duty to guard passengers in their care from harm, so far as it can reasonably be done. The company must guard passengers from the attacks of wrongdoers, if such attacks can be foreseen, and it is their duty to protect them from annoyance and insult, not only from their own servants, but from all others. *Connell v. Chesapeake & O. R. Co.* (Ball v. Chesapeake & O. R. Co.) 93 Va. 44, 32 L.R.A. 792, 57 Am. St. Rep. 786, 24 S. E. 467; *Beale, Innkeepers*, § 373. In the notes in *Ann. Cas.* 1913A, 902, it is said: "The person placed in charge of a sleeping car is bound, as an employee of the sleeping car company, to the exercise of ordinary care for the protection and comfort of persons using the car in accordance with the regulations of the company."

In *Calder v. Southern R. Co.* 89 S. C. 287, 71 S. E. 841, *Ann. Cas.* 1913A, 894, it is held that the carrier and the sleeping car company are both liable for the negligent failure of the servants of the latter to protect passengers in their cars. In *Pullman Co. v. Norton*, — Tex. Civ. App.

—, 91 S. W. 841, the Texas court of civil appeals declares that a railway company and a sleeping car company both owe to a passenger the duty of exercising care in protecting him from injury. In *Hill v. Pullman Co.* (C. C.) 188 Fed. 501, it is held that the sleeping car company was answerable in damages to a passenger for an assault in the car under the evidence in that case. In *Younglove v. Pullman Co.* (D. C.) 207 Fed. 798, it is held that the defendant, as a carrier, is required to use due care for the protection and safety of its passengers, not only while the passenger is in the car, but until the passenger alights from the car. In *Pullman Co. v. Hoyle*, 52 Tex. Civ. App. 534, 115 S. W. 316, it is held that a sleeping car company owed a passenger the duty to safely discharge her at her destination, and was liable for any injury resulting from negligence in that respect.

An investigation of the authorities discloses that they all hold that it is the duty of a Pullman Company, although not technically a common carrier, to exercise reasonable care in the protection of passengers holding tickets upon the car. It must be conceded that, if the testimony offered by the plaintiffs is true, the defendant's conductor entirely failed to protect them from the assault and robbery committed at the

very steps of the car, while the conductor was helping them into it.

The motion to nonsuit is properly overruled. The defendant assigns error because the court admitted in evidence a contract between the Pullman Company and the Southern Railway Company, and then remarked in the absence of the jury: "I am of the opinion that the contract is not competent evidence in this case, as I don't see how it could affect any of the rights of the plaintiff."

We have examined the contract, and find that there is nothing in it which would absolve the defendant from liability under the testimony introduced by the plaintiff.

The other assignments of error relating to the evidence are without merit, and do not need any discussion. The charge of the court presented the law and the evidence to the jury in a clear and correct manner. The court might well have charged that, if the facts are as testified to by the plaintiffs, the defendant is liable for the injury,—of course, stating the other side of the controversy.

As to whether the Southern Railway Company is liable is a matter not before us.

No error.

Petition for rehearing denied.

Annotation—Duty of sleeping or parlor car company to protect passengers from assault.

The liability of a railroad company for acts of employee of a sleeping or Pullman car company toward passengers is treated in the note to *Campbell v. Seaboard Air Line R. Co.* 23 L.R.A.(N.S.) 1056; and see later case, *Denver & R. G. R. Co. v. Perry*, 27 L.R.A.(N.S.) 761.

The principles governing the liability of carriers generally for assaults on passengers by employees are discussed in the notes to *Davis v. Houghtelin*, 14 L.R.A. 738; *Daniel v. Petersburg R. Co.* 4 L.R.A.(N.S.) 485; *Houston & T. C. R. Co. v. Bush*, 32 L.R.A.(N.S.) 1201; and *St. Louis, I. M. & S. R. Co. v. Jackson*, L.R.A.1915E, 668; and those applicable to assaults by fellow passengers in the notes to *Illinois C. R. Co. v. Minor*, 16 L.R.A. 627; *Brown v. Chicago, R. I. & P. R. Co.* 2 L.R.A.(N.S.) 105; *Jansen v. Minneapolis & St. L. R. Co.* 32 L.R.A.(N.S.) 1206; and *Louisville & N. R. Co. v. Renfro*, 33 L.R.A.(N.S.) 133.

For convenience, however, cases falling within the scope of either of those series of notes, which involved the liability of a sleeping or Pullman car com-

pany for an assault upon a passenger, have been cited in the present note.

But cases of assaults committed upon passengers in an ejection or attempted ejection of passengers from a coach are not included in this note. (For such cases, see the L.R.A. Indexes, under the title "Carriers," subdivision "Ejection.")

Assault by employee.

An assault committed by the porter of a sleeping car company, whose duties are to answer calls of passengers and also to serve them with food, upon a passenger who has summoned such porter to the smoking compartment of a sleeping car and requested that food be served, was held, in *Pullman Palace Car Co. v. Lawrence* (1897) 74 Miss. 782, 22 So. 53, 2 Am. Neg. Rep. 586, to have been made while such porter was engaged in the company's business and while acting within the scope of his employment, so as to make the Pullman car company liable.

And a sleeping car company will be liable for an indecent assault committed

upon a female passenger by its porter, who is in charge of the car. *Campbell v. Pullman Palace-Car Co.* (1890) 42 Fed. 484.

However, a passenger on a Pullman car who is the aggressor in an unprovoked abuse of the Pullman car company's servant, and grossly and brutally insults him by applying to him vile and offensive language, cannot hold the company liable for an assault upon him by such servant. *Rohrbach v. Pullman's Palace Car Co.* (1909) 166 Fed. 797.

So, the Pullman company was held not liable for an assault by its porter upon a passenger where the latter, without cause or provocation, and solely because not served refreshments out of turn, called the porter a black bastard, which language, the court said, the passenger must have known would arouse the anger and resentment of any man possessing the least spark of self-respect. *Ibid.*

A passenger in a day coach who goes into a sleeping car for the sole purpose of inducing the steward to sell him liquor in violation of law, and also in violation of the company's instructions to the steward, being technically a trespasser, cannot hold the sleeping car company liable for an assault committed upon him by the steward. *Cassedy v. Pullman Palace-Car Co.* (1895) — *Miss.* —, 17 So. 373.

So, also, that a Pullman company is not liable for an assault committed by its porter on a passenger in a day coach who had gone into the sleeping car for the purpose of requesting permission to wash was held in *Williams v. Pullman Palace Car Co.* (1888) 40 La. Ann. 87, 8 Am. St. Rep. 512, 3 So. 631. The court based its decision on the absence of any contractual relations between such passenger and the sleeping car company, and also on the fact that the general principles of the law of master and servant were inapplicable to this case. As to the latter point the court said: "The great difficulty in applying these principles lies in defining what acts properly fall within the scope of the servant's employment. The evidence in this case establishes that the porters employed in defendant's service are mere menials employed to clean up the car and keep it in order and to wait upon the passengers, having no police authority whatever and no connection with the enforcement of the rules of the service except to report violations of them to the conductor. Anything more completely outside of 'the functions to which he was employed' L.R.A.1917F.

than the assault committed on the plaintiff could hardly be conceived. If it had been his duty forcibly to prevent the plaintiff from entering the car, or to put him out at all, and, in performing this duty, he had used wanton and needless violence, inflicting injury, defendant might have been responsible. But he had no such duty or authority. We do not lose sight of the fact that plaintiff was not a trespasser, but had a right to enter the car for the purpose of asking permission to wash his hands or of trying to hire the privilege, and that, in addressing the porter, he was dealing with him as a servant of the company. This emphasizes the outrage to which he was subjected, but would be a dangerous ground for holding the employer responsible. A person has a right to enter a bank for the purpose of collecting a check and to present it to the paying teller for payment; but if, on such presentation, the teller should leap over the counter and knock him down, surely such an act would not subject the bank to liability. So one may lawfully enter a store and deal with any clerk with reference to the purchase of goods, but if, on some dispute, the clerk should commit assault and battery upon him, the merchant would not be responsible therefor. Or if one on lawful business should knock at the door of any private house, and, on asking the servant who answered the call for permission to see the master, the servant should assault and beat him, would the master be responsible? Clearly, in all such cases, the lawfulness of the party's conduct, and the fact that the injury was received while he was properly dealing with the servant as a servant, would not suffice to bind the master unless the latter had expressly or impliedly authorized the act, or had been guilty of some fault in knowingly employing so dangerous a servant."

Assault by fellow passenger or stranger.

GARRETT v. SOUTHERN R. Co. ante, 885, is in harmony with the rule that ordinary and reasonable care and diligence in watching over its passengers to protect them from assault and injury by strangers or fellow passengers are required on the part of the sleeping car or parlor car company.

So, a railroad company and a sleeping car company whose employees had absented themselves from the car for a period of time are guilty of such negligence in failing to protect a female passenger in the sleeping car as to make

them liable for indignities and outrages inflicted upon such passenger by a stranger who entered the sleeping car. *St. Louis, I. M. & S. R. Co. v. Hatch* (1906) 116 Tenn. 580, 94 S. W. 671.

As to the contention that, as there was no reasonable ground for suspicion that these parties would enter the sleeper and commit this wrong, neither company could be charged with negligence or held liable for the injury, the court stated that the principle contended for comes into play as a matter of necessity only where the carrier is diligent in the discharge of his general duty to his passenger; in other words, is not guilty of negligence; and is not applicable where the carrier is guilty of abandoning his post, where only he could discharge this duty.

A Pullman company which is negligent in failing to keep a sufficient watch to protect passengers in a sleeping car from robbery is liable for an assault committed upon a passenger by a sneak thief who is attempting to rob such passenger. *Hill v. Pullman Co.* (1911) 188 Fed. 497.

So, also, in *Calder v. Southern R. Co.* (1911) 89 S. C. 287, 51 S. E. 847, Ann. Cas. 1913A, 894, it was held that a Pullman company owes the duty to a sleeping passenger occupying a berth in one of its cars to protect him from robbery and assault.

In *Meyer v. St. Louis, I. M. & S. R. Co.* (1893) 4 C. C. A. 221, 10 U. S. App. 677, 54 Fed. 116, action against a railway company and Pullman palace car com-

pany for the killing of a passenger by an insane fellow passenger, an instruction in effect that the Pullman palace car company is not a common carrier, and so not burdened with the heavy and exceptional obligations of a common carrier for the protection of its passengers from injury, and that the extent of its obligation for the protection of its passengers from injury is to maintain a reasonable watch to protect those passengers from any known danger reasonably probable to arise under the circumstances, was held, assuming it to correctly state the extent of the obligation resting upon the sleeping car company, nevertheless to warrant reversal because of failure to instruct the jury that the company had the right, if need arose, to restrain or eject from the car an insane person, as the jury would naturally infer from the charge that the rights of the sleeping car company were in this particular even more limited than those of the railway company.

In *Connell v. Chesapeake & O. R. Co.* (*Ball v. Chesapeake & O. R. Co.*) (1896) 93 Va. 44, 32 L.R.A. 792, 57 Am. St. Rep. 786, 24 S. E. 467 (action against railway company and the Pullman palace car company), it was held that the murder of a passenger when asleep in a sleeping car by some intruder, stranger or fellow passenger, does not render the carrier liable if the carrier or its employees did not know of any impending danger, and there were no circumstances to arouse their suspicions. J. H. B.

OKLAHOMA SUPREME COURT.

COLONIAL REFINING COMPANY, Plff.
in Err.,
v.

MARVIN LATHROP.

(— Okla. —, 186 Pac. 747.)

Evidence — photograph — special purpose.

1. The probative value of photographs de-

Headnotes by BRETT, J.

pend upon their accuracy. They must be shown by extrinsic evidence to be faithful representations of the place or subject as it existed at the time involved in the controversy. And photographs taken to show more than this, with men in various assumed positions, and things in various assumed situations, intended only to illustrate hypothetical situations, and to explain certain theories of the parties, are incompetent.

For other cases, see *Evidencce, V. in Dig.* 1-52 N. S.

Note. — The use of photographs as evidence is the subject of notes appended to *Dederichs v. Salt Lake City R. Co.* 35 L.R.A. 802, and *Ligon v. Allen*, 51 L.R.A. (N.S.) 842; and see later cases, *Griffith v. American Coal Co.* L.R.A.1915F, 803, and *Louisville & N. R. Co. v. Ashley*, L.R.A.1916E, 763.

The note to *Oklahoma City v. Reed*, 33 L.R.A. (N.S.) 1085, on "Burden of proof as to contributory negligence," discusses at L.R.A.1917F.

pages 1201 et seq., the rule as to pleading contributory negligence, including the availability of the defense under a general denial. See later cases, *Farris v. Southern R. Co.* 40 L.R.A. (N.S.) 1115, and *Illinois C. R. Co. v. Lowery*, 49 L.R.A. (N.S.) 1149.

Generally as to sufficiency of general allegations of negligence, see note to *King v. Oregon Short Line R. Co.* 59 L.R.A. 209, and see especially page 275 of that note with reference to contributory negligence.

Pleading — general denial — contributory negligence.

2. An answer in an action for personal injuries, which only denies that the injury was caused by the negligence of defendant, and alleges that it was "wholly" caused by the negligence of the plaintiff, is in effect nothing more than a general denial, and does not plead contributory negligence.

The law requires the plaintiff to apprise the defendant in the beginning as to what he relies upon for a recovery, and limits him to the facts pleaded. And it likewise requires the defendant to apprise the plaintiff of any special or affirmative defense he expects to make, by pleading the facts constituting such defense. There is no reason why one should be entitled to the light, and the other required to grope in the dark. Hence, contributory negligence to be available to the defendant must be specifically pleaded, unless such contributory negligence appears from the allegations of the plaintiff's petition, or unless the plaintiff's own case raises the presumption of contributory negligence.

For other cases, see Pleading, III. b, in Dig. 1-52 N. S.

Writ — service on managing agent.

3. A return of the service of summons on a domestic corporation which shows that the president was not found in the county, and that the writ was served upon the managing agent, is sufficient. The statute contemplates that the absence of one officer from the county—"the chief officer"—opens the door for legally serving summons upon any one of the subordinates designated by the statute. It does not contemplate the absurdity of a multiplicity of chief officers, but makes the definite provision that if the one, single, "chief officer is not found in the county," then service may be made upon either the "cashier, treasurer, secretary, clerk, or managing agent."

For other cases, see Writ and Process, II. b, in Dig. 1-52 N. S.

(June 6, 1917.)

ERROR to the District Court for Payne County to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. Affirmed.

The facts are stated in the opinion.

Messrs. H. A. King, Reece & Grubbs, Charles West, and H. H. Hagan, for plaintiff in error:

The manner of service provided by statute for service of summons on a domestic corporation must be strictly followed.

Oklahoma F. Ins. Co. v. Barber Asphalt Paving Co. 34 Okla. 149, 125 Pac. 734; St. Louis & S. F. R. Co. v. Clark, 17 Okla. 562, 87 Pac. 430; Cunningham Commission Co. v. Rorer Mill & Elevator Co. 25 Okla. 133, 105 Pac. 676; Ravia Granite Ballast L.R.A.1917F.

Co. v. Wilson, 22 Okla. 689, 98 Pac. 949; Pond v. National Mortg. & Debuture Co. 6 Kan. App. 718, 50 Pac. 973; Ball v. Warrington, 87 Fed. 695.

If there was evidence in the record tending in any degree to prove contributory negligence it was the duty of the trial court to submit that issue to the jury, and its failure to do so would constitute reversible error.

Oklahoma R. Co. v. Milam, — Okla. —, 147 Pac. 314; Chicago, R. I. & P. R. Co. v. Clark, — Okla. —, 148 Pac. 998; Chicago, R. I. & P. R. Co. v. Pitchford, 44 Okla. 197, 143 Pac. 1146; Hugo v. Nance, 39 Okla. 640, 135 Pac. 346.

It was error to refuse to admit the photographs in evidence.

Smith v. Territory, 11 Okla. 669, 69 Pac. 805; Shaw v. State, 83 Ga. 92, 9 S. E. 768, 8 Am. Crim. Rep. 426; State v. O'Reilly, 126 Mo. 597, 29 S. W. 577.

Messrs. Robert A. Lowry and T. A. Higgins, for defendant in error:

In the absence of a showing in the trial court that the by-laws of the defendant corporation provided for a vice president, and a chairman of the board of the directors other than its president, the motion to quash summons and service thereof was properly overruled.

St. Louis & S. F. R. Co. v. Clark, 17 Okla. 562, 87 Pac. 430; Ravia Granite Ballast Co. v. Wilson, 22 Okla. 689, 98 Pac. 949; Oklahoma F. Ins. Co. v. Barber Asphalt Paving Co. 34 Okla. 149, 125 Pac. 734; Pond v. National Mortg. & Debuture Co. 6 Kan. App. 718, 50 Pac. 973; Cunningham Commission Co. v. Rorer Mill & Elevator Co. 25 Okla. 133, 105 Pac. 676; First Nat. Bank v. Latham, 37 Okla. 286, 132 Pac. 801.

There was no error in the rejection of the photographs.

9 Eng. Ev. 779; Babb v. Oxford Paper Co. 99 Me. 298, 59 Atl. 290; Stewart v. St. Paul City R. Co. 78 Minn. 110, 80 N. W. 865, 7 Am. Neg. Rep. 80; Smith v. Territory, 11 Okla. 669, 69 Pac. 805; 4 Enc. Ev. 284; Tudor Iron Works v. Weber, 129 Ill. 535, 21 N. E. 1078; McNaier v. Manhattan R. Co. 51 Hun, 644, 22 N. Y. S. R. 840, 4 N. Y. Supp. 310; American Exp. Co. v. Spellman, 90 Ill. 455; Hunter v. Allen, 35 Barb. 42.

The answer did not plead contributory negligence. It amounted to a general denial only.

Enid City R. Co. v. Webber, 32 Okla. 180, 121 Pac. 235, Ann. Cas. 1914A, 569; Watkinds v. Southern P. Co. 4 L.R.A. 239, 14 Sawy. 30, 38 Fed. 711; Birsch v. Citizens' Electric Co. 36 Mont. 574, 93 Pac. 940; Buechner v. New Orleans, 112 La. 599, 66 L.R.A. 334, 104 Am. St. Rep. 455, 36 So. 604; Melzner v. Chicago, M. & St. P. R. Co.

51 Mont. 487, 153 Pac. 1020; Tennessee Coal, Iron & R. Co. v. Herndon, 100 Ala. 451, 14 So. 287, 13 Am. Neg. Cas. 180; Jeffersonville, M. & I. R. Co. v. Dunlap, 20 Ind. 428; Harrison v. Missouri P. R. Co. 74 Mo. 364, 41 Am. Rep. 318; Osborne v. Alabama Steel & Wire Co. 135 Ala. 571, 33 So. 687; Watson v. Farmer, 141 N. C. 452, 54 S. E. 419; Southern R. Co. v. Branyon, 145 Ala. 662, 39 So. 675; Forbes v. Davidson, 147 Ala. 702, 41 So. 312; Newport, L. & A. Turnp. Co. v. Pirmann, 26 Ky. L. Rep. 933, 82 S. W. 976; Gleason v. Missouri River Power Co. 42 Mont. 238, 112 Pac. 398; Pullen v. Butte, 38 Mont. 194, 21 L.R.A.(N.S.) 42, 99 Pac. 290; Phoenix Ins. Co. v. Moog, 78 Ala. 284, 56 Am. Rep. 31; McInerney v. Virginia-Carolina Chemical Co. 118 Fed. 653; Pennsylvania Co. v. Horton, 132 Ind. 189, 31 N. E. 45; Chicago, St. L. & P. R. Co. v. Barnes, 2 Ind. App. 213, 28 N. E. 328; New York, C. & St. L. R. Co. v. Mushrush, 11 Ind. App. 192, 37 N. E. 954, 38 N. E. 871; Murray v. Gulf, C. & S. F. R. Co. 73 Tex. 2, 11 S. W. 125; Harrison v. Missouri P. R. Co. 74 Mo. 364, 41 Am. Rep. 318; Marth v. Kingfisher Commercial Club, 44 Okla. 514, 144 Pac. 1049, 8 N. C. C. A. 784; Oklahoma City v. Reed, 117 Okla. 518, 33 L.R.A.(N.S.) 1083, 87 Pac. 645.

Brett, J., delivered the opinion of the court:

On February 9, 1914, Marvin Lathrop, the defendant in error, filed suit in the district court of Payne county against the plaintiff in error, the Colonial Refining Company, a corporation, to recover damages in the sum of \$10,000 for personal injuries, alleged to have been sustained by Lathrop while in the employ of the said corporation. The parties will be referred to in this opinion as they appeared in the court below; that is, Lathrop, defendant in error, will be referred to as plaintiff, and the Colonial Refining Company will be referred to as defendant. The plaintiff alleged to his petition that he was employed by the defendant as an ordinary day laborer; that while so employed he was ordered and directed by William Fletcher, the defendant's foreman, to go up on the top of a large cylindrical tank to assist another employee in the filling of a 5-gallon jug with sulphuric acid, which was to be taken from the tank by means of a bucket and poured into the jug; that the plaintiff did not know of the dangerous character of the acid, and that defendant negligently required him to perform this task without informing him of the dangerous character of the acid; that when the jug was nearly full of the acid, by reason of the oval surface of the top of

the tank upon which it was sitting, it commenced to slide, and to prevent it from sliding off the tank and falling to the ground he seized the jug, and when he seized it a portion of the acid splashed into his face and eyes, causing him great pain and anguish, and inflicting upon him serious injuries. Summons was duly issued upon the petition, and the defendant made special appearance, and moved to quash the service of summons, which motion was overruled.

The defendant subsequently filed its amended answer, which consisted first of a general denial, then a special denial that William Fletcher was a vice principal, pleaded the assumption of risk, and closed by pleading "that whatever injuries, if any, were sustained by plaintiff herein were not in any manner caused by the negligence of this defendant; but such injuries claimed to have been sustained by plaintiff were caused solely and only by negligence, carelessness, and want of care of plaintiff herein, and the defendant is in no manner liable therefor."

Plaintiff replied by a general denial. Upon the pleadings thus framed the cause went to trial, and resulted in judgment for plaintiff in the sum of \$2,000, from which judgment the defendant appeals to this court.

There are a number of errors assigned, but there are only three that are urged and relied upon.

The first assignment urged is directed against the refusal of the court to quash the service of summons, the second complains of the court's refusal to instruct the jury upon contributory negligence, and the third complains of the refusal of the court to admit in evidence certain photographs. We will discuss these assignments in their inverse order.

1. The photographs offered in evidence, and which the court refused to admit, showed a man standing in assumed positions upon the tank upon which the plaintiff is alleged to have received his injuries, and each picture in addition also showed a jug sitting in different positions on the tank. The court had already admitted in evidence one photograph, showing the size, shape, and surroundings of this particular tank; but we think properly refused to admit in evidence these pictures, which were intended to illustrate a hypothetical situation, and to explain the theory of the defendant as to how the injuries complained of might have occurred. The picture showing the size, shape, and surroundings of this tank was competent; but the pictures showing a man standing in assumed positions, and jugs placed in various assumed situations, serving merely to illustrate certain theories of the defend-

ant as to how the accident might have happened, were incompetent, and, when objected to by plaintiff, were properly excluded. In *Stewart v. St. Paul City R. Co.* 78 Minn. 110, 80 N. W. 855, 7 Am. Neg. Rep. 80, the court, in speaking of the probative value of photographs, says: "Their value depends upon their accuracy. They must be shown by extrinsic evidence to be faithful representations of the place or subject as it existed at the time involved in the controversy."

In *Babb v. Oxford Paper Co.* 99 Me. 298, 59 Atl. 290, the court says: "To be admissible, photographs should simply show conditions existing at the time in question. But photographs taken to show more than this, with men in various assumed postures, and things in various assumed situations, in order to illustrate the claims and contentions of the parties, should not be admitted. An examination of the excluded photographs shows that they fall within the latter class. They would serve merely to illustrate certain theories of the defendant as to how the accident happened." 9 Enc. Ev. 779.

But the defendant cites *Smith v. Territory*, 11 Okla. 669, 69 Pac. 805, in support of its contention that these photographs should have been admitted. But that case is not in point. There the court held that photographs of the deceased, taken after death, and which were shown by extrinsic evidence to correctly show the exact location of the wounds and the course of the bullet which produced death, were admissible on the theory that the photographs did correctly represent the location, nature, and character of the wounds. And that holding is correct, and is not in conflict with anything we have said, but is based upon facts very different from the facts in the case at bar, where the photographs did not purport to represent the exact conditions under which the plaintiff was injured, but only to illustrate a hypothetical situation.

In *St. Louis & S. F. R. Co. v. Dale*, 36 Okla. 114, 128 Pac. 137, the pictures offered and admitted in evidence to show the topography of the country, the length and extent of the ditches in controversy, the timber and other permanent surroundings, were taken months subsequent to the time the damage was alleged to have been sustained; yet they were shown by extrinsic evidence to be faithful representations of the topography of the country, the ditches, and other permanent surroundings, as they existed at the time involved in the controversy. The most that could be claimed in the case at bar is that it was within the discretion of the court as to whether or not these pic-

tures should be admitted. And even upon that hypothesis it cannot be said the court abused its discretion.

2. The next assignment we shall notice is that the court erred in refusing to instruct the jury upon contributory negligence. The defendant in its brief says: "It will be recollected that the answer raised the defense of contributory negligence, alleging: 'Further answering, defendant says that whatever injuries, if any, were sustained by plaintiff herein were not in any manner caused by the negligence of this defendant, but such injuries claimed to have been sustained by plaintiff were caused solely and only by negligence, carelessness, and want of care of plaintiff herein, and the defendant is in no manner liable therefor.'"

But the sufficiency of this paragraph as a plea of contributory negligence is specifically challenged by the plaintiff. And this presents the question squarely, Does this paragraph of the answer plead contributory negligence? We think not. It is, in effect, only another denial of any and all negligence on the part of the defendant, while contributory negligence, as the very words imply, arises when the plaintiff, as well as the defendant, has done some act negligently, or has omitted through negligence to do some act which it was their respective duty to do, and the combined negligence of the two parties directly produced the injury complained of. *Washington v. Baltimore & O. R. Co.* 17 W. Va. 190. And can it be said that an answer which denies any and all negligence on the part of the defendant, and places the entire responsibility for the injury upon the negligence of the plaintiff alone, pleads contributory negligence? The word "contributory" means to contribute to, or aid, in effecting a result. And under such a pleading, what is the defendant alleged to have contributed to, or what has he aided, in effecting the result? The pleading says that the plaintiff, and the plaintiff alone, was guilty of negligence; and if that be true, then there was no negligence on the part of the defendant to which the plaintiff could have contributed. And the pleading as stated above is nothing more than another and general denial of any and all negligence on the part of the defendant.

Enid City R. Co. v. Webber, 32 Okla. 180, 121 Pac. 235, Ann. Cas. 1914A, 569, is a case in which Webber had recovered a judgment against the railway company for personal injuries, and from that judgment the railway company appealed to this court; and, among other things, complained because the court below did not render judgment in its favor on the pleadings. The second paragraph of its answer was: "Even

if it be true that plaintiff received injuries as alleged, such injuries did not result from negligence of the defendant, but were the result of the negligence of the plaintiff."

To this answer Webber filed no reply, and the railway company insisted that Webber's failure to reply to that paragraph of the answer admitted that he was negligent, as pleaded in that paragraph, and that it should therefore have had judgment on the pleadings. But this court said: "This answer required no reply; it stated no new matter, and was, in fact, merely a general denial."

In *Watkins v. Southern P. Co.* (D. C.) 4 L.R.A. 239, 14 Sawy. 30, 38 Fed. 711, the syllabus says in part that "a statement in an answer purporting to be a defense of contributory negligence to an action for damages for an injury to the person, which only denies that the injury was caused by the negligence of the defendant, and alleges that it was 'wholly' caused by the negligence of the plaintiff, is not such a defense."

And in the body of the opinion, the court says: "This defense is not a good plea of contributory negligence;" and, "as I have said, it amounts to nothing more or less than another denial of the allegation in the complaint."

In *Birsch v. Citizens' Electric Co.* 36 Mont. 574, 93 Pac. 940, which was an action for personal injuries, the sixth paragraph of the defendant's answer was: "That if plaintiff was injured at the time alleged, or at any other time, by coming in contact with one of the defendant's wires charged with electricity, such injury was wholly due to plaintiff's own neglect, and was not in any way due to any negligence on the part of defendant, or of any of its officers."

And the defendant insisted that this paragraph of its answer pleaded contributory negligence. But the court said: "The only attempt made to plead contributory negligence is found in the paragraph of the answer quoted above, and that the allegations of that paragraph are insufficient is apparent. In the paragraph it is alleged that plaintiff's injury was wholly due to his own negligence, and was not in any way due to the negligence of the defendant. Contributory negligence on the part of plaintiff presupposes negligence on the part of the defendant. *Beach, Contributory Neg.* 2d ed. § 64; *Wastl v. Montana Union R. Co.* 24 Mont. 159, 61 Pac. 9. 'Contributory negligence is a want of ordinary care upon the part of a person injured by the actionable negligence of another, combining and concurring with that negligence and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred.' L.R.A.1917F.

7 Am. & Eng. Enc. Law, 2d ed. 371. This definition is approved in *Moakler v. Willemette Valley R. Co.* 18 Or. 189, 6 L.R.A. 656, 17 Am. St. Rep. 717, 22 Pac. 948, 10 Am. Neg. Cas. 50, and *Montgomery Gaslight Co. v. Montgomery & E. R. Co.* 86 Ala. 372, 5 So. 735, 11 Am. Neg. Cas. 94. . . . It goes without saying, then, that an answer which denies any negligence on the part of the defendant, and alleges that the injury resulted wholly from plaintiff's negligence, does not plead contributory negligence."

And this doctrine was reaffirmed by the supreme court of Montana in *Melzner v. Chicago, M. & St. P. R. Co.* 51 Mont. 487, 153 Pac. 1019, in which case the syllabus in part says: "The allegation of the answer that deceased came to his death through his own carelessness and negligence is not a plea of contributory negligence, and so does not authorize instructions thereon."

And one of the grounds for reversing the case was that contributory negligence was injected into it for the first time by one of the instructions, the court saying: "In the answer it is alleged that Page came to his death through his own carelessness and negligence. This is not a plea of contributory negligence, as was pointed out in *Birsch v. Citizens' Electric Co.* supra. These instructions are altogether out of place, and error was committed in giving them."

And this doctrine, we think, is supported by reason, and the better authorities. *Cogdell v. Wilmington & W. R. Co.* 132 N. C. 852, 44 S. E. 618; *Hoffman v. Gordon*, 15 Ohio St. 211.

This court has repeatedly said: "The defense of contributory negligence, when well pleaded, if supported by any evidence, entitles the pleader to an instruction thereon by the court." *Hugo v. Nance*, 39 Okla. 640, 135 Pac. 346, and other cases.

And the defendant relies upon these cases. But these very cases imply that there is an improper, as well as a proper, way of pleading contributory negligence, and clearly recognize that there is a distinction between such a plea and a general denial. The opinion in *Clemens v. St. Louis & S. F. R. Co.* 35 Okla. 667, 131 Pac. 169, while not discussing the precise point raised in the case at bar, clearly recognizes the distinction between a general denial and pleas which amount to the same and contributory negligence, and quotes approvingly from 6 Current Law, 768, 769, as follows: "While a denial of negligence and an allegation of contributory negligence are verbally inconsistent, they are not so in practice, and a defendant need not elect between the two defenses; nor does the plea of contributory

negligence, when properly pleaded, admit the negligence as charged in the petition."

The opinion further quotes from the syllabus in *Fowler v. Brooks*, 85 Kan. 861, 70 Pac. 600, which says: "In an action for personal injuries, where defendant denies generally, and alleges contributory negligence, the latter allegation is not an implied admission of negligence rendering proof of negligence unnecessary and limiting the issues to that of contributory negligence,"—thus clearly indicating that the defense of contributory negligence is not raised by simply denying negligence on the part of the defendant and imputing all negligence to the plaintiff.

Besides, as a matter of common justice, we think that since the plaintiff must apprise the defendant in the beginning as to what he relies upon for a recovery, and is limited to the facts pleaded, the defendant should be required also to apprise the plaintiff of any special or affirmative defense he expects to make by pleading the facts constituting such defense, and should likewise be limited to the defense pleaded. We know of no reason why one should be entitled to the light and the other be required to grope in the dark. And the sound and just rule is that "contributory negligence, . . . to be available to the defendant, must be specially pleaded, . . . unless such contributory negligence appears from the allegations of the complaint, or unless the plaintiff's own case raises a presumption of contributory negligence." *Birsch v. Citizens' Electric Co.* 36 Mont. 574, 93 Pac. 940; *Pryor v. Walkerville*, 31 Mont. 618, 79 Pac. 240; *Orient Ins. Co. v. Northern P. R. Co.* 31 Mont. 502, 78 Pac. 1036; *Nord v. Boston & M. Consol. Copper & S. Min. Co.* 33 Mont. 464, 84 Pac. 1116, 89 Pac. 647; *Nelson v. Boston & M. Consol. Copper & S. Min. Co.* 35 Mont. 223, 88 Pac. 785.

And in the case at bar neither of these conditions prevails, and we think the court did not err in refusing to instruct the jury upon contributory negligence.

3. The only remaining assignment urged is that the court erred in refusing to quash the service of summons. The return of summons is the following: "Received this writ February 9, 1914, and, as commanded therein, I summoned the following persons of the defendant within named, at the times following, to wit: President or secretary not being in Payne county, I served by delivering a copy to Roy B. Jones, as manager of the Colonial Refining Company, at Cushing, Oklahoma, February 14, 1914."

The statute prescribing the service of summons on a domestic corporation is § 4715, Revised Laws 1910, and reads as follows: "A summons against a corporation

may be served upon the president, mayor, chairman of the board of directors, or trustees, or other chief officer, or upon an agent duly appointed to receive service of process; or, if its chief officer is not found in the county, upon its cashier, treasurer, secretary, clerk, or managing agent; or, if none of the aforesaid officers can be found, by a copy left at the office or usual place of business of such corporation, with the person having charge thereof."

The question is, Does this return meet the requirements of the statute? The defendant insists that the negation, that the president was not in the county, did not negative the fact that a chief officer was not in the county, and urges that, even if the president was absent from the county, "if the vice president was in the county at the time the president was absent therefrom, he was the chief officer within the meaning of the statute." And says the words "chief officer" must have some significance separate and distinct from president, chairman of the board of directors, etc. We think it is true that it does, and that it is a blanket phrase, intended to cover the chief officer of corporations who might perchance be designated by some other official title than the ones specifically set out and mentioned in the statute. But there can be but one chief officer of a corporation; for if one is chief, then all others must necessarily be subordinate. The very meaning of the word itself precludes any other idea. But the official title of the chief officer need not be president or mayor, but may be whatever the corporation designates, and under this blanket provision of the statute, if one is the chief officer, no matter what his official title may be, the statute makes him subject to service of summons.

While it is true that it has been held that service on a vice president, in the absence of the president from the county, is sufficient, yet many corporations have no vice president; and we cannot, by interpolation, place a greater burden on litigants than that which the statute has already imposed, by requiring a return to show that the vice president, an officer not mentioned by the statute, was also absent from the county. While the return in this case may not be worded just as we would have worded it, yet it does say the president was not found in the county, and that the writ was served on Roy B. Jones, manager of the corporation. And the statute specifically provides that if the "chief officer is not found in the county," whether he be president, or designated by some other official cognomen, that service may be made "upon its cashier, treasurer, secretary, clerk, or managing agent." And this return says the corpora-

tion's president, its chief officer, was not in the county, and that service was made upon one of the subordinates specifically designated by the statute. This, we think, was sufficient, and the court did not err in overruling the motion to quash. The statute contemplates that the absence of the one officer from the county,—the "chief officer," opens the door for legally serving summons upon any one of the subordinates designated. It does not contemplate the absurdity of a multiplicity of chief officers, and that the litigant must run the gauntlet of a descending scale before being entitled to make service upon the subordinates designated, but makes the definite provision that if the one, single, "chief officer is not found in the county," then service may be made upon either the "cashier, treasurer,

secretary, clerk, or managing agent." If the service in the case at bar had been made under the last clause of the section, by leaving a copy at the office or usual place of business, with the person having charge thereof, then, of course, it would have been necessary to negative, not only the presence of the chief officer in the county, but also of the cashier, treasurer, secretary, clerk, and managing agent. But where service is made upon either the cashier, secretary, clerk, or managing agent, it is necessary to negative only the presence of the chief officer.

The judgment is affirmed.

All Justices concur, Thacker, J., concurring in conclusion only.

SOUTH CAROLINA SUPREME COURT.

STATE OF SOUTH CAROLINA

v.

WALTER LABOON et al., Appts.

(— S. C. —, 92 S. E. 622.)

Witness — competency — manslaughter.

1. A witness is not incompetent because he has been convicted of manslaughter.

For other cases, see Witnesses, I. a, in Dig. 1-52 N. S.

Evidence — res gestæ — statement by one shot.

2. A statement by one shot by another as to who shot him, made to a person who, when the row began, went a short distance to give the alarm and immediately returned, finding the one making the statement lying down, and immediately receiving it, is admissible in evidence as part of the res gestæ.

For other cases, see Evidence, X. d, in Dig. 1-52 N. S.

(May 23, 1917.)

APPEAL by defendants from a judgment of the General Sessions Circuit Court for Anderson County, convicting them of manslaughter. Dismissed.

The facts are stated in the opinion.

Messrs. Greene & Earle, for appellants:

The witness Frank Patterson was incompetent.

State v. Anderson, 24 S. C. 112; State v.

Note. — For crimes which disqualify one as a witness, see annotation following this case, post, 898.

Generally as to how near the main transaction declarations must be made in order to constitute part of the res gestæ, see note to Ohio & M. R. Co. v. Stearns, 19 L.R.A. 733. L.R.A.1917F.

James, 15 S. C. 235; 40 Cyc. 2205; 3 Enc. Ev. 204; Smith v. State, 129 Ala. 89, 87 Am. St. Rep. 47, 29 So. 699; Butler v. Wentworth, 84 Me. 25, 17 L.R.A. 766, 24 Atl. 456; Ex parte Wilson, 114 U. S. 421, 29 L. ed. 91, 5 Sup. Ct. Rep. 935, 4 Am. Crim. Rep. 283; United States v. Barefield, 23 Fed. 137; State v. Anderson, 24 S. C. 112

The testimony of Frank Patterson and Tecora Long in regard to an alleged declaration made by the deceased as to who shot him was inadmissible as part of the res gestæ.

State v. McDaniel, 68 S. C. 310, 102 Am. St. Rep. 661, 47 S. E. 384; State v. Gardner, 83 S. C. 477, 65 S. E. 630; State v. Way, 76 S. C. 92, 56 S. E. 653; State v. Lindsey, 68 S. C. 277, 47 S. E. 389; 11 Enc. Ev. 328; State v. Taylor, 56 S. C. 369, 34 S. E. 939; State v. Rish, 104 S. C. 257, 88 S. E. 531; People v. Ah Lee, 60 Cal. 85.

Mr. Kurtz P. Smith for the State.

Gary, Ch. J., delivered the opinion of the court:

The defendants were tried for murder, and convicted of manslaughter.

The first question presented by the exceptions is whether there was error on the part of his Honor, the presiding judge, in overruling the objection of the appellants to the testimony of a witness offered by the state, on the ground that he had been convicted of manslaughter, it being a felony. At common law it was a prerequisite to the

The admissibility as res gestæ of statements made some time after the accident is discussed in the note to Walters v. Spokane International R. Co. 42 L.R.A. (N.S.) 917; and see also Chesapeake Stone Co. v. Holbrook, L.R.A.1916D, 311, and other cases referred to in the footnote.

disqualification of a witness, on the ground that he had been convicted of an offense, that such offense should be of the crimen falsi; and, in order for the crime to be infamous, it was not only necessary that it should involve falsehood or fraud, but that it should be of such a nature as made it probable that the party committing the offense was devoid of truth and insensible to the obligations of an oath. The infamy which rendered such person incompetent as a witness was formerly held to arise from two sources: the conviction of certain offenses and the infliction of certain punishments. It was soon found that the classification based upon the nature of the punishment involved offenses that were not of the crimen falsi, and accordingly such classification was rejected as unreasonable. A classification founded upon the fact that certain offenses are denominated felonies is likewise unsound, because it is not a fact that the nature of all felonies is such as to make it probable that the parties committing them are devoid of truth and insensible to the obligations of an oath. The name by which an offense is designated does not change its moral characteristics, which must necessarily be considered in determining whether the person convicted of a felony is disqualified as a witness; in other words, whether the offense was of the crimen falsi.

These conclusions are sustained by the following authorities: Greenl. Ev. vol. 1, §§ 372, 373:

"Under this general head of exclusion, because of insensibility to the obligation of an oath, may be ranked the case of persons infamous; that is, persons who, whatever may be their professed belief, have been guilty of those heinous crimes which men generally are not found to commit, unless when so depraved as to be unworthy of credit for truth. The basis of the rule seems to be that such a person is morally too corrupt to be trusted to testify,—so reckless of the distinction between truth and falsehood, and insensible to the restraining force of an oath, as to render it extremely improbable that he will speak the truth at all. . . .

"It is a point of no small difficulty to determine precisely the crimes which render the perpetrator thus infamous. The rule is justly stated to require that 'the publicum judicium must be upon an offense implying such a dereliction of moral principle as carries with it a conclusion of a total disregard to the obligation of an oath.' But the difficulty lies in the specification of those offenses. The usual and more general enumeration is treason, felony, and the crimen falsi. In regard to the two former,

as all treasons and almost all felonies were punishable with death, it was very natural that crimes deemed of so grave a character as to render the offender unworthy to live should be considered as rendering him unworthy of belief in a court of justice. But the extent and meaning of the term 'crimen falsi' in our law is nowhere laid down with precision."

1 Starkie on Evidence, p. 494: "Formerly the infamy of the punishment as being characteristic of the crime, and not the nature of the crime itself, was the test of incompetency, but in modern times, immediate reference has been made to the offense itself, since it is the crime, and not the punishment, which renders the offender unworthy of belief. By the common law, the punishment of the pillory indicated the crimen falsi, and consequently no one who had stood in the pillory could afterwards be a witness; but now a person is competent, although he has undergone that punishment for a libel, trespass, or riot; and, on the other hand, when convicted of an infamous crime, he is not competent, although his punishment may have been a mere fine."

In the case of *State v. James*, 15 S. C. 233, the court had under consideration the question whether a person who had been convicted of petit larceny was a competent witness. Associate Justice (afterwards Chief Justice) McIver, in delivering the opinion of the court, said: "There can be no doubt that at common law a conviction of petit larceny rendered a witness incompetent to testify, . . . and we do not see how the fact that the legislature has declared the offense of petit larceny a misdemeanor and reduced the punishment can affect the question under consideration. . . . The fact that the legislature has seen fit to alter the amount and character of the punishment for this offense does not change the nature of the offense, the moral qualities of which remain the same as before. This, therefore, cannot restore the competency of a person convicted of this offense, for, as we have seen, 'it is the crime, and not the punishment, that renders the man infamous.'"

It thus clearly appears that neither a change in the nature of the punishment, nor the designation of an offense as a felony, alters the moral qualities which must be taken into consideration in determining whether the offense is infamous.

The next question for consideration is whether there was error on the part of the circuit judge in overruling the objection of the appellants to certain declarations of the deceased, on the ground that they did not form part of the *res gestæ*. There was tes-

timony tending to show that the difficulty took place a short distance from the church building; that when the first shot was fired the witness went to the church for the purpose of giving notice of the row, and then heard two other shots; that as soon as he gave the notice of the row, he returned to the place where the difficulty had taken place, and found the deceased lying on his back. The time elapsing from the beginning of the row until the deceased made his statement as to who had shot him was

variously estimated from five to fifteen minutes. The fact that the witness went to the church before the difficulty was finished, and that he returned as soon as he gave the notice and before any attempt had been made to remove the deceased, tended to show that the declarations of the deceased formed part of the *res gestæ*.

Appeal dismissed.

Hydrick, Watts, Fraser, and Gage, JJ., concur.

Annotation—Crimes which disqualify one as a witness.

In referring in this note to disqualifying crimes, it is intended, of course, to refer to crimes for which the proposed witness has been sentenced.

This note does not include the question whether statutes permitting an accused to testify in his own defense will qualify him if he has been convicted of another offense,¹ nor does it include the question of conviction in another jurisdiction as affecting competency of witnesses,² nor the effect of pardon or commutation of sentence upon the competency of witnesses.³

"The disqualification of a person who has been convicted of crime," says Professor Wigmore, "seems not to have been fully established in our law until well on into the 1600's."⁴ It seems to have been considered at first that the disqualification depended upon the nature

of the punishment rather than upon the nature of the crime,⁵ but it later became settled that it is the nature of the crime, and not of the punishment, which makes one infamous and consequently incompetent as a witness.⁶

It is usual to speak generally of the common-law disqualification as applying to treason, felony, and *crimen falsi*, the phrase apparently being taken from Chief Baron Gilbert's work on Evidence.⁷ Coke, stating cases where a witness is not to be sworn, says: "As if the witness were infamous: For example, if he be attainted of a false verdict or of a conspiracie at the suite of the King, or convicted of perjury or of a *præmunire*, or of forgery upon the statute of 5 Eliz. chap. 14, and not upon the statute of 1 Hen. V. chap. 3, or convict of felony, or by judgement lost his eares, or stood up-

¹ For example of cases on this subject see *Ransom v. State* (1887) 49 Ark. 176, 4 S. W. 658; *Hinton v. Com.* (1909) 134 Ky. 511, 121 S. W. 434; *Roberson v. Woodfork* (1913) 155 Ky. 206, 159 S. W. 793; *Delamater v. People* (1871) 5 Lans. (N. Y.) 332; *Newman v. People* (1872) 63 Barb. (N. Y.) 630; *Morgan v. State* (1888) 86 Tenn. 472, 7 S. W. 456; *Williams v. State* (1889) 28 Tex. App. 301, 12 S. W. 1103; *Shannon v. State* (1890) 28 Tex. App. 474, 13 S. W. 599.

² For that subject, see the note to *Brown v. United States*, L.R.A.1917A, 1138.

³ For that subject, see the note to *Thompson v. United States*, 47 L.R.A.(N.S.) 206.

⁴ 1 Wigmore, Ev. § 519.

⁵ 1 Co. Litt. 6b, quoted *infra*. See also the opinion of Holt, Ch. J., in *Rex v. Crosby* (1695) 5 Mod. 15, 87 Eng. Reprint, 491, which, however, he seems to have modified in *Rex v. Davis* (1695) 5 Mod. 75, 87 Eng. Reprint, 527.

"This infamy was formerly held to arise from two sources: A conviction of certain offenses, and the infliction of certain penalties. The mere conviction, properly evidenced, of some crimes, was always sufficient, as it is at present, to render the offender infamous, whilst some punish-

ments of a personally degrading character had also the same effect, whatever the crimes might be for which they were inflicted. But it is now settled, on better principles, that it is the crime, and not the punishment, which creates the infamy and destroys the competency of the witness." *People v. Whipple* (1827) 9 Cow. (N. Y.) 708.

⁶ *Chater v. Hawkins* (1689) 3 Lev. 426, 83 Eng. Reprint, 763; *Willes, Ch. J.*, in *Pendock v. Mackinder* (1755) *Willes*, 665, 125 Eng. Reprint, 1375; *People v. Whipple* (1827) 9 Cow. 708, *supra* (as stating the rule); *Schuykill County v. Copley* (1871) 67 Pa. 386, 5 Am. Rep. 441; *Gilbert, Ev.* 140; *Clancey's Case* (1714) *Fortescue*, 208, 92 Eng. Reprint, 821 (opinions of the judges).

⁷ "Now there are several crimes that so blemish that the party is ever afterwards unfit to be a witness, as treason, felony, and every *crimen falsi*, as perjury, forgery, and the like." *Gilbert, Ev.* 139.

"It is well settled that at common law the only offenses that disqualify a witness are of three classes, and three classes only, viz., treason, felony, and the *crimen falsi*." *United States v. Sims* (1907) 161 Fed. 1008.

on the tumbrell, or been stigmaticus, branded, or the like, whereby they became infamous for some offenses, *quæ sunt minoris culpæ sunt majoris infamæ.*"⁸ Hawkins specifies as disqualifying crimes, treason, felony, piracy, præmunire, perjury, forgery under 5th Eliz. He also states that one is disqualified against whom there has been judgment in attain for giving a false verdict, or in conspiracy at the suit of the King, or judgment for any crime whatsoever to stand in the pillory or to be whipped or branded.⁹

The meaning of the term "*Crimen falsi*," which was borrowed from the Roman law, has not been defined with precision.¹⁰ Greenleaf, the leading American authority on the subject, says:¹¹ "In the Roman law, from which we have borrowed the term, it included not only forgery, but every species of

fraud and deceit. If the offense did not fall under any other head, it was called *stellionatus*, which included 'all kinds of cozenage and knavish practice in bargaining.' But it is clear that the common law has not employed the term in this extensive sense, when applying it to the disqualification of witnesses; because convictions for many offenses, clearly belonging to the *crimen falsi* of the civilians, have not this effect. Of this sort are deceits in the quality of provisions, deceits by false weights and measures, conspiracy to defraud by spreading false news, and several others."¹²

Some views of various courts on the subject, mainly derived from Greenleaf, are given in the footnote.¹³

Disqualifying crimes at common law.

At common law a witness is disqualified who has been sentenced for mur-

⁸ 1 Co. Litt. 6b.

⁹ 2 Hawk. P. C. chap. 46, § 19.

¹⁰ 1 Greenl. Ev. § 373.

¹¹ 1 Greenl. Ev. § 373.

¹² It is further said in a note to 1 Greenleaf on Evidence, § 373: "The *crimen falsi*, as recognized in the Roman law, might be committed: (1) By words, as in perjury; (2) by writing, as in forgery; (3) by act or deed; namely, in counterfeiting or adulterating the public money,—in fraudulently substituting one child for another, or a supposititious birth,—or in fraudulently personating another,—in using false weights or measures,—in selling or mortgaging the same thing to two several persons, in two several contracts, and in officiously supporting the suit of another by money, etc., answering to the common-law crime of maintenance. Wood, Institutes of Civil Law, pp. 282, 283; Hallifax, Roman Law, p. 134."

¹³ In *Utley v. Merrick* (1846) 11 Met. (Mass.) 302, the court said: "To render a witness incompetent by his having been convicted of a crime, the crime must be such as to render him infamous, and therefore unworthy of credit for truth. What crimes will render a witness thus infamous it may be difficult in some cases to decide. It is well settled, however, that a conviction of treason, felony, or the *crimen falsi*, renders a witness incompetent. But what crimes are to be considered as designated by the term '*crimen falsi*' is not so well settled. 'In the Roman law,' as Professor Greenleaf remarks, 'from which we have borrowed the term, it included not only forgery, but every species of fraud and deceit.' 'But it is clear,' he says, 'that the common law has not employed the term in this extensive sense, when applying it to the disqualification of witnesses.' 1 Greenl. Ev. § 373. These remarks, we think, are correct, and they are fully supported by the authorities cited L.R.A.1917F.

to sustain them. And we are also of opinion that the deduction which Mr. Greenleaf makes from these authorities is well founded. 'From these decisions,' he remarks, 'it may be deduced that the *crimen falsi* of the common law not only involves the charge of falsehood, but is also one which may injuriously affect the administration of justice by the introduction of falsehood and fraud.' The latter part of the quotation is found also in *State v. Randolph* (1856) 24 Conn. 363.

"At common law—and we have no statute in this state upon the subject—persons convicted of treason, felony, and every species of the *crimen falsi*, are incompetent to testify as witnesses, by reason of their infamy. Thus, a conviction for forgery will disqualify, as will also a conviction of any offense tending to pervert the administration of justice by falsehood or fraud. Of this nature are perjury and subornation of perjury; attain of false verdict; bribing a witness to absent himself, in order that he may not give evidence; conspiring to procure the absence of a witness; conspiring to accuse another person of a capital offense; barratry; and other crimes of a like character." *Little v. Gibson* (1859) 30 N. H. 505.

"The meaning of the term *crimen falsi*, which was borrowed from the Roman law, has not been defined with precision. It is generally accepted as embracing all offenses tending to pervert the administration of justice by falsehood or fraud. . . . The basis of the rule seems to be, that such a person is morally too corrupt to be trusted to testify,—so reckless of the distinction between truth and falsehood, and insensible to the restraining force of an oath, as to render it extremely improbable that he will speak the truth at all. Of such a person, Chief Baron Gilbert remarks, that 'the credit of his oath is overbalanced by the stain of iniquity.' 1 Greenl.

der,¹⁴ burglary,¹⁵ highway robbery,¹⁶ "larceny,"¹⁷ grand larceny,¹⁸ petit larceny,¹⁹ "theft,"²⁰ pocket picking,²¹ forgery,²² conspiracy to accuse one of crime,²³ conspiracy to bribe a witness not to appear,²⁴ bribing a witness to leave the kingdom,²⁵ barratry,²⁶ "felony,"²⁷ or for "an infamous crime."²⁸ Perjury, while a disqualification at common law, was made so also by statute at an early day.²⁹

As to some matters, the courts have

Ev. § 372." *Taylor v. State* (1878) 62 Ala. 164.

The opinion has been expressed that "the disqualification to testify appears to have been limited to those adjudged guilty of treason, felony, forgery, and crimes injuriously affecting by falsehood and fraud the administration of justice, such as perjury, subornation of perjury, suppression of testimony by bribery, conspiring to accuse one of crime, or to procure the absence of a witness; and not to have been extended to cases of private cheats, such as the obtaining of goods by false pretenses, or the uttering of counterfeit coin or forged securities." *Gray, J., Ex Parte Wilson* (1885) 114 U. S. 417, 29 L. ed. 89, 5 Sup. Ct. Rep. 935, 4 Am. Crim. Rep. 283.

¹⁴ *Fonville v. Atlanta & C. Air Line R. Co.* (1912) 93 S. C. 287, 75 S. E. 172; *Berry v. Godwin* (1916) — *Tex. Civ. App.* —, 188 S. W. 30 (the common law applying to civil actions).

¹⁵ *Taylor v. State* (1878) 62 Ala. 164.

¹⁶ *State v. Peterson* (1892) 35 S. C. 279, 14 S. E. 617.

¹⁷ *United States v. Brown* (1835) 4 Cranch, C. C. 607; *Fed. Cas. No. 14,661*; *Le Baron v. Crombie* (1817) 14 *Mass.* 234.

¹⁸ *Taylor v. State* (1878) 62 Ala. 164; *State v. Howard* (1878) 19 *Kan.* 507; *State v. Clark* (1899) 60 *Kan.* 450, 56 *Pac.* 767; *State v. Foley* (1880) 15 *Nev.* 64, 37 *Am. Rep.* 458; *State v. Benoit* (1861) 16 *La. Ann.* 273 (horse stealing).

¹⁹ *Pendock v. Mackinder* (1755) *Willes, Rep.* 665, 125 *Eng. Reprint*, 1375; *Sylvester v. State* (1881) 71 *Ala.* 17; *Burns v. Campbell* (1882) 71 *Ala.* 271; *Werner v. State* (1884) 44 *Ark.* 122 (the common law applying in criminal cases); *McLain v. Chicago* (1906) 127 *Ill. App.* 489 (the court expressing this opinion); *Com. v. Keith* (1844) 8 *Met. (Mass.)* 531 ("simple larceny" less than \$5); *Lyford v. Farrar* (1855) 31 *N. H.* 314; *State v. James* (1881) 15 *S. C.* 233.

Contra: *Rex v. Pourkfdorff* (1764) *Quincy (Mass.)* 104.

(Note that petit larceny was a felony at common law: *Pendock v. Mackinder* (*Eng.*) supra; *Ward v. People* (1842) 3 *Hill* (*N. Y.*) 305, affirmed in (1843) 6 *Hill*, 144 [obiter]; *Carpenter v. Nixon* (1843) 5 *Hill* (*N. Y.*) 260 [obiter]).

²⁰ *State v. Gardner* (1793) 1 *Root (Conn.)* 485.
L.R.A.1917F.

shown some difference of opinion. Thus, while receiving stolen goods has been held to make a witness incompetent,³⁰ there is at least one decision to the contrary.³¹ And while a witness was held not disqualified for fraudulently conspiring to defraud by circulating rumors for the purpose of raising the price of public funds,³² or for disposing of a crop while under a lien,³³ or for conspiracy to cheat and defraud creditors,³⁴ it has been held, on the other hand, that conspiracy

²¹ *Nichols v. Dallyhunny* (1738) *Barnes, Notes*, 79, 94 *Eng. Reprint*, 815.

²² *Perkins v. Stevens* (1833) 24 *Pick. (Mass.)* 277; *State v. Candler* (1824) 10 *N. C.* (3 *Hawks*) 393; *Webster v. Mann* (1882) 56 *Tex.* 119, 42 *Am. Rep.* 688. Witnesses were held disqualified by forgery in *Jones v. Mason* (1728) 2 *Strange*, 834, 93 *Eng. Reprint*, 881, and in *Walker v. Kearney* (1740) 2 *Strange*, 1148, 93 *Eng. Reprint*, 1092; but it does not appear whether this was forgery at common law or under the statute referred to by Coke in 1 *Co. Litt.* 6b.

²³ *Rex v. Priddle* (1787) 1 *Leach*, C. L. 442. It does not appear from the report what the conspiracy was, but in notes to 1 *Starkie on Evidence*, 95, and 1 *Greenleaf on Evidence*, 373, this interpretation is given.

²⁴ *Bushel v. Barrett* (1826) *Ryan & M. (Eng.)* 434.

²⁵ Opinions of the judges in *Clancey's Case*, *Fortescue*, 208, 92 *Eng. Reprint*, 821.

²⁶ *Rex v. Ford* (1700) 2 *Salk.* 690, 91 *Eng. Reprint*, 585.

²⁷ *Brown v. Crashaw* (1613) 2 *Bulstr.* 154, 80 *Eng. Reprint*, 1028; *Celier's Case* (1680) 2 *Raym.* 369, 83 *Eng. Reprint*, 192; *Maxey v. United States* (1913) 125 *C. C. A.* 77, 207 *Fed.* 327; *People v. Bowen* (1872) 43 *Cal.* 439, 13 *Am. Rep.* 148; *Blanc v. Rodgers* (1874) 49 *Cal.* 15; *State v. Timmons* (1833) 2 *Harr. (Del.)* 528 (kidnapping); *State v. Mullen* (1881) 33 *La. Ann.* 159, 4 *Am. Crim. Rep.* 181; *Tillman v. Fletcher* (1890) 78 *Tex.* 673, 15 *S. W.* 161; *Gulf, C. & S. F. R. Co. v. Johnson* (1905) — *Tex. Civ. App.* —, 86 *S. W.* 34.

²⁸ *United States v. Hollis* (1890) 43 *Fed.* 248.

²⁹ See, under the statute, *Anonymous* (1701) 2 *Salk.* 691, 91 *Eng. Reprint*, 536; *Anonymous* (1701) 3 *Salk.* 155, 91 *Eng. Reprint*, 748.

³⁰ *Com. v. Rogers* (1844) 7 *Met. (Mass.)* 500, 41 *Am. Dec.* 458; *State v. Dodson* (1880) 14 *S. C.* 628.

³¹ *Com. v. Murphy* (1845) 3 *Clark (Pa.)* 290.

³² *Re Ville De Varsovie* (1817) 2 *Dodson, Adm. (Eng.)* 174; *Crowther v. Hopwood* (1820) 3 *Starkie (Eng.)* 21.

³³ *State v. Green* (1896) 48 *S. C.* 136, 26 *S. E.* 234.

³⁴ *Bickel v. Fasig* (1859) 33 *Pa.* 463.

with one taking the oath of an insolvent debtor to defraud his creditors by secreting property is an infamous crime, partaking of the *crimen falsi*, and will disqualify a witness.³⁵

Crimes not disqualifying at common law.

At common law a witness is not disqualified by assault and battery with intent to murder;³⁶ by obtaining goods by false pretenses;³⁷ unlawfully cutting timber;³⁸ maliciously obstructing the passing of cars on a railroad;³⁹ nor by the offense described by the statute imposing a penalty on any person who wantonly or maliciously injures any railroad in the state which is in use for the transportation of passengers or merchandise, or places any obstruction or impediment thereon.⁴⁰ Nor will a witness be disqualified by the offense of libel,⁴¹ nor by that of keeping a public gaming house,⁴² nor a bawdyhouse,⁴³ nor by the offense of adultery,⁴⁴ nor, it has been said, by the offense of being a common prostitute.⁴⁵ So, the witness will not be disqualified by the offense of embezzlement.⁴⁶ It has, however, been held in one state that while embezzlement was not a disqualifying offense at common law, if, under the statute, the acts constituting the offense might have been

larceny at common law, the appellate court would not presume that the conviction of a proposed witness of embezzlement was for acts not constituting larceny at common law, and therefore he was properly disqualified.⁴⁷ But this seems hardly consistent with an earlier decision in the same state, holding that a witness would not be disqualified by arson in the third degree where it was not shown that his offense was such as would be arson at common law.⁴⁸

The opinion has been expressed that the offense of making and delivering to the assessor a false and fraudulent schedule of property for taxation, with intent to defeat the law in relation to the assessment of property for taxation, was not an infamous crime nor *crimen falsi*.⁴⁹ Singing a song against the government was not a disqualifying offense by the civil and common law.⁵⁰

Of course, the offense must be an offense against the state. Thus, a violation of a town ordinance against stealing does not disqualify.⁵¹

Statutory disqualification.

It is not intended here to do more than refer to cases illustrating the statutes.

Various statutes have disqualified witnesses for perjury;⁵² false swearing;⁵³ subornation of perjury;⁵⁴ larceny;⁵⁵

³⁵ *United States v. Porter* (1812) 2 Cranch, C. C. 60, Fed. Cas. No. 16,072.

³⁶ *United States v. Brockius* (1811) 3 Wash. C. C. 99, Fed. Cas. No. 14,662.

³⁷ *Utley v. Merrick* (1846) 11 Met. (Mass.) 302.

³⁸ *Holler v. Firth* (1810) 3 N. J. L. 723.

³⁹ *Com. v. Dame* (1851) 8 Cush. (Mass.) 384.

⁴⁰ *Clifton v. State* (1883) 78 Ala. 473.

⁴¹ *Campbell v. State* (1853) 23 Ala. 44.

By the canon and civil law libel was not a disqualification. *Chater v. Hawkins* (1695) 3 Lev. 426, 83 Eng. Reprint, 763.

⁴² *Rex v. Grant* (1825) Ryan & M. (Eng.) 270.

⁴³ *Deer v. State* (1851) 14 Mo. 348.

⁴⁴ *Little v. Gibson* (1859) 39 N. H. 506.

⁴⁵ *State v. Randolph* (1856) 24 Conn. 363.

⁴⁶ *United States v. Sims* (1907) 161 Fed. 1008; *Schuykill County v. Copley* (1871) 67 Pa. 386, 5 Am. Rep. 441 (embezzlement by county tax collector).

One sentenced for defrauding a national bank of which he was clerk by abstracting its moneys is not incompetent; the offense is not treason, felony, or *crimen falsi*. *Keliher v. United States* (1912) 114 C. C. A. 128, 193 Fed. 8.

In *United States v. Sims* (1907) 161 Fed. 1008, the court said: "Does embezzlement fall within the meaning of the term, '*crimen falsi*?' It is abundantly settled that, in order to fall within this designation, a L.R.A.1917F.

crime must be of such a character that it not only carries with it the element of falsehood, but it must be of such a nature as tends to obstruct the administration of public justice. It is clear that the offense fulfils neither of these conditions."

⁴⁷ *Lipscomb v. McClellan* (1882) 72 Ala. 151.

⁴⁸ *Harrison v. State* (1876) 55 Ala. 239.

⁴⁹ *Matzenbaugh v. People* (1901) 194 Ill. 103, 88 Am. St. Rep. 134, 62 N. E. 546.

⁵⁰ *Chater v. Hawkins* (1695) 3 Lev. 426, 83 Eng. Reprint, 763.

⁵¹ *Cheatham v. State* (1877) 59 Ala. 40.

⁵² *Anonymous* (1701) 2 Salk. 691, 91 Eng. Reprint, 586; *Anonymous* (1697) 3 Salk. 155, 91 Eng. Reprint, 748; *Holridge v. Gillespie* (1815) 2 Johns. Ch. (N. Y.) 30; *Houghtaling v. Kelderhouse* (1851) 1 Park. Crim. Rep. (N. Y.) 241; *Samuels v. Com.* (1909) 110 Va. 901, 66 S. E. 222, 19 Ann. Cas. 380.

⁵³ *Hinton v. Com.* (1909) 134 Ky. 511, 121 S. W. 434; *Roberson v. Woodfork* (1913) 155 Ky. 206, 159 S. W. 793; *Singleton v. Com.* (1916) 169 Ky. 518, 184 S. W. 871.

⁵⁴ *Re Sawyer* (1842) 2 Q. B. 721, 114 Eng. Reprint, 281, 2 Gale & D. 141, 11 L. J. Q. B. N. S. 234, 6 Jur. 669.

⁵⁵ *Hall v. Doyle* (1880) 35 Ark. 445 (statute applying to civil cases); *Cash v. Cash* (1899) 67 Ark. 278, 54 S. W. 744 (petit larceny); *Foreman v. Baldwin* (1860) 24 Ill. 298 (petit larceny); *State v. Grant*

forgery;⁵⁶ obtaining money by false pretenses;⁵⁷ and felony.⁵⁸

It has been held that a statute excluding a witness convicted of arson will not apply to a witness convicted under a later statute of the offense of burning a ginhouse, as such burning did not constitute the offense of arson at common law.⁵⁹ Also that a statute providing that a party convicted of dealing faro, and prescribing the consequences that shall attend this infamy, which are disqualification for the exercise of the right of suffrage and for holding any office of honor, trust, or profit, does not disqualify the convict as a witness.⁶⁰

Abolishment or modification of the common-law rule.

Statutes abolishing entirely the common-law rule disqualifying witnesses because of crime have been enacted in many jurisdictions. It is only intended here to refer to cases illustrating or stating the change.⁶¹ In England there has been some uncertainty as to whether the statute qualifies as a witness one under sentence of death.⁶²

Some statutes have confined the exemption to civil cases;⁶³ under others certain crimes will disqualify, as perjury,⁶⁴ or perjury and subornation of perjury.⁶⁵ Other statutes variously have

(1883) 79 Mo. 113, 49 Am. Rep. 218 (petit larceny); *State v. Kirschner* (1886) 23 Mo. App. 349 (grand larceny); *Evans v. State* (1872) 7 Baxt. (Tenn.) 12 (petit larceny); *Moore v. State* (1896) 96 Tenn. 209, 33 S. W. 1046 (larceny and robbery).

In *Pruitt v. Miller* (1851) 3 Ind. 16, it was held that the disqualifying statute did not include petit larceny.

⁵⁶ *Poage v. State* (1854) 3 Ohio St. 229.
⁵⁷ *Ritter v. Democratic Press Co.* (1878) 68 Mo. 458.

⁵⁸ *People ex rel. Lord v. Robertson* (1863) 26 How. Pr. (N. Y.) 90; *People v. Park* (1869) 41 N. Y. 24.

So, by statute applying to criminal actions, *Schell v. State* (1877) 2 Tex. App. 30; *Long v. State* (1881) 10 Tex. App. 186; *Carr v. State* (1885) 19 Tex. App. 635, 53 Am. Rep. 395; *McGee v. State* (1891) 29 Tex. App. 596, 16 S. W. 422; *Dudley v. State* (1887) 24 Tex. App. 163, 5 S. W. 649; *Miller v. State* (1904) 46 Tex. Civ. App. 569, 84 S. W. 844; *Bradford v. State* (1911) 62 Tex. Crim. Rep. 424, 138 S. W. 119; *Watts v. State* (1912) 67 Tex. Crim. Rep. 4, 148 S. W. 310.

Felony for which the witness has not been punished (or pardoned). *Quillin v. Com.* (1906) 105 Va. 874, 54 S. E. 333, 8 Ann. Cas. 818.

⁵⁹ *Williams v. Dickenson* (1891) 28 Fla. 90, 9 So. 847.

⁶⁰ *Holloway v. Com.* (1875) 11 Bush (Ky.) 344.

⁶¹ *Reg. v. Drury* (1848) 3 Car. & K. (Eng.) 190; *People v. Willard* (1891) 92 Cal. 482, 28 Pac. 585; *Card v. Fort* (1889) 57 Conn. 427, 18 Atl. 713; *Brunswick & W. R. Co. v. Clem* (1888) 80 Ga. 534, 7 S. E. 84; *Dixon v. State* (1902) 116 Ga. 186, 42 S. E. 357; *Bowers v. Southern R. Co.* (1912) 10 Ga. App. 367, 73 S. E. 677; *Bartholomew v. People* (1882) 104 Ill. 601; *Stocking v. State* (1855) 7 Ind. 326; *State v. Mack* (1889) 41 La. Ann. 1079, 6 So. 808; *State v. McManus* (1890) 42 La. Ann. 1194, 8 So. 305; *State v. Asbury* (1897) 49 La. Ann. 1741, 23 So. 322; *State v. Blount* (1909) 124 La. 202, 50 So. 12; *Woodman v. Churchill* (1863) 51 Me. 112; *Newhall v. Jenkins* (1854) 2 Gray (Mass.) 562; *Com. v. Gorham* (1868) 90 Mass. 420 (but the L.R.A.1917F.

common law was restored as to attesting witnesses to wills; see *O'Connell v. Dow* (1903) 182 Mass. 541, 66 N. E. 788, expressing the opinion that bribery, being a felony in Massachusetts, "is an infamous crime within the rule of the common law which renders a person convicted of an infamous crime incompetent to testify"; *People v. Maunnausau* (1886) 60 Mich. 15, 26 N. W. 797; *State v. Sauer* (1890) 42 Minn. 261, 44 N. W. 115 (referring to the qualifying statute, and stating that the common law in respect to disqualification of a witness for crime never prevailed in Minnesota); *State v. Loney* (1884) 82 Mo. 84; *State v. Myers* (1906) 198 Mo. 225, 94 S. W. 242; *People v. McGloin* (1883) 91 N. Y. 241; *People v. O'Neil* (1888) 48 Hun (N. Y.) 36, affirmed in (1888) 109 N. Y. 251, 14 N. E. 68; *People v. Sebring* (1895) 14 Misc. 31, 35 N. Y. Supp. 237; *State v. Harston* (1869) 63 N. C. 294; *State v. Adair* (1873) 68 N. C. 68; *Ex parte Harris* (1875) 73 N. C. 65; *August v. Finnerty* (1908) 30 Ohio C. C. 330; *Baltimore & O. R. Co. v. Rambo* (1893) 8 O. C. A. 6, 16 U. S. App. 277, 59 Fed. 75 (Ohio); *Hopt v. Utah* (1884) 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417 (Utah); *Sutton v. Fox* (1882) 55 Wis. 531, 42 Am. Rep. 744, 13 N. W. 477; *Koch v. State* (1906) 126 Wis. 470, 3 L.R.A.(N.S.) 1086, 106 N. W. 531, 5 Ann. Cas. 389.

⁶² In *Reg. v. Webb* (1867) 11 Cox, C. C. (Eng.) 133, it was held that the qualifying statute did not qualify one under sentence of death. But the contrary was held in *Reg. v. Fitzgerald* (1884, Dublin) reported in a note in 2 Taylor on Evidence, § 1347.

A person sentenced to death is now a competent witness in Canada. *Rex v. Kuzin* (1915) 25 Manitoba, L. R. 218, 24 Can. Crim. Cas. 66, 21 D. L. R. 378 (citing to the contrary, *Graeme v. Globe Printing Co.* 10 Can. L. T. 367); *King v. Hatch* (1909) 16 Can. Crim. Cas. 196.

⁶³ *Winter v. Sass* (1878) 19 Kan. 556.

⁶⁴ *Menefee v. State* (1910) 59 Fla. 316, 51 So. 555; *State v. Champoux* (1903) 33 Wash. 339, 74 Pac. 567; *State v. Pearson* (1905) 37 Wash. 405, 79 Pac. 985.

⁶⁵ *Wynne v. State* (1908) 155 Fla. 99;

qualified as witnesses those convicted of all crimes except statutory felonies,⁶⁶ or except felonies which have not been punished or pardoned,⁶⁷ or have confined the

disqualification of felony to criminal cases.⁶⁸ Illustrations of some other statutes are referred to in the footnote.⁶⁹

King v. McChesney (1887) 7 Haw. 104; *United States v. Moore* (1906) 3 Haw. Dist. Ct. 66; *United States v. Morimoto* (1909) 3 Haw. Dist. Ct. 396; *Keithler v. State* (1848) 10 Smedes & M. (Miss.) 192; *State v. Henson* (1901) 66 N. J. L. 601, 50 Atl. 468, 616; *Hyde v. Territory* (1899) 8 Okla. 69, 56 Pac. 851; *Martin v. Territory* (1904) 14 Okla. 598, 78 Pac. 88; *Wells v. Territory* (1905) 15 Okla. 195, 81 Pac. 425; *Price v. State* (1913) 9 Okla. Crim. Rep. 359, 131 Pac. 1102; *Com. v. Clemmer* (1899) 190 Pa. 202, 42 Atl. 675; *Com. v. Doe* (1908) 18 Pa. Dist. R. 611.

⁶⁶ *Carpenter v. Nixon* (1843) 5 Hill (N. Y.) 260; *Shay v. People* (1860) 22 N. Y. 317.

⁶⁷ *Barbour v. Com.* (1885) 80 Va. 287; *Benton v. Com.* (1893) 89 Va. 570, 16 S. E. 725 (perjury, however, is excluded, though punished or pardoned).

⁶⁸ *Welsh v. State* (1877) 3 Tex. App. 114; *Solan v. State* (1916) — Tex. Crim. —, 182 S. W. 317.

⁶⁹ Excepting those convicted of perjury,

false swearing, or subornation of perjury, and also, in civil cases, prisoners in the penitentiary of the state or of any other country. *Com. v. Minor* (1890) 89 Ky. 555, 13 S. W. 5.

Excluding only those convicted of the offenses of perjury, false swearing, subornation of perjury, or a school officer who makes a false report, or a notary who makes a false statement as to the notice in a protest. *Illinois C. R. Co. v. McManus* (1904) 118 Ky. 780, 82 S. W. 399. In this case it does not appear whether the convict was actually in prison, so it leaves the matter in some doubt as to whether the former statute excluding in civil cases prisoners in the penitentiary is still in force or not.

"A person convicted of felony and sentenced therefor, except it be for perjury, may, by leave of the court, be examined as a witness in any criminal prosecution, though he has not been pardoned or punished therefor." *State v. Hatfield* (1900) 48 W. Va. 561, 37 S. E. 626. B. B. B.

SOUTH DAKOTA SUPREME COURT.

CITY OF WATERTOWN, Respt.,
v.

MAURICE CHRISTNACHT et al., Appts.

(— S. D. —, 164 N. W. 62.)

Constitutional law — forbidding association with prostitute.

Providing punishment for any male person found associating or in company with a female known or reputed to be a prostitute violates the constitutional right of liberty.

For other cases, see *Constitutional Law*, II. b, 1, in Dig. 1-52 N. S.

(August 23, 1917.)

APPEAL by defendants from a judgment of the Municipal Court of Watertown convicting them of violating an ordinance forbidding association with prostitutes. Reversed.

The facts are stated in the opinion.

Mr. Clay Carpenter, for appellants:

The ordinance of the city of Watertown upon which this prosecution is based is void, and the city is without power to enact the same.

Weideman v. State, 4 Ind. App. 397, 30

Note. — As to statute or ordinance making it an offense to associate with disreputable persons, see annotation following this case, post, 904.
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N. E. 920; *People v. Gastro*, 75 Mich. 127, 42 N. W. 937; *Butte v. Peasley*, 18 Mont. 303, 45 Pac. 210; *Re Way*, 41 Mich. 299, 1 N. W. 1021; *Re Stegenga*, 133 Mich. 55, 61 L.R.A. 763, 94 N. W. 385; *State v. Stone*, 96 Minn. 482, 105 N. W. 187; *St. Paul v. Briggs*, 85 Minn. 290, 89 Am. St. Rep. 554, 88 N. W. 984.

Gates, P. J., delivered the opinion of the court:

An ordinance of the city of Watertown declares, among other things, the following:

"Sec. 17. (Pimp). Any male person . . . who shall be found associating with females known or reputed as common courtesans or prostitutes, or who shall be found in any company with any female known or reputed as a common prostitute or courtesan, . . . within the limits of the city of Watertown, shall be deemed a pimp, and upon conviction thereof shall be fined in any sum not exceeding \$50, nor less than \$10, and imprisonment for any determinate period not exceeding ten days, nor less than five days."

The defendants were arrested, tried, convicted, and adjudged to pay a fine of \$25 and costs, under a complaint which charged that at the city of Watertown they, "on and before the 16th day of November, A. D. 1916, were then and there unlawfully found associating with females known and reputed as common courtesans and prostitutes," and

which complaint further stated the names of such females. From the judgment, defendants appeal.

It is urged, and we think correctly, that this ordinance is unconstitutional. In *Pinkerton v. Verberg*, 78 Mich. 573, 7 L.R.A. 507, 18 Am. St. Rep. 473, 44 N. W. 579, the court well said: "Personal liberty, which is guaranteed to every citizen under our Constitution and laws, consists of the right of locomotion—to go where one pleases, and when, and to do that which may lead to one's business or pleasure, only so far restrained as the rights of others may make it necessary for the welfare of all other citizens."

Quoting the above, the supreme court of Missouri said in *St. Louis v. Roche*, 128 Mo. 541, 31 S. W. 915: "Our Constitution and laws guarantee to every citizen the right to go where and when he pleases, and to associate with whom he pleases, exacting from him only that he conduct himself in a decent and orderly manner, that he disturb no one, and that he interfere with the rights of no other citizen."

In that case it was held that an ordinance prohibiting association with thieves, pickpockets, etc., was "absolutely invalid, on the broad ground that its direct effect is to invade and necessarily destroy one, at least, of those 'certain inalienable rights' of the citizen bestowed by the Creator and guaranteed by the organic law, personal liberty."

In a similar case that court said, in *St. Louis v. Fitz*, 53 Mo. 582: "Such person might well be said to have the reputation of being a thief, as he had actually been convicted and punished as such by a competent judicial tribunal; but, even in such case, is he therefore marked as a leper in society, to be avoided by his former associates? This would close the door to repentance or reformation, and once a thief, always a thief, would be the maxim upon which police of-

ficers would act. Perhaps the maxim may answer very well, practically, for them, especially in justifying precautionary measures; but it will not, and ought not to, be enforced by courts, whose business it is to administer justice. However humble may be the citizen arrested under an ordinance prohibiting intercourse with such former criminal, his right to select his own company, so long as no actual breach of law occurs, and no intended breach of law can be established, is as sacred, and as much under the protection of the state, as though he moved in the more elevated spheres of society. The tendency of power to pass from the many to the few is sufficiently rapid, without further encouragement, and the power to arrest for keeping bad company is a dangerous one, liable to great abuses and partial and unjust discriminations."

See also *McQuillin, Mun. Corp. § 749*; *Abbott, Mun. Corp. § 129*.

To sustain the validity of the quoted portion of the Watertown ordinance would prevent personal effort on the part of male citizens to uplift and ameliorate the condition of fallen women. Ministers of the Gospel, physicians, nurses, welfare workers, —all would be subject to the infamous appellation contained in the ordinance and to the pains and penalties of the ordinance. The constitutionality of a law is determined, not alone by what has been done, but by what may be done, under its provisions. *Minneapolis Brewing Co. v. McGillivray (C. C.)* 104 Fed. 258. Surely it does not need further elaboration to make it clear that the ordinance in question violates the personal liberty guaranteed by article 6, § 1, of our Constitution.

The judgment appealed from is reversed, and the trial court is directed to discharge the defendants.

Annotation—Statute or ordinance making it an offense to associate with disreputable persons.

This note does not include statutes or ordinances directed specifically against the keeping, living in, or frequenting disorderly houses. As to validity of statute or ordinance against bawdy houses, see note to *People ex rel. Thrasher v. Smith*, L.R.A.1917B, 1078.

The general question of municipal power as to nuisances affecting public morals, decency, peace, and good order is treated in the note to *State v. Karstendiek*, 30 L.R.A. 520.

Generally as to constitutionality of discrimination against women in police

regulations, see note to *Gastineau v. Com.* 49 L.R.A. 111, which is supplemented as regards the power to exclude women from saloons in the note to *People v. Case*, 18 L.R.A.(N.S.) 657.

The right of municipal corporation to prohibit loitering on public streets, is treated in note to *St. Louis v. Gloner*, 15 L.R.A.(N.S.) 973.

The holding of *WATERTOWN v. CHRISTNACHT*, ante, 903, that an ordinance prohibiting absolutely and in sweeping terms association with prostitutes is unconstitutional as an invasion of the per-

sonal liberty of the citizen finds support in other cases.

Thus, in *St. Louis v. Fitz* (1873) 53 Mo. 582, reversing a conviction on the ground of misleading instruction to the jury, which failed to make it clear that an ordinance against "knowingly associating with persons having the reputation of being thieves and prostitutes" did not apply to mere casual association or an association for honest purposes, the court, while not declaring the ordinance invalid, doubted the theory upon which the case was tried in the criminal court, namely, that a mere association with the class of persons described subjected the defendant to a criminal prosecution, without regard to the commission of any offense against the law, or any intent to commit such offense. Judge Sherwood concurred in the result reached, being of the opinion that the ordinance was absolutely invalid as an invasion of personal liberty.

The above ordinance was subsequently amended, presumably to conform to the views expressed in the *Fitz* Case, there being added the words, "or any other person, for the purpose or with the intent to agree, conspire, combine or confederate, first, to commit any offense, or, second, to cheat or defraud any person of any money or property," etc. But even as so amended the ordinance was in the later decisions, *St. Louis v. Roche* (1895) 128 Mo. 541, 31 S. W. 915, and *Ex parte Smith* (1896) 135 Mo. 223, 33 L.R.A. 606, 58 Am. St. Rep. 576, 36 S. W. 628, held unconstitutional as an invasion of the right of personal liberty.

Citing the unreported case *St. Louis v. Lee* (1880) 8 Mo. App. 598, it is stated that an ordinance of the city of St.

Louis relating to vagrancy is not unconstitutional; but to convict under it, the association with persons of bad repute named must be shown to have been for the purpose of promoting some breach of the law.

An ordinance providing "that it shall be unlawful for any male person to walk or ride in company with any lewd female or common prostitute, or to stand or converse with her upon any street, alley, lane, or public ground within the corporate limits of said village" was in *Cady v. Barnesville* (1878) 4 Ohio Dec. Reprint, 396, 4 Ohio L. J. 101, declared unconstitutional and void.

It is stated in *Hechinger v. Maysville* (1900) 22 Ky. L. Rep. 486, 49 L.R.A. 114, 57 S. W. 619, that an ordinance making it unlawful for any person to associate, escort, converse, or loiter with any female known as a common prostitute, either by day or by night, upon any of the streets or alleys of the city, except her husband, father, brother, or other male relative, is invalid, as there can be no good reason in exempting any other male relative than the husband, father, or brother from its provision, or for failing to give her mother and sister the same privilege allowed to the father or brother, while any person should be allowed to converse with her long enough to transact any necessary and legitimate business.

In the *Hechinger* Case, the court expresses the opinion that in any event under the ordinance in question no person could be legally fined unless he had knowledge or information of the disreputable character of the female.

J. D. C.

WASHINGTON SUPREME COURT.

STATE OF WASHINGTON EX REL. H.
N. MARTIN

v.

SUPERIOR COURT OF GRANT COUNTY
et al.

(— Wash. —, 166 Pac. 630.)

Prohibition — to arrest proceedings after refusal to change venue.

1. Appeal from the final judgment is not a "plain, speedy, and adequate remedy in due course of law" to correct a refusal to

Note. — For prohibition against court proceeding with a case after erroneously denying a change of venue, see annotation following this case, post, 911.
L.R.A.1917F.

change venue to which defendant is entitled, independent of the issue tendered in the complaint, within the meaning of a statute allowing a writ of prohibition to be issued in all cases where there is not such remedy to arrest proceedings of a tribunal which are without or in excess of the jurisdiction of such tribunal.

For other cases, see *Prohibition, II. in Dig.* 1-52 N. S.

Same — venue — transitory action — surrender of mortgage.

2. An action to compel surrender for cancellation of a note and real estate mortgage securing it is transitory, and need not be brought in the county where the land is situated.

For other cases, see *Venue, I. in Dig.* 1-52 N. S.

(July 21, 1917.)

PETITION for a writ of prohibition to restrain respondents from proceeding with the trial of an action brought to compel surrender for cancelation of a note and real estate mortgage. Writ granted.

The facts are stated in the opinion.

Messrs. **Martin & Jesseph**, for relator:

A writ of prohibition will issue to prohibit a judge from proceeding where change of venue is improperly refused.

32 Cyc. 608 (c); State ex rel. **Cummings v. Superior Ct.** 5 Wash. 518, 32 Pac. 457, 771; State ex rel. **Campbell v. Superior Ct.** 7 Wash. 306, 34 Pac. 1103.

A suit to cancel an assessment is not an action affecting real property, within the statute.

Nichols v. Voorhis, 74 N. Y. 28; **Central Bank v. Warren**, 15 N. Y. 578.

If the relief sought does not require the court to deal directly with the estate itself, the proceeding does not affect real estate within the meaning of the statute.

Rosenbaum v. Evans, 63 Wash. 509, 115 Pac. 1054.

The decree in this case will act in personam, and the action is transitory.

Thompson v. Elmore, 13 Ky. L. Rep. 692, 18 S. W. 236; **Beach v. Hodgdon**, 66 Cal. 187, 5 Pac. 77; **Coker v. Montgomery**, 110 Ga. 20, 35 S. E. 273; **Johnson v. Gibson**, 116 Ill. 294, 6 N. E. 205; **Hayes v. O'Brien**, 149 Ill. 403, 23 L.R.A. 555, 37 N. E. 74; **Massie v. Watts**, 6 Cranch, 149, 3 L. ed. 182; **Morgan v. Bell**, 3 Wash. 660, 16 L.R.A. 614, 28 Pac. 925; State ex rel. **Cummings v. Superior Ct.** 5 Wash. 518, 32 Pac. 457, 771; State ex rel. **Campbell v. Superior Ct.** 7 Wash. 306, 34 Pac. 1103; State ex rel. **Seougale v. Superior Ct.** 55 Wash. 728, 133 Am. St. Rep. 1030, 104 Pac. 607; **Sheppard v. Coeur d'Alene Lumber Co.** 62 Wash. 12, 44 L.R.A.(N.S.) 267, 112 Pac. 932, Ann. Cas. 1912C, 909; **Rosenbaum v. Evans**, 63 Wash. 508, 115 Pac. 1054; **English v. Gibbons**, 79 Wash. 210, 140 Pac. 322; **Smith v. Allen**, 18 Wash. 1, 39 L.R.A. 82, 63 Am. St. Rep. 864, 50 Pac. 783; **Carkeek v. Boston Nat. Bank**, 16 Wash. 399, 47 Pac. 884; **Nichols v. Voorhis**, supra; **Woodbury v. Nevada Southern R. Co.** 120 Cal. 463, 52 Pac. 730; **Williams v. Ayrault**, 31 Barb. 364; **Williams v. Fitzhugh**, 37 N. Y. 444; **Lehmberg v. Biberstein**, 51 Tex. 457; **Saf-fold v. Scottish-American Mortg. Co.** 98 Ga. 785, 27 S. E. 208; **Yates County Nat. Bank v. Blake**, 43 Hun. 162.

Prohibition will issue where it appears that an inferior tribunal is acting without or in excess of its jurisdiction.

State ex rel. **Hopman v. Superior Ct.** 88 Wash. 612, 153 Pac. 315; State ex rel. **Calhoun v. Superior Ct.** 86 Wash. 492, 150 Pac. 1168; State ex rel. **Meyer v. Clifford**, 78 L.R.A.1917F.

Wash. 555, 139 Pac. 650; State ex rel. **Wood v. Superior Ct.** 76 Wash. 27, 135 Pac. 494; State ex rel. **Martin v. Hinkle**, 47 Wash. 157, 91 Pac. 640; State ex rel. **Mackintosh v. Superior Ct.** 45 Wash. 248, 88 Pac. 207.

Mr. **Daniel T. Cross** for respondents.

Chadwick, J., delivered the opinion of the court:

On the 3d day of January, 1917, **M. H. Sorrell** and wife brought an action in the superior court of Grant county against **H. N. Martin** and **Amanda V. Martin**, his wife. It is alleged in the complaint that **Sorrell** and wife executed a mortgage upon certain real estate in Grant county to secure a promissory note due and payable to **H. N. Martin**; that the note and mortgage were given without any consideration; and praying that the court decree that the note and mortgage be surrendered for cancelation. **Martin** and wife are now, and have been for twenty-five years last past, residents of Lincoln county, Washington, and were served personally in that county. They appeared in the action by demurrer and motion to change the venue of the action from Grant county to Lincoln county. The motion to change the venue was accompanied by sufficient affidavit of merit. The judge presiding in the court below overruled the motion for change of venue, holding that the action was a local action, and, notwithstanding the residence of the defendants in another county, the case was triable in the place where the land is situated. **Martin** and wife then applied to this court for a writ of prohibition, and, upon a rule to show cause, the facts as we have thus detailed them were made to appear.

The respondent insists that this court should not and cannot, under the authority of the doctrines to which the court has attached itself, hear the petition of the relators; that, notwithstanding the fact that they may be residents of Lincoln county, and may be entitled to a change of venue, the question may be raised upon appeal; and that the court will not review the error of the court below by the issuance of an extraordinary writ. Respondent bases this contention squarely upon the case of **State ex rel. Miller v. Superior Ct.** 40 Wash. 553, 2 L.R.A.(N.S.) 395, 111 Am. St. Rep. 925, 82 Pac. 877. It is insisted by the relator that the court has so modified the doctrine of the **Miller Case**, in **State ex rel. Wood v. Superior Ct.** 76 Wash. 27, 135 Pac. 494, and in **State ex rel. Hopman v. Superior Ct.** 88 Wash. 612, 153 Pac. 315, that the writ will issue.

Whether this court will anticipate and review errors of the trial court upon such questions as inhere in the record, which

may be heard on appeal, is one that has sorely perplexed the judicial mind, and much confusion has crept into our cases. But it would seem that the doctrine of State ex rel. Miller v. Superior Ct. supra, is still unimpeached and unimpaired. The real question is whether it was properly applied in that case. The rule as stated does not deny that the writ will lie where the remedy by appeal is inadequate. It is said: "The adequacy of the remedy by appeal, or in the ordinary course of law, is there declared [State ex rel. Townsend Gas & E. L. Co. v. Superior Ct. 20 Wash. 502, 55 Pac. 933] to be the true test in all cases, and not the mere question of jurisdiction or lack of jurisdiction."

Hence the inquiry whether the remedy by appeal is adequate, or whether that question, when coupled with a question of jurisdiction is enough to sustain the writ, is not foreclosed. Our statute provides:

"The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person."

"It may be issued . . . in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law."

Rem. Code, §§ 1027, 1028.

In State ex rel. Miller v. Superior Ct. the court puts the inquiry, "Has the relator an adequate remedy by appeal?" and proceeds: "As a general rule, the legislature of this state has deemed an appeal from the final judgment an adequate remedy for the correction of all errors committed in the course of a trial, and, ordinarily, an erroneous ruling on a question of jurisdiction is no exception to this general rule."

But if it be held that a court, having jurisdiction, may erroneously exercise that jurisdiction, and that its rulings might be adequately reviewed on appeal, it does not follow that the court may so proceed in all cases without denying to a litigant that speed and adequacy of remedy which is sanctioned and guaranteed by the statute. The Miller Case was, as this one is, a petition for a writ, where the court had refused to change the venue of a case to another county. The court did not go beyond the prior decisions of this and other courts, declaring the general rule that the first test in issuing such writs is to ask whether a remedy by appeal will be speedy and adequate. It was held that the remedy by appeal was adequate. It would seem that to determine the question, as it applies to cases involving the right to change the venue of a case, we L.R.A.1917F.

should first consider the statutes under which a change of venue may be had, and their legal effect as determined by this court.

Under §§ 207, 208, and 209, Rem. Code, one who is sued in a county other than that of his residence is entitled to a change of venue, if the action be a transitory one. While it may in general terms be referred to as a privilege, the claim for a change of venue, when once asserted, no question of fact being involved, and no discretion of the court invoked, is more than a privilege; it is a right. It has been so held whenever and wherever this court has been called upon to pass upon the question. State ex rel. Griffith v. Superior Ct. — Wash. —, 164 Pac. 516; State ex rel. Stockman v. Superior Ct. 15 Wash. 366, 46 Pac. 395; Smith v. Allen, 18 Wash. 1, 39 L.R.A. 82, 63 Am. St. Rep. 864, 50 Pac. 783; State ex rel. Schwabacher Bros. & Co. v. Superior Ct. 61 Wash. 681, 112 Pac. 927, Ann. Cas. 1912C, 814; State ex rel. Stewart & H. Drug Co. v. Superior Ct. 67 Wash. 321, 121 Pac. 460; State ex rel. Cummings v. Superior Ct. 5 Wash. 518, 32 Pac. 457, 771; State ex rel. Campbell v. Superior Ct. 7 Wash. 306, 34 Pac. 1103; State ex rel. Allen v. Superior Ct. 9 Wash. 668, 38 Pac. 206; 4 Enc. Pl. & Pr. 440.

It would seem, if the statute grants a right that does not depend upon the merit of the case, but is independent of the merit of the case, that a litigant should not be put to the hazard, delay, and expense of a trial upon the merits as a prerequisite to the assertion of the right. In such cases the court is called upon to deal with something more than "simply a law of procedure and practice," as was held by Judge Dunbar, and properly so, considering the record in the case of State ex rel. Townsend Gas & E. L. Co. v. Superior Ct. 20 Wash. 502, 55 Pac. 933. It is a right made equivalent to the right to fix the venue of a local action under the statute, and, when asserted, should not be thrust aside as an incident or an error, to be heard upon an appeal from a judgment on the merits. The term "speedy and adequate," when applied to remedies, means, or ought to mean, a remedy adequate and timely to review the particular error relied on, and not merely a remedy which depends upon a proper determination of the issue as defined by the pleadings, and such questions of practice and procedure as may arise in bringing the case to issue and trying out the facts.

Wherefore it may be said, where there is a right to a trial in a particular place, which right is independent of the issue as tendered by the complaint, an adequate remedy means a trial in the first instance

by a court having jurisdiction to hear and determine the merits. To rule otherwise would bring us to a holding that, although the right to a change depended in no way upon a controverted fact of residence, the defendant would have to meet the delay and expense of a trial, and possibly suffer a judgment (if he have clever counsel, he would stand mute and make no defense to the merits), which we would be willing to sustain, if we were free to do so. Before we could even consider the merit of the case, we would have to decide the question of venue, or the question of jurisdiction, and do that which ought to have been done in the first place,—remand, with directions to change the venue and retry the case; and for the reason that the court did not have jurisdiction. If we would have to so hold on appeal, why should we not say so now; the record being before us in the same form as it would come on appeal? It requires no argument to convince the writer that such a situation would be intolerable, and such as the law has sought to avoid by providing a means whereby the appellate court can keep the stream of justice flowing between its proper banks.

By thus proceeding we may presume that one appeal will settle the merits of the case, whatever the judgment of the court below may be. If we deny the writ, we may assume that in a fair proportion of the cases two appeals, one abortive and the other to the merits, will be necessary. This has always been the rule where the court below has ordered the venue of a case to another county. The statute says (§ 1027) that "the writ of prohibition is the counterpart of the writ of mandate." Now, if it be so, why have we not the counterpart of this case in the case of *State ex rel. Wyman v. Superior Ct.* 40 Wash. 443, 2 L.R.A.(N.S.) 568, 111 Am. St. Rep. 915, 82 Pac. 875, 5 Ann. Cas. 775, where the court said: "If . . . the superior court of Spokane county had exclusive jurisdiction to hear and determine the garnishment proceedings, without power or discretion to order a change of venue, mandamus is the proper remedy."

In *State ex rel. Howell v. Superior Ct.* 82 Wash. 356, 144 Pac. 291, the expediency of a proceeding in mandamus to test the right of a court to order a change of venue was not suggested by counsel or questioned by the court. It will be marked that the writ was not denied because it was not a proper case for a writ, but because the court to which it was directed had passed the jurisdiction to try the case to another county. In *State ex rel. Schwabacher Bros. & Co. v. Superior Ct.* 61 Wash. 681, 112 Pac. 927, Ann. Cas. 1912C, 814, the court entertained a writ of certiorari to review an order of

the superior court, changing the venue of a case from King county to Chelan county. Upon the authority of the *Wyman* Case it was held that the remedy by appeal was inadequate.

In passing we take it that no argument can be based on the form of the remedy, whether it be certiorari or mandamus or prohibition. The result of our cases, brought here by certiorari, have been the same,—to compel the court having jurisdiction to proceed with the trial, or to refrain from trying the case, as it was in *State ex rel. Griffith v. Superior Ct.* — Wash. —, 164 Pac. 516. It is not out of place to say that we question the propriety of resorting to a writ of review in cases of this kind; this for reasons not necessary to be now discussed. The reason which is first suggested in the *Wyman* Case, and followed in *State ex rel. Scougale v. Superior Ct.* 55 Wash. 328, 133 Am. St. Rep. 1030, 104 Pac. 607, and in the *Nash* Case, for the issuance of a writ of mandamus to compel a court to try a case after it has ordered a change, is, if the jurisdiction be exclusive in the court which assumes to grant the change, mandamus will lie. This is upon the theory that, where an erroneous exercise of jurisdiction by the court to which the case may be sent could only be reviewed "eventually" after a trial in the wrong court, an appeal does not afford an adequate remedy; or as said in the *Scougale* Case: "If the change of venue was erroneously made, we cannot presume that the superior court of Snohomish county will assume to exercise jurisdiction; nor could we, upon an appeal from that court, direct the superior court of Pierce county to proceed with the trial. The remedy by appeal is therefore inadequate."

If prohibition be the counterpart of mandamus, it should follow that the one might be employed to compel, and the other to prohibit, upon the same state of facts, depending upon whether plaintiff or defendant invokes the writ. To say that mandamus will lie, if the court to which a case is ordered sent does not have jurisdiction, and may refuse to take jurisdiction, or delay the case pending a trial, and to deny that prohibition will lie, to prevent a court without jurisdiction from trying a case that ought to be sent to another county, is drawing the sights so fine that the "judicial mind" has been put to some extremity to mark the line of cleavage. In the case of *State ex rel. Lewis v. Hogg*, 22 Wash. 646, 62 Pac. 143, the court says: "The remedy [prohibition] is employed only to restrain courts and inferior tribunals exercising judicial functions from acting without or in excess of their jurisdiction; and, if the court or tribunal

sought to be restrained has jurisdiction of the subject-matter in the controversy, a mistaken exercise of its acknowledged powers will not justify the issuance of the writ. Stated in another way, "it matters not whether the court below has decided correctly or erroneously; its jurisdiction being conceded, prohibition will not go to prevent an erroneous exercise of that jurisdiction." High, Extr. Leg. Rem. § 772."

As a general proposition, it may be that a court will not review a question arising in a case by an extraordinary writ, where the court committing the error complained of has jurisdiction of the subject-matter; but this test is not to be taken without qualification. It applies where, as in the Lewis Case, the errors complained of were incident to the proceeding as defined by the pleadings and inhered in the record. It does not apply where the question is collateral to the issue, involves a right given by an independent statute, and which but for the writ would be denied the party entitled to it, or be so postponed as to be a burden instead of a right. The test, "jurisdiction of the subject-matter," is elusive. It is questionable whether the rule will bear unqualified statement in that form, where the venue of a case ought to be changed and the action is transitory. Either court has jurisdiction to try the issue, and therefore jurisdiction of the subject-matter; or, if it be said that jurisdiction of the subject-matter is in the one court or the other, we are not without authority for holding that it is in the court of the county where the relators reside. If a corporation can be sued only in the county of its domicile, and the courts of another county have no jurisdiction of the subject-matter of a case brought against it (*Hammel v. Fidelity Mut. Aid Asso* 42 Wash. 448, 85 Pac. 35; *Whitman County v. United States Fidelity & G. Co.* 49 Wash. 150, 94 Pac. 906), then surely a citizen who has claimed his "right" should find the same prohibition in the law.

The words, "speedy and adequate," must mean something. Originally the writ was not issued, except in a clear case, and then only when there was no other available remedy. *Harbor Line Comrs. v. State*, 2 Wash. 530, 27 Pac. 550. The Act of 1895 (Laws 1895, p. 117) was passed after the decision last referred to. It may have been that the legislature sought to cure the inflexible rule theretofore laid down by the courts, and to make the writ available where the result of an appeal might tend to embarrass and delay a final decision on the merits of the case. After a somewhat extensive review of the decisions of other courts, not one case, unless it be *State ex rel. Independent Pub. Co. v. Smith*, 23 Mont. L.R.A.1917F.

329, 58 Pac. 867, quoted as authority in the *Miller Case*, has been found that denies the right to the writ of prohibition, where the venue of a case should be changed as of right. We have reviewed the authorities cited in the *Montana case*. Wherever it is stated in terms that a writ will not issue to prohibit (or mandamus to compel) a court from proceeding to try a case after refusing to grant a change of venue, some element of discretion was involved. The trial judge had been called upon to pass upon some question of fact; the place of residence was controverted, local prejudice was set up, the convenience of witnesses was put in issue, or whether the ends of justice would be served had engaged the mind of the court. Obviously no court would review the discretion or the judgment of a court upon a controverted fact under such circumstances.

"The rule appears to be well settled that, where the jurisdiction of the court does not depend upon some controverted fact to be determined by it, and the court is proceeding without or in excess of its jurisdiction, the writ of prohibition will lie." *State ex rel. Hopman v. Superior Ct.* 88 Wash. 612, 153 Pac. 315.

On the other hand, wherever elsewhere the question we have to deal with has occurred, it has been held that it is proper for the writ to issue, because a remedy by appeal is inadequate. "Where an application for a change of place of trial is made by a defendant, based upon a ground which entitles him to the change as a matter of right, the court to which it is addressed has no discretion except to grant the application. In such cases the court is ousted of jurisdiction to proceed further with the cause than to enter the order of removal. *Pearse v. Borden*, 3 Colo. App. 351, 33 Pac. 140. It follows, from what has already been said in discussing the two preceding questions, that the respondent court is divested of jurisdiction to hear and determine this cause, and this brings us to the last question to consider, the determination of which depends upon whether the relator should be remitted to his remedy by appeal or writ of error. The writ of prohibition is not one of right, but whether or not it shall be granted rests in the sound discretion of this court. It is a power conferred by the Constitution, by means of which, when necessary, supervisory control may be exercised over inferior tribunals, acting without or in excess of their jurisdiction. Although the questions involved upon which the writ is asked may be reviewed on appeal or error, this is not conclusive against the right as to the writ, if in the judgment of the court such remedies are not plain, speedy, and adequate. . . .

We have not overlooked the proposition, advanced by counsel for respondent, that the district court had jurisdiction to determine the motion for a change, and that in overruling this motion, if this is error, it has merely committed one in the exercise of the jurisdiction conferred upon it by law. If this were the only question involved in this proceeding, the proposition would be unanswerable; but the case does not call for, or admit of, the application of the principle, frequently announced, that proceedings in prohibition cannot supersede the ordinary functions of an appeal or writ of error. It is essentially different from those cases where we have applied this doctrine. The district court now proposes to proceed with the trial of a case of which it has no further jurisdiction, and it is to restrain this action that these proceedings were instituted. In other words, while the court originally had jurisdiction of the subject-matter of the action, the parties, and the questions involved in the motion for a change of venue, by denying this motion it assumes an authority and jurisdiction to try the case upon its merits which it does not possess. The difference between cases where we have held that errors complained of would not be reviewed in prohibition, because reviewable on error or appeal, and those in which the proposition is not applicable, is clearly pointed out in *People ex rel. Long v. District Ct. 28 Colo. 161, 63 Pac. 321*. It would seem idle to require or permit the parties to try their cause in a forum without jurisdiction. For the protection of the plaintiff, as well as the defendant, the cause should be heard by a court the authority of which cannot be successfully attacked." *People ex rel. Lackey v. District Ct. 30 Colo. 123, 69 Pac. 597*.

The logic of the situation is that, although a court has jurisdiction of the subject-matter and the parties, the assertion of the statutory right to a change of venue, where the nonresidence of the defendant is admitted, ousts the court of first resort of its jurisdiction to proceed in any way other than to order the change. The attempt to hold to the broad rule quoted from *High, Extraordinary Legal Remedies*, in *State ex rel. Townsend Gas & E. L. Co. v. Superior Ct.*, upon which the holding in the *Miller Case* was predicated,—that is, that the writ of prohibition will not issue where there is a remedy by appeal,—has been without real result, for in the very nature of things the court has been put to the stress of meeting the statute, which allows the remedy when an appeal would be inadequate. But, after all, the logic of every one of our decisions is that the remedy by appeal means an adequate remedy by appeal, and that no certain

rule can be laid down for the issuance of the writ, unless it be in cases like the one we have at bar, where the defendant is entitled as of right to a change of venue. To illustrate the thought I have endeavored to suggest, we have but to refer to the *Nash Case* (though rightfully decided, was probably put upon the wrong ground), where the court passed upon the sufficiency of the showing made that a change of venue was necessary for the convenience of witnesses, and the case of *State ex rel. Pierce County v. Superior Ct. 86 Wash. 685, 151 Pac. 108*, where the right of a taxpayer to maintain an action against public officers was the real question to be decided. The court held the remedy by appeal to be inadequate, and issued a writ of prohibition because of the "special and peculiar circumstances" rendering the remedy in the ordinary course of law inadequate certainly it will not be contended by anyone that the sufficiency of the showing made in the *Nash Case* and the capacity of the relator to maintain the action in the *Pierce County Case* could not have been reviewed as errors arising in the course of the trial in the court below.

The governing principle is fairly illustrated in *State ex rel. Calhoun v. Superior Ct. 86 Wash. 492, 150 Pac. 1168*. In that case it is made clear that a court will not issue a writ to arrest the exercise of an acknowledged jurisdiction. The remedy being by appeal, that is to say, if the court has jurisdiction to try a controverted question or a challenge to its jurisdiction, such challenge resting in controverted facts, this court will not restrain it, although the ruling may be erroneous, but will leave the party to his remedy by appeal. That case is the antithesis of this one; for here, there being no dispute of fact and the right resting in the statute, the court had no jurisdiction to proceed, for there was no question of jurisdiction to be determined, by judicial expression or otherwise. To the same effect is *State ex rel. Meyer v. Clifford, 78 Wash. 555, 139 Pac. 650*, where the court was careful to suggest that the words in the statute, "in excess" of jurisdiction of such tribunal, do not mean an error, either in law or fact, committed in the exercise of an acknowledged jurisdiction. If a court is proceeding without having acquired jurisdiction, or insists upon proceeding after it has lost jurisdiction, it presents a state of facts calling for the issuance of the writ. *State ex rel. Wood v. Superior Ct. 76 Wash. 27, 135 Pac. 494*; *State ex rel. Hopman v. Superior Ct. 88 Wash. 612, 153 Pac. 315*. In *State ex rel. Wood v. Superior Court, supra*, we have a view of the question from another angle. There the court held, upon the authority of former decisions, that prohibition would lie

to arrest proceedings in a court that had not obtained jurisdiction. In principle, this line of cases sustains our present holding; for, if the writ will issue to restrain a court that cannot render an effective judgment, because it has not obtained jurisdiction, it should issue to restrain a court that could not render a judgment upon the merits against a party entitled to a change of venue upon the ground of nonresidence.

The question why we do not overrule the Miller Case may occur. Notwithstanding the conclusion reached by the court, and the fact that counsel for both sides have treated the Miller Case as the one controlling in the case at bar, unless qualified by subsequent decisions, the Miller Case was rightly decided. The action had been begun against three parties, all nonresidents of the county in which the action was begun. Two of the defendants moved for a change of venue, asserting that all of the defendants were nonresidents, and that the convenience of witnesses would be served by the change. The other defendant filed an affidavit asking that the court refuse a change, and an affidavit was filed by the plaintiff, showing that the convenience of the greater number of the witnesses would be best served by

holding the case for trial in Spokane county. The court refused a change: First, upon the fact of convenience, controverted by the affidavits of the parties; and, second, because, where two or more parties are sued in the wrong county, all must join in the motion to change the venue upon the ground of nonresidence, or it will be denied. 4 Enc. Pl. & Pr. 419; 40 Cyc. 146. Such being the state of the record, the Miller Case could not have been decided in any other way, notwithstanding the unqualified statement of the holding of the court to be found in the syllabus and in the digest.

We understand counsel to admit the action to be transitory, if the court adheres to the doctrine announced in *Rosenbaum v. Evans*, 63 Wash. 506, 115 Pac. 1054, and cases from this court cited therein. A decree in a case of this kind operates in personam; and, under the authority of *Rosenbaum v. Evans* and *English v. Gibbons*, 79 Wash. 210, 140 Pac. 322, we hold the action to be transitory, and that the relator is entitled to a change of venue as of right.

Writ will issue.

ELLIS, Ch. J., and Mount, Main, and Fullerton, JJ., concur.

Annotation—Prohibition against court proceeding with a case in which it erroneously denied a change of venue.

This note is supplementary to the one appended to *State ex rel. Miller v. Superior Ct.* 2 L.R.A.(N.S.) 395, where the earlier cases will be found.

For mandamus to compel a change of venue, see *Talley v. Maupin*, post, 912, and the note thereto.

The decision in *STATE EX REL. MARTIN v. SUPERIOR CT.* ante, 905, a writ of prohibition will be issued against a court proceeding with a case after erroneously denying a change of venue to which a party was entitled as matter of right, the remedy by appeal being inadequate, is supported by *People ex rel. Burke v. District Ct.* (1915) 60 Colo. 1, 152 Pac. 149; *People ex rel. Uyado v. District Ct.* (1915) 60 Colo. 42, 152 Pac. 164. And see *State ex rel. Lentz v. Fort* (1903) 178 Mo. 518, 77 S. W. 741, cited in note in 2 L.R.A.(N.S.) p. 396.

So, where an application for a liquor license applies for a change of venue, and the effect of a judgment against his right to a license would be to prevent him from pursuing his business, and an appeal would not operate to stay its effect so he could continue business during the appeal, an appeal would be inadequate and prohibition would lie. L.R.A.1917F.

State ex rel. Bixman v. Denton (1908) 128 Mo. App. 304, 107 S. W. 446; *Rush v. Denhardt*, 138 Ky. 238, 127 S. W. 785, Ann. Cas. 1912A, 1199.

And one who is in custody under a charge of a felony, and is financially unable to furnish bail or prosecute an appeal, is entitled to a writ of prohibition upon refusal of the trial judge to grant a change of judges because of prejudice of the judge, as he is entitled to a speedy public trial by an impartial jury and an unbiased judge under the Constitution, and an appeal would not be an adequate remedy. *State ex rel. Jones v. Gay* (1911) 65 Wash. 629, 118 Pac. 830.

Likewise, where two informations were issued against one charged with murder, both charging the same offense, and a change of venue to another county was granted upon one of the informations, a writ of prohibition was issued to prevent the original court from proceeding with a trial on the other information, as it was without jurisdiction to try such case, and proceedings in error would not furnish an adequate remedy, inasmuch as, if the case was proceeded with in that court, the de-

fendant (relator) must give bail or be confined in jail until tried, must be to the expense of defending himself, and, if convicted, remain in custody until he can have the case regularly heard and determined in the appellate court. *Keefe v. District Ct.* (1908) 16 Wyo. 381, 94 Pac. 459.

But where appeal furnishes an adequate remedy, a writ of prohibition will not be issued.

So, in *State ex rel. La Furgey v. Superior Ct.* (1907) 47 Wash. 154, 91 Pac. 639, and *State ex rel. Lyon v. Police Ct.* (1909) 53 Wash. 361, 101 Pac. 1082, it is held, following *State ex rel. Miller v. Superior Ct.* (1905) 40 Wash. 555, 2 L.R.A.(N.S.) 395, 111 Am. St. Rep. 925, 82 Pac. 877, that prohibition will not lie to prevent the trial court from proceeding to try a cause even if it is without jurisdiction by reason of an erroneous denial of an application for a change of venue, for the reason that there is an adequate remedy by appeal, as the fact that an appeal may subject

him to inconvenience and expense does not destroy its effectiveness to ultimately reach any unauthorized action the trial court may have taken.

And there is no presumption that a judge is disqualified; and, if a party would seek a change of the place of trial upon that ground, the burden is upon him to present facts showing such disqualification; and a writ of prohibition to prevent the judge from proceeding with the case after a motion for a change of place of trial has been made will be denied unless a sufficient showing that the judge is disqualified, or that defendant could not have a fair and impartial trial before him, is made in the affidavit in support of the motion presented to the court to which application for prohibition is made. *Dakan v. Superior Ct.* (1905) 2 Cal. App. 52, 82 Pac. 1129. See also other cases cited in note in 2 L.R.A.(N.S.) 395, denying relief by prohibition.

R. L. S.

OKLAHOMA SUPREME COURT.

HARRY TALLEY

v.

ROBERT W. MAUPIN, Justice of the Peace.

(— Okla. —, 166 Pac. 734.)

Mandamus — to compel change of venue.

Mandamus will not lie to compel a justice of the peace to grant an application for change of venue, for the reason that the party making such application has a plain and adequate remedy at law by bill of exceptions and petition in error.

For other cases, see Mandamus, I. b, in Dig. 1-52 N. S.

(June 6, 1917.)

APPPLICATION for a writ of mandamus to compel defendant to grant change of venue in a civil action pending before him. Writ denied.

The facts are stated in the opinion.

Messrs. Shirk & Danner and D. S. Levy, for plaintiff:

This court has original jurisdiction to entertain the mandamus proceeding.

Homesteaders v. McCombs, 24 Okla. 201, 38 L.R.A.(N.S.) 1000, 103 Pac. 691, 20 Ann.

Headnote by KANE, J.

Note. — For mandamus to compel change of venue, see annotation following this case, post, 914.
L.R.A.1917F.

Cas. 181; *State ex rel. Schmidt v. Cappeller*, 37 Ohio St. 121; *Ellis v. Outler*, 25 Okla. 469, 106 Pac. 957; *State ex rel. Atchison, T. & S. F. R. Co. v. Jefferson County*, 11 Kan. 66; *Winfrey v. Benton*, 25 Okla. 445, 106 Pac. 853; *Wrought Iron Range Co. v. Leach*, 32 Okla. 706, 123 Pac. 419.

Plaintiff has no adequate remedy at law, and therefore, the writ of mandamus should issue as prayed for.

Herbert v. Beathard, 26 Kan. 746; *Patten v. Cagle*, 32 Okla. 499, 122 Pac. 154; *Fooshee & Brunson v. Smith*, 34 Okla. 247, 124 Pac. 1070; *Cullen v. Sloniker*, 39 Okla. 353, 135 Pac. 341; *Wrought Iron Range Co. v. Leach*, 32 Okla. 706, 123 Pac. 419; *Barnhart v. Davis*, 30 Kan. 520, 2 Pac. 633; *State ex rel. Proctor v. Cotton*, 33 Neb. 560, 50 N. W. 688; *State ex rel. Johnson v. Washburn*, 22 Wis. 99.

Mr. Harry W. Priest, for defendant:

A justice of the peace cannot be compelled by mandamus to grant a change of venue, for the reason that the party applying for the change of venue has an adequate remedy by appeal from any judgment which is rendered against him by the justice.

Winfrey v. Benton, 25 Okla. 445, 106 Pac. 853; *Wrought Iron Range Co. v. Leach*, 32 Okla. 706, 123 Pac. 419; *Spacek v. Aubert*, 92 Kan. 677, 141 Pac. 254; *Mason v. Brubel*, 64 Kan. 835, 68 Pac. 660; *High, Extr Leg. Rem.* 3d ed. § 183; *Willman v. District Ct.* 4 Idaho, 11, 35 Pac. 692.

Plaintiff has shown no facts by his peti-

tion which justify him in invoking the original jurisdiction of this court, and this is not a case in which the court will exercise its original jurisdiction to grant mandamus.

Homesteaders v. McCombs, 24 Okla. 201, 38 L.R.A.(N.S.) 1000, 103 Pac. 601, 20 Ann. Cas. 181; *Territory ex rel. Galbraith v. Chicago, R. I. & P. R. Co.* 2 Okla. 108, 39 Pac. 389; *State ex rel. Lowe v. Pruett*, 43 Okla. 766, 144 Pac. 365.

Kane, J., delivered the opinion of the court:

This an original proceeding in mandamus, commenced by the plaintiff for the purpose of requiring the defendant as a justice of the peace to grant a change of venue in a civil action pending before him, wherein the plaintiff herein is defendant.

It seems that on the 7th day of March, this year, the plaintiff herein, being defendant in a cause pending before the defendant herein, as a justice of the peace, filed an affidavit for change of venue from said defendant to another justice of the peace, said affidavit and application for change of venue stating in substance that the affiant verily believes that he cannot have a fair and impartial trial of said cause before said defendant on account of the bias and prejudice of said defendant against him, which application was denied.

It is the contention of counsel for plaintiff that the right to have a change of venue from one justice to another is an absolute right, and that a justice of the peace has no discretion in the matter, but it is his mandatory duty to grant the change immediately upon the application therefor being made; the only discretion he may exercise being as to what other justice of the peace he will send the case. This court in several cases has held to the contrary. *Winfrey v. Benton*, 25 Okla. 445, 106 Pac. 853; *Wrought Iron Range Co. v. Leach*, 32 Okla. 706, 123 Pac. 419. This is also the rule in the state of Kansas. *Spacek v. Aubert*, 92 Kan. 677, 141 Pac. 254. The general rule is stated by Mr. High (High, Extr. Leg. Rem. 3d ed. § 183) as follows: "The granting or refusing of a change of venue, being a matter of judicial discretion, is not, as we have already seen, subject to control by mandamus. But the refusal of the courts to interfere in such cases may also be based upon the existence of other relief, since the decision of an inferior court, refusing an application for change of venue, is subject to review by appeal from the final judgment, and mandamus will not therefore lie to compel the change."

In *Winfrey v. Benton et al.*, supra, it was held that a writ of mandamus would not lie L.R.A.1917F.

to compel a justice of the peace to grant a change of venue, for the reason that the defendant had a plain and adequate remedy by appeal or error. In distinguishing *Winfrey v. Benton*, supra, counsel for plaintiff in their brief say: "It is true, this court in the case of *Winfrey v. Benton*, 25 Okla. 445, 106 Pac. 853, in an opinion by Justice Dunn, and decided in January, 1910, held 'that a party to a suit in the justice court could not compel the justice, by mandamus, to grant a change of venue, because he had an adequate remedy at law by appeal.' It is evident from reading the opinion in that case, that the question was not considered, to wit, that since the adoption of the Constitution, all statutory provisions with reference to appeals from justice courts by bills of exception and assignments of error were no longer in force and effect. This latter question was not determined by this court until subsequent to the case of *Winfrey v. Benton*, supra, but was determined by this court for the first time in the case of *Gulf Pine Line Co. v. Vanderberg*, 28 Okla. 637, 34 L.R.A.(N.S.) 661, 115 Pac. 782, Ann. Cas. 1912D, 407, decided May, 1911, and *Patten v. Cagle*, 32 Okla. 409, 122 Pac. 154, decided January, 1912."

It is possibly true that in laying down the rule in the *Winfrey Case* the court erroneously assumed that the action of a justice of the peace in overruling an application for change of venue could be reviewed by bill of exceptions and petition in error. Whether this assumption was well founded at that time is immaterial now, for by a recent decision of this court it has been held that "in this jurisdiction there are two procedures for a review of a judgment of a justice of the peace court: (1) By appeal to the county, superior, or district court, to be tried de novo upon both questions of law and fact; and (2) by a review upon questions of law upon bill of exceptions and petition in error." *Faust v. Fenton*, — Okla. —, 166 Pac. 731, an opinion rendered by Mr. Commissioner Collier, which has just been approved by the court.

In view of this pronouncement, we held in line with *Winfrey v. Benton*, supra, and the other cases and authorities herein cited, that mandamus will not lie to compel a justice of the peace to grant an application for change of venue, for the reason that the party making such application has a plain and adequate remedy at law by bill of exceptions and petition in error.

For the reasons stated, the writ is denied.

All the Justices concur.

Petition for rehearing denied July 24, 1917.

Annotation—Mandamus to compel change of venue.

Generally as to the superintending control and supervisory jurisdiction of the superior over the inferior or subordinate tribunal see notes to *State ex rel. Fourth Nat. Bank v. Johnson*, 51 L.R.A. 33, and *State ex rel. McGovern v. Williams*, 20 L.R.A.(N.S.) 941.

The question whether mandamus is the proper remedy to prevent a court having exclusive jurisdiction to hear and determine a proceeding from ordering a change of venue will be found discussed in *State ex rel. Wyman, P. & Co. v. Spokane County Super. Ct.* 2 L.R.A.(N.S.) 568, and the note thereto.

For mandamus to compel removal of a case to a Federal court or the remanding of a case to a state court, see *Re Harding*, 37 L.R.A.(N.S.) 392, and note.

As to the right to a writ of prohibition to prevent a court from hearing a case after erroneously denying a change of venue, see *State ex rel. Miller v. Superior Ct.* 2 L.R.A.(N.S.) 395, and *State ex rel. Martin v. Superior Ct.* ante, 905, and the notes thereto.

Where judge has no discretion in matter.

When in a particular case, the court to whom an application for a change of venue is made has no discretion in the matter, but is required by law to grant the change, his duty to do so will be enforced by mandamus. (This, however, is doubtless subject to the qualification embodied in the proposition subsequently stated, that mandamus will not lie if there is an adequate remedy by appeal or error.)

Thus, in *Ex parte Chase* (1869) 43 Ala. 303, it is held that the word "may" in a statute providing "any person charged with an indictable offense may have his trial removed to another county on making application to the court setting forth specifically the reason why he cannot have a fair and impartial trial in the county in which the indictment is found," must be construed as imperative to effect the legislative purpose, and therefore the judge may be compelled by mandamus to grant a change of venue,—overruling *Ex parte Banks* (1856) 28 Ala. 28. (Generally as to when "may" in a constitutional provision is deemed to be mandatory, see note to *State ex rel. Greaves v. Henry*, 5 L.R.A.(N.S.) 340.

So, where a change of venue has been granted to a county other than the one L.R.A.1917F.

required by statute, the remedy before trial is by mandamus. *Ex parte Reeves* (1874) 51 Ala. 55.

Under a statute providing that, if the judge is disqualified from acting, the case must be transferred for trial to a court the parties may agree upon, or in case they do not so agree then to the nearest court where a like objection does not exist, a judge who is disqualified because directly interested in the action has no discretion in the matter, his only duty being to transfer the case, and this duty will be enforced by mandamus. *Livermore v. Brundage* (1883) 64 Cal. 299, 30 Pac. 848; *Krumdick v. Crump* (1893) 98 Cal. 117, 32 Pac. 800.

A justice of the peace does not exercise judicial discretion in determining whether he will grant a change of venue, but, if an application is sufficient, he must grant the change, and may be compelled to do so by mandamus. *Herbert v. Beathard* (1882) 26 Kan. 746.

And where the plain injunction of the statute leaves a disqualified judge no discretion in the matter of changing the place of trial, mandamus will issue to compel him to do so. *Gamble v. First Judicial Dist. Ct.* (1903) 27 Nev. 233, 74 Pac. 530.

Where, upon presentation of a proper affidavit to the clerk showing that the judge of the court is an interested party, and asking for a change of venue, the clerk has no discretion in the matter, but the statute makes it his duty to transmit the case to another court, mandamus is the appropriate remedy to compel him to do so, and there is no other adequate and specific means of relief. *State v. Shaw* (1885) 43 Ohio St. 324, 1 N. E. 753.

And when a clerk of the court refuses to carry out an order for a change of venue, he may be compelled to do so by mandamus. *State ex rel. Glass v. Chapman* (1902) 67 Ohio St. 1, 65 N. E. 154.

And where a proper application for a change of venue in a criminal case has been denied and the trial proceeded with to a conviction, the appellate court will reverse with direction to grant the change of venue. *Marks v. State* (1871) 45 Ala. 38; *Birdsong v. State* (1872) 47 Ala. 68.

In *People ex rel. Smith v. Judge of Twelfth Dist.* (1861) 17 Cal. 547, where

the district judge refused to obey a special act of the legislature changing the venue of a case before him, on the ground that the act was unconstitutional, the court held that the act in question was constitutional and certified its opinion to the trial court, but held that mandamus was not the proper remedy; no reason being given for so holding.

When discretion was exercised.

But when the change of venue is not a matter of right, but the judge to whom application for change of venue is made is required to exercise some discretion, mandamus is not the proper remedy for an erroneous exercise of such discretion.

Thus, where a justice did not refuse to act upon a petition for change of venue, but denied such petition on the ground that the affidavit was insufficient, mandamus will not issue compelling him to grant the change. *Galbraith v. Williams* (1899) 106 Ky. 431, 50 S. W. 686.

So, in *Glazier v. Ingham* Circuit Judge (1908) 153 Mich. 481, 116 N. W. 1007, it is held that a defendant in a criminal case has no absolute right to a change of venue, but the right depends upon a showing of cause to be made by him, and where most of the showing made would apply to all of the populous counties in the state, and the showing of an actual prejudice was met by counter affidavits which called for the exercise of the sound judgment and discretion of the circuit judge, his conclusion ought not to be disturbed by mandamus except in the case of a clear abuse of discretion.

Mandamus was also denied in *Lyle v. Cass* Circuit Judge (1909) 157 Mich. 33, 121 N. W. 306, where the circuit judge did not refuse to hear and decide a motion for a change of venue, but passed upon the question judicially. And this decision was followed in *Grand Rapids & I. R. Co. v. Cheboygan* Circuit Judge (1909) 159 Mich. 210, 123 N. W. 591.

A change of venue statute which requires that notice of a petition for a change be given to the opposite party, and, after a hearing thereon, the court or judge shall, if satisfied of the truth of the facts alleged, award a change of venue, the duty imposed is judicial, not ministerial; and if a judge decides against a change of venue, mandamus will not issue. *Newlin's Petition* (1889) 123 Pa. 541, 16 Atl. 737.
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And where, by statute, an affidavit for a change of venue must be supported by the affidavit of five credible persons residing in the county, and the court is called upon to determine the sufficiency of the affidavit, such determination involves judicial discretion, and he will not be compelled by mandamus to grant a change of venue. *State ex rel. Snell v. Wilson* (1896) 12 Ohio C. C. 636, 7 Ohio C. D. 17.

To compel exercise of discretion.

If a judge, having discretion in the matter, refuses or unreasonably delays to exercise it, he may be compelled by mandamus to act upon the application though no specific action will be directed.

Thus, mandamus will be issued to compel a judge to immediately hear and decide a motion for a change of venue. *Hennessy v. Nicol* (1894) 105 Cal. 138, 38 Pac. 640.

But where a judge who is a party to a suit promptly overrules a motion to change the place of trial, the proper remedy is an appeal: mandamus being proper only when the court refuses or unreasonably delays to decide the motion. *San Joaquin County v. Superior Ct.* (1893) 98 Cal. 602, 33 Pac. 482.

So, in *People ex rel. Flagley v. Hubbard* (1863) 22 Cal. 34, it is held that while mandamus will lie to compel a judge to act upon an application for a change of venue, it will not lie to compel him to act in a particular manner; the remedy, if his action be erroneous, being by appeal. The court distinguishes *Larue v. Gaskins* (1855) 5 Cal. 507, on the ground that in that case, in which mandamus was issued, the court refused either to transfer the cause or proceed with the trial.

When mandamus unavailing.

Mandamus will not be granted to compel a justice to grant a change of venue where it would be unavailing; as, where an application for a change of venue was denied and the case proceeded to judgment, execution, and sale of property in satisfaction of the judgment. *Ellis v. Whitaker* (1901) 62 Kan. 582, 64 Pac. 62.

When party has other remedy.

As is held in *TALLEY v. MAUPIN*, ante, 912, mandamus will not be issued to compel a change of venue when the applicant has another remedy. So, if an adequate remedy is furnished by appeal or error, mandamus will be denied. *Hamilton v. Smart* (1908) 78 Kan. 218,

95 Pac. 836; *Spacek v. Aubert* (1914) 92 Kan. 677, 141 Pac. 254; *Ex parte Chambers* (1881) 10 Mo. App. 240; *State ex rel. Independent Pub. Co. v. Smith* (1899) 23 Mont. 329, 58 Pac. 867; *State ex rel. Proctor v. Cotton* (1891) 33 Neb. 560, 50 N. W. 688; *Winfrey v. Benton* (1910) 25 Okla. 445, 106 Pac. 853; *State ex rel. Johnson v. Washburn* (1867) 22 Wis. 99, overruling *State ex rel. Brownell v. McArthur* (1861) 13 Wis. 407; *State ex rel. Milwaukee Electric R. & Light Co. v. Circuit Ct.* (1908) 134 Wis. 301, 114 N. W. 455.

But, if appeal from the decision denying a change of venue will not lie, mandamus will issue. *State ex rel. Spence v. Dick* (1899) 103 Wis. 407, 79 N. W. 421, distinguishing *State ex rel. Johnson v. Washburn* (Wis.) supra, which was decided before an appeal was available; *State ex rel. Lloyd v. Clayton* (1899) 34 Mo. App. 563; *State v. Brumley* (1893) 53 Mo. App. 126; *State ex rel. Wedeking v. McCracken* (1895) 60 Mo. App. 650.

And although appeal will lie, mandamus will issue if such remedy is inadequate.

So, where the statute relating to change of venue is such that, if a defendant complies with its provisions, he has an absolute right to have the venue changed to the county of his alleged residence, the change will be compelled by mandamus, as, by letting the case go to trial and appealing from the judgment or from an order denying a new trial, the party would not have an adequate remedy. *State ex rel. Minneapolis*

Threshing Mach. Co. v. Dist. Ct. (1899) 77 Minn. 302, 79 N. W. 960.

Miscellaneous cases.

Mandamus will not issue simply to compel a court to grant a change of venue, an order made in such a case being merely interlocutory. *People ex rel. Clark v. McRoberts* (1881) 100 Ill. 458; *People v. Church* (1902) 103 Ill. App. 132.

A judge has until the end of the term to grant or deny a motion for change of venue, and where, during the term, it appears that he did not deny the change, but intended to grant it or call in another judge, mandamus will not issue. *State ex rel. Deleglise v. Goodland* (1906) 128 Wis. 57, 107 N. W. 29.

Under a statute providing that a justice may change the place of trial when it appears from the affidavit of a plaintiff that the justice is so prejudiced against the party making the motion that he cannot expect an impartial trial before him, a justice will not be compelled by mandamus to grant a change of venue where the only showing made to the appellate court is an allegation in the terms of the statute, as, in the nature of things, the judge himself must determine his own bias or freedom from bias, and before his decision can be disturbed by mandamus, sufficient must appear in the showing made before him and reproduced before the court issuing the writ, whereby the latter tribunal can determine, as a matter of law, that the justice is prejudiced. *Best v. Parkes* (1916) 82 Or. 171, 161 Pac. 255.

R. L. S.

FLORIDA SUPREME COURT.

VIRGINIA H. TUCKER

v.

JOHN L. FOUTS.

(— Fla. —, 76 So. 130.)

Usury — bonus by stranger.

1. If a third person, in order to get some benefit for himself, or for any personal reasons, without the knowledge or consent of the borrower, pays a lender a bonus as an inducement for a loan, the borrower receiving the full amount and paying no part of

Headnotes by BROWNE, Ch. J.

Note. — For payment of bonus by stranger as usury, see annotation following this case, post, 923.
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the bonus and not affected pecuniarily thereby, the transaction is not an usurious one. For other cases, see *Usury, I. a, in Dig. 1-52 N. S.*

Same — payment on behalf of borrower.

2. If a borrower promises to pay, or is in any wise obligated to pay, a bonus or any part thereof for a loan, which bonus is paid or promised to be paid by a third party as any consideration for the loan, and the amount so paid or promised to be paid for which the borrower is in any wise liable is in itself, or in addition to any interest paid or promised to be paid, more than the rate of interest which the statutes of Florida allow to be charged, collected, or received, the transaction is usurious.

For other cases, see *Usury, I. a, in Dig. 1-52 N. S.*

Evidence — usury — burden of proof.

3. When a defendant sets up usury as a

defense, the burden of proof is on him to establish it; but, when the usury is proved, the burden of proving that the holder of usurious paper purchased it before maturity without notice of the usury is upon the party relying on such purchase.

For other cases, see Evidence, II. §, 1, in Dig. 1-52 N. S.

(June 9, 1917.)

A PPEAL by defendant from a decree of the Circuit Court for Pinellas County in complainant's favor, in a suit to foreclose a mortgage. Reversed.

The facts are stated in the opinion.

Mr. Charles B. Parkhill for appellant.
Messrs. McKay, Withers, & Phipps, for appellee:

The original transaction was not usurious, inasmuch as the \$400 note was merely a voluntary bonus given by a third person, and not excessive interest exacted of the debtor.

29 Am. & Eng. Enc. Law, 484; 39 Cyc. 981; McArthur v. Schenck, 31 Wis. 673; 11 Am. Rep. 643; Madison University v. White, 25 Hun, 490; Clarke v. Sheehan, 47 N. Y. 188.

A rule of strict construction applies as against usury statutes.

39 Cyc. 910, 911; 1 Jones, Mortg. § 643; 29 Am. & Eng. Enc. Law, 532; Conover v. Van Mater, 18 N. J. Eq. 481.

The burden to establish usury by very clear evidence is always on the mortgagor.

1 Jones, Mortg. § 643; 29 Am. & Eng. Enc. Law, 541, 542; Wood v. Babbitt, 149 Fed. 822; Conover v. Van Mater, 18 N. J. Eq. 481.

As against a bona fide holder of negotiable paper, the defense of usury cannot be made in this state.

Lynchburg Nat. Bank v. Scott Bros. 91 Va. 652, 29 L.R.A. 827, 50 Am. St. Rep. 860, 22 S. E. 487; Union Trust Co. v. Preston Nat. Bank, 136 Mich. 460, 112 Am. St. Rep. 370, 99 N. W. 399, 4 Ann. Cas. 347; Gray v. Boyle, 55 Wash. 578, 133 Am. St. Rep. 1042, 104 Pac. 828; Citizens' State Bank v. Nore, 67 Neb. 69, 60 L.R.A. 737, 93 N. W. 160, 2 Ann. Cas. 604; Storz Brewing Co. v. Skirving, 94 Neb. 215, 142 N. W. 669; Northern Nat. Bank v. Arnold, 187 Pa. 356, 40 Atl. 794; Knox v. Clifford, 38 Wis. 651, 20 Am. Rep. 28; Leightman v. Kadetska, 58 Iowa, 676, 43 Am. Rep. 129, 12 N. W. 736; Boughner v. Meyer, 5 Colo. 71, 40 Am. Rep. 139; New v. Walker, 108 Ind. 365, 58 Am. Rep. 47, 9 N. E. 386; Henry v. State Bank, 131 Iowa, 97, 107 N. W. 1034; Myers v. Kessler, 74 C. C. A. 62, 142 Fed. 730; Bradshaw v. Van Valkenburg, 97 Tenn. 316, 37 S. W. 88; American Sav. Bank & T. Co. v. Helgesen, 64 Wash. 54, 116 Pac. 837, Ann. L.R.A. 1917F.

Cas. 1913A, 390; Richter v. Burdock, 257 Ill. 410, 100 N. E. 1063; Cheney v. Cooper, 14 Neb. 415, 16 N. W. 471; Cheney v. Janssen, 29 N. W. 289, and note, 20 Neb. 128; Commercial Nat. Bank v. Jordan, 71 Fla. 566, 71 So. 760.

Under the uniform Negotiable Instrument Law a note in the hands of a bona fide holder is valid and enforceable although, by statute, it is actually declared void as between the original parties.

Schlesinger v. Kelly, 114 App. Div. 546, 99 N. Y. Supp. 1088; Broadway Trust Co. v. Manheim, 47 Misc. 415, 95 N. Y. Supp. 93; Klar v. Kostiuik, 65 Misc. 199, 119 N. Y. Supp. 683; Emanuel v. Misicki, 149 N. Y. Supp. 905; Ernst Oeser & Co. v. Behrend, 89 Misc. 391, 151 N. Y. Supp. 875; Schlesinger v. Gilhooly, 189 N. Y. 1, 81 N. E. 619, 12 Ann. Cas. 1138; Schlesinger v. Lehmaier, 191 N. Y. 69, 16 L.R.A. (N.S.) 696, 123 Am. St. Rep. 591, 83 N. E. 657; Wirt v. Stubblefield, 17 App. D. C. 283; People's Bank & T. Co. v. Fenwick Sanitarium, 130' La. 723, 43 L.R.A. (N.S.) 228, 58 So. 523, Ann. Cas. 1913C, 1322; Wood v. Babbitt, 149 Fed. 822; Gray v. Boyle, 55 Wash. 578, 133 Am. St. Rep. 1042, 104 Pac. 828; Gordon v. Levine, 197 Mass. 263, 15 L.R.A. (N.S.) 243, 125 Am. St. Rep. 361, 83 N. E. 861; Arnd v. Sjoblom, 131 Wis. 642, 10 L.R.A. (N.S.) 842, 111 N. W. 666, 11 Ann. Cas. 1179; Samson v. Ward, 147 Wis. 48, 132 N. W. 629; Arnau v. First Nat. Bank, 36 Fla. 398, 18 So. 786; Jones v. Manitowoc Shipbuilding & Dry Dock Co. 65 Fla. 467, 62 So. 590; McClure v. American Nat. Bank, 67 Fla. 32, 64 So. 427; Bland v. Fidelity Trust Co. 71 Fla. 499, L.R.A. 1916F, 209, 71 So. 630; Commercial Nat. Bank v. Jordan, 71 Fla. 566, 71 So. 760.

Browne, Ch. J., delivered the opinion of the court:

J. L. Fouts brought a bill to foreclose a mortgage against Mrs. Virginia H. Tucker in the circuit court of Pinellas county, Florida. The bill alleges, in substance, that Virginia H. Tucker, on the 10th of December, 1914, gave to the Bank of Safety Harbor her promissory note of that date for \$3,000, payable ninety days thereafter, with interest after maturity at 8 per cent; that on the same day she executed a mortgage deed to the Bank of Safety Harbor for certain lands described in the bill, and that the Bank of Safety Harbor, for value received, assigned, transferred, sold, and delivered to J. L. Fouts said note and mortgage on the 16th day of March, 1915. The bill was sworn to by the complainant.

Attached to the bill and made a part thereof is an assignment of the mortgage and note to J. L. Fouts, dated March 16,

1915, and the notarial certificate affixed to the assignment shows that it was executed on March 16, 1915. To this bill the defendant filed her answer, setting up by way of defense that the Bank of Safety Harbor did wilfully and knowingly charge her \$475 as interest on the principal sum of \$3,000 lent by said bank to defendant for a period of ninety days, and that she gave the bank a promissory note for \$400 payable ninety days thereafter; that the note for \$400 was signed and executed by the Espiritu Santo Springs Company, a corporation of which the defendant was at the time president and a holder of the majority of the stock, and that upon the completion of the transaction the sum of \$3,000 so borrowed was placed to the credit of the Espiritu Santo Springs Company, which company checked it out from the bank and used the same. She prays that the principal sum of \$3,000 and all interest thereon be forfeited to the defendant.

On the succeeding rule day the complainant filed an amendment to his bill of complaint, wherein he alleges that the assignment of the note and mortgage to him by the Bank of Safety Harbor was made on March 6, 1915, and that he was a bona fide purchaser of the note and mortgage for value before maturity and without notice. To the bill as amended the plaintiff filed her answer, which was substantially the same as the answer to the original bill, except that it denied that for value received the Bank of Safety Harbor assigned, transferred, and delivered to the complainant all its right, title, and interest in said note and mortgage on March 6, 1916, and denies that John L. Fouts was a bona fide purchaser of same for value before maturity and without notice.

The complainant filed his replication, and testimony was taken before a master, and a decree rendered by the circuit judge in favor of the complainant for the sum of \$3,333.33, and \$250 solicitor's fees. From this final decree the defendant takes her appeal.

There are six assignments of error, but only the first five are argued by appellant, and as these present the question whether the judge erred in rendering the final decree herein, we will follow the course adopted by the appellant in his brief, and discuss them together.

The first question presented for determination is, Was the initial transaction an usurious one? The charges in the answer as to the circumstances of the transaction connected with the loan are sustained by the testimony. Briefly the facts gleaned from the answer and the testimony are these: The appellant was the president of the Espiritu Santo Springs Company, and L.R.A.1917F.

owned a majority of its stock. That extensive developments were being made by the company on its property, and it was in pressing need for money to continue the work. When the mortgage and note were executed, the \$3,000 loaned thereon was placed to the credit of, and checked out by, the Espiritu Santo Springs Company, and it was the beneficiary of the loan. W. E. Sinclair was the vice president and general manager of the company and the confidential adviser and trusted agent of Mrs. Tucker. He negotiated the loan with the Bank of Safety Harbor for Mrs. Tucker. There is no doubt that a charge of \$475 for a loan of \$3,000 for ninety days is over 25 per cent per annum, and comes within the condemnation of the provisions of § 5, chap. 5980, Laws of 1909 (Comp. Laws 1914, § 3107b), which provides: "Any person, association of persons, firm or corporation, or the agent, officer or other representative of any person, association of persons, firm or corporation lending money in this state who shall wilfully and knowingly charge or accept any sum of money greater than the sum of money loaned, and an additional sum of money equal to 25 per centum per annum upon the principal sum loaned, by any contract, contrivance or device whatever, directly or indirectly, by way of commissions, discount, exchange, interest, pretended sale of any article, assignment of salary or wages, inspection fees or other fees, or otherwise, or for forbearing to enforce the collection of such moneys or otherwise, shall forfeit the entire sum, both the principal and interest, to the party charged such usurious interest, and shall be deemed guilty of a misdemeanor, and on conviction, be fined not more than \$100 or be imprisoned in the county jail not more than ninety days, or both, in the discretion of the court."

It is contended by the appellee that because the note for \$400 which was given for the loan, in addition to the \$75 was the note of the Espiritu Santo Springs Company, it was a mere bonus, and that a bonus for a loan paid by a third person is not usury. A bonus paid by a third person may or may not cause a transaction to be usurious, according to the circumstances. Thus, if a third person in order to get some benefit for himself, or for any personal reasons, without the knowledge or consent of the borrower, pays the lender a bonus as an inducement for a loan, the borrower receiving the full amount and paying no part of the bonus, and not affected pecuniarily thereby, the transaction is not an usurious one. This proposition is supported by the authorities cited by appellee,

but neither this doctrine nor the facts in the cases cited fit the facts in the instant case. Thus in *Madison University v. White*, 25 Hun, 490, the facts were that John L. White and George C. White wanted to borrow \$12,000 with which to purchase land. As an inducement to Madison University to make the loan, one Joseph Mason subscribed and paid to the university library fund \$250, without the knowledge or consent of either of the borrowers, who had the full benefit of the \$12,000 without paying or promising to pay any part of the bonus, or anything but the legal rate of interest. Mason gave the bonus as an inducement for the loan, so that he might make a sale of the lands to the Whites, who were to pay for the same with the borrowed money. This transaction was held not to be usurious. In the case of *McArthur v. Schenck*, 31 Wis. 673, 11 Am. Rep. 643, cited by appellee, A, wishing to buy a farm of B for \$2,500, applied to C for a loan of that sum. C refused to make the loan unless a bonus of \$30 was paid. A refused to pay the bonus. Rather than lose the sale, B paid the bonus, and the loan was made at legal rate of interest. This transaction was held not to be usurious.

In *Clarke v. Sheehan*, 47 N. Y. 188, cited by appellee, Sheehan entered into a verbal contract with Clarke & Allen to furnish them with his composition for converting iron into steel, for which Sheehan held a patent, to be used by them in making pump barrels. Sheehan was also to harden pipes for them if they desired, at a stipulated price, and agreed not to furnish any of the composition to any other parties. Ten days later Sheehan applied to Clarke & Allen for a loan of \$500 to enable him to "go right along and furnish . . . the composition without delay." The parties acted upon this verbal agreement, and regarded themselves, when the loan was applied for, and agreed to be made, morally, though not legally, bound by it. On application for the loan Clarke & Allen suggested that the verbal agreement be reduced to writing, and that a bond and mortgage be executed for the \$500, conditioned for the payment thereof with interest, and that Sheehan faithfully fulfil the conditions of his contract, and in case he did not do so, the whole sum of \$500 and interest should become immediately payable. The referee held the contract usurious, because Clarke & Allen, as a condition of the loan, required that the verbal agreement be reduced to writing and signed, so as to make it of binding force, thereby intentionally securing in addition to lawful interest, valuable rights under and by

virtue of the agreement. The court of appeals, in reversing the finding of the referee, said: "From the findings of the referee, it appears that the loan of \$500 was not the inducement to the undertaking of the defendant Thomas Sheehan, to furnish composition and harden pipes for the plaintiff's firm, but that that engagement had been verbally made before the loan was suggested, and the loan was applied for by the defendant for the avowed purpose of enabling him to carry out such previous engagement. He was perfectly willing, and it seems desirous, at that time, to furnish the composition and harden the pipes at the stipulated prices, and the referee has found that they were fair. The prices which he was to receive were evidently considered full compensation for the article and labor to be furnished. These prices were not fixed with reference to any loan of money, and when the loan was subsequently agreed upon, no rebate was made from them. It cannot be said, under these circumstances, that the agreement to furnish the composition and harden the pipes was an additional compensation paid by the defendant for the use of the money, even if it be conceded that the verbal agreement could not have been enforced."

The court, in discussing the legal proposition, said: "I cannot agree to the soundness of this proposition. The mere fact that a loan of money on interest is the consideration for another contract is not, in all cases, conclusive evidence of usury. If, by the collateral contract, some benefit is secured to the lender, for which the borrower does not receive an equivalent, and which the lender would not have obtained, except for the loan, and which is intended as additional compensation for the loan, it is usury. But if provision is made for full compensation to the borrower for all he may do under the collateral contract, there is no usury. Usury consists of a corrupt agreement, whereby more than lawful interest is to be paid; and all shifts and devices which may be resorted to, for the purpose of covering up or concealing such an agreement, are ineffectual, if the intent to obtain more than legal interest for the use of the money can be discovered."

None of these cases fit the facts in this case, or support the contention of the appellee. Mrs. Tucker was the owner of considerable property, consisting of lands, and a majority of the stock in the *Espiritu Santo Springs Company*. She was interested largely in the development and improvement of the properties of the *Espiritu Santo Springs Company*, and was in dire need of money to continue the development. In this situation she sent her trusted agent

and personal representative, who was also vice president and general manager of the Espiritu Santo Springs Company, to the Bank of Safety Harbor to effect a loan of \$3,000 in order that the work of developing the Espiritu Santo Springs Company's lands might not be suspended. The contract was made with the bank by Sinclair, her agent; he agreed for her that she would individually give a mortgage for \$3,000 on lands which she owned in her own name, and pay \$75 in advance as interest, and the Espiritu Santo Springs Company, of which she was president and majority stockholder, would execute and deliver a note for \$400 at 8 per cent interest to the Bank of Safety Harbor.

It is clear from the testimony that the loan of \$3,000 was for the Espiritu Santo Springs Company, and that Mrs. Tucker, who regarded the affairs of that company as hers, mortgaged her property for the benefit of the Espiritu Santo Springs Company. She testified that she borrowed the \$3,000 from the Bank of Safety Harbor "to advance the interest of the Espiritu Santo Springs Company, and to continue the work on the fill." When asked how much interest the bank charged her for the \$3,000 for ninety days, she replied: "I am afraid to trust to my memory, but Mr. Sinclair can answer this for me, as I have implicit confidence in him, and sincerely trust Mr. Sinclair; we were in dire need of money, and that was the reason I was so willing for him to mortgage the lots."

When asked about the note for \$400 given by the Espiritu Santo Springs Company, she said she "knew there was another note for \$400 given for interest on the \$3,000 which the Espiritu Santo Springs Company got the benefit of." In reply to a question whether "W. E. Sinclair, the vice president of the Espiritu Santo Springs Company, was acting for you in the borrowing of the \$3,000 from the Bank of Safety Harbor, and what he did was with your consent and knowledge," she said: "It certainly was; I told him to get the money on the best terms he could." Sinclair managed the entire transaction for Mrs. Tucker. He made the terms with the bank, he handed Mrs. Tucker the note for \$3,000 to sign, he executed and delivered the \$400 note with her knowledge and consent, whereby the company of which she was president and majority stockholder became obligated to pay the bank \$400. Both notes and mortgages are dated December 10, 1914; the \$3,000 borrowed was placed to the credit of the Espiritu Santo Springs Company on that day, and was afterwards checked out by the company. We fail to see how this

transaction can possibly be brought within the rule that, where a third person, in order to get some benefit for himself, or for personal reasons, without the knowledge or consent of the borrower, pays a lender a bonus as an inducement for a loan, the borrower receiving the full amount and paying no part of the bonus, and not affected pecuniarily thereby, there is no usury. The transaction lacks nearly every element necessary to bring it within this rule. Unless we consider Mrs. Tucker and the Espiritu Santo Springs Company as practically the same person, the borrower, Mrs. Tucker, not only did not receive the full amount of the loan, but received none of it. If we regard the beneficiary of the loan, the Espiritu Santo Springs Company, as the borrower, the note for \$400 given as an inducement for the loan was not given by a third party, but the identical party who received the money from the loan. Even if Mrs. Tucker had received the entire amount borrowed, it cannot be said that the \$400 note was given without her knowledge or consent; for she very clearly states that she knew of it, and authorized it, and did so because of the dire need which she was in; neither can it be said that she paid no part of the bonus, because as a majority stockholder in the Espiritu Santo Springs Company she would have to pay such proportion of the note as was represented by her interest in the company.

It is quite clear that the transaction by the Bank of Safety Harbor was an usurious one and in contravention of § 5, chap. 5960, Acts of 1909. The complainant, however, seeks to avoid the consequences of the usurious contract, by setting up that he is a bona fide purchaser of the note and mortgage for value, before maturity and without notice. Usury having been established, the burden is on the complainant to prove that he is an innocent holder.

The defendant having set up usury as a defense, the burden of proof is on him to establish it, but when the usury is proved, the burden of proving that the holder of the usurious note purchased it before maturity without notice of the usury is upon the party relying upon such purchase. 39 Cyc. 1085, 1086; *Simpson v. Hetter*, 42 Misc. 482, 87 N. Y. Supp. 243; *Richardson v. Stone*, 32 Neb. 617, 49 N. W. 763; *Male v. Wink*, 61 Neb. 748, 86 N. W. 472.

Has Fouts successfully fulfilled the requirements of the law which places on him the burden of proving that he is an innocent purchaser and had no notice of the usury, and that he bought the note before maturity? If he has failed to do this in either particular, he cannot recover.

Fouts in his sworn bill says he bought the note and mortgage from the Bank of Safety Harbor on the 16th of March, 1915. This was six days after maturity.

The original mortgage attached to the bill has two indorsements,—one undated, which states that “for value received we hereby sell this mortgage without recourse to J. L. Fouts;” and a second and more formal one, which sells both note and mortgage to Fouts, which is dated March 16, 1915, and duly acknowledged by E. N. Morrow, cashier of the Bank of Safety Harbor, before a justice of the peace, who certifies that it was executed on the 16th of March, 1915.

Fouts filed an amended bill contradicting the statement in the original bill that the note and mortgage were bought by him on March 16, 1915, and alleging that the Bank of Safety Harbor sold it to him on March 6th, and that the long assignment dated March 16th was executed by the Bank of Safety Harbor after the note and mortgage had become due and had been turned over to complainant's attorneys for foreclosure.

Fouts was cashier of the Citizens' Bank of Mulberry, and Morrow was cashier of the Bank of Safety Harbor. Their version of the transaction resulting in the sale of the note and mortgage to Fouts is that, prior to March 5th, they had some talk about its sale by the bank, and on that date Fouts told Miss Annie Glenn, assistant cashier of the Mulberry Bank, to telephone to Morrow at Safety Harbor and ask him if he would sell the \$3,000 note of Mrs. Virginia Tucker to Fouts; that Morrow said he would, and thereupon Morrow mailed the note and mortgage to him, and he received them March 8th. Fouts being hard of hearing, the telephone conversation with Morrow was carried on by Miss Glenn on behalf of Fouts. She testified that nothing was said about what Fouts was to pay for the note and mortgage, nor how it was to be paid; and neither Fouts nor Morrow testify about any agreement as to how the money was to be paid, and on this vague conversation between Miss Glenn and Morrow, the latter indorsed the note and mortgage over to Fouts and sent them to him by mail, without knowing, so far as the testimony discloses, how or when Fouts was to pay for them. Fouts says he gave the Bank of Safety Harbor credit on the books of the Citizens' Bank of Mulberry for \$1,500 and sent Morrow two checks of \$700 each. To corroborate this a duplicate deposit slip written on stationery of the Citizens' Bank of Mulberry showing a deposit to the credit of the Bank of Safety Harbor of \$1,500, dated November 8, 1915, was offered in evidence. Prior to the production of this deposit slip before the master, L. C. Morrow, then the cashier of the Bank of Safety Harbor, who had succeeded E. N. Morrow in that capacity, examined the files of the bank, and could not find such a deposit slip. It was proved that Fouts was in the Bank of Safety Harbor with E. N. Morrow between the dates when L. C. Morrow could not find the slip and the time when E. N. Morrow produced it. L. C. Morrow did not say the slip was not in the files of the bank, but only that he had examined them and could not find it, and he sought to explain this by saying he had only been employed in the bank a few months, and that it would take all the afternoon to go through all the files. Further, to corroborate their testimony, the bill against the Mulberry Bank for telephone service for the month of March was offered in evidence, and it showed five conversations by Miss Glenn with Morrow, two at Clearwater and three at Safety Harbor, and the one on the 5th was with him at Clearwater; the next conversation between them was on the 9th, at Safety Harbor. Fouts says the entry showing a conversation with Morrow at Clearwater on the 5th inst. is a mistake. Fouts testified that he had a telephone conversation with Morrow on the 5th, and confirmed it on the 6th. There is no charge for phone service between the 5th and the 9th.

In the minute book of the directors of the Bank of Safety Harbor there appears this entry, dated March 15, 1915, and signed by five of the directors: “We, the undersigned directors of the Bank of Safety Harbor, hereby authorize the sale of the Virginia H. Tucker mortgage and note for \$3,000 to J. L. Fouts.”

The teller's daily balance book of the Bank of Safety Harbor shows an entry on March 16, 1915, of a credit to Citizens' Bank of Mulberry under heading “Notes Payable” “number thirty-eight, three thousand dollars.” The cashier testified that the note No. 38 was the Virginia Tucker note, and the entry represented that the Virginia Tucker note was paid on that day. Morrow, the former cashier, who made the usurious contract with Mrs. Tucker's agent, in an attempt to explain this, says that on the 8th or 9th of March he received a credit slip from Citizens' Bank of Mulberry, showing that there had been deposited to the credit of the Bank of Safety Harbor \$1,500, and two checks for \$750 each, which Fouts asked him to hold until he needed the money, and that he did not credit the note as paid, or charge the Citizens' Bank until November 16, 1915.

To meet the burden of proving that he took the note before maturity, we have Morrow's and Fouts' testimony that the sale was consummated between the 6th and 8th of March. Against this, we have Fouts' sworn statement in the bill that he bought the note on the 16th; the entry in the minute book of the directors of the Bank of Safety Harbor on March 15th, authorizing the sale of the Virginia Tucker note for \$3,000 to J. L. Fouts; the entry in the books of the bank that the note was paid on the 16th, and a credit on that day of \$3,000 in favor of Citizens' Bank of Mulberry, of which Fouts was cashier. Fouts and Morrow say that all these records are mistakes, but it is taxing our credulity to too great an extent to expect us to believe that chance alone caused all but one of these mistakes to be made on the same day, and that chance alone controlled the dating of the minute entry on the directors' books authorizing the sale of the Virginia Tucker note to Fouts on the 15th of March, the day before the other entries show the sale was finally consummated.

There are two letters from Fouts to Sinclair which strongly support the appellant's contention that Fouts bought the note after maturity. One dated March 8th, the day before the Virginia Tucker note became due, reads: "Reference to your conversation of yesterday, have to state that I will not alter the terms quoted in my letter to you. I have succeeded in getting this money, and if the deal is not made by Thursday of this week, the same will be returned, and I will not again take this matter up with my people. It is up to you as to whether you wish it on these terms and conditions, but it will be useless to go into this matter again after Thursday, as I will return the money."

Without going over his testimony in detail, it is sufficient to say that through his entire testimony on this point, he is very positive and emphatic that he was not to furnish the money to Sinclair from his own funds, but was to get it from other sources, and that the thousand dollars he was to receive was "commission." Notwithstanding Fouts' attempted explanation of the language of this letter, that "if the deal is not made by Thursday of this week, the same will be returned," it seems quite clear to us that the transaction stood on the 8th precisely as it did on the 28th of February, when Sinclair applied to him to raise funds to pay off Mrs. Tucker's indebtedness to the bank, and that Fouts did not buy the note until after the 11th of March, two days after maturity. In this letter he makes use of these expres-

sions: "If the deal is not made by Thursday of this week, the same will be returned, and I will not again take this matter up with my people;" and "it will be useless to go into this matter again after Thursday."

The "matter" which Sinclair and Fouts were negotiating about was a loan from friends of Fouts to Mrs. Tucker to take up her note and mortgage held by the Bank of Safety Harbor; and his entire letter negatives any theory that at that time Fouts, and not the bank, owned the note. On March 16th, Fouts notified Sinclair by letter that he holds the note of Mrs. Tucker, thus adding another circumstance to support the theory that the sale was consummated on that date. Finally, we have the testimony of Mr. Sidney Washington, one of the directors of the Bank of Safety Harbor, that he understood that the note was sold to Fouts after it became due, and that he made objections to its being so sold. We think the appellee has not only failed to meet the burden of proof which was on him to show that he took this note before maturity, but that the evidence clearly establishes that he took it after it became due. The rule is clear that one who purchases an usurious note after maturity takes it subject to the defense of usury which may have been set up against the original holder.

The evidence is still stronger that Fouts had notice of the usurious character of the transaction between the Bank of Safety Harbor and Mrs. Tucker. Sinclair testified that, having learned that the Bank of Safety Harbor would not extend the note when it came due, he sought elsewhere to raise the money to take it up, and entered into negotiations with Fouts with that end in view. They had an interview in Tampa on Sunday the 28th of February, 1915, and then took an automobile and went to Safety Harbor and looked at the lots, and Fouts said the Security was sufficient, and that if Sinclair would pay \$1,000 for the money for six months, he would let him have \$3,000, and if he could not pay it when due Fouts would renew it for another six months. Sinclair says that at this time he explained to Fouts the \$475 interest he had paid the Bank of Safety Harbor for the loan to Mrs. Tucker, and that the bank was taking advantage of him. Fouts denies that Sinclair told him about having paid the bank \$475 for the loan to Mrs. Tucker.

Sinclair's statement is more probable, as it is usual for one seeking a loan with which to take up another about to become due to state all the circumstances connected therewith. It also seems probable that,

Fouts being told by Sinclair that he had agreed to pay the Bank of Safety Harbor \$475 for a loan of \$3,000 for ninety days was what prompted him to demand \$1,000 for the loan of the same amount for six months.

It appears that Sinclair was willing to submit to this hard bargain, but on March 3d, Fouts wrote him to the effect that he would get the loan for him, but Mrs. Tucker must give her note for \$4,120, payable in six months, secured by a mortgage on thirty-five lots, instead of twenty-seven as offered; that there was to be no contract providing for further extension; and making other hard terms. The testimony does not show that Sinclair replied in writing to this letter, but in Fouts' letter of March 8th he says, "Reference to our conversation," etc. It is apparent from this that between March 3d and 8th, there was a conversation between Fouts and Sinclair in relation to this transaction. Sinclair says it took place in Safety Harbor on the 3d or 4th of March. Fouts denies that he was in Safety Harbor any week day in March except the 10th, but makes no attempt to explain where the conversation referred to in his letter of the 8th took place. It was not a telephone conversation, for the bill for such service for March shows no conversation between Fouts and Sinclair. Miss Alma Pearce, O. M. Goodrich, and Sinclair say it occurred in Sinclair's office in Safety Harbor on the 3d or 4th of March. Sinclair says that on this occasion he again told Fouts about the \$475 he had paid the Bank of Safety Harbor for the loan, and when Fouts got angry and threatened to buy the note and put him in a hole, he shook his finger in Fouts' face and said, "I notify you if you buy

that paper after what I have told you, you are not an innocent purchaser." Both Miss Pearce and Goodrich fully corroborate Sinclair in this particular. Fouts denies this, and denies that he was in Safety Harbor any week day in March before the 10th. His assistant cashier says that Fouts was not absent from Mulberry any time between the 1st and 10th of March, but her knowledge is derived from the fact that on those days the entries in the books are in Fouts' handwriting. Mulberry and Safety Harbor are not so far apart that Fouts could not have gone there and returned on the same day in time to have written up his books. The conclusion is inevitable from Fouts' letters of March 3d and 8th that a conversation took place between him and Sinclair between those dates, and the testimony of Miss Pearce and Goodrich is positive and convincing that it took place in Sinclair's office in Safety Harbor, and that on that occasion Sinclair informed Fouts of the usurious character of Mrs. Tucker's note which he afterwards bought and is seeking to collect in this cause.

We are satisfied from the testimony that Fouts bought Mrs. Tucker's note from the Bank of Safety Harbor after maturity, and that he had notice of the usury with which it was tainted, and has therefore forfeited the entire sum, both principal and interest. Having reached this conclusion, it is not necessary for us to pass upon the effect of § 5 of chapter 5960, Acts of 1909, on an innocent holder for value before maturity.

The decree is reversed.

Taylor, Shackleford, Whitfield, and Ellis, JJ., concur.

Annotation—Usury: payment of bonus by stranger.

As is stated in *TUCKER v. FOUTS*, ante, 916, it is clear that if a third person, for any personal reasons, without the knowledge or consent of the borrower, pays the lender a bonus as an inducement for a loan, this will not make the transaction usurious as between the lender and borrower. *Madison University v. White* (1881) 25 Hun (N. Y.) 490; *McArthur v. Schenok* (1872) 31 Wis. 673, 11 Am. Rep. 643, both of which cases arose upon foreclosure of the security given on the loan, and which are sufficiently set forth in *TUCKER v. FOUTS*.

Whether the transaction would be usurious as regards the party paying the bonus is a question about which there seems a difference of opinion.

L.R.A.1917F.

In *Gleason v. Childs* (1880) 52 Vt. 421, the plaintiff owed Edson, who owed the defendant the same amount, both on due promissory notes; Edson demanded payment, but agreed that if the plaintiff would arrange with the defendant to wait a year, he would also wait another year; the plaintiff so arranged, paying the defendant a bonus for the delay. It was held that the plaintiff could not recover the bonus, as it was not usury, since it was not paid on any debt or loan of the plaintiff.

In *Spalding v. Bank of Muskingum* (1841) 12 Ohio, 544, however, it was held that an agreement made by contractors on state works with a bank, that if the bank would make a loan to the state to be applied to carry on the

works, they would pay the bank a commission, was usurious, but that the bank having, with the contractors' consent, deducted the commission in paying the state's checks on it given to the contractors, the contractors were participes criminis, and could not recover back the commission from the bank.

It does not appear in either of the last two cases whether the borrower knew about the bonus.

In *Hamilton v. Brennan* (1895) 90 Hun, 340, 35 N. Y. Supp. 805, affirmed in (1897) 154 N. Y. 738, 49 N. E. 1097, it was held where under an agreement the maker of a note was to pay the lender \$50 bonus, and the maker's husband subsequently paid the bonus out of his own pocket, that this did not validate the transaction. B. B. B.

KENTUCKY COURT OF APPEALS.

FIDELITY & CASUALTY COMPANY OF NEW YORK, Appt., v. ED MARTIN.

(163 Ky. 12, 173 S. W. 307.)

Insurance — indemnity — liability to person injured.

One who has insured the owner of an automobile against loss and liability for damages for bodily injuries suffered by any person as the result of an accident caused by the use of the machine, and whose contract provides that no action shall be brought against it unless by the insured for loss after judgment by payment in money, is not subject to garnishment by a person so injured if the insured is insolvent, so that the judgment recovered against him is not collectable, although the insured, under the provisions of the policy, undertook the defense of the action in which the judgment was recovered.

For other cases, see Insurance, VIII. in Dig. 1-52 N. S.

(Hannah and Nunn, JJ., dissent.)

(February 19, 1915.)

APPEAL by the garnishee from a judgment of the Circuit Court for McCracken County in favor of plaintiff in an action brought to enforce liability on an indemnity insurance policy. Reversed.

The facts are stated in the opinion.

Messrs. Berry & Grassham and Fred Forcht, for appellant:

Under the contract between Wells and

the Fidelity & Casualty Company of New York, no cause of action obtained in favor of anyone until the insured had sustained a loss, and then only in favor of the insured for reimbursement, or of insured's assignee or trustee.

Cayard v. Robertson, 123 Tenn. 382, 30 L.R.A.(N.S.) 1224, 131 S. W. 864, Ann. Cas. 1912C, 152; *Peifer v. Penn Allen Portland Cement Co.* 240 Pa. 468, 87 Atl. 623; *Kennedy v. Fidelity & C. Co.* 100 Minn. 1, 9 L.R.A.(N.S.) 478, 117 Am. St. Rep. 658, 110 N. W. 97, 10 Ann. Cas. 1; *Appel v. People's Surety Co.* 148 App. Div. 70, 132 N. Y. Supp. 200; *Embler v. Hartford Steam Boiler Inspection & Ins. Co.* 158 N. Y. 431, 44 L.R.A. 512, 53 N. E. 212; *Mobile L. Ins. Co. v. Brame*, 95 U. S. 754, 24 L. ed. 580; *Cardwell v. Atwater*, 15 Ky. L. Rep. 570; *Triplett v. Helm*, 5 J. J. Marsh. 651; *Powell v. Eve*, 2 Bibb. 317; 9 Cyc. 372; 15 Cyc. 1038; *Carter v. Aetna L. Ins. Co.* 76 Kan. 275, 11 L.R.A.(N.S.) 1155, 91 Pac. 178; *Travellers Ins. Co. v. Moses*, 63 N. J. Eq. 260, 92 Am. St. Rep. 663, 49 Atl. 720; *Cushman v. Carbondale Fuel Co.* 122 Iowa, 656, 98 N. W. 509; *Allen v. Aetna L. Ins. Co.* 7 L.R.A.(N.S.) 958, 76 C. C. A. 265, 145 Fed. 881; *Finley v. United States Casualty Co.* 113 Tenn. 592, 83 S. W. 2, 3 Ann. Cas. 962; *Bain v. Atkins*, 181 Mass. 240, 57 L.R.A. 791, 92 Am. St. Rep. 411, 63 N. E. 414; *Ford v. Aetna Ins. Co.* 70 Wash. 29, 126 Pac. 69; *Clark v. Bonsal*, 157 N. C. 270, 48 L.R.A.(N.S.) 191, 72 S. E. 954; *Morris v. Travelers' Ins. Co.* 189 Fed. 211.

Messrs. Hendrick & Nichols, Eugene Graves, and Crossland & Crossland for appellee.

Note.—The general subject of insurance indemnifying against liability for injury caused by automobiles is treated in the notes to *Harris v. American Casualty Co.* 44 L.R.A.(N.S.) 70; *Patterson v. Standard Acci. Ins. Co.* 51 L.R.A.(N.S.) 585; and *Federal Ins. Co. v. Hiter*, L.R.A.1915E, 575.

The general question whether insurance against injuring the person or property of a third person is indemnity or liability insurance is treated in the note to *Patterson L.R.A.1917F.*

v. Adan, 48 L.R.A.(N.S.) 184; and see later cases, *Davies v. Maryland Casualty Co.* L.R.A.1916D, 395; *Maryland Casualty Co. v. Peppard*, L.R.A.1916E, 507; and *Elliott v. Aetna L. Ins. Co.* L.R.A.1917C, 1061. See also the note to *Clark v. Bonsal*, 48 L.R.A.(N.S.) 191, as to injured employee's right to reach fund under an employers' liability policy. Various notes on related questions are cited in the note first referred to.

Settle, J., delivered the opinion of the court:

May 14, 1912, the appellee, Ed Martin, was run over upon a street of the city of Paducah by an automobile owned and operated by one Lon Wells. The injuries thereby inflicted upon appellee were of a painful and permanent character. In July following appellee instituted an action in the court below to recover of Wells the damages sustained by him on account of the injuries referred to. After Wells had been duly summoned, but before the case came to trial, he died intestate, domiciled in McCracken county. Following his death his estate, by proper order of the McCracken county court, was placed in the hands of F. G. Rudolph, public administrator of that county, for administration, and thereafter, by an order of the McCracken circuit court, the action which had been brought by appellee against Lon Wells was revived against F. G. Rudolph, as administrator of his estate. In the trial which followed in that court appellee recovered a verdict and judgment against the administrator for the sum of \$4,500, with interest at 6 per cent per annum from the date of the judgment until paid, and his costs expended in the action, amounting to \$32.15. An execution having been issued on this judgment and returned "No property found," appellee by this action in equity, brought against F. G. Rudolph, administrator of the estate of Lon Wells, deceased, in the McCracken circuit court, sought satisfaction of the judgment by process of attachment, to this end alleging its obtention, the return of nulla bona, and the insolvency of Wells's estate, but that the appellant, Fidelity & Casualty Company, was indebted to Wells's administrator in a sum equal to the amount of appellee's judgment, upon an employer's indemnity policy which it had issued to the decedent, Lon Wells, before the accident in which the appellee, Martin, was injured, and by the terms of which policy appellant had obligated itself to pay all damages that might be sustained by any person through the negligent operation of the automobile by Wells. It was further alleged that appellee was entitled to receive and have applied to the payment of his judgment the amount thus claimed to be owing by appellant to the estate of Wells. A general order of attachment was prayed and issued against the administrator of Wells and appellant, and a copy thereof served on each of them.

After service upon it of the order of attachment, appellant filed an answer as garnishee, in which it averred that, at the time of the service of the attachment or garnishment upon it, it did not have in

its hands any money, choses in action, or other thing belonging or going to the estate of the decedent, Wells, or to the administrator thereof, and prayed to be dismissed with its costs. Several amended petitions were filed by appellee, one of which made appellant a party defendant to the action, and, in substance, alleged that the policy issued to the decedent, Wells, by appellant, by its terms imposed upon the latter the obligation to pay and satisfy the judgment which Martin had recovered against the estate of the decedent. It was further alleged in the amended petition that, by virtue of the order of attachment issued on the original petition in equity and its service upon appellant as garnishee, the appellee, Martin, had a lien on the insurance money or indemnity claimed to be due from appellant to the estate of Wells, and for the amount alleged to be due under the policy judgment was asked against appellant.

In another of his amended petitions appellee further alleged that, by taking control of the assured's and his administrator's defense in the original action for damages brought by appellee, appellant became bound by the judgment recovered by the latter, and estopped to deny its liability upon the policy.

Obviously, to aid appellee in compelling, if possible, the payment of his judgment by appellant, F. G. Rudolph, as administrator of the estate of Lon Wells, deceased, filed in the suit in equity his answer, which he made a cross petition against the appellant, and therein asked the court to adjudge that appellant be required to answer and defend the action and compelled to pay and discharge the liability of the estate of Lon Wells, deceased, to the appellee, Martin, basing the relief thus asked on the allegations in the answer and cross petition that appellant, for a valuable consideration paid to it by the decedent, Wells, issued and delivered to him during his lifetime its policy, in and by the provisions of which it obligated itself to pay all damages that might be caused to any person through the negligent operation of the automobile owned by the decedent, and to indemnify and hold the decedent harmless as to any damages that might result to a third person by paying same when ascertained by a judgment recovered against the assured by the person injured. By an amendment the administrator made more specific various averments of his original answer and cross petition, alleged the insolvency of the estate of his decedent, that he had received but \$2.92 by way of assets of the estate, which he had paid to appellee, and prayed for himself, as administrator,

a personal judgment against appellant for the amount of the judgment which appellee had recovered against him as the administrator of Wells's estate.

To the petition, as amended, and the answer and cross petition of the administrator, as amended, appellant filed demurrers. The court sustained the demurrer to the answer and cross petition of the administrator, as amended, and, the latter failing to plead further, his answer and cross petition, as amended, was dismissed. From that ruling the administrator failed to appeal.

Appellant's demurrer to the petition, as amended, was overruled by the court, to which ruling it excepted. It thereupon filed an answer wherein, after traversing the affirmative matter of the petition, as amended, it in substance alleged: First, that by its terms no liability could result to it upon the policy it issued to Wells, except for a loss sustained and actually paid in money by the latter or his administrator in satisfaction of a final judgment, rendered after a trial in an action against the assured or his administrator by the person injured by the assured's negligent operation of his automobile, and that no such loss was ever paid in money by the assured or his administrator; second, that its taking control of the defense in the action brought by appellee against the assured was a right given it by the policy, the exercise of which did not make the judgment recovered by appellee binding upon it or estop it to deny liability on the policy, because, by the terms of the policy, the judgment is prevented from having such effect.

To this answer appellee interposed a demurrer, which, after first overruling, the court sustained. To this ruling appellant excepted, and, as it failed to plead further, the court adjudged that appellee recover of it the sum of \$4,500, being the amount of the judgment previously obtained by appellee against Wells's administrator, with 6 per cent interest from February 12, 1913, and its costs expended in this and the original action, for all of which execution was awarded. This appeal seeks the reversal of that judgment, and the question which it presents for decision has not been passed on in this jurisdiction, though it seems to have been well settled in numerous other jurisdictions.

The judgment of the circuit court, if sustained, must be made to rest upon one of two grounds: Either that the recovery of the judgment by appellee against Wells's administrator was a loss actually sustained by the estate of the assured in the meaning of the policy, for which appellant became

liable, without the payment of the judgment by the assured or his administrator in money; or that appellant, having taken charge of the defense in the original action of the appellee, Martin, against Lon Wells, as its policy provided it might do, is concluded by the judgment rendered in that action, and therefore estopped to deny its liability therefor under the policy. Whether either of these propositions is sustained by the provisions of the policy we must now determine.

The character of the indemnity provided by the policy is set forth in clauses 1 and 2 thereof:

"(1) To indemnify the person, firm, or corporation, named in statement 1 of the Schedule of Statements and herein called the assured, against loss from the liability imposed by law upon the assured for damages on account of bodily injuries or death suffered by any person or persons as the result of an accident occurring while this policy is in force and caused by reason of the use, ownership, or maintenance of any of the automobiles described in statement 4 of the said schedule, while used as described in statement 6 of the said schedule within the limits of the United States of America, Canada, and Mexico.

"(2) To defend in the name and on behalf of the assured any suit brought against the assured to enforce a claim, whether groundless or not, for damages on account of bodily injuries or death suffered, or alleged to have been suffered, by any person or persons within the limits designated in the preceding paragraph and under the circumstances therein described, and as the result of an accident occurring while this policy is in force."

The indemnity afforded is subject to certain conditions, specified in clauses A to T, inclusive, contained in the policy. Clause A provides: "Upon the occurrence of an accident the assured shall give immediate written notice thereof, with the fullest information obtainable at the time, to the company at its home office or to the agent who has countersigned this policy. If a claim is made on account of such accident the assured shall give like notice thereof with full particulars. If thereafter any suit is brought against the assured to enforce such a claim, the assured shall immediately forward to the company at its home office every summons or other process as soon as the same shall have been served on him. The company reserves the right to settle any claim or suit. Whenever requested by the company, the assured shall aid in securing information, evidence, and the attendance of witnesses; in effecting settlements; and in prosecuting appeals. The assured

shall at all times render to the company all co-operation and assistance within his power."

Clause E: "The assured shall not voluntarily assume any liability, nor interfere in any negotiations or legal proceedings conducted by the company on account of any claim, nor, except at his own cost, settle any claim, nor incur any other expense without the written consent of the company previously given, except that he may provide at the time of the accident, and at the cost of the company, such immediate surgical relief as is imperative."

Clause K, which more particularly concerns the question involved in the instant case, is as follows: "No action shall be brought against the company under or by reason of this policy unless it shall be brought by the assured for a loss, defined hereunder, after final judgment has been rendered in a suit, described hereunder, and within two years from the date of such judgment, to wit, for a loss that the assured has actually sustained by the assured's payment in money—(a) of a final judgment rendered after a trial in a suit against the assured; (b) of the expenses (excluding any payment in settlement of a suit or judgment) incurred by the assured in the defense of a suit against the assured. The company does not prejudice by this condition any defenses against such action that it may be entitled to make under this policy."

By clause R of the policy the company's liability for loss from an accident resulting either in bodily injuries to or in the death of one person is limited to \$5,000, and such expenses as it may incur in defending any suit, including the interest on any verdict or judgment and any costs taxed against the assured.

In view of the great weight of authority to that effect, it is our conclusion that the policy here involved indemnifies against loss, and not against liability. This seems clearly to appear from clause K, which declares: "No action shall be brought against the company under or by reason of this policy unless it shall be brought by the *assured for a loss*, defined hereunder, after final judgment has been rendered in a suit, described hereunder, and within two years from the date of such judgment, to wit, for a loss that the assured has *actually sustained by the assured's payment in money—(a) of a final judgment rendered after a trial in a suit against the assured.* . . ."

It is not perceived that the meaning of the foregoing provisions of clause K is affected by the stipulations in the preceding clauses; indeed, a compliance with clause

K is made a condition precedent to any right of action on the policy. The policy is one of indemnity against loss actually sustained and paid in money by the assured, without regard to who assumes the defense or whether it is successfully or unsuccessfully made. In the preceding clauses, A and E, the appellant reserved the privilege and assumed the obligation of defending or settling claims for damages covered by the policy, and the assured undertook to furnish all needful assistance in making a defense, and agreed that he would not voluntarily assume any liability, interfere in any negotiations or legal proceedings that might be conducted by appellant on account of any claim for such damages, nor settle such claim at his own cost without written consent of appellant. But there is nothing in any provision of clauses A and E which actually or by implication declares that, in the event such defense as appellant might make to an action brought against the assured for damages should be unsuccessful, it would pay the judgment. The question of payment is confined to, and provided for in, clause K. It would therefore seem to follow that the fact that appellant made defense for the assured or his administrator in the action for damages brought by appellee did not estop it from denying liability under its policy in the present action. The right to defend being given appellant by the policy, we must suppose that the burden of making the defense was assumed for the reason that the award to be made in that action might finally be the measure of appellant's own responsibility, and, indeed, would have been, if the administrator of the assured had, as provided by clause K, paid the judgment recovered against him by appellee. But, in view of the provisions of the policy to the contrary, the act of appellant in defending the action for damages in behalf of the assured or his administrator was not an agreement, and did not constitute an undertaking, to pay appellee's judgment for the assured or his administrator.

We are unable to see that the doctrine of privity of contract, invoked by appellee's counsel, can have any application here. The policy in question was not written for the protection of appellee, or even remotely for his benefit. Its sole object was to indemnify the assured, Wells, against loss sustained and paid. As said in 15 Cyc. subd. 8, p. 1038: "Insurance under a policy of this kind is a matter wholly between the insurance company and the assured, in which the employee has no legal or equitable interest any more than in any other property belonging absolutely to the assured. The

assured may use the proceeds of a settlement made by him with the insurance company as he sees fit, as there is no privity of contract between the assured and the employee."

Whatever obligation arises out of a contract is due to the person to whom the obligation exists or is made. Therefore an action for the breach of a contract can, as a rule, be brought only by one who is a party to the contract. An exception is allowed in the case of the third party, for whose benefit a contract is made. In such case he may be allowed to bring an action in his own name, but it must be made to appear that *when the contract was made* some obligation or duty was owing from the promisee in the contract to the party to be benefited, and not merely that the performance of the contract might be made to benefit him. If this were not true, one's responsibility for not carrying out his agreement with another would have no limit, as the ill effects of his failure to do so could be taken advantage of by one claiming to be affected, even to a remote degree. *Cardwell v. Atwater*, 15 Ky. L. Rep. 570; *Triplett v. Helm*, 5 J. J. Marsh. 651; *Powell v. Eve*, 2 Bibb. 317; *Mobile L. Ins. Co. v. Brame*, 95 U. S. 754, 24 L. ed. 580; *Carter v. Aetna L. Ins. Co.* 76 Kan. 275, 11 L.R.A.(N.S.) 1155, 91 Pac. 178. Manifestly, the doctrine of privity can have no place in the consideration of this case, as it is excluded by the terms of the policy, which make it a contract exclusively for the benefit of the assured, and confines to him the right of action against the insurance company, which even he cannot bring until he sustains a loss by the payment in money of a liability. For these reasons the authorities cited by appellee's counsel as bearing on this aspect of the case are inapplicable.

We have been referred to a great number of cases which sustain appellant's contention, and but two holding to the contrary. Among those of the class first mentioned is that of *Ford v. Aetna L. Ins. Co.* 70 Wash. 29, 126 Pac. 69, decided by the supreme court of Washington August 26, 1911. Ford, the plaintiff, was an employee of two structural iron contractors named Gerrick, and he attempted to compel the Aetna Life Insurance Company to pay a judgment for \$2,476 and costs, which he had previously obtained against the Gerricks in an action for damages asserted for injuries he sustained through the Gerricks' negligence. The latter held an employer's liability policy issued by the Aetna Life Insurance Company, by the terms of which the Aetna Company had assumed the defense of the suit which had been brought by Ford against the Gerricks. After Ford recovered judg-

ment against the Gerricks, the latter became insolvent, and paid no part of the judgment. Thereupon Ford obtained a writ of garnishment against the Aetna Life Insurance Company, requiring it to appear and answer upon oath as garnishee. The Aetna Company answered that it was not then, when the writ was served upon it, indebted to the Gerricks in any sum, and did not have any property or effects of the Gerricks in its possession. It at the same time filed an answer admitting the issuance of a casualty policy to the Gerricks, which contained the following provisions:

"B. If suit is brought against the assured to enforce a claim for damages covered by this policy, he shall immediately forward to the company every summons or other process as soon as the same shall have been served on him, and the company will, at its own cost, defend such suit in the name and on behalf of the assured. . . .

"D. No action shall lie against the company to recover for any loss . . . or expense under this policy unless it shall be brought by the assured for loss . . . or expense actually sustained and paid in money by him after actual trial of the issue."

The insurance company also admitted that it had defended for the Gerricks the suit brought against them by Ford, and it was contended by the latter that by thus defending and taking entire charge of the litigation the insurance company assumed the payment of the judgment recovered by Ford against the Gerricks, and that condition D of the policy, above quoted, did not apply, and, further, that the insurance was thereby changed from an indemnity to liability insurance; but, in rejecting this contention, the supreme court of Washington in its opinion said: "The policy indemnifies against loss, and not against liability. It seems quite clear that the liability in clause D for loss 'actually sustained and paid in money by him after actual trial of the issue' is not enlarged or changed by the stipulations in the preceding clauses, but that a compliance with its terms is made a condition precedent to any right of action on the policy. In short, the policy is one of indemnity against loss actually sustained and paid in money by the assured, without regard to who assumes the defense. In clause B the appellant reserved the privilege and assumed the obligation of defending claims for damages covered by the policy. But this does not imply that, in the event the defense is unsuccessful, it will pay the judgment. The question of payment is provided for in

clause D. This is the interpretation we put upon a similar policy in *Puget Sound Improv. Co. v. Frankfort Marine, Acci. & Plate Glass Ins. Co.* 52 Wash. 124, 100 Pac. 190, and *Sheard v. United States Fidelity & G. Co.* 58 Wash. 29, 107 Pac. 1024, 109 Pac. 276. The same construction has been given to like policies in other jurisdictions. *Finley v. United States Casualty Co.* 113 Tenn. 592, 83 S. W. 2, 3 Ann. Cas. 962; *Frye v. Bath Gas & E. Co.* 97 Me. 241, 59 L.R.A. 444, 94 Am. St. Rep. 500, 54 Atl. 395; *Connolly v. Bolster*, 187 Mass. 266, 72 N. E. 981; *Clark v. Bonsal*, 157 N. C. 270, 48 L.R.A.(N.S.) 191, 72 S. E. 954; *Carter v. Aetna L. Ins. Co.* 76 Kan. 275, 11 L.R.A.(N.S.) 1155, 91 Pac. 178; *Cayard v. Robertson*, 123 Tenn. 382, 30 L.R.A.(N.S.) 1224, 131 S. W. 864, Ann. Cas. 1912C, 152; *O'Connell v. New York, N. H. & H. R. Co.* 187 Mass. 272, 72 N. E. 979; *Appel v. People's Surety Co.* 148 App. Div. 70, 132 N. Y. Supp. 200; *Conqueror Zinc & Lead Co. v. Aetna L. Ins. Co.* 152 Mo. App. 332, 133 S. W. 156."

In referring to the legal effect of the defense made by the insurance company to the suit brought by Ford against the Gerricks, the court, relying on *Carter v. Aetna Ins. Co.* 76 Kan. 275, 11 L.R.A.(N.S.) 1155, 91 Pac. 178, further said: "The fact that the insurance company made the defense for the bridge company against plaintiff's claim for damages did not estop it from denying liability under its contract. The right to defend was specifically given by the contract, and this burden was assumed for the reason that the award to be made in the proceeding might ultimately be the measure of its own liability. To defend the action in behalf of the assured was in no sense an agreement to pay the plaintiff's judgment, and could not have misled the plaintiff."

In *Connolly v. Bolster*, 187 Mass. 266, 72 N. E. 981, the supreme court of Massachusetts construed a policy similar to the one involved in the instant case, in doing which it disagreed with the conclusion reached by the supreme court of New Hampshire in *Sanders v. Frankfort Marine, Acci. & Plate Glass Ins. Co.* 72 N. H. 485, 101 Am. St. Rep. 688, 57 Atl. 655, one of the two cases which sustain the contention of the appellee here. In the opinion it is said: "The conclusion that payment of the judgment recovered by the employee was not a condition precedent to an action on the policy was reached in *Sanders v. Frankfort Marine, Acci. & Plate Glass Ins. Co.* on these grounds: 'The word 'defend' in the second clause means to protect and secure against attack,—in short, to successfully defend,—and therefore included an

obligation on the part of the company to pay the judgment, if the case defended resulted in a judgment against the assured; that the second clause of the general agreements, so construed, was not consistent with the eighth clause of the general agreements, which stipulates, in terms, that 'no action shall lie against the company as respects any loss under this policy, unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue;' that, if the eighth clause is construed to cover cases of which the insurance company has assumed the defense, it is inconsistent with the second clause so construed, and consequently the eighth clause must be construed not to cover those cases, but to be confined to cases of which the insurance company has not assumed the defense."

Rejecting this view, the court said: "We are of opinion, however, in the first place, that the word 'defend' in the second clause is to have its natural import; that it means here what it means when counsel are retained to defend an action; and that it is not to be extended beyond that, and to mean to 'successfully defend.' In the second place, the second clause is an obligation in addition to the obligation to indemnify the assured against loss, like the suing and laboring clause in a marine policy, . . . and not a clause qualifying the main obligation of the policy to 'indemnify' against loss from liability for damages on account of bodily injuries to employees caused by negligence of the assured. The object of this second clause is plain when taken in connection with the third. It is plainly inserted as an additional obligation and privilege for the protection of the insurance company, on the assumption that it is for the pecuniary interest of the company to be given the conduct of and to defend the action which is to fix its liability and the amount to be paid when liable, rather than to leave that matter to be dealt with by the several persons insured, respectively. . . . Whether the insurance company is bound to pay the judgment depends upon the terms of its agreement to indemnify the assured against loss, and the eighth clause in terms provides that no action shall lie for 'any loss under this policy' unless brought by the assured 'to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue.'"

The same court in another opinion, handed down the same day, in the case of *O'Connell v. New York, N. H. & H. R. Co.* 187 Mass. 272, 72 N. E. 979, also held that the fact that the surety company

undertook the defense of an action growing out of injuries to a servant of the assured did not estop it from denying that the case was covered by the policy, and did not preclude it from relying on the provision of the policy making payment of the judgment by the assured a condition precedent to an action on the policy.

Cayard v. Robertson, 123 Tenn. 382, 30 L.R.A.(N.S.) 1224, 131 S. W. 864, Ann. Cas. 1912C, 152, is also an analogous case. Cayard recovered a judgment of \$5,000 damages against Robertson & Hobbs for injuries sustained. The latter did not pay the judgment, nor could it be collected from them, because of their insolvency. Robertson & Hobbs held an indemnity policy from the Amsterdam Casualty Company similar to that in the instant case. A bill in equity was instituted by Cayard against Robertson & Hobbs and the Casualty Company for the purpose of collecting the judgment from the Casualty Company. The policy contained the following provisions:

"(2) If thereafter any suit is brought against the assured to enforce a claim for damages on account of an accident covered by this policy, immediate notice thereof shall be given to the company, and the company shall defend such suit in the name and on behalf of the assured, or settle the same.

"(7) No action shall lie against the company as respects any loss under this policy, unless it shall be brought by the assured himself, to reimburse him for loss actually sustained and paid by him in satisfaction of a final judgment after trial of the issue."

In directing the dismissal of the bill the supreme court of Tennessee held that an employee obtaining a judgment against his employer for a personal injury would not, on the insolvency of the latter, be entitled to a decree against an insurer in an indemnity policy, stipulating indemnity to the employer against loss for damages on account of bodily injuries, and that no action would lie against the insurer unless brought by the employer to reimburse himself for loss actually sustained,—i. e., paid,—although the insurer, following the happening of the accident and notice thereof, took exclusive control of the negotiations for a settlement and of the defense of the action brought by the employee for his injuries. This ruling seems to have been rested upon the ground that there was no privity of contract between the servant injured and the insurance company; that the fund providing for an indemnity is not a trust fund; and that the loss contemplated was that which the master would sustain by the satisfaction of the judgment obtained against him by the servant. Among other L.R.A.1917F.

things, it is in the opinion said: "We had occasion in *Finley v. United States Casualty Co.* 113 Tenn. 592, 83 S. W. 2, 3 Ann. Cas. 962, to consider a policy in all material respects like the one at bar. We there recognized the distinction made by the authorities between a policy insuring an employer against liability and one agreeing to indemnify the assured 'against loss from liability for damages,' and it was held that the policy then in question was of the latter character, and, further, that the amount of the insurance provided for in the policy did not become available until the payment of the loss by the assured, and could not be impounded by an employee and appropriated by him to an unsatisfied judgment against his employer."

It also appears from the opinion that counsel for Cayard relied upon the case of *Sanders v. Frankfort Marine, Acci. & Plate Glass Ins. Co.* 72 N. H. 485, 101 Am. St. Rep. 688, 57 Atl. 655, in support of their contention, but that the court refused to accept the construction of the policy adopted in that case.

In line with the cases referred to is that of *Pfeiler v. Penn Allen Portland Cement Co.* 240 Pa. 468, 87 Atl. 623, decided April 28, 1913. The facts, as well as the court's conclusion of law, will fully appear in the following excerpt from the opinion: "The plaintiff obtained a judgment in an action for personal injuries against the Penn Allen Portland Cement Company, which became insolvent and was adjudged a bankrupt. He filed a bill for subrogation to the rights of the cement company under an indemnity policy of accident insurance issued to it by the *Ætna Life Insurance Company*, and for a decree requiring the insurance company to pay to him the amount of his judgment against the cement company. The court sustained a demurrer and dismissed the bill. The insurance policy provided that 'no action shall lie against the company to recover for any loss or expense under this policy unless it shall be brought by the assured for loss or expense actually sustained and paid in money by him after actual trial of the issue, nor unless such action is brought within two years after payment of such loss or expense.' The cement company has paid nothing, and, under the express terms of its contract, it is not entitled to recover from the insurance company. Since it has no right of action, there is nothing to which the plaintiff could be subrogated. For this reason the bill was dismissed by the learned judge of the common pleas, and in the decree entered we fully concur."

In *Clark v. Bonsal*, 157 N. C. 270, 48 L.R.A.(N.S.) 191, 72 S. E. 954, the same

question was considered. Following a statement of the facts, it is in the opinion said: "In construing contracts of this character, the courts have generally held that, if the indemnity is clearly one against loss or damage, no action will lie in favor of the insured till some damage has been sustained, either by payment of the whole sum or some part of an employee's claim; but if the stipulation is, in effect, one indemnifying against liability, a right of action accrues when the injury occurs; or, in some instances, when amount and rightfulness of the claim have been established by judgment of some court having jurisdiction,—this, according to the terms of the policy; but, unless the contract expressly provides that it is taken out for the benefit of the injured employees and payment of recoveries by them, none of the cases hold that an injured employee may, in the first instance, proceed directly against the insurance company. . . . An ordinary indemnity contract of this character is not made for the benefit of the employee, either in its express terms or in its underlying purpose. It is made for the protection and the indemnity of the employer, fortifying him against unexpected and uncertain demands which might otherwise prove disastrous to his business, and the rights arising under such a contract are his property, and actions to recover the same are, and should be, under his control. The nature of the contract and the principles applicable are well stated in one of the Massachusetts cases (*Bain v. Atkins*, 181 Mass. 240, 57 L.R.A. 791, 92 Am. St. Rep. 411, 63 N. E. 414, as follows: 'The only parties to the contract of insurance were Atkins and the company. The consideration for the company's promise came from Atkins alone, and the promise was only to him and his legal representatives. Not only was the plaintiff not a party to either the consideration or the contract, but the terms of the contract do not purport to promise an indemnity for the benefit of any person other than Atkins. The policy only purports to insure Atkins and his legal representatives against legal liability for damages respecting injuries from accidents to any person or persons at certain places within the time and under the circumstances defined. It contains no agreement that the insurance shall inure to the benefit of the person accidentally injured, and no language from which such an understanding or intention can be implied. Atkins was under no obligation to procure insurance for the benefit of the plaintiff, nor did any relation exist between the plaintiff and Atkins which could give the latter the right to procure insurance for the bene-

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fit of the plaintiff. The only correct statement of the situation is simply that the insurance was a matter wholly between the company and Atkins, in which the plaintiff had no legal or equitable interest, any more than in any other property belonging absolutely to Atkins.'

The same conclusion with respect to a similar policy was reached by the supreme court of Iowa in *Cushman v. Carbondale Fuel Co.* 122 Iowa, 656, 98 N. W. 509. In that case the person injured, having obtained a judgment against the assured therefor and failing to collect same, brought an action, as here attempted, against the insurer, to compel the payment of the judgment by the latter. The relief prayed was denied, the court saying: "The obligation of the guarantee company was for the protection of the fuel company alone. The plaintiff was not a party to the contract, and had no legal rights thereunder. While the policy provided that the guarantee company might appear and defend for the fuel company in any action brought against it for personal injuries, such provision was for the protection of the guarantee company alone, and imposed no liability upon it beyond the terms of the contract. A court of equity can no more disregard the express provisions of the contract than could a court of law, and neither can make a new contract for the parties which would impose a liability not originally contracted for; hence, whatever relief a court of chancery might grant plaintiff in any event must of necessity be based upon, and be determined by, the contract which the parties have themselves made. The only obligation of the guarantee company was to indemnify the fuel company against a loss actually sustained and paid in satisfaction of a judgment after trial of the issue.' This covenant is as explicit and certain as language could well make it, and, as between the parties to the contract, no recovery could be had against the guarantee company because the judgment against the fuel company was not paid, and consequently the covenant was not broken."

To the same effect are the following cases: *Travellers' Ins. Co. v. Moses*, 63 N. J. Eq. 280, 92 Am. St. Rep. 663, 49 Atl. 720; *Stenbom v. Brown-Corliss Engine Co.* 137 Wis. 564, 20 L.R.A.(N.S.) 956, 119 N. W. 308; *Texas Short Line R. Co. v. Waymire*, — Tex. Civ. App. —, 89 S. W. 452; *Atlas Hardwood Lumber Co. v. Georgia L. Ins. Co.* 129 Tenn. 477, 167 S. W. 109; *American Employers' Liability Ins. Co. v. Fordyce*, 62 Ark. 562, 54 Am. St. Rep. 305, 36 S. W. 1051.

As has been intimated, there seem to be but two cases that can be said to uphold

the contention of appellee, viz., *Sanders v. Frankfort Marine, Acci. & Plate Glass Ins. Co.* 72 N. H. 485, 101 Am. St. Rep. 688, 57 Atl. 655, and *Patterson v. Adan*, 119 Minn. 308, 48 L.R.A.(N.S.) 184, 138 N. W. 281.

In the *Sanders* Case the decision of the court is mainly based on the theory that the word "defend," appearing in the policy, means "to protect,"—successfully defend; and that, when the indemnity company contracted in its policy to defend any action brought against the assured, it had to do so successfully and defeat the plaintiff, otherwise the latter could recover of it the amount of the judgment obtained against the assured. In the opinion it is said: "If 'to defend' means 'to protect, to secure against attack,'—in short, to successfully defend,—it is perfectly clear that the insurance company agree to perform their covenant of indemnity against loss by assuming the liability. This is conceded. But it is claimed that the agreement to defend against the proceedings means merely to contest the suit to final judgment. While, in a technical sense, to defend a suit is to contest it, the word 'defend' also includes the broader meanings above suggested. Webster's Dict. If the meaning were, as is claimed, merely the conduct of the litigation until judgment should be rendered, no reason has been suggested why the purpose was not explicitly stated. Having entered upon the defense of the suit, no way is perceived by which (at least, before judgment) the insurance company could escape liability, except by settlement with the plaintiff or payment to the assured. The engagement is not merely to contest the suit to judgment, but to 'defend against such proceedings,'—meaning necessarily all the proceedings in the suit founded upon the claim for damages against the insured."

The conclusion here stated would appear to force the insurance company to the alternative of either refusing to defend, or of assuming the entire liability of the suit. This view of the matter seems to overlook the fact that the purpose of the insurance company in framing its contract, as was done in that case and the instant case, was not so much to require a solvent assured to first pay the judgment, as to prevent itself from being subrogated to a loss which an insolvent assured was relieved by his insolvency from paying.

The *Patterson* Case is so analogous in its facts and the reasoning of the opinion to the *Sanders* Case that an elaborate discussion of it is unnecessary. Manifestly, neither case is in accord with the great weight of authority; indeed, this is ad-

mitted by the opinion in the *Patterson* Case.

It is argued by counsel for appellee that, if appellant had intended its policy contract to be understood as it now insists upon its being construed, it would have so written it as to clearly give it such meaning. This might be answered by saying that appellant's form of policy is so written, but, as first adopted and used, was susceptible of the construction given it in the *Sanders* and *Patterson* Cases, supra, and which appellee would now give it; and because it and others then substantially like it were so construed in the earlier cases of *Anoka Lumber Co. v. Fidelity & C. Co.* 63 Minn. 286, 30 L.R.A. 689, 65 N. W. 353, and *Ross v. American Employers' Liability Ins. Co.* 56 N. J. Eq. 41, 38 Atl. 22, it resulted in appellant and other like insurance companies changing the wording of their policies so as to cover, as they now do, only liability which had been paid. *Poe v. Philadelphia Casualty Co.* 118 Md. 347, 84 Atl. 476. In other words, the earlier policies of this character were so worded as to insure employers against liability incurred to their employees for death or injuries resulting from the employer's negligence; and the courts naturally held that liability was fixed by the rendition of a final judgment, and that the casualty companies were liable on their contract, though the employer had not actually discharged his liability by payment; but this is not true of the later policies, such as that involved in the instant case, for, as stated, the amount of the insurance provided for in them does not become available until the payment of the loss by the assured.

It was said in argument, and not controverted, that in twenty of the states the courts of last resort have given the insurance contract under consideration the construction here contended for by appellant, and that only in New Hampshire and Minnesota have the courts of last resort adopted the construction contended for by appellee; the cases so holding being those of *Sanders v. Frankfort Marine, Acci. & Plate Glass Ins. Co.* and *Patterson v. Adan*, supra. While we accord great weight to the ability and high standing of the two courts referred to, their interpretation of the contract is so obviously out of harmony with the current of authority that we deem it unwise to adopt it.

It is not perceived that appellee is in a position to be benefited by his attachment. If the policy imposes no liability upon appellant, in the absence of a showing of a loss actually sustained and paid in money by the assured or his administrator, follow-

ing the recovery by appellee of the judgment against the latter, there is no indebtedness owing by appellant and nothing in its hands going to the estate of the assured that can be subjected to garnishment. *Allen v. Aetna L. Ins. Co.* 7 L.R.A.(N.S.) 958, 76 C. C. A. 265, 145 Fed. 881.

It is complained by appellee that to construe the contract of insurance as insisted by appellant would ignore the numerous equities that exist in behalf of appellee, and subject him to the hardship of being deprived of compensation for his injuries. It is a sufficient response to say that we can do no more than determine the rights of the parties under the contract of insurance. As said in *Bennett v. Stuart*, 161 Ky. 264, 170 S. W. 642: "A court of equity has no right to make a contract to suit one of the parties. It must take the contract as it finds it, and determine the rights of the parties from it as they themselves make or leave it. *Garnes v. Frazier*, — Ky. —, 118 S. W. 998."

However deserving appellee may be of compensation, what he is asking us to do is to aid him, a stranger to the contract, by giving it a meaning not authorized by its language, and that neither of the real parties to it intended it to have.

It follows from what has been said that, in our opinion, the Circuit Court erred in overruling appellant's demurrer to the petition, in sustaining appellee's demurrer to appellant's answer, and also in rendering the judgment appealed from. For the reasons indicated the judgment is reversed, and cause remanded for proceedings consistent with the opinion.

Hannah and Nunn, JJ., dissent.

Nunn, J., dissenting:

On the idea that the policy in question was not written for the protection of the injured party or employee, the court holds that, if the owner or employer cannot or will not pay the damages sustained, then the insurance company need not. In my opinion, such a construction of the policy outlaws it, and the business at once becomes a menace to industry and a threat to the life of employees.

Out of deference to the opinion of my associates, and in view of the weight of authority which supports their opinion, I have hesitated to take a contrary view. But in the light of legislation and adjudication in Kentucky on the subject of compensation for injured employees, I feel constrained not only to dissent, but to give the reasons which to me seem sufficient to justify a contrary view.

This form of insurance—and I can make L.R.A.1917F.

nothing else out of it, although called indemnity—is as worthy and desirable, properly considered, as life or fire insurance. The purpose of all insurance or indemnity is, or should be, to furnish financial aid or security against casualty or misfortune. Insurance or indemnity against death of a parent, or loss of a home, or against liability arising from injury to an employee, if taken and held in the right spirit, is a wise precaution for anyone to take who has incurred duties of support or has assumed duties imposing legal liabilities. It is true a great many abuses have from time to time crept into the business of insurance, and, from these abuses, the companies as well as the public have frequently been imposed upon. But, in the main, the business has afforded the relief contemplated, although it has no doubt caused the loss of many uninsured homes, and the death of some persons in cases where the insured's care for his own life was less than for the beneficiary, and in others where the beneficiary desired the proceeds more than the life of the insured. In its incipency insurance policies were deemed wager contracts, and therefore illegal, but the paramount necessity for indemnity of this sort obtained for them a legal status in all cases where there is an insurable interest; that is, such an interest as would outweigh any inducement or incentive for either party to precipitate or bring about the contingency which renders the policy payable. By limiting insurance benefits to those having such interests, an insurable interest, and to the extent of that interest, the business of insurance has grown to large proportions, and has beneficially affected a large portion of society. But, if the principle of insurable interest be overlooked or disregarded, then the business is indefensible, and becomes a curse to society. This rule of insurable interest applies to all forms of insurance, and the kind in question should never be permitted to become an exception. There are three necessary parties or incidents to an insurance contract: the insurer, the person or property insured, and the beneficiary. The law requires the beneficiary to have an insurable interest. As construed by the court, the employer is not benefited by the policy; neither has he an insurable interest in the employee. If it be said that the employee is not a beneficiary, and has no interest, insurable or otherwise, in liability insurance, then the opinion of the court, supported by the weight of authority though it be, eliminates the most necessary party to the contract,—the beneficiary,—whether he be an individual employee or one of a class of persons, and obliterates the only inter-

est that is legitimately insurable in such cases. The inducements and incentives in the two remaining parties are so dangerous as to leave the contract without a redeeming feature and render it more pernicious than an undisguised gambling contract. As already indicated, some features of employers' liability insurance are questionable at best. For instance, there is a provision that the insurance company will secretly defend in the name of the insured every claim presented by an employee, whether groundless or not, and, to the exclusion of the employer, will employ attorneys and take general charge of the case. The employer cannot interfere with the proceedings, nor can he settle the claim. Any attempt at compromise or payment voids the policy. Such contracts in reality constitute the offenses of barratry, maintenance, and champerty, frequently and severely denounced by statute and common law, because they encourage strife and litigation and are injurious to public interests. It is also questionable if the employer, who owes so many duties to his employee, can properly be permitted to contract for indemnity against his own breach of those duties. It certainly is not conducive to safety of employees, because a reckless employer, feeling secure in the indemnity, will be careless and indifferent to the safety of places, tools, and appliances where and with which his servants work. But these dangers, disadvantages, and legal obstacles in the way of the contract have been deemed heretofore to be counterbalanced by the protection given to industry against sudden and sometimes heavy liability arising from accident to employees, and the security given to them by affording a fund with which the liability may be met and the injured employee compensated. But the opinion of the court nullifies these redeeming features of the contract. It leaves no protection to industry against unexpected liability. It, in fact, makes insolvency or bankruptcy more probable. The contract, as construed by the company and upheld by the court, means that the employer voids the policy if he pays the loss, and, if he does not pay it, there is no liability on the company. It follows that there is a complete defense if the company, by withholding aid to the employer, makes it impossible for the employer to pay. So construed, the contract necessarily promotes and encourages bankruptcy. I do not believe the contract should be given any such construction, for, when taken as a whole, it is fairly susceptible of another construction compatible with principles of public policy and in harmony with the public welfare. The right construction is to recognize an insurable

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and enforceable interest in the party or class who may have such a claim against the insured as amounts to a liability which may be imposed by law. The company calls it an "employers' liability policy." It is so printed in large type on both sides of it, and the main clause of the contract, printed in equally large type, is a covenant to indemnify the assured against loss from the *liability imposed by law* upon the assured for damages on account of bodily injuries or death suffered by any person or persons as the result of an accident occurring while the policy is in force. That idea runs through the policy, and it is clearly the purpose of it, unless a fine-print clause hid away near the middle of the policy gives to it an altogether different meaning. The hidden clause reads: "No action shall be brought against the company unless for a loss that the assured has actually sustained by the assured's payment in money."

Taking that single clause as controlling the whole policy, there can be no mistake of its meaning, and a recovery cannot be had by anyone unless the assured has actually paid the loss; but, if that is the meaning of it, then the contract as a whole is meaningless, if not vicious. It is unreasonable to presume that it was intended that after the assured had surrendered all control of the litigation to the insurer, and after the insurer had exercised absolute control of the defense until judgment, then the assured must convert his assets into money, if he can, or be driven to the brink of bankruptcy or insolvency to pay a judgment in order that the company may be compelled thereafter to pay the insured.

Payment of a debt indemnified against, and not existing when the covenant is made, as a condition precedent to the indemnifier's liability, has more than once been repudiated in Kentucky. In *Robertson v. Morgan*, 3 B. Mon. 307, the court said: "It has been determined by this court that, though a covenant or condition to indemnify against a debt or a duty already incurred is not broken without suit brought against the covenantee, yet, when the covenant is to indemnify against a debt or duty which may accrue in the future, a liability to suit is a breach." *Lewis v. Crockett*, 3 Bibb. 197. If *Morgan's* right of action did not depend upon the institution of suit against him, much less can it be made to depend upon his payment of the money to the creditor."

It is absurd to say one possessing contractual ability and actuated by right motives would accept a policy, and pay his money for it, at the time understanding that he must go into his pockets and perhaps at great inconvenience pay over a large

sum in settlement of the liability in order to have a cause of action against the company, or, if unable to pay, go into bankruptcy, when bankruptcy was the thing that he was contracting against. I am aware that it is no business of the courts to make contracts for litigants, but where the whole contract is capable of two interpretations, that one should be adopted which is more favorable to the beneficiary, because the language used is that of the insurer. *Mutual Ben. L. Ins. Co. v. Dunn*, 106 Ky. 597, 51 S. W. 20; *American Acci. Co. v. Reigart*, 94 Ky. 549, 21 L.R.A. 851, 42 Am. St. Rep. 374, 23 S. W. 191. And I am sure no method of construction should be adopted which would afford an incentive for the insurer to destroy the insured financially, or one that would create an inducement for the employer to be careless of the safety of his employees, without at the same time giving the employee a right under the contract to be compensated for an injury growing out of the increased hazard which the contract caused.

Clause 2 of the contract obligates the company to defend the suit. To defend means to protect, ward off, or repel the danger. It is not an obligation to attempt to defend. The purpose was to successfully defend, and save the insured from liability and loss. The obligation is not satisfied by employing attorneys and interposing a defense in court. If that be the extent of the contract, it ought to be called an "employers' nonliability policy."

I believe the New Hampshire courts have rightly construed and enforced such a policy of insurance. In *Sanders v. Frankfort Marine Acci. & Plate Glass Ins. Co.* 72 N. H. 485, 101 Am. St. Rep. 688, 57 Atl. 658, the supreme court of that state, in construing a policy almost exactly like the one at bar, used the following language: "In this case the insurance company undertook the investigation of the case, and after suit was brought assumed the entire defense by their counsel, and conducted the same to final judgment. The present action is

not one respecting a loss by the insured under the policy. The defendants' contention that the assured have lost nothing because they have paid nothing may, so far as the case is concerned, be conceded. The proceeding is not even to enforce the agreement of the policy to assume the liability; but the plaintiff's case stands upon the legal result of the assumption of liability by the company because they assumed—in legal effect, agreed to pay—the assured's liability to this plaintiff to the extent of \$5,000. Equity requires them to perform their agreement by payment to him. . . . The view that the contract means that the insurance company, after taking control of the proceedings in a suit against the assured, cannot thereafter be discharged except by payment of the indemnity to the assured or securing his discharge from the claim, is thought to best conform to the intent of the parties, and is adopted."

This court has often recognized the doctrine that, where one takes charge of the defense to an action, controls it, employs counsel, produces evidence, and pays the expense of the nominal party to the suit, he is bound by the judgment of record, although the record does not show him to be a party thereto. *Schmidt v. Louisville, C. & L. R. Co.* 99 Ky. 143, 35 S. W. 135, 36 S. W. 168; *Clark County v. Ecton*, 150 Ky. 778, 150 S. W. 1016; *Heavrin v. Lack Malleable Iron Co.* 153 Ky. 329, 155 S. W. 729.

The position I take is not unfair or inimical to the interest of the company. It certainly contemplated payment of the loss whenever liability is fixed on the employer. It has been paid to take that very risk. If insurer be relieved because the insured is unable to pay the loss, then a large per cent of the policies are unenforceable, because they are held by insolvent people.

Hannah, J., concurs in this dissent.

Petition for rehearing denied.

KENTUCKY COURT OF APPEALS.

GEORGE H. MERRITT, Jr., Appt.,
v.

B. P. CRAVENS.

(168 Ky. 155, 181 S. W. 970.)

Pleading — actions barred by limitations — demurrer.

1. A complaint is not demurrable because

it shows on its face that the cause of action is barred by the Statute of Limitations, since such defense must be raised by plea or answer.

For other cases, see *Pleading*, VII. d, in *Dig.* 1-52 N. S.

Same — variance — mistake in date.

2. Variance between the pleading and proof as to the date of accrual of the cause of action is not fatal under a statute pro-

Note. — The extent of alienation necessary to sustain an action for alienation of affections against a stranger is treated in the annotation following *Rott v. Goehring*, L.R.A.1916E, 1091. L.R.A.1917F.

Generally, for divorce or separation as affecting action for alienation of affections or criminal conversation, see note to *De Ford v. Johnson*, 46 L.R.A.(N.S.) 1084.

viding that no variance is material which does not mislead a party, which fact must be shown to the satisfaction of the court if no attempt is made to show that the complaining party was misled in any manner.

For other cases, see Evidence, XIII. b, in Dig. 1-52 N. S.

Judgment — non obstante veredicto — variance.

3. Judgment for defendant non obstante veredicto should not be entered because of variance between pleading and proof as to the date when the cause of action accrued, where the statute provides that no variance is material unless prejudicial, which fact must be shown to the satisfaction of the court.

For other cases, see Judgment, I. c, 4, in Dig. 1-52 N. S.

Witness — divorced wife — action by husband.

4. A divorced wife may testify, in an action by her former husband for alienation of her affections, as to transactions between herself and defendant, under a statute providing that no husband or wife shall testify, while the marriage exists or afterwards, concerning any communication between them during marriage, nor shall either testify against the other.

For other cases, see Witnesses, I. b, in Dig. 1-52 N. S.

Evidence — alienation of affections — proof of adultery — sufficiency.

5. An action by a man for alienation of his wife's affections is not sustained by a mere proof of adultery for a pecuniary consideration.

For other cases, see Evidence, XII. f, in Dig. 1-52 N. S.

Appeal — variance — theory of case.

6. A verdict for plaintiff in an action for alienation of affections cannot be sustained where the proof shows merely criminal conversation, although the complaint would have sustained a recovery upon the latter ground if the action had been tried upon that theory.

For other cases, see Appeal and Error, VII. j, 3, in Dig. 1-52 N. S.

(January 27, 1916.)

APPPEAL by defendant from a judgment of the Circuit Court for Christian County in favor of plaintiff in an action brought to recover damages for alienation of his wife's affections. Reversed.

The facts are stated in the opinion.

Messrs. C. H. Bush and Hazelrigg & Hazelrigg for appellant.

Messrs. Trimble & Bell, Smith & Slaughter, and J. C. Duffy for appellee.

Thomas, J., delivered the opinion of the court:

In February, 1900, the appellee, B. P. Cravens, and his wife, Bertha Cravens, were L.R.A.1917F.

married. They lived together as husband and wife until the 23d day of December, 1913, when, for the reasons hereinafter stated, the appellee claims to have left his wife, and within a few days thereafter filed suit against her for divorce in the circuit court of Christian county, and on February 22, 1914, a judgment granting him an absolute divorce from his wife was rendered by that court. About the time of the filing of the divorce suit, appellee filed this suit against appellant, George H. Merritt, Jr., seeking to recover from the defendant the sum of \$25,000 as damages because, as he claimed, the appellant had alienated the affections of his wife. During the marriage there were born to appellee and his wife six children, five of whom are living, the oldest being thirteen years of age and the youngest three years of age; or, rather, these were their ages at the time of the trial of this case. The appellee seems to have been somewhat of a roving character, and had been living in Hopkinsville, Christian county, Kentucky, the last time for something like three or four years just previous to the filing of this suit. His avocation seems to have been that of a carpenter around a coal mine, and he sometimes worked as a section hand on the railroad. For some considerable time previous to March 3, 1913, the appellee had been occupying as tenant a house belonging to the appellant, which was used by himself and family as a residence. His health had become greatly impaired, and, on account of his resulting physical decline, his mind became more or less impaired; and on the last date mentioned he was adjudged to be a person of unsound mind, and was placed as an inmate in the Western Kentucky Lunatic Asylum located at Hopkinsville, where he remained until July 6th following that date. On this day he returned to his home and resumed his position as a member of the family and as the head thereof, which position he continued to occupy until he separated from his wife. Upon the trial of the case there was a verdict and judgment in favor of the appellee for the sum of \$6,000 against appellant, and, complaining of that judgment, he prosecutes this appeal. At the time of the trial of the case the divorce hereinbefore mentioned had been granted, and on behalf of the appellee his divorced wife was permitted to testify over the objections and exceptions of appellant. There was a demurrer to the petition, which was overruled, and the exceptions taken. Several grounds for a new trial were relied upon, but the chief ones urged before us are: (1) Error of the court in overruling the demurrer to the petition; (2) error of the court in permit-

ting the wife of appellee to testify upon the trial; and (3) error of the court in improperly instructing the jury and in refusing instructions offered by appellant.

Considering these grounds in the order mentioned, we may state that the objection taken to the petition by the demurrer is that it shows on its face that the cause of action is barred by the Statute of Limitations. This comes about from the evident fact that there was a typographical error made in drafting the petition, so that it was made to state that the acts complained of occurred in the year 1910, instead of in the year 1913. It is insisted that this character of action must be brought within one year from the time it accrued, as is provided by § 2516 of the Kentucky Statutes, and it is urged that, as the petition showed on its face that more than one year had expired from the committing of the acts by appellant, of which complaint is made in the petition, the demurrer should have been sustained. There is some authority for this position, but a much greater number of cases from this court, as well as the more recent ones, hold that the Statute of Limitations is a personal plea, which cannot only be waived by the defendant by a failure to plead it, but that before suit in any character of cases, the statutory bar may be prolonged by some act of the party to be charged; and it is familiar law that a cause of action which had already become barred may furnish a valid consideration for a new promise. These rules with reference to the Statute of Limitations would seem to indicate that the law views the right of a party to rely upon the statute, not for the purpose of prohibiting a recovery because of any special regard for the rights of the party, but rather for the purpose of encouraging a rule of repose by which parties may have their causes tried and investigated at a time when the testimony, either by witnesses or otherwise, may be available, and before the witnesses should die, or the evidence should otherwise become unobtainable. Of the cases holding that the statute should be relied upon by answer, we append the following from this court: *Chiles v. Drake*, 2 Met. (Ky.) 146, 74 Am. Dec. 406; *Rankin v. Turney*, 2 Bush, 555; *Board v. Jolly*, 5 Bush, 86; *Stillwell v. Leavy*, 84 Ky. 379, 1 S. W. 590; *Mullins v. Mullins*, 120 Ky. 643, 87 S. W. 764; *Swineboard v. Wood*, 123 Ky. 604, 97 S. W. 25; *Yeager v. Bank of Kentucky*, 125 Ky. 183, 100 S. W. 848; *Brashears v. Brashears*, 144 Ky. 451, 130 S. W. 738; *Baker v. Begley*, 155 Ky. 234, 159 S. W. 691; *Hackett v. State Bank & Trust Co.* 155 Ky. 392, 159 S. W. 952; *Davis v. Louisville*, 159 Ky. 252, 166 S. W. L.R.A.1917F.

969; *Louisville v. O'Donaghue*, 157 Ky. 243, 162 S. W. 1110.

As stated, the law has no cherished desire to force the barring of an action by the statute, and if the defendant does not see proper to rely upon it, it is no concern of the law; and it is equally disinterested as to whether the plaintiff succeeds upon a cause of action that is barred, or one that is not barred, leaving the matter entirely with the party to be benefited by the statute. The statute is no bar to the merits, but is only a privilege extended to a litigant whereby he may, if he chooses, close the door of the court on his tardy adversary. We are therefore of the opinion that the better practice is that those who seek to take advantage of the statute must plead it.

But, if we were mistaken in this, still the error relied upon by the appellant could not avail him in this case, because the undisputed facts show that the cause of action, if any, which the appellee has, arose from acts committed in 1913, within less than a year next before the filing of the suit. It furthermore appears that long before the trial of this case the appellant gave his deposition concerning the matter, and he was fully apprised of the year in which the action was laid, and at the time of the trial was not in the least surprised when it was shown by the testimony that the acts with which he was charged occurred in 1913. Section 129 of the Civil Code of Practice is as follows: "129. Variance when material—amendment. No variance between pleadings and proof is material, which does not mislead a party, to his prejudice, in maintaining his action or defense upon the merits. A party who claims to have been so misled must show that fact to the satisfaction of the court; and, thereupon, the court may order the pleading to be amended, upon such terms as may be just."

The purpose of the enactment of this section was to meet just such conditions as those with which we are now dealing. Manifestly, the variance between the date as alleged and as proven could have no possible effect upon the case, unless one of them would establish a bar to the cause of action. For illustration, suppose the limitation in this action was five years, and the allegation had been, as it is, that the acts occurred in 1910, when the proof showed that they occurred in 1913. This would produce no fatal variance unless the complaining party could show that he was in some manner misled by reason of the variance to his prejudice. It is not pretended in this case that the appellant was in any manner misled, or that the typographical error in the writing of the year

in the petition in any manner prejudiced his substantial rights. We therefore conclude that the variance was not material, and that it furnishes no ground of complaint by appellant. *Gaines v. Deposit Bank*, 19 Ky. L. Rep. 171, 39 S. W. 438; *Illinois C. R. Co. v. Smith*, 133 Ky. 732, 118 S. W. 933; *Central Coal & I. Co. v. Thompson*, 31 Ky. L. Rep. 276, 102 S. W. 272; *Continental Coal Co. v. Hunt*, 28 Ky. L. Rep. 1010, 90 S. W. 1056.

Before considering the second objection above to the judgment, it might be proper to notice another point made by appellant, which is that after the returning of the verdict he entered a motion in arrest of judgment, which was overruled. Strictly speaking, this motion is a part only of the criminal practice, but considering it as a motion for a judgment non obstante veredicto, the observations which we have made with reference to the supposed variance between the allegations and the proof will apply here, and for the reason stated there was no error in failing to sustain that motion.

Serious complaint is made of the action of the court in permitting the divorced wife of the appellee to testify, as it is claimed that this violates the provision of § 606 of the Civil Code, but numerous decisions from this court do not support this contention. The case of *Hostetter v. Green*, 159 Ky. 611, L.R.A.1915C, 870, 167 S. W. 919, was brought to recover damages for alienation of affections. There were two trials of the case, and before the last trial the wife of the appellee obtained a divorce from him, and at that trial the appellants therein offered to introduce the divorced wife as a witness in their behalf, to prove a fact which was not concerning any communication between herself and husband during marriage, and information which came to her, not in consequence of, or by reason of the existence of, the marriage relation; but the court declined to permit her to answer. This court, in determining the action of the lower court in refusing this testimony to be erroneous, in the course of the opinion, said: "Before the last trial of this case a divorce had been granted to the wife of the appellee, and she was offered as a witness for the appellants, and the lower court declined to permit her to testify, and they are complaining of that action. Section 606 of the Civil Code provides, among other things: 'Neither a husband nor his wife shall testify while the marriage exists or afterwards concerning any communication between them during marriage. Nor shall either of them testify against the other.'

"It was avowed the witness, if permitted to answer, would state that in December, 1909, in her presence, the appellant, J. P. L.R.A.1917F.

Hostetter, stated to the appellee, Green, that he (*Hostetter*) and his family were going to move from Franklin county to Fayette county, and that Green might take his (*Hostetter's*) farm, rent free, and live there with his wife, and that Green declined said proposition, and left the place, and never returned. It is apparent from the express wording of the section of the Code quoted that neither the husband nor the wife is a competent witness to testify against the other during the existence of the marriage relation; but in this case it was sought, so far as that part of the avowal above referred to is concerned, to show by the divorced wife the conversation had between her father and her then husband, which was in no sense a communication between her and her husband growing out of the marital relation. She heard the conversation between her father and Green just as any other witness might have heard it if present, and we are aware of no reason of public policy which denies to a litigant the right to introduce the evidence of his divorced wife against the husband, although the occurrence took place during their marriage, if it did not grow out of, and she did not acquire the knowledge through, or by reason of, the marital relation. The evidence offered was in no sense a communication from the husband to the wife, and had no connection whatever with the marital relations between them; it was a transaction between her husband and another which only happened to take place in her presence.

"The case of *Com. v. Sapp*, 90 Ky. 580, 29 Am. St. Rep. 406, 14 S. W. 834, was where the commonwealth offered to introduce the divorced wife as a witness against *Sapp*, who had been indicted, charged with attempting to poison her, and the court, in discussing her competency as a witness, said: 'If the proposed testimony violates marital confidence in the slightest degree, or tends, however, slightly, to impair the rule for its protection, the highest consideration forbids its introduction. The word "communication," therefore, as used in our statutes, should be given a liberal construction. It should not be confined to a mere statement by the husband to the wife, or vice versa, but should be construed to embrace all knowledge upon the part of the one or the other obtained by reason of the marriage relation, and which, but for the confidence growing out of it, would not have been known to the party. The reason of this rule does not apply, however, to facts known to a surviving or divorced husband or wife independent of the existence of the former marriage, although the knowledge was derived during its existence, and relates

to the transactions of the one or the other; therefore the rule should not be applied in such a case. What the state proposed to prove by the divorced wife in this case was not any communication or knowledge which can fairly be considered as having come to her by reason of her being then the wife of the accused.'

"The case of *Elswick v. Com.* 13 Bush, 155, was where a defendant charged with grand larceny offered to introduce his divorced wife as a witness, and the trial court refused to permit it. In reversing that judgment for that reason the court said: 'Information coming to a husband or a wife in consequence or by reason of the existence of the marriage relation is to be treated as confidential, and the confidence which the law creates while the parties remain in the most intimate of all relations cannot be broken even after that relation has been dissolved. But the reason for this rule does not apply to facts known to a surviving or a divorced husband or wife independent of the previous existence of the marriage. Accordingly, in an action by a husband for a criminal conversation with a wife from whom he had subsequently been divorced, she was held to be a competent witness to prove the charge laid in the husband's declaration.'"

It is manifest from this opinion, together with the authorities from this court therein referred to, that the evidence of a divorced wife in cases like this, if it does not concern any communication between herself and husband during marriage, or which she obtained by virtue of the marital relation, is not forbidden by the section of the Civil Code, supra. It results, therefore, that inasmuch as her testimony in this case was not of the forbidden class, the court committed no error in permitting her to testify.

Having disposed of these preliminary questions, we come now to the merits of the case.

The only testimony looking to the establishment of the plaintiff's claim made in the petition is that given by his divorced wife. The substance of her testimony is that appellant came to her house for the first time on the 8th day of April, 1913, for the purpose of collecting some rent, and that she paid him at that time something like \$12, the house being rented for \$8 per month; that about the 28th day of April, he again called at the house for the purpose of collecting rent, and at that time she paid him \$5; that for a few days after that appellant appeared around and about the house, but upon these occasions he was superintending some repair work about the premises, principally the yard fence. She

says that the next time that appellant called at the house was on May 6th following, at about 8 o'clock at night, and that he stated on that occasion that the purpose of his trip was to collect more rent, but that she informed him that she had no money and could pay no rent.

She testified as to what then occurred, as follows:

Q. What did he say about the conditions?

A. He asked me if I had the rent, and I told him no, sir, I didn't have it, and really he ought to come down on the rent some, that I thought \$8 was too much for me to pay; and he told me he couldn't do it, if he came down on the rent with me the rest of them would expect it too. He sat there, and he asked for a drink of water, and I got that, and then Mr. Merritt sat down in the chair and took me in his lap and told me if I would do them things the house rent shouldn't cost me anything, and I told him I couldn't do it, but he kept on, and told me they would soon get tired of helping me, and all these things, and finally led me into it.

Q. That was the 6th of May?

A. Yes, sir.

Q. Did you go to bed with him that night?

A. No, sir.

Q. Where did you have intercourse with him?

A. Right in the hall, in the dining room.

Q. Did he tell you anything about taking care of you?

A. He told me I shouldn't suffer.

Q. If you would let him do what he wanted to?

A. Yes, sir.

Q. Did you do that?

A. Yes, sir.

Q. Did he say anything else about taking care of you?

A. No, sir, not then.

Continuing, she states that the appellant visited her at her house on the following dates: May 8th, 18th, 20th, 27th, and on June 3d, 18th, 20th, and 24th. That upon each of these occasions he had intercourse with her in the house, and in her bedroom, and not at the place of the first adulterous act, and that she conceived and became pregnant on the night of May 13th. Two of the children of the appellee, being thirteen and eleven years of age, each testified in substance that upon one occasion, about dark, appellant came to the house, but the witnesses had retired for the night, but had not gone to sleep. They heard him ask their mother for rent, but did not hear any other conversation, and soon went to sleep. Aside from their testimony, that of

the divorced wife is the only testimony establishing the unlawful intercourse in any manner whatever. After appellee returned home from the asylum on July 6, 1913, and according to his testimony, he cohabited with his wife and had intercourse with her from time to time up to the day of his separation. He nowhere testified that he ever discovered that his wife was pregnant, and, according to the testimony in the record, the only way that he ever learned of this was because his wife sent for an attorney to come to the house, before whom, and in the presence of her husband, she admitted, for the first time, the unlawful intimacy which she claims had occurred between her and the appellant. In that same conversation, before the attorney and in the presence of her husband, she stated that her pregnancy was the result of such intimacy, and that the appellant was the father of her unborn child. Upon receiving this information, the appellee, according to his testimony, repaired to the house of a brother-in-law; but he continued to visit the house of his wife, in whose custody he had left the children, and according to the testimony he continued to furnish clothing and other provisions necessary for the family. In fact, the neighbors not only saw him at various times of the day and sometimes at night going into and out of the premises, but likewise at work in the performance of chores around and about there as he had formerly done, and some of them did not know that a separation had taken place.

It will be noticed that the divorce suit was filed about the same time that this suit was filed, and there was no effort made by the appellee to possess himself of the five infant children, or to molest in the least the wife's possession of them. In fact, the judgment in the divorce suit, which is in the record, makes no mention whatever as to who shall have the custody of the children. We mention these facts only as bearing upon his claim of loss of the affections of his wife.

Upon the question as to the deportment of his wife toward him after his return from the asylum and the way in which she treated him after his return, he testified as follows:

State whether or not you noticed any difference in your wife's appearance after your return.

A. I couldn't say. She was about the same before I was carried away, just as affectionate as she had been all my life. Always had been affectionate and true to me, and honest, and I never doubted her. L.R.A.1917F.

Q. Did you see any difference in her appearance?

A. Not a bit.

Q. How long before you noticed any difference in her appearance?

A. Never noticed any until I found this out.

Q. When was that?

A. December 23d.

Q. Did you find out that your wife was pregnant by another man?

A. Not till I was told so by her. If that is competent.

And upon cross-examination he said:

Q. You say that her treatment of you was just as kind and affectionate as it had ever been?

A. It was.

Q. And remained that way so long as you lived with her, didn't it?

A. Yes, sir.

Q. There was never any change in her treatment and in her conduct towards you as long as you lived with her after you came home from the asylum, was there?

A. There was not.

Q. And she treated you just as a good wife should do clear up until you left her; is that a fact?

A. Yes, sir.

Q. And you left her—she didn't leave you, did she?

A. I left her.

Q. She never left you?

A. No, sir.

Q. Never threatened to leave you?

A. No, sir.

Q. Ministered to you and treated you just like she had always done?

A. Yes, sir.

The wife testifies that because of the unlawful relations existing between her and the appellant, he had won her affections, but her acts in every way refute this statement. There is nothing in the record to show that appellant exercised any blandishments, or persuasions, or any seductive influences to cause the wife to surrender to him more than as hereinbefore stated. He did not beguile her in any way, or use any means to allure or attract her towards him, but if guilty at all, it was because of a plain surrender by the wife in consideration of some financial favors, which do not seem to have been insisted on, because the record shows that, although importuned to do so, the appellant paid her no money. There is evidence, however, to show that after the return of appellee from the asylum, he was given a receipt by appellant for the rent up to perhaps July 1st, which was something more than the amount that had been paid to him.

The court instructed the jury solely upon the theory that this was a suit purely for alienating of affections, and the question is, Under the condition of the record, should this have been done?

The law affords two separate and distinct remedies by which either spouse may recover damages which they might suffer by reason of the wrongful invasion of any of the marital rights. These are a suit for alienation of affections and a suit for criminal conversation. They are quite separate and distinct, and the facts which will support the former will not support the latter. The existence of these two distinct causes of actions is recognized by all of the text-writers, as well as courts of last resort. 8 Am. & Eng. Enc. Law, 2d ed. 260; id. vol. 15, p. 862; 1 Cooley, Torts, p. 466; 21 Cyc. pp. 1617, 1623; Kibby v. Rucker, 1 A. K. Marsh. 391; Dietzman v. Mullin, 108 Ky. 610, 50 L.R.A. 808, 94 Am. St. Rep. 390, 57 S. W. 247; Scott v. O'Brien, 129 Ky. 1, 16 L.R.A. (N.S.) 742, 130 Am. St. Rep. 419, 110 S. W. 260. The same distinction is recognized by Blackstone in his Commentaries on the Law of England, and all recognized authorities.

In a suit to recover for alienation of affections, all the authorities agree that it is essential for the plaintiff to show that the defendant produced and brought about the alienation of the affections of the wife, if the suit is brought by the husband, or the alienation of the affections of the husband, if the suit is brought by the wife. In this character of action it is permissible to prove, not for the purpose of establishing the cause of action, but in aggravation of damages, sexual intercourse, although such conduct is not an essential ingredient to enable the plaintiff to recover. On the contrary, in a suit for criminal conversation the exact reverse is true. The action will fail without the proof of seduction, and it is not necessary to maintain the action that there be any proof of alienation of affections.

The authorities to which we have been referred and which we have been able to find clearly indicate to our minds that where the proof shows only adultery committed by the defendant with the spouse of the plaintiff, the action is properly one for criminal conversation, and should be practised, as well as submitted to the jury, upon this theory alone; and it would be error to submit to the jury as a ground of recovery facts necessary to recover in an action for alienating of affections. Supporting the position which we have indicated, that proof only of adultery or seduction is not sufficient to maintain a cause of action for alienating of affections, we append the fol-

lowing: "Mere proof of abandonment, and that the husband maintains improper relation with the defendant, is not sufficient." *Buchanan v. Foster*, 23 App. Div. 542, 48 N. Y. Supp. 732; *Churchill v. Lewis*, 17 Abb. N. C. 226; and see *Hodecker v. Stricker*, 39 N. Y. Supp. 515; *Warner v. Miller*, 17 Abb. N. C. 221.

In *Bigaouette v. Paulet*, 134 Mass. 123, 45 Am. Rep. 307, the court in the following clause of its opinion, recognizing this doctrine, says: "The loss of consortium is presumed, although the wife may have herself been the seducer, or may not have been living with the husband. A husband who is living apart from his wife, if he has not renounced his marital rights, can maintain the action, and it is not necessary for him to prove alienation of the wife's affections, or actual loss of her society and assistance. . . . The essential injury to the husband consists in the defilement of the marriage bed,—in the invasion of his exclusive right to marital intercourse with his wife, and to beget his own children."

Following these authorities, this court said in the case of *Scott v. O'Brien*, supra: "To support an action for alienating a husband's or wife's affections, it must be established that the defendant is the enticer. Mere proof of abandonment, and that the husband or wife maintains improper relations with the defendant, is not sufficient."

We have concluded, then, that the court should not have given to the jury instructions 1 and 2, as they base the right of the plaintiff to a recovery upon the idea that the proof established a suit for the alienation of affections, when, as we have found, the proof for plaintiff established a cause of action in his favor for criminal conversation. Under the instructions and the proof the jury might have believed that the appellant had not had intercourse with the wife of appellee, yet they were authorized to return a verdict in favor of the latter, or they may have believed that appellant was guilty of adultery, but that the affections of the wife had not been alienated. As the instructions permitted the jury to return the verdict under either of the causes of action, when, according to our view, only one of them was proven, necessarily this was prejudicial error.

It must not be forgotten that the suit for alienation of affections is not one for the alienation of the plaintiff's affections, but is one to recover for the alienation of the affections of the plaintiff's spouse. The proof herein, as we have seen, might establish the former, and indeed the criminal intercourse may have been sufficient to have done this, but it is not a ground of recovery against the appellant.

It may be insisted that the jury were authorized, even if the instructions had limited the trial of the case to one for criminal conversation only, to return the verdict which they did; but even if this be conceded, it is not the question being considered. A party to a suit has the right to either prosecute it or to have it prosecuted against him under the form of action given by the law for such cases, and to have the proven case, or defense, submitted to the jury, and it will not do to speculate, or to say that the verdict might have been the same. These two causes of action belong to the same genus, and as they "may be prosecuted by the same kind of action," in that they each partake of the nature of trespass on the case and each sound in tort and "affect all the parties to the action," they may be joined under § 83 of the Civil Code of Practice; and we are of the opinion that the allegations of the petition are sufficient to constitute a cause of action under either remedy. If the evidence upon another trial should be substantially the same as upon this trial, the court should instruct

the jury, in substance, that if they should believe from the evidence that the defendant seduced and had intercourse with plaintiff's wife, they should find for plaintiff and assess his damages in such a sum as would compensate him for the loss of the comfort and society of his wife, and for mental pain and anguish, and humiliation, if any, which he suffered by reason of the adulterous acts of the defendant, and for the disgrace and shame, if any, which the plaintiff may have suffered on account thereof, not to exceed in all the sum of \$25,000, the amount sued for, and unless the jury so believe from the evidence, they should find for the appellant.

If the evidence upon another trial should develop sufficient proof of the alienation of the wife's affections to justify the submission of this question to the jury, it should be submitted as a proper element of damages.

Judgment reversed, with directions to proceed in accordance with the opinion.

Petition for rehearing denied.

MISSISSIPPI SUPREME COURT.
(In Banc.)

MRS. M. E. HOLMAN, Appt.,

v.

GEORGE RICHARDSON.

(— Miss. —, 76 So. 136.)

Water — surface — right to dam back.

1. An owner of city property has no right to erect a wall to prevent diffused surface water from flowing along a swale onto his property from higher land, thereby creating a pond on such land, if with no greater expense he can dispose of the water without injury to either party by the construction of a drain.

For other cases, see *Waters*, II. g, in *Dig.* 1-52 N. S.

Same — prescriptive right — underground drain.

2. The prescriptive right to cast water onto adjoining property cannot be acquired by underground drains of which the owner of such property has no knowledge.

For other cases, see *Waters*, II. k, in *Dig.* 1-52 N. S.

Note.—The right as to flow of surface water is discussed generally in the note to *Gray v. McWilliams*, 21 L.R.A. 593. The obstruction of surface water in city is treated specifically in the notes to *Levy v. Nash*, 20 L.R.A. (N.S.) 155, and *Shahan v. Brown*, 43 L.R.A. (N.S.) 792.

The right to hasten flow of surface water along natural drainways is discussed in the notes to *Manteufel v. Wetzel*, 19 L.R.A. (N.S.) 167, and *Trigg v. Timmerman*, L.R.A. 1916F, 427. L.R.A.1917F.

Same — hastening flow — liability.

3. The owner of the lower of two adjoining lots crossed by a swale cannot complain of the construction of tile drains by the upper proprietor to carry the water down the swale to his property, if no more water is caused to flow onto his property than would do so without them, and the flow of water is not accelerated to his injury.

For other cases, see *Waters*, II. g, in *Dig.* 1-52 N. S.

(Cook, J., dissents.)

(July 9, 1917.)

A PPEAL by defendant from a decree of the Chancery Court for Noxubee County in favor of complainant in a suit to enjoin defendant from erecting a wall between her property and that of complainant. Reversed.

The facts are stated in the opinion.

Messrs. Neville, Stone, & Currie, for appellant:

Surface water is a common enemy which every proprietor may fight as he deems best.

40 Cyc. 642; 30 Am. & Eng. Enc. Law, 2d ed. 330.

The common-law rule is in force in Mississippi.

Alcorn v. Sadler, 66 Miss. 221, 5 So. 694; *Sinai v. Louisville, N. O. & T. R. Co.* 71 Miss. 547, 14 So. 87.

The owner of a city or town lot may obstruct the flow of surface water from adjoining premises.

Rielly v. Stephenson, 222 Pa. 252, 22 L.R.A.(N.S.) 947, 128 Am. St. Rep. 805, 70 Atl. 1097; *Shahan v. Brown*, 179 Ala. 425, 43 L.R.A.(N.S.) 792, 60 So. 891; *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276.

No title by prescription can be acquired in an easement without the acquiescence and knowledge of the owner of the servient tenement.

22 Am. & Eng. Enc. Law, 2d. ed. 1210; *Mississippi Mills Co. v. Smith*, 69 Miss. 299, 30 Am. St. Rep. 546, 11 So. 26; *Warren County v. Mastronardi*, 70 Miss. 273, 24 So. 199; *McCaughn v. Young*, 85 Miss. 277, 37 So. 839; *Carbrey v. Willis*, 83 Am. Dec. 688, and note, 7 Allen, 364; *Gray v. Cambridge*, 2 L.R.A.(N.S.) 976, and note, 189 Mass. 405, 76 N. E. 195; *Hannefin v. Blake*, 102 Mass. 297; *Treadwell v. Inslee*, 120 N. Y. 458, 24 N. E. 651.

Messrs. Whitfield & Whitfield and A. T. Dent, also for appellant in reply to suggestion of error:

Unless Mrs. Holman knew that this underground tile was in place more than ten years before this bill was filed, or unless the evidence should show that the placing of this underground tile was so notorious, open, and visible as that she must have known for more than ten years before the filing of this bill, then there is no easement.

Gray v. Cambridge, 189 Mass. 405, 2 L.R.A.(N.S.) 983, 76 N. E. 195; *Carbrey v. Willis*, 7 Allen, 364, 83 Am. Dec. 688; *Hannefin v. Blake*, 102 Mass. 297; *Union Lighterage Co. v. London Graving Dock Co.* [1901] 2 Ch. 300, 70 L. J. Ch. N. S. 558, 84 L. T. N. S. 527, 17 Times L. R. 447, [1902] 1 Ch. 557, 71 L. J. Ch. N. S. 791, 87 L. T. N. S. 381, 18 Times L. R. 754; *Gately v. Martin* [1900] 2 Ir. R. 269; *Deerfield v. Connecticut River R. Co.* 144 Mass. 325, 11 N. E. 105; *Ludlow Mfg. Co. v. Indian Orchard Co.* 177 Mass. 61, 58 N. E. 181; *Treadwell v. Inslee*, 120 N. Y. 465, 24 N. E. 651; *Warren County v. Mastronardi*, 76 Miss. 273, 24 So. 199; *McCaughn v. Young*, 85 Miss. 277, 37 So. 839.

Richardson is attempting to get this court to overrule all its previous decisions in regard to the common-law right of throwing surface water back on the land of the servient owner.

40 Cyc. 642; 30 Am. & Eng. Enc. Law, 324; *Sinai v. Louisville, N. O. & T. R. Co.* 71 Miss. 547, 14 So. 87; *Alcorn v. Sadler*, 66 Miss. 221, 5 So. 694; *Rielly v. Stephenson*, 222 Pa. 252, 22 L.R.A.(N.S.) 947, 128 Am. St. Rep. 805, 70 Atl. 1097; *Shahan v. Brown*, 179 Ala. 425, 43 L.R.A.(N.S.) 792, 60 So. 891.
L.R.A.1917F.

Mr. W. W. Magruder, for appellee:

There are two general rules, the common-law rule and the civil-law rule, by which the rights of adjoining owners in the flowage of water are ascertained and determined.

40 Cyc. 640-643; *Gray v. McWilliams*, 21 L.R.A. 593, and note, 98 Cal. 157, 35 Am. St. Rep. 163, 32 Pac. 976.

Our court has in effect adopted the civil-law rule.

If any such rule as that of the so-called common law ever existed as a definite legal principle, its application to existing modern conditions has become so increasingly difficult that the courts have practically emasculated it.

Rawstron v. Taylor, 11 Exch. 369, 156 Eng. Reprint, 873, 25 L. J. Exch. N. S. 33; *Bellows v. Sackett*, 15 Barb. 96.

The fundamental principle under the modern authorities is the maxim, *sic utere tuo ut alienum non laedas*.

Hunt v. Sain, 181 Ill. 372, 54 N. E. 970; *Ribordy v. Murray*, 177 Ill. 134, 52 N. E. 325; *Roe v. Howard County*, 75 Neb. 448, 5 L.R.A.(N.S.) 831, 106 N. W. 587; *Cushing v. Pires*, 124 Cal. 663, 57 Pac. 572; *Finkbinder v. Ernst*, 126 Mich. 565, 85 N. W. 1127; *Priest v. Maxwell*, 127 Iowa, 744, 104 N. W. 344; *Montgomery v. Locke*, 2 Cal. Unrep. 693, 11 Pac. 874; *Boyd v. Conklin*, 54 Mich. 583, 52 Am. Rep. 831, 20 N. W. 595; *Shane v. Kansas City, St. J. & C. B. R. Co.* 71 Mo. 237, 36 Am. Rep. 480.

An easement or prescriptive right may be created and acquired by the statutory occupancy or user for the required period of time under claim of right.

Ryan v. Mississippi Valley & S. I. R. Co. 62 Miss. 162; *Alcorn v. Sadler*, 66 Miss. 221, 5 So. 694; *Crumbaugh v. Mobile & O. R. Co.* 105 Miss. 485, 62 So. 233; *Vincent v. Michel*, 7 La. 52, 26 Am. Dec. 496; *White v. Chapin*, 12 Allen, 516; *Schnitzius v. Bailey*, 48 N. J. Eq. 409; *Leidlein v. Meyer*, 95 Mich. 586, 55 N. W. 367; *Trenton v. Rucker*, 102 Mich. 19, 34 L.R.A.(N.S.) 569, 127 N. W. 39; *Earl v. De Hart*, 12 N. J. Eq. 280, 72 Am. Dec. 395; *McKinley v. Union County*, 29 N. J. Eq. 171; *Shane v. Kansas City, St. J. & C. B. R. Co.* 71 Mo. 237, 36 Am. Rep. 480.

Messrs. Green & Green, also for appellee on suggestion of error:

The common law does not suffer the damming up of a natural drainage ditch by a lower proprietor against an upper proprietor.

3 Farnham, Waters, p. 2509; *Illinois C. R. Co. v. Miller*, 68 Miss. 760, 10 So. 61; *Mississippi & T. R. Co. v. Archibald*, 67 Miss. 40, 7 So. 212.

The common-enemy doctrine begins nowhere and ends nowhere.

3 Farnham, Waters, p. 2612; Martin v. Jett, 12 La. 501, 32 Am. Dec. 123.

The alleged common-law rule had its origin in the dictum of a Massachusetts court, formulated in its present shape by decisions in the state of New Jersey.

Chicago, R. I. & P. R. Co. v. Groves, 20 Okla. 101, 22 L.R.A.(N.S.) 802, 93 Pac. 755; Yazoo & M. Valley R. Co. v. Scott, 110 Miss. 443, 70 So. 459; Yazoo & M. Valley R. Co. v. Sultan, 106 Miss. 373, 49 L.R.A.(N.S.) 700, 63 So. 672; Thompson v. Mobile, I. & K. C. R. Co. 104 Miss. 660, 61 So. 596; Walker v. New Mexico & S. P. R. Co. 165 U. S. 593, 41 L. ed. 837, 17 Sup. Ct. Rep. 421, 1 Am. Neg. Rep. 768; Pittsburg, C. C. & St. L. R. Co. v. Machler, 158 Ind. 159, 63 N. E. 210; Atchison, T. & S. F. R. Co. v. Hammer, 22 Kan. 763, 31 Am. Rep. 216; Kansas City & E. R. Co. v. Riley, 33 Kan. 374, 6 Pac. 581; Morrison v. Bucksport & B. R. Co. 67 Me. 353; Schneider v. Missouri P. R. Co. 29 Mo. App. 68; Wagner v. Long Island R. Co. 2 Hun, 633; Shane v. Kansas City, St. J. & C. B. R. Co. 71 Mo. 238, 36 Am. Rep. 480; Quinn v. Chicago, M. & St. P. R. Co. 23 S. D. 126, 22 L.R.A.(N.S.) 789, 120 N. W. 884; Ribordy v. Murray, 177 Ill. 134, 52 N. E. 325; Anheuser-Busch Brewing Assn. v. Peterson, 41 Neb. 897, 60 N. W. 373; Chicago, R. I. & P. R. Co. v. Groves, 20 Okla. 101, 22 L.R.A.(N.S.) 802, 93 Pac. 755; Baltimore & S. P. R. Co. v. Hackett, 87 Md. 224, 39 Atl. 510; Hahn v. Thornberry, 7 Bush, 403; Mapes v. Bolton, 89 Neb. 815, 132 N. W. 386; Wharton v. Stevens, 84 Iowa, 111, 15 L.R.A. 630, 35 Am. St. Rep. 296, 50 N. W. 562.

A right to flow water over land may be acquired by prescription.

Alcorn v. Sadler, 71 Miss. 634, 42 Am. St. Rep. 484, 14 So. 444; Bonelli Bros. v. Blakemore, 66 Miss. 143, 14 Am. St. Rep. 550, 5 So. 228; Gray v. Cambridge, 189 Mass. 405, 2 L.R.A.(N.S.) 976, 76 N. E. 195; Carbrey v. Willis, 7 Allen, 364, 83 Am. Dec. 688; Hanneff v. Blake, 102 Mass. 297; Treadwell v. Inslee, 120 N. Y. 458, 24 N. E. 651.

Want of knowledge never yet suspended the running of the Statute of Limitations.

19 Am. & Eng. Enc. Law, 2d ed. 214; McCarlie v. Atkinson, 77 Miss. 594, 78 Am. St. Rep. 540, 27 So. 641; Cook v. Rives, 13 Smedes & M. 328, 53 Am. Dec. 88; Young v. Cook, 30 Miss. 320; Buckner v. Calcote, 28 Miss. 432; Edwards v. Gibbs, 39 Miss. 166; State v. Furlong, 60 Miss. 839; Fleming v. Grafton, 54 Miss. 79; Hudson v. Kimbrough, 74 Miss. 346, 21 So. 885; Gould, Waters, 3d ed. 545; Illinois C. R. Co. v. Miller, 68 Miss. 760; 10 So. 61; Barkley v. Wilcox, 86 N. Y. 148, 40 L.R.A.1917F.

Am. Rep. 519; Robertson v. Alford, 13 Smedes & M. 509; Butler v. Craig, 27 Miss. 628, 61 Am. Dec. 527; Smith v. Westmoreland, 12 Smedes & M. 663; Crane v. French, 38 Miss. 528; Ingraham v. Regan, 23 Miss. 213; Hill v. Nash, 73 Miss. 862, 19 So. 709; Klaus v. Moore, 77 Miss. 701, 27 So. 612; Masonic Ben. Assn. v. First State Bank, 99 Miss. 610, 55 So. 412.

The actual assertion of the right to drain gives notice of our right in the premises.

Alcorn v. Sadler, 71 Miss. 634, 42 Am. St. Rep. 484, 14 So. 444; Crumbaugh v. Mobile & O. R. Co. 105 Miss. 487, 62 So. 233.

The exception as to urban lots has no application here. There was no artificial drainage provided by law, and the lots were not used for building purposes.

Southern R. Co. v. Lewis, 165 Ala. 555, 138 Am. St. Rep. 77, 51 So. 750; Crabtree v. Baker, 75 Ala. 95, 51 Am. Rep. 424; Hall v. Rising, 141 Ala. 433, 37 So. 586; 3 Farnham, Waters, p. 2607, § 889e; Nashville, C. & St. L. R. Co. v. Yarbrough, 194 Ala. 162, 69 So. 583; Walshe v. Dwight Mfg. Co. 178 Ala. 310, 59 So. 632.

Smith, Ch. J., delivered the opinion of the court:

Appellant and appellee own and reside upon adjoining lots in the city of Macon, that of appellee bounding appellant's lot on the north and west. The level of appellee's lot is higher than that of appellant's, and there is a large swale or hollow beginning on appellant's premises some distance from and extending down to the line separating the two lots. This swale or hollow is not a natural drain in the sense that by it water is collected in or confined to a well-defined natural channel, but because of it, however, a large volume of water is at times collected at the point where it touches appellant's lot. At this point a ditch, dug many years ago by a gentleman who then owned both lots, conducts the water across appellant's lot to a public drain along the street which bounds appellant's lot on the south. Two or more underground tile drains accelerate the flow of the water from appellee's lot to the head of this ditch across appellant's lot, but discharge no water thereon other than such as would be so discharged without them. In addition to the water collected at the head of this ditch, water also flows from appellee's lot on and across appellant's lot for practically the entire length of the line dividing them. The volume of water which now flows from appellee's lot across that of appellant's is less than it was when appellee purchased his, because of certain artificial drains, other than those here complained of constructed by him, which

conduct a portion of the water in another direction. The flow of this water across appellant's lot is damaging to her, and if it should remain on appellee's lot will damage him. In order to prevent this water from flowing across her lot, appellant commenced the erection of a solid brick wall extending the full length of the line separating it from appellee's lot, the effect of which would be to cast the water back upon appellee's lot. A ditch can be dug along the north and west line of appellant's lot at a cost not exceeding that of this brick wall, which would conduct the water to the public drain on the south side of appellant's lot, into which the ditch now crosses her lot flows, by means of which the water would be prevented from damaging either of the parties hereto. After appellant began the erection of this brick wall and before its completion, appellee filed his bill in the court below praying that she be enjoined from building and maintaining it. A temporary injunction was granted in accordance with the prayer of the bill, which injunction on final hearing was made perpetual.

Two questions are presented to us by this record: First, to what extent, if any, may appellant obstruct the natural flow of rainwater in a diffused state from appellee's premises over and across her own? Second, what right, if any, has appellee to collect rainwater falling upon his premises by means of artificial drains, and discharge it on the premises of appellant?

Any discussion of the rules of the civil and of the ancient common law with reference to the right of one landowner to obstruct the flow of surface water from the land of an adjoining owner on and across his, and the difference, if any such in fact exists, between the rules of those two systems of law, will be of no value here for the reason that the rule with us, as will appear from examination of the cases from this court hereinafter cited, is that when adjoining lots owned by different persons are on a different level, so that there will be a natural flow of rainwater in a diffused state from the higher to the lower level, the owner of the lower lot may fend the water therefrom, provided he does so for proper objects and exercises reasonable care to prevent unnecessary injury to the higher lot. *Illinois C. R. Co. v. Miller*, 68 Miss. 760, 10 So. 61; *Sinai v. Louisville, N. O. & T. R. Co.* 71 Miss. 547, 14 So. 87; *Kansas City, M. & B. R. Co. v. Smith*, 72 Miss. 677, 27 L.R.A. 762, 43 Am. St. Rep. 579, 17 So. 78; *Yazoo & M. Valley R. Co. v. Davis*, 73 Miss. 678, 32 L.R.A. 262, 55 Am. St. Rep. 562, 19 So. 487; *Canton, A. & N. R. Co. v. Paine*, — Miss. —, 19 So. 199; *Illinois C. R. Co. v. Wilbourn*, 74 Miss. 284, 21 So. L.R.A.1917F.

1; *Alabama & V. R. Co. v. Daniels*, 108 Miss. 68, 66 So. 324. That the rule applied in these cases above announced was so understood by Mr. Freeman will appear from the note to *Mizell v. McGowan*, 85 Am. St. Rep. 724. This rule, which also prevails in several other states (3 *Farnham, Waters*, § 890, p. 2616, and authorities there cited), is based upon and is simply a concrete application of the maxim that "one must so use his own as to not unnecessarily injure others."

A corollary to this rule necessarily is that where two methods of disposing of such water are available to the owner of the lower lot, each equally efficacious and neither requiring an unreasonably greater expense than the other, one of which will damage the adjoining property and the other will not, the latter must be adopted by the owner of the lower lot in fending the water therefrom. The decision in *Sinai v. Louisville, N. O. & T. R. Co.* 71 Miss. 547, 14 So. 87; turned upon this express proposition, as was pointed out in *Yazoo & M. Valley R. Co. v. Davis*, 73 Miss. 678, 32 L.R.A. 262, 55 Am. St. Rep. 562, 19 So. 487, wherein the court, in approving the holding in that case, said: "A company having a right to construct its railroad may not, in disregard of the rights of adjoining proprietors, so construct its roadbed as to destroy the value of the lands of third persons, even though the injury be occasioned by turning back surface water upon such lands, if, with due regard to the duty it owes to the public, and in the reasonable use of its own property, and at no undue expense, it can, by putting in trestles, culverts, or other openings, provide a way through which such water may safely be allowed to escape."

It is true that in the cases wherein this court has heretofore dealt with this question the offending party was a railroad company, but there can be no distinction in this regard between the rights and duties of such a company and of an individual, as pointed out in 3 *Farnham on Waters*, § 904, except, as set forth in *Yazoo & M. Valley R. Co. v. Davis*, supra, such as may be caused by the fact that, since a railroad company is authorized by law to construct its embankment, it may not be liable at all for damages which necessarily result to an adjoining landowner from a proper construction thereof, and, we may add further, except such difference as may be caused by the provision of § 17 of our present Constitution, that "private property shall not be . . . damaged for public use except on due compensation being first made to the owner or owners thereof," which section, however, had no influence on those decisions.

Applying this rule in the case at bar,

it necessarily follows that the appellant is without right to prevent this surface water from crossing her land in a diffused state by means of a brick wall, thereby causing it to pond on appellee's land, for she can at no greater expense fully protect herself by digging a ditch across the north and down the west boundary of her lot to the public drain hereinbefore referred to and at the same time inflict no damage upon appellee. Appellant, of course, has the right to erect and maintain this brick wall, but in so doing she must exercise reasonable care to prevent the water being thereby caused to pond on appellee's lot to his damage.

Coming now to the second question. Appellee's claim is that he has acquired the right by prescription to collect this water in the underground tile drains complained of and cast it over and across appellant's land through the ditch extending from the end of the swale or hillside hollow to the public drain on the opposite side of her lot. It is unnecessary for us to determine whether or not such a right may be acquired by prescription, for the reason, if no other, that the existence of these underground tile drains was unknown to appellant until about three years before the beginning of this litigation, and their existence in the very nature of the thing was not open and notorious.

It appears, however, from the evidence that the conformation of the surface of appellee's lot is such that the underground tile drains complained of do not cause any more water to collect at the head of and flow through the ditch across appellant's lot than would so do without them, and it does not appear that they accelerate the flow of the water to such an extent as to thereby damage appellant more than she would be without them, from which it necessarily follows that she has no ground of complaint because of their existence.

The decree of the court below, having taken a much broader scope than is warranted by the foregoing views, was erroneous, so that we committed no error in reversing it; but the cause should have been remanded instead of judgment final being entered here. Our former judgment, therefore, will be set aside, the decree of the court below will be reversed, and the cause remanded. The former opinion herein rendered will be withdrawn.

Reversed and remanded.

Stevens, J., specially concurring:

I agree in the result reached by the court, that is, the order reversing and remanding the cause. I do not concur in the reasoning of the majority in the opinion this day delivered on the suggestion of error. I L.R.A.1917F.

agree with Judge Cook in the interpretation which he has placed upon previous decisions of this court; and, in the main, I agree with the views expressed in his concurring opinion. It is perfectly manifest to me that the process of reasoning in the majority opinion completely changes the law of waters in Mississippi, and substitutes a rule that has never before been recognized in this state. I think the court should at least declare in express language that previous holdings of our court, are overruled.

Much importance is given by the court to the maxim that one must so use his own as not unnecessarily to injure another's. This might be termed the "golden rule" which the law applies to the everyday affairs of men. I fully recognize this broad principle of justice, but the principle is erroneously applied in the instant case. As applied to the present case it is made to say that Mrs. Holman, as the owner of the lower estate, must receive and at her own expense dispose of the surface water flowing from the upper estate, simply and solely because she, at a reasonable expense, can drain off or dispose of these surface waters. The record shows conclusively that Mr. Richardson, as the owner of the upper estate, can ditch and drain off his own surface waters at a reasonable expense. The majority say that the obligation must be borne by Mrs. Holman, the owner of the lower estate. I say that the obligation is the primary obligation of Mr. Richardson, the owner of the upper estate. I fail to see the justice of permitting a well to do landlord to install a system of underground tiling, and by means thereof to concentrate at one point and project surface water upon the humble garden spot of a helpless widow. Yet this is the very action which the court now approves. It would not be so bad if Mr. Richardson did not have a system of underground tiling. In that case the surface water would be diffused over a larger area and would run onto the premises of Mrs. Holman in a manner less calculated to do so much damage. As it is, the proof shows that the surface waters from the large premises of Mr. Richardson are collected into one large pipe, and through the mouth of this pipe projected into a ditch leading through Mrs. Holman's premises. The result of this is that the garden of appellant is frequently overflowed to the extent that a large part thereof cannot be utilized. Mrs. Holman then is the one who is "unnecessarily injured" under the maxim applied by the majority. I have always been taught that a landowner has complete dominion over his own so long as he does not unnecessarily injure another. Mrs. Hol-

man has done nothing to injure Mr. Richardson's premises. She is simply arranging her own premises so that they may be utilized. What she does is in the interest of good husbandry. There is no complaint that she does not take care of her own surface water. The sole complaint is that she ought to take care not only of her own surface water, but of the surface water which falls upon Mr. Richardson's estate. She then is having a double burden imposed upon her, while Mr. Richardson escapes all burden whatever. This manifestly reverses the rule heretofore existing in Mississippi. If Mr. Richardson could not possibly provide ditches and drains for his own land, the case might be different. It is not, however, an instance where the upper tenant cannot possibly take care of his own excess surface water without imposing upon the lower estate. He can provide his own drainage and that across his own land. This, in equity and good conscience, he ought to do. Our court made an exception in the application of the law against railroad companies. The reason for this was clearly announced by our court in the *Sinai Case*. The very charter rights of railroad companies empower them to appropriate a narrow strip of country across large stretches of agricultural lands, and to construct thereon miles of embankments, which necessarily obstruct natural drainage. Of course, the present case does not fall within the exception. The majority opinion declares that "the owner of the lower lot may fend the water therefrom, provided he does so for proper objects and exercises reasonable care to prevent unnecessary injury to the higher lot."

There is little consolation in this statement of the court when it is followed by the express holding that the lower tenant must pay the expense. Of course, the lower tenant can always fend off the water by appropriating his own land for necessary ditches and paying all the expense himself. If this is a natural right it is a very costly one.

There is neither claim nor showing that the curb or wall being constructed by Mrs. Holman is a "spite wall." Her attempt to improve her property should be encouraged.

Cook, J., dissenting:

As I have always considered and still consider the settled law to be in this state, the opinion of the court in this case has destroyed the rule. Judge Campbell, speaking for this court in *Alcorn v. Sadler*, 66 Miss. 229, 5 So. 695, had this to say: "He may arrest its flow over his land and divert it before it gets to rest in the reservoir or lake, or whatever the body of water may

be called, but after it loses its casual and vagrant character as surface water diffused over his land, and reaches the place of rest and becomes a body or collection of water, owned chiefly by another, he cannot lawfully drain it and destroy what belongs to that other in order to clear of water that part of his own land covered by it."

The last pronouncement of this court upon the Mississippi rule was made one year ago in *Harvey v. Illinois C. R. Co.* 111 Miss. 838, 72 So. 274, in these words: "By the recognized law of this state surface water may be appropriated to his own use by the landowner, or he may expel it from his land. 'Surface water is regarded as a common enemy, which every proprietor may fight or get rid of as best he may; but a landowner has no right to rid his land of surface water by collecting it in artificial channels and discharging it through or upon the land of an adjoining proprietor.' Gould, Waters, 3d ed. § 271."

The opinion of the court cites several cases decided by this court to support its decision, which I will briefly review. The first case cited is *Illinois C. R. Co. v. Miller*, 68 Miss. 760, 10 So. 61. In passing it will be noted that the court in the case cited expressly approves the rule announced in *Harvey v. Illinois C. R. Co.* supra, but aside from the fact that this case involved the diversion of natural water course, the gist of the decision may be found in this paragraph: "The defendant has, for the protection of its roadbed, dug a ditch along its eastern line, into which is collected surface water, falling upon adjacent lands for a half mile along the ditch, and which but for the ditch would have flowed upon lands of other persons, and has discharged the water thus accumulated upon the lands of the plaintiff which were free from the flow of the water in its natural course. Upon all the authorities this is an unlawful act, and for it the plaintiff is entitled to recover."

It is difficult to find in the case just discussed any authority for the holding of the majority in the present case. The next case cited by the court is *Sinai v. Louisville, N. O. & T. R. Co.* 71 Miss. 547, 14 So. 87. Judge Woods, after stating the facts, opens his opinion with these words: "The question presented is resolvable by the application of common-law principles to new and changed conditions. At the ancient common law every landowner fought and fenced against surface water as suited his necessities. It was a common enemy, which the landholder dealt with according to his own pleasure, for his own protection. But this strict rule had its origin when the soil was used for agricultural purposes. In that primeval day of the law's birth and growth,

a railway corporation . . . was undreamed of."

So it was in that case the court wisely, I think, modified the rule to fit unforeseen and undreamed-of conditions. It was an adjustment of the law to a "new order of society." This case left undisputed the general rule—the common-law rule which had theretofore been applied to the known conditions. But the court applies to this case the maxim that each person must so use his own property as not to do unnecessary harm to another.

In the present case we have nothing new; the situation here is the same everywhere in the rolling lands of the state, and the effect of the decision is to totally destroy the rule,—to make the lower estate the servient estate. In other words, the maxim is made much more potent than the rule of law heretofore recognized by the courts of this state; and if the decision of the court is to be the law, the civil law with regard to surface waters will hereafter prevail, for it is difficult to imagine a case wherein to fight surface water would not be denied, upon the theory of injury to the upper proprietor. I confess, in the light of the ruling of this court in the present case, that I have never understood the Sinai Case. The court, in that case, as I have always understood, was undertaking to uphold the common-law rule with such limitations as the unique conditions manifestly demanded. It will be noted, however, that the railroad company was held liable in that case, but not the appellee in this case, who did a similar act; that is to say, he has maintained his right to dump the surface water flowing from and over his lands onto the lower lands, and the lower owner is enjoined from making a fight against the enemy. Stated differently, in the Sinai Case the railroad company was held liable for misusing the surface waters, and the appellee here is accorded the right and power to prevent the appellant from raising her hand in defense, clearly because her land is somewhat lower than the dominant estate,—a reversal of the rule heretofore applied in this state. In the present case Mrs. Holman is required, by the decree of this court, to bear the expense of taking care of the surface water flowing over and off Mr. Richardson's lot, while it would not cost Richardson any more to do so than it will cost Mrs. Holman.

This decree can only be defended upon the civil law theory that the upper estate is the dominant estate and the lower estate is the servient estate; a reversal of the Mississippi rule, as I understand it. The next case cited by the court for its opinion is *Kansas City, M. & B. R. Co. v. Smith*, 72 L.R.A.1917F.

Miss. 677, 27 L.R.A. 762, 48 Am. St. Rep. 579, 17 So. 78. This is another railroad case, and deals with flowing streams and the overflow waters of same; and, this being true, it has no application to the present case for the reasons mentioned above. But the *Smith Case* needs no interpretation; and we will quote from the opinion therein a statement of the conditions then under consideration, viz.: "In *Sinai v. Louisville, N. O. & T. R. Co.* supra, we declared that the supposed rule of the common law, under which it was there claimed that each proprietor had the absolute right of excluding surface water from his premises, regardless of any injury to an adjoining proprietor, could not be invoked (if it in fact existed) by a railroad company asserting a right to submerge hundreds of acres of adjoining land with surface water by its embankment. It is apparent that a rule intended to regulate the correlative rights of adjoining landowners whose property is devoted to agriculture or residence purposes could not be applied to the same extent, either in favor or against a railroad company owning a strip of land 100 feet wide and hundreds of miles long."

Again, the majority opinion cites *Yazoo & M. Valley R. Co. v. Davis*, 73 *Miss. 678, 32 L.R.A. 262, 55 Am. St. Rep. 562, 19 So. 487.* I do not think this case has the remotest application to the present case. It was held in that case that the company had presumably paid for all damages flowing from the proper construction of the road, in the eminent domain proceedings, and that the company was under no duty to so construct its roadbed as to provide against all except unprecedented overflows. The *Daniels Case*, 108 *Miss. 68, 66 So. 324*, did not involve the questions here discussed, and this manifestly appears from a reading of the opinion, and this is true of *Canton, A. & N. R. Co. v. Paine*, — *Miss. —, 19 So. 199.*

Having discussed all the cases cited in the majority opinion, and believing that not one of these cases afford any authority for the holding of the court, I will add a word about the case decided. The court has stated the case most favorably for Mr. Richardson, not more so than the evidence offered by him warrants, and in my opinion the statement does not entitle him to the relief accorded him.

Having the utmost respect for the learning and ability of the members of the court concurring in the opinion, I nevertheless believe that they have entirely misconceived the principles announced in the cases relied on. These were all railroad cases, and in all of them this court was at pains to explain that they were exceptional cases and

called for a modified rule; an equitable and just rule to meet modern conditions. Of course, there was no thought of applying one rule to a railroad corporation and a different rule to private persons similarly situated, for the obvious reason that private persons, unless they engage in the business of building and operating commercial railroads, can never find themselves in the same situation. The railroad cases are in a class to themselves, because they bring about conditions unlike other classes of landowners.

I concur in the judgment of the court reversing the decree of the chancellor, but dissent from the rules of law announced in the opinion.

This change in the common law of the state is a legislative function, and if I correctly interpret the rules of law controlling this case, the court has assumed the rôle of legislators, which, in my opinion, is always dangerous, and in this case of doubtful wisdom, to put it mildly.

CALIFORNIA SUPREME COURT. (Department No. 1.)

CHARLOTTE E. AYERS et al., Respts.,
v.

SOUTHERN PACIFIC RAILROAD COMPANY et al., Appts.

(173 Cal. 74, 159 Pac. 144.)

Fraud — promissory agreement — breach — effect.

1. The vendor of lots in a town laid out by himself is not liable for breach of a representation that no liquor should ever be sold in the town, unless the representation was made without intention to perform it, or with intent to defraud and thereby to induce the purchase of lots in the town.

For other cases, see Fraud and Deceit, III. in Dig. 1-52 N. S.

Covenant — promise as warranty.

2. A mere statement by a vendor of lots in a town laid out by him, to purchasers, that no liquor should be sold in the town, does not constitute a warranty that such shall be the fact.

For other cases, see Vendor and Purchaser, I. a, in Dig. 1-52 N. S.

Evidence — to enlarge covenant in deed.

3. If a deed contains an express covenant that no intoxicating liquor shall be sold on the property, parol evidence is not admissible of an agreement by the vendor at time of sale that none shall be sold in the town. *For other cases, see Evidence, VI. c, in Dig. 1-52 N. S.*

Principal and agent — authority of agent — agreement as to sale of liquor.

4. Authority to an agent to make sales of lots upon the terms, and subject to such agreements and conditions and restrictions as the principal may instruct, does not include power to covenant that no liquor shall be sold on any of the lots in the tract over which his authority extends.

For other cases, see Principal and Agent, II. a, in Dig. 1-52 N. S.

(July 15, 1916.)

Note. — For implied or ostensible authority of agent to bind his principal by covenants in the sale of real property, see annotation following this case, post, 954. And see references therein for annotations on related questions.

APPEAL by defendants from a judgment of the Superior Court for Kern County in plaintiff's favor, from an order denying a new trial, and from an order denying a motion for judgment on the findings, in an action to recover for injury to plaintiffs' business and property from alleged failure of defendants to prevent the selling of liquor in the town wherein plaintiffs' property was situated. Reversed.

The facts are stated in the opinion.

Messrs. Frank McGowan, Frank Thunnen, William M. Singer, and William Singer, Jr., for appellants:

Plaintiffs cannot recover damages on the theory of a general scheme or plan.

3 Devlin, Deeds, § 990e; Evans v. Foss, 194 Mass. 513, 9 L.R.A.(N.S.) 1039, 80 N. E. 587, 11 Ann. Cas. 171; Judd v. Robinson, 14 Ann. Cas. 1024, note; Mulligan v. Jordan, 50 N. J. Eq. 363, 24 Atl. 543; Haines v. Einwachter, — N. J. Eq. —, 55 Atl. 38; Jewell v. Lee, 14 Allen, 145, 92 Am. Dec. 744; Sharp v. Ropes, 110 Mass. 381; Keates v. Lyon, L. R. 4 Ch. 218, 38 L. J. Ch. N. S. 357, 20 L. T. N. S. 255, 17 Week. Rep. 338; Renals v. Cowlishaw, L. R. 11 Ch. Div. 866, 48 L. J. Ch. N. S. 830, 41 L. T. N. S. 116, 28 Week. Rep. 9; De Gray v. Monmouth Beach Club House Co. 50 N. J. Eq. 329, 24 Atl. 388; Trout v. Lucas, 54 N. J. Eq. 361, 35 Atl. 153; Hemsley v. Marlborough Hotel Co. 65 N. J. Eq. 167, 55 Atl. 994; Washb. Real Prop. 6th ed. § 592; Fresno Canal & Irrig. Co. v. Rowell, 80 Cal. 118, 13 Am. St. Rep. 112, 22 Pac. 53; Lyford v. North Pacific Coast R. Co. 92 Cal. 93, 28 Pac. 103.

There is no showing of fraud or fraudulent representations.

McGinn's Estate, 3 Cof. Prob. Dec. Anno. (Cal.) 26; Finney v. Curtis, 78 Cal. 498, 21 Pac. 120, 1 Am. Neg. Cas. 265; Davidson v. Jordan, 47 Cal. 351, 7 Mor. Min. Rep. 54; Barber v. Morgan, 51 Barb. 116; Heller v. Dyerville Mfg. Co. 116 Cal. 133, 47

Pac. 1016; Oroville & V. R. Co. v. Plumas County, 37 Cal. 354.

Parol evidence is inadmissible for the purpose of changing the character of an instrument.

Hawley v. Kaftz, 148 Cal. 396, 3 L.R.A. (N.S.) 741, 113 Am. St. Rep. 282, 83 Pac. 248; Richardson v. Crandall, 48 N. Y. 348; Kullman, S. & Co. v. Sugar Apparatus Mfg. Co. 153 Cal. 731, 96 Pac. 369; Dollar v. International Bkg. Corp. 13 Cal. App. 331, 109 Pac. 499; Ludeen v. Ottis, 164 Cal. 186, 128 Pac. 335; Gladding v. Montgomery, 20 Cal. App. 276, 128 Pac. 790; Bradford Invest. Co. v. Joost, 117 Cal. 211, 48 Pac. 1083.

There is no causal relation or connection between the acts complained of and the alleged injuries.

Smith v. Buttner, 90 Cal. 95, 27 Pac. 29; Sargent v. Machias, 65 Me. 592; Hilton v. St. Louis, 99 Mo. 207, 12 S. W. 657; Roberts v. Northern P. R. Co. 158 U. S. 1, 39 L. ed. 873, 15 Sup. Ct. Rep. 756; McFadden v. Johnson, 72 Pa. 335, 13 Am. Rep. 681.

Plaintiffs cannot take advantage of the condition subsequent, because there is no privity of contract or estate.

Vanderlice v. Hanks, 3 Cal. 28; Bucklew v. Estell, 5 Cal. 108; Miller v. Swann, 89 Ala. 631, 7 So. 771; Neely v. Hoskins, 84 Me. 386, 24 Atl. 882; Cross v. Carson, 8 Blackf. 138, 44 Am. Dec. 758; Board of Education v. First Baptist Church, 63 Ill. 205; Boyer v. Tressler, 18 Ind. 260; McElroy v. Morley, 40 Kan. 76, 19 Pac. 341; Badger v. Boardman, 16 Gray, 559; Skinner v. Shepard, 130 Mass. 180; Hooper v. Cummings, 45 Me. 359; Piper v. Union P. R. Co. 14 Kan. 568; Jeffries v. Jeffries, 117 Mass. 184; McPike v. Heaton, 131 Cal. 109, 82 Am. St. Rep. 335, 63 Pac. 179; William Ede Co. v. Heywood, 153 Cal. 615, 22 L.R.A. (N.S.) 562, 96 Pac. 81.

Regarding the "condition" as a covenant, plaintiffs cannot recover.

Test Oil Co. v. La Tourette, 19 Okla. 214, 91 Pac. 1025; Long v. Cramer Meat & Packing Co. 155 Cal. 402, 101 Pac. 297; Los Angeles Terminal Land Co. v. Muir, 136 Cal. 36, 68 Pac. 308; Weller v. Brown, 160 Cal. 518, 117 Pac. 517; Anson, Contr. 2 Am. ed. p. 209; Second Nat. Bank v. Grand Lodge, F. & A. M. 98 U. S. 123-125, 25 L. ed. 75-77; Parker v. Jeffery, 26 Or. 189, 37 Pac. 712; Eaton v. Fairbury Waterworks Co. 37 Neb. 557, 21 L.R.A. 653, 40 Am. St. Rep. 510, 56 N. W. 201; Hennessey v. Bond, 23 C. C. A. 203, 48 U. S. App. 89, 77 Fed. 405; Boston Safe-Deposit & T. Co. v. Salem Water Co. 94 Fed. 240; Durnherr v. Rau, 135 N. Y. 222, 32 N. E. 49; Vrooman v. Turner, 69 N. Y. 284, 25 L.R.A. 1917F.

Am. Rep. 195; Foster v. Sykes, 23 Ala. 796; Boyer v. Tressler, 18 Ind. 260; Litchfield v. Garratt, 10 Mich. 426; Farmers' Bank v. Groves, 12 How. 51, 13 L. ed. 889; Mason v. Crosby, 3 Woodb. & M. 258, Fed. Cas. No. 9,236; Varnell v. McGinnis, 72 Ill. 445; Doran v. Shaw, 26 Ind. 284; Indianapolis Natural Gas Co. v. Kibbey, 135 Ind. 357, 35 N. E. 392, 17 Mor. Min. Rep. 677; Reynolds v. Louisville, N. A. & C. R. Co. 143 Ind. 579, 40 N. E. 410; Holandsworth v. Com. 11 Bush, 617; Gillis v. Nelson, 16 La. Ann. 275; Harris v. McKinley, 57 Minn. 198, 58 N. W. 991; Letorey v. Forstall, 27 La. Ann. 83; Cecil v. Rose, 17 Md. 92; Cahill v. Hall, 161 Mass. 512, 37 N. E. 573; Leo v. Green, 52 N. J. Eq. 1, 28 Atl. 904; Hardy v. Williams, 31 N. C. (9 Ired. L.) 177; Shattuck v. Smith, 5 Or. 125; Hall v. Hunton, 17 Vt. 244, 44 Am. Dec. 332; Denike v. De Graaf, 87 Hun, 61, 33 N. Y. Supp. 1015; Milton v. Story, 11 Vt. 101, 34 Am. Dec. 671; Thomas Mfg. Co. v. Prather, 65 Ark. 27, 44 S. W. 218; Heys v. Wilstach, 82 Ind. 13; Waycross Air-Line R. Co. v. Southern Pine Co. 115 Ga. 7, 41 S. E. 271; Lane v. Williams, 156 Cal. 269, 104 Pac. 301; Kruschke v. Quatsoc, 49 Colo. 312, 112 Pac. 769; Mallory v. Ferguson, 50 Kan. 685, 22 L.R.A. 99, 32 Pac. 410; Chung Kee v. Davidson, 73 Cal. 522, 15 Pac. 100; Buckley v. Gray, 110 Cal. 339, 31 L.R.A. 862, 52 Am. St. Rep. 88, 42 Pac. 900; Roddy v. Missouri P. R. Co. 104 Mo. 234, 12 L.R.A. 746, 24 Am. St. Rep. 333, 15 S. W. 1112; Winterbottom v. Wright, 10 Mees. & W. 109, 152 Eng. Reprint, 402, 11 L. J. Exch. N. S. 415; Alderson v. Cutting, 163 Cal. 503, 126 Pac. 157, Ann. Cas. 1914A, 1.

One who, with malicious motives, but without threats, violence, falsehood, deception, or benefit to himself, induces another to violate his contract, is not liable for damages.

Boyson v. Thorn, 98 Cal. 578, 21 L.R.A. 233, 33 Pac. 492; Swain v. Johnson, 151 N. C. 93, 28 L.R.A. (N.S.) 615, 65 S. E. 619; Guethler v. Altman, 26 Ind. App. 590, 84 Am. St. Rep. 313, 60 N. E. 355.

Plaintiffs' remedy is in equity to enjoin other grantees who are violating the condition.

3 Devlin, Deeds, §§ 968, 990e; Evans v. Foss, 194 Mass. 513, 9 L.R.A. (N.S.) 1039, 80 N. E. 587, 11 Ann. Cas. 171.

The plaintiffs cannot recover on the theory of an independent collateral agreement.

Gladding v. Montgomery, 20 Cal. App. 276, 128 Pac. 790; Kullman, S. & Co. v. Sugar Apparatus Mfg. Co. 153 Cal. 725, 93 Pac. 369; Bradford Invest. Co. v. Joost, 117 Cal. 204, 48 Pac. 1083; Sivers v. Sivers, 97 Cal. 518, 32 Pac. 571; Guidery v. Green,

95 Cal. 630, 30 Pac. 786; *Beall v. Fisher*, 95 Cal. 568, 30 Pac. 773; *Mowry v. Heney*, 86 Cal. 475, 25 Pac. 17; *Seitz v. Brewers' Refrigerating Mach. Co.* 141 U. S. 510, 36 L. ed. 837, 12 Sup. Ct. Rep. 46; *Board of Education v. Grant*, 118 Cal. 39, 50 Pac. 5; *Nouman v. Sutter County Land Co.* 81 Cal. 1, 6 L.R.A. 219, 22 Pac. 515; *McDonald v. Poole*, 113 Cal. 437, 45 Pac. 702; *Peabody v. Phelps*, 9 Cal. 228; *Naumburg v. Young*, 44 N. J. L. 331, 43 Am. Rep. 380; *Hord v. Montgomery*, 26 Ill. App. 41; *Boston & A. R. Co. v. Briggs*, 132 Mass. 24; *Fitch v. Seymour*, 9 Met. 462; *Scott v. Scott*, 70 Pa. 244.

Birchard, as agent with a limited authority, could not bind appellants by the alleged representations.

Blum v. Robertson, 24 Cal. 127; *Tiffany Agency*, p. 194; *Quay v. Presidio & F. R. Co.* 82 Cal. 5, 22 Pac. 925; *Frink v. Roe*, 70 Cal. 307, 11 Pac. 820.

Messrs. Street & Street and Charles del Bondio, for respondents:

The defendant, Southern Pacific Railroad Company sold all lots under the general scheme or plan that intoxicating liquors should not be sold in the town of Moron.

Burdell v. Grandi, 152 Cal. 376, 14 L.R.A. (N.S.) 909, 125 Am. St. Rep. 61, 92 Pac. 1022.

Plaintiffs having been induced to purchase because of the general plan or scheme of the railroad company and upon its representations and statements that no liquor should be sold within the limits of the town of Moron, this constituted a contract on the part of the railroad company with plaintiffs, that it would not permit or consent to the sale of intoxicating liquor within the town.

Musgrave v. Sherwood, 23 Hun. 669; *Tallmadge v. East River Bank*, 26 N. Y. 105; *Roberts v. Scull*, 58 N. J. Eq. 396, 43 Atl. 583; *Roper v. Williams*, 1 Turn. & R. 18, 37 Eng. Reprint, 990; *Peck v. Matthews*, L. R. 3 Eq. 515, 16 L. T. N. S. 991, 15 Week. Rep. 689; *San Leandro v. Le Breton*, 72 Cal. 174, 13 Pac. 405; *Lennig v. Ocean City Asso.* 41 N. J. Eq. 606, 56 Am. Rep. 16, 7 Atl. 491; *Bridgewater v. Ocean City R. Co.* 62 N. J. Eq. 276, 49 Atl. 801; *Williams v. Burrell*, 1 C. B. 402, 135 Eng. Reprint, 596, 14 L. J. C. P. N. S. 98, 9 Jur. 282; 11 Cyc. 1046; *De Gray v. Monmouth Beach Club House Co.* 50 N. J. Eq. 329, 24 Atl. 388.

The railroad company was liable to plaintiffs for the injuries and losses sustained by them because it consented to and permitted the sale of intoxicating liquors.

Shoemaker v. Acker, 116 Cal. 239, 48 Pac. 62; *Knoch v. Haizlip*, 163 Cal. 146, 124 Pac. 998; *Talbert v. Mason*, 136 Iowa, L.R.A.1917F.

373, 14 L.R.A.(N.S.) 878, 125 Am. St. Rep. 259, 113 N. W. 918; *Bigham v. Wabash-Pittsburg Terminal R. Co.* 223 Pa. 106, 72 Atl. 318.

The covenants in the deed show that the general scheme or plan that no intoxicating liquor should ever be sold or given away in the town of Moron is consistent with the deed or deeds, and is not inconsistent therewith, and does not purport to affect or vary the terms of the deed.

Sivers v. Sivers, 97 Cal. 521, 32 Pac. 571; *Savings Bank v. Asbury*, 117 Cal. 103, 48 Pac. 1081; *Pierce v. Edwards*, 150 Cal. 654, 89 Pac. 600; *Whittier v. Home Sav. Bank*, 161 Cal. 317, 119 Pac. 92; *Wehnes v. Roberts*, 92 Neb. 696, 139 N. W. 212, Ann. Cas. 1914A, 452; *Hines v. Willcox*, 96 Tenn. 148, 34 L.R.A. 824, 54 Am. St. Rep. 823, 33 S. W. 914; *Durkin v. Cobleigh*, 17 L.R.A. 270, note; *Cole v. Hadley*, 162 Mass. 579, 39 N. E. 279; *Drew v. Wiswall*, 183 Mass. 554, 67 N. E. 666; *Taylor v. Finnigan*, 189 Mass. 568, 2 L.R.A.(N.S.) 973, 76 N. E. 203; *Chapin v. Dobson*, 78 N. Y. 74, 34 Am. Rep. 512; *Rackemann v. Riverbank Improv. Co.* 167 Mass. 1, 57 Am. St. Rep. 427, 44 N. E. 990; *Hendrick v. Crowley*, 31 Cal. 471; *Bennett v. Solomon*, 6 Cal. 135; *Spear v. Ward*, 20 Cal. 659; *Moffatt v. Bulson*, 96 Cal. 107, 31 Am. St. Rep. 192, 30 Pac. 1022; *Aitchison v. Carruthers*, 161 Cal. 7, 118 Pac. 239; *Musgrave v. Sherwood*, 23 Hun. 669; *Tallmadge v. East River Bank*, 26 N. Y. 105; *Jersey Farm Co. v. Atlanta Realty Co.* 164 Cal. 412, 120 Pac. 593; *Kaufman v. All Persons*, 16 Cal. App. 388, 117 Pac. 586.

Shaw, J., delivered the opinion of the court:

Three appeals by the defendants are presented by the record, one from the judgment, a second from an order denying a new trial, the third from an order denying defendants' motion for a judgment on the findings. The judgment is against the Southern Pacific Railroad Company alone.

The complaint purports to state a cause of action for damages to plaintiffs' business and property, arising from the failure of the defendants to prevent the keeping of saloons and the sale of liquors in the town wherein the property of plaintiffs was situated. We will now state the allegations of fact upon which the claim is predicated.

The defendant Southern Pacific Railroad Company, being the owner of a tract of land in Kern county, laid it off into blocks, lots, and streets, called it the town of Moron, and filed a map thereof in the office of the county recorder on July 1, 1909. It then adopted and made public "a general scheme or plan" that no alcoholic liquors "should

ever be sold or kept for sale or given away upon any of the lands" situated within said town, and that no part thereof should be sold or conveyed except upon a covenant and condition inserted in the agreement or deed, as a part of its consideration, by the purchaser, his heirs, successors, or assigns, that no alcoholic liquors should ever be sold, kept for sale, or given away thereon, and that a breach of the condition should work a forfeiture and a reverter to said company. This general scheme or plan was carried out, and every deed and agreement of sale of every lot or parcel of land sold within said town contained the covenant and condition subsequent above stated. Said company, through its agents, engaged in the sale of said lots, "represented and stated to plaintiffs that it was the general scheme and plan of the defendants in laying out and platting said town of Moron that no intoxicating liquor should ever be sold or given away therein, and that no intoxicating liquor would ever be sold or given away therein," and that a covenant would be inserted in every deed and agreement of sale, as above stated. The plaintiff Charlotte E. Ayers is the real party in interest, C. W. Ayers being joined as plaintiff solely because he is her husband. Believing said representations and relying thereon, she bought seven lots in Moron. Believing that said liquor covenant was binding upon every purchaser of a lot, "and that defendants would enforce said covenants and not permit any purchaser or owner of any lot within said town of Moron to sell or give away any intoxicating liquors therein, and relying on said representations and statements of defendants," she erected a hotel on her said lots, furnished it, and on June 16, 1910, engaged in the hotel business therein, and has ever since continued in said business. In January and February, 1911, several saloons and a restaurant were established in said town by divers persons on lots sold by said company by deed containing the aforesaid covenants and conditions, and the business of selling intoxicating liquors has ever since been carried on in said saloons, in violation of said covenants and conditions, and with the "full knowledge, consent, and permission of said defendants." The said restaurant has been and is conducted as a place where intoxicating liquors are sold, and it has caused a loss of patronage to said plaintiff in her hotel dining room, to her damage in the sum of \$5,000. The saloons have caused people to leave plaintiff's hotel and patronize the saloons and restaurants aforesaid. By reason of said withdrawal of patronage from plaintiff's hotel she is unable to sell her property, and by reason of the keeping

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of said saloons plaintiff's property has depreciated in value to her damage in the sum of \$25,000. Defendants, though often requested by plaintiff so to do, have failed and refused to prohibit, stop, prevent, and enjoin said persons from selling intoxicating liquors in said town of Moron. The court below found these allegations to be true in the main, and assessed the plaintiff's damage from loss of patronage in her hotel at \$5,000, and from depreciation in the value of her property at \$15,000. The judgment was for \$20,000.

The charge that the defendant represented to plaintiff that it was its general plan that no intoxicating liquors should be sold in Moron and that the covenant to that effect should be inserted in each deed and agreement amounts to nothing as a basis for the action, for these were not false representations. The things occurred in accordance with the representations.

The only other representation was in regard to the future; that is, "that no intoxicating liquor would ever be sold or given away" in said town. Even if this be regarded as a promise rather than a prediction, and a promise which was not fulfilled, or of which performance was refused, it does not amount to fraud. The making of a promise does not constitute fraud unless it is made without any intention of performing it. Civ. Code, § 1572, subd. 4. "The mere failure to perform the covenant does not relate back to and render the same fraudulent." *Lawrence v. Gayetty*, 78 Cal. 131, 12 Am. St. Rep. 29, 17 Mor. Min. Rep. 169, 20 Pac. 384. It is not alleged that the so-called promise was made without any intention of performing it, nor even that it was made with intent to deceive or defraud the plaintiff, or to induce her to buy the property. Such allegations are necessary in pleading false representations as fraud. *Heller v. Dyerville Mfg. Co.* 116 Cal. 133, 47 Pac. 1016. The complaint cannot be sustained on the ground that it states a cause of action for damages produced by fraud or deceit. *Feeney v. Howard*, 79 Cal. 528, 4 L.R.A. 826, 12 Am. St. Rep. 162, 21 Pac. 984; *Woodroof v. Howes*, 88 Cal. 190, 26 Pac. 111.

The complaint does not allege that the statement "that no intoxicating liquor would ever be sold or given away" in the town of Moron was made as a promise or agreement. Literally the allegation means only that the defendant merely stated it as a fact that would occur or as a matter of opinion and prophecy. In neither case would such a statement constitute a binding contract or warranty that the future should be according to the prophecy or a basis for an action. *Rendell v. Scott*, 70

Cal. 514, 11 Pac. 779; *Holton v. Noble*, 83 Cal. 7, 23 Pac. 58; *Nounnan v. Sutter County Land Co.* 81 Cal. 6, 6 L.R.A. 219, 22 Pac. 515.

Conceding, however, that it may be taken as an allegation that the Southern Pacific Railroad Company thereupon entered into an undertaking or contract that no intoxicating liquor would ever be sold or given away in said town, we are met with the objection that there was no legal evidence to support the allegation. The only evidence offered consisted of declarations made by the agent of the railroad company to the plaintiffs at the time of making the sale to Mrs. Ayers of two of the lots. One S. C. Birchard was appointed by the Southern Pacific Railroad Company, as its agent, to effect the sale of the lots in Moron. His appointment was in writing. It authorized him to "make earnest and active effort to effect the sale of such lots at the prices and upon the terms, and subject to such agreements and conditions and restrictions as the railroad company may instruct."

The method of sale adopted was that each person desiring to purchase a lot should sign a written application to the railroad company to become such purchaser, the application would then be forwarded to the general office of the railroad company at San Francisco for approval, and, if approved, would be returned to Birchard. An agreement for the sale would then be prepared and signed by the railroad company and the purchaser, providing that upon payment of the price the railroad company would execute a deed to said purchaser. The forms of applications for purchase were prepared and printed by the railroad company, and were by it furnished to Birchard. The purchase by the plaintiff Charlotte E. Ayers of lots in Moron was made in this way. The application signed by the plaintiff was not introduced in evidence, and its contents do not appear in the record. There is no evidence that the undertaking alleged was contained therein, as indeed it could not be, since it was signed only by the purchaser. The agreement signed by both parties declared that, as a part of the consideration of the sale, it was made subject to the condition that no intoxicating liquor "shall ever be sold or kept for sale or given away upon said premises," upon the penalty of forfeiture and reversion of title to the company in case of a breach thereof, and that said condition and covenant should be written into the deed and should run with the land. These provisions were also inserted in the deed executed by the railroad company to the plaintiff in pursuance of said sale. Neither the agreement nor the

deed contained any stipulation or undertaking on the part of the railroad company that it would undertake to prevent the sale of intoxicating liquors forever, or at all, in the town of Moron. C. W. Ayers testified that Birchard, during the negotiations attending the sale, said "that there never would be any liquor sold in the town of Moron; that it was intended and purposed to be a dry town; that no liquor would be allowed to be sold under any circumstances by anybody."

This statement is the only evidence of the undertaking relied on. It was admitted over the objection of the defendants that Birchard had no authority to enter into such an agreement on behalf of the railroad company, and that it was incompetent to vary an agreement in writing by evidence of such declarations. That it was inadmissible over these objections is clear. It comes within the rule of § 1856 of the Code of Civil Procedure, that "when the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms," and therefore that between the parties "no evidence of the terms of the agreement other than the contents of the writing" can be given. The section states the exceptions to the rule. They are that parol evidence is admissible for some purposes where a mistake or imperfection in the writing is in issue, or its validity is in dispute, or where it is necessary to explain an extrinsic ambiguity, or to establish illegality or fraud. This case does not come within any of the exceptions.

The so-called agreement that sales of liquor should never take place in Moron was essentially a warranty regarding the permanent advantages of the property sold. Such a warranty, if made, would be a part of the contract of sale, and not collateral thereto. To justify the admission of parol evidence of a contract between parties who have made an agreement in writing, on the ground that it is collateral, it must be upon a subject distinct from that to which the writing relates. *Germain Fruit Co. v. J. K. Armsby Co.* 153 Cal. 594, 96 Pac. 319. Here the written agreement itself speaks on the subject of the sale of intoxicating liquors, and provides that none shall ever be sold on the premises described. To add to this provision the further stipulation that none should ever be sold in the entire town of Moron and that the railroad company should see that none were ever sold there, would be to add by parol to a written agreement which on its face purports to be complete upon that subject, and which, under § 1856, is presumed to embrace all the terms agreed on. Such evidence is in-

admissible. *Harrison v. McCormick*, 89 Cal. 330, 23 Am. St. Rep. 469, 26 Pac. 830; *Germain Fruit Co. v. J. K. Armsby Co.* supra; *Gardiner v. McDonogh*, 147 Cal. 319, 81 Pac. 964; *Empire Invest. Co. v. Mort*, 169 Cal. 739, 147 Pac. 960; *Johnson v. D. H. Bibb Lumber Co.* 140 Cal. 99, 73 Pac. 730.

The case does not come within the rule of such cases as *Sivers v. Sivers*, 97 Cal. 521, 32 Pac. 571, and *Whittier v. Home Sav. Bank*, 161 Cal. 317, 119 Pac. 92, cited by respondent, that evidence of a contract in parol may be given if it is upon a subject upon which the contract is silent. The contract was not silent on the subject. The conversation itself, in which the declaration is said to have been made, covered the conditions actually inserted in the agreement, as well as the stipulation claimed to have been made by parol. The presumption is conclusive that, by signing the agreement afterwards executed and containing no such stipulation, the parties finally determined not to insist on that stipulation.

It is also clear that Birchard had no authority to make such an agreement for the railroad company. His authority was in writing, and it not only did not authorize

him to make such an agreement, but limited his power in that regard to such terms and conditions as the principal should instruct him to make. While it may be that the authority simply to make sales would include power to make the ordinary covenants and stipulations usually included in an agreement of sale, as to which we express no opinion, it cannot be that it would give power to make such an extraordinary and unheard of agreement as that here claimed, an agreement to forever prevent any and all sales of intoxicating liquors by any and all persons, within the area of a town, whether incorporated or not,—an undertaking which the state itself, with all its sovereign powers over its inhabitants, is unable to carry out. Such power could not be implied from the mere appointment of an agent to sell land.

Our conclusion is that the judgment is not sustained by the evidence.

The judgment and orders appealed from are reversed.

We concur: Sloss, J.; Lawler, J.

Petition for rehearing denied August 14, 1916.

Annotation—Implied or ostensible authority of an agent to bind his principal by covenants in the sale of real property.

The implied or ostensible authority of an agent for the sale of land as to representation is discussed in the note to *Hodson v. Wells & D. Co.* post, 962.

The implied or ostensible authority of an agent for the sale of personal property to warrant the same is discussed in the note to *Nixon Min. Drill Co. v. Burke*, L.R.A.1916C, 412.

The covenants most frequently considered by the courts have been covenants of general warranty. The courts are not agreed as to whether an agent authorized to bind his principal by a contract to convey, or to convey himself, is authorized to contract for, or include in his conveyance, covenants of general warranty.

The courts are not always clear as to the sense in which the expression, "covenants of general warranty," is used. It seems clear in some cases, at least, that the expression is used to include the covenants usually found in what is commonly called a warranty deed, although a warranty deed usually includes covenants other than those of general warranty.

It is the theory of some courts that power to contract for the sale of, or to L.R.A.1917F.

sell and convey, lands with no restrictions, gives power to include covenants in the executory contract or the conveyance as the case may be. In *Jasper v. Wilson* (1908) 14 N. M. 482, 23 L.R.A.(N.S.) 982, 94 Pac. 951, authority conferred on a real estate broker to make a binding contract for the sale of land is held to include power to bind the grantor to execute covenants of general warranty. It was sought to show a custom or usage to execute a deed of general warranty, but the proof was unsatisfactory. The court states that, "assuming that there was no sufficient proof of custom or usage, or assuming that usage or custom was inadmissible as supplementing the power, still we believe that the great weight of authority is to the effect that a power to sell and make a binding contract of sale implies a power to contract for a conveyance with general warranty." It is stated obiter in *Backman v. Charlestown* (1860) 42 N. H. 125, that "a power to sell and convey land with no restriction gives power to convey with warranty."

Some cases which hold that an agent for the sale of property is empowered to

bind his principal by covenants of general warranty do so on the theory that such covenants are common and usual in the conveyance of property. It is stated obiter in *Schultz v. Griffin* (1890) 121 N. Y. 294, 18 Am. St. Rep. 825, 24 N. E. 480, that the great preponderance of authority now is that a power without restriction to sell and convey real estate gives authority to the agent to deliver deeds with general warranty binding on the principal, where under the circumstances this is the common and usual mode of assurance, thus disapproving of the holding in *Nixon v. Hyserott* (1809) 5 Johns. (N. Y.) 58, *infra*. The court in *Peters v. Farnsworth* (1843) 15 Vt. 155, 40 Am. Dec. 671, while referring to the power of the agent to execute such covenants as are usual, seems to base that decision upon the broad authority conferred in the power of attorney. See *infra* as to discussion of this case.

See *Taggart v. Stanbery* (1841) 2 McLean, 543, Fed. Cas. No. 13,724, *infra*. See *Le Roy v. Beard* (1850) 8 How. (U. S.) 451, 12 L. ed. 1151, *infra*.

Some courts have taken the view that covenants of general warranty are required under a contract to convey which is silent as to form of conveyance. Hence, if an agent is empowered to contract to convey, he may bind his principal by an agreement to convey by covenants of general warranty. Thus, an agent empowered to sell certain property was held empowered to bind his principal by a contract to convey by a deed of general warranty in *Vanada v. Hopkins* (1829) 1 J. J. Marsh. (Ky.) 285, 19 Am. Dec. 92. As just stated, this decision is based largely upon the theory that a contract to convey without any stipulation as to the form of the deed requires a warranty deed. The court states: "We cannot give it less effect than to authorize Hopkins, in consideration of the sum which the purchaser made promise to pay, to give a title bond in the name of Alves, binding him on the payment of the money to make a sufficient title. What kind of deed or conveyance would such a bond require? . . . It would be a deed with general warranty. . . . The power of attorney did authorize Hopkins to stipulate for the conveyance of the legal estate. If Alves did not intend to go that far, he was vesting a colorable power in Hopkins, by which to deprive men of their money without responsibility on his part; no one would so understand the power from its gen-

eral tenor and language. Hopkins, having power to contract for the conveyance of the legal title, had therefore authority to stipulate for a conveyance by deed with general warranty. Such would have been the legal result without an express stipulation to that effect, had his contract with Vanada and Winpee only covenanted to convey the legal title." This case is cited with approval in *Farrell v. Edwards* (1896) 8 S. D. 425, 66 N. W. 812, but it is not clear that there was any question in the *Farrell Case* as to the power of the agent to bind his principal to convey by a warranty deed.

Other courts hold that an agent who has a mere power of sale is not empowered to bind his principal by a contract to convey by deed of general warranty; nor is he empowered to execute a conveyance containing covenants of general warranty. In *Howe v. Harrington* (1867) 18 N. J. Eq. 495, it is held that an agent acting under a power of attorney authorizing him only to sell and convey, and containing no authority to covenant, is not empowered to bind his principal by covenant of general warranty. It was accordingly held in this case that the deed must be considered as a deed of bargain and sale without covenant; therefore that it would not, by way of estoppel, pass an after-acquired title of the grantor. The principal was held not bound by covenants of warranty contained in a deed executed by an attorney in fact, in *Chaison v. Beauchamp Bros.* (1896) 12 Tex. Civ. App. 109, 34 S. W. 303. The power of attorney in this case is not set out.

Some courts, in holding that power to sell does not authorize an agent to contract to convey by warranty deed, take a position directly contrary to those above, as to what kind of a conveyance one who has contracted to convey without specifying the kind of conveyance is bound to execute. In *Stengel v. Sergeant* (1908) 74 N. J. Eq. 20, 68 Atl. 1106, it is held that a purchaser under an agreement to convey, while he is entitled to a clear title, is not entitled to covenants of warranty unless the vendor has so stipulated. Accordingly, a broker who has authority merely to sell cannot bind his principal by an agreement to sell with full covenants of warranty. In *Spengler v. Sonnenberg* (1913) 88 Ohio St. 192, 52 L.R.A. (N.S.) 510, 102 N. E. 737, Ann. Cas. 1914D, 1083, real estate brokers authorized to sell lands and enter into a written contract with the purchaser are held not

to have implied authority to agree to convey by warranty deed, since a vendor is under no obligation, in the absence of express provision, to furnish such a deed. In *Nixon v. Hyserott* (1809) 5 Johns. (N. Y.) 58, an attorney authorized to sell and to execute such conveyances and assurances in law as should or might be needful or necessary, according to the judgment of the said attorney, was held to have no authority to bind his principal by covenant. A conveyance or assurance is stated to be good and perfect without either warranty or personal covenant, and therefore they are not necessarily implied in an authority to convey. It is further stated that an authority is to be strictly pursued, and an act varying in substance from it is void. Accordingly, a grantee in the deed executed by the agent was held to have no right of action against the grantor on the covenant. The deed is stated to have contained the "usual covenants of seisin, etc." But see *Schultz v. Griffin* (N. Y.) *supra*.

The implied power of an agent as to covenants depends to a large extent upon the character of the express power conferred. Variations in the express power are given considerable weight in the determination of the implied power. In some cases the power to bind the principal by covenants is determined because of special circumstances in conferring the express power. In *Peterson v. Church* (1905) 16 Haw. 739, an action by a real estate broker to recover for his services, the broker was held to have exceeded his authority in attempting to bind his principal to convey by a warranty deed, where the principal, in the letter conferring the authority to sell, mentioned a mortgage and stated that this would of necessity have to be assumed by any purchaser, and offered to sell for a cash price which took into consideration the assumption by the purchaser of the mortgage. In *Yazel v. Palmer* (1878) 88 Ill. 597, an agent to whom land had been conveyed by a husband and wife without covenant of warranty, under an agreement that the agent should sell the same for the benefit of the wife, is not authorized to make a covenant binding the wife. A purchaser who entered into a contract with an agent who attempted to bind his principal to convey the land "in fee simple, and with a perfect title free from all encumbrances," was held not entitled to relief against the principal, who had authorized his agent to sell the

land subject to a lease thereon, in an action of specific performance. In *Thomas v. Joslin* (1883) 30 Minn. 388, 15 N. W. 675.

The general tenor of the agent's authorization may broaden his implied powers. Thus, in *Bronson v. Coffin* (1875) 118 Mass. 156, the court, after stating that a naked power to sell land may not give the attorney power to bind the principal by any covenant, states that the power of attorney "in this case is broader than a mere power to sell. It gives the attorney power to sell and to make all necessary deeds of conveyance, to pay the taxes, to make leases, to appear in and defend suits, to submit to arbitration any matter respecting the estate, and generally to do any acts in relation to the estate which the interest of the principals required. It seems to have been the intention of the principals to intrust the management and disposal of their estate to the attorney, and to authorize him to make such deeds and to do such acts as in his judgment would be most for their benefit. We think he was authorized to give the deed to the plaintiff, which is in the form usually adopted in conveying real estate and contains the usual covenants." The instrument appointing the agent was a general power of attorney and gave to him power "to sell and convey any and all the real estate belonging to us situated in . . . and all our respective rights, title, and interest in and to any and all said real estate, and to make, execute, and deliver all necessary deeds of conveyance of the same." The instrument then empowered the agent to pay taxes, lease the estate, etc., as recited above. In *Peters v. Farnsworth* (1843) 15 Vt. 153, 40 Am. Dec. 671, an attorney was held empowered to bind his principal by covenants of seisin and warranty, and therefore not to be personally liable in an action by the purchaser, who had been ejected from the premises. The letter of attorney authorized the agent to do all that was necessary in relation to certain tracts of land, to obtain possession and to "sell for the best prices, either by public auction or private contract, as he might think most advantageous. And upon sale thereof or any part thereof, and on receipt of the money arising from such sale or sales, to give sufficient releases, acquittances, and discharges for the same, and to sign, seal, and execute all or any such contracts, agreements, conveyances, and assurances, and to do and perform all

such acts and things for perfecting such sale or sales thereof, or any part thereof, as shall be requisite and necessary in that behalf." The power of attorney involved in *Le Roy v. Beard* (1850) 8 How. (U. S.) 451, 12 L. ed. 1151, empowered the agent "to contract for the sale of, and to sell, either in whole or in part, the land and real estate so purchased by the said Starr," and "on such terms in all respects as the said Starr shall deem most advantageous." It further authorized the agent to execute "deeds of conveyance necessary for the full and perfect transfer of all our respective right, title," etc., "as sufficiently in all respects as we ourselves could do personally in the premises," and further authorized the agent to sell "on such terms in all respects as he may deem most eligible." It was held under this power of attorney to be within the authority of the agent to enter into a covenant of seisin. The court, after referring to the power of attorney, states that it would be difficult "to select language stronger than this to justify the making of covenants without specifying them *eo nomine*. When this last is done, no question as to the extent of the power can arise, to be settled by any court. But when, as here, this last is not done, the extent of the power is to be settled by the language employed in the whole instrument, . . . aided by the situation of the parties and of the property, the usages of the country on such subjects, the acts of the parties themselves, and any other circumstance having a legal bearing and throwing light on the question."

In *Taggart v. Stanbery* (1841) 2 McLean, 543, Fed. Cas. No. 13,724, an agent authorized to sell and convey lands of his principal in as full and ample a manner as could be done by the principal was held empowered to convey by a deed of general warranty. The court refers to the case of *Nixon v. Hyserott* (1809) 5 Johns. (N. Y.) 58, and states that between that case and the one under consideration a distinction may be drawn, but that doubts "are entertained whether that case is sustainable on principle or authority." It is stated that in the *Nixon* Case there was not merely an authority given to convey, but to make such conveyances and assurances as might be needful or necessary in the judgment of the attorney; that a bona fide exercise of the attorney's judgment should have been held to bind the principal. The court, in discussing the general principles

which govern the implied powers of the agent, states that the intention of the parties must be the guide, and concludes that, it appearing that the agent was authorized to convey the lands in as full and ample a manner as the principal himself could convey them, the parties must have understood this power as authorizing a conveyance with warranty in pursuance of the general practice of the country. The objection in this case was not made by the principal however, but was made by the purchaser in an action by the vendor to recover a part of the purchase price. On this point the court states that "the grantee accepted the deed, being satisfied with its covenants and with the power of the agent to make it. It is unnecessary to inquire whether the power of attorney was before the defendant when he accepted of the deed. He had a right to inspect it, and having taken the deed, he must be presumed to have been satisfied with the power."

The general power of attorney involved in *Johnson v. Knapp* (1868) 146 Mass. 70, 15 N. E. 134, authorized the agent to "make, execute, acknowledge, and deliver good and sufficient deeds and conveyances of the same, either with or without covenants of warranty." This power of attorney was held to authorize the agent to insert a covenant against encumbrances in a deed.

In *Beheret v. Myers* (1911) 240 Mo. 58, 144 S. W. 824, an agent who has authority to contract for a satisfactory deed is held to have power to contract for a warranty deed. The court states that "warranty deeds are usual deeds; quitclaim deeds are exceptional."

The covenant involved may be such as the law implies and therefore within the power of the agent. An agent for the sale of lots, who had agreed to convey a title free from all liens and encumbrances, including certain paving, sewer, and city taxes which were then liens on the property, was held to have agreed to no more than the law requires the vendor of land to do. Accordingly, the owner was held liable by the agreement. *Malloy v. Foley* (1912) 155 Iowa, 447, 133 N. W. 778, 136 N. W. 131. An agent for the sale of public land was held not to have exceeded his authority in making a deed with a warranty against persons claiming under the commonwealth, in *Ward v. Bartholomew* (1828) 6 Pick. (Mass.) 409. The court states that such a warranty is only the effect of a sale without any covenant. It is the view of the court

in *McLaughlin v. Wheeler* (1891) 1 S. D. 497, 47 N. W. 816, that the law requires a vendor to furnish a good title. Accordingly, it is stated that if the owners of real estate employ an agent to find a purchaser, such agent has authority to contract to convey a good title, as this undertaking adds no obligation not imposed by law upon the seller.

In *Keim v. Lindley* (1895) — N. J. —, 30 Atl. 1063, an action for specific performance of a contract to convey land, an agent authorized generally to execute a contract for the sale of land was held not to have acted in excess of his authority by inserting in the contract a provision that the title should be free and clear.

The power of the agent to bind the principal by a covenant may be expressly negatived. A principal was held not bound by what is termed a "guaranty" contained in a deed of conveyance, where the power of attorney expressly provided that the attorney should not bind the principal by any covenants of warranty whatever. In *Williamson v. Davey* (1908) 52 Tex. Civ. App. 353, 114 S. W. 195. In *Robinson v. Lowe* (1901) 50 W. Va. 75, 40 S. E. 454, it is stated that, while a principal who had authorized an attorney in fact to make a quitclaim deed would not be bound by the warranty contained in a deed of general warranty executed by the agent, the deed certainly divested the principal of the title.

The covenant in *AYERS v. SOUTHERN P. R. Co.* ante, 949, was an unusual one. It is the theory of the court that a mere authority to make sales does not empower the agent to make such an unusual agreement. Few covenants of unusual character have been the subject of adjudication so far as the power of an agent to make them was concerned.

In *Anderson v. American Suburban Corp.* (1911) 155 N. C. 131, 36 L.R.A. (N.S.) 896, 71 S. E. 221, a corporation engaged in placing a tract of land on the market as building lots was held not entitled to repudiate promises made by its authorized agents as to improvements to be placed on the tract while retaining the benefit of the contract made in reliance thereof, especially where, by its advertisement, it implied that the promises were authorized.

It is stated in *Noftager v. Barkdoll* (1897) 148 Ind. 531, 47 N. E. 960, that one authorized by the owner of land to receive proposals for the sale thereof, and to act as the owner's agent in negotiations for sales of the property, but not authorized to make a contract of sale without the consent of the owner, cannot bind the owner by a statement to the effect that adjoining lots owned by the vendor would not be fenced, and that the purchaser and his customers could pass on and across said lots until they were fenced. It is further stated, however, in this case, that if the agent had been the owner of the lots, and if what he said was sufficient to amount to a license to the purchaser to pass over the lot, it was revocable at pleasure.

An agent authorized to sell land for a certain stated price, who sold for a less price and agreed to pay the taxes for the year in which the sale was made and the subsequent year, was held not to have acted within the scope of his authority, and therefore not to have bound his principal, in *Holbrook v. McCarthy* (1882) 61 Cal. 216.

It is stated in *McMillan v. Hutcheson* (1868) 4 Bush (Ky.) 611, that a conveyance by an agent is not voidable because it binds the principal by a less extensive warranty than the power might have authorized. W. A. E.

NORTH DAKOTA SUPREME COURT.

JOHN A. HODSON, Respt.,

v.

WELLS & DICKEY COMPANY, Appt.

(31 N. D. 395, 154 N. W. 193.)

Principal and agent — sale of real estate — representations — binding effect.

Defendants appointed one Weese, a sales solicitor, to obtain purchaser for real estate in North Dakota under contract set

forth in the opinion, and which contract contained the following clause: "No advertisement or other representations on your part that you are for any purposes an agent of said company will be permitted, the term 'sales solicitor' being invariably used; and any violation of this provision shall of itself revoke this appointment and terminate your authority thereunder."

Plaintiff alleges that Weese induced him

Note. — For implied or ostensible authority of agent for the sale of land as to representations, see annotation following this case, post, 962; and see references therein for annotation on related questions.

to purchase land by false representations as to its quality and value. Held, for reasons stated in the opinion, that the action will not lie, as it was not within the scope of the authority of Weese to make any representations as to the quality or value of the land.

For other cases, see Principal and Agent, II. in Dig. 1-52 N. S.

(July 2, 1915.)

APPEAL by defendant from a judgment of the District Court for Stutsman County in plaintiff's favor in an action brought to recover damages for alleged false representations of defendant's agent as to quality and value of land purchased by plaintiff of defendant. Reversed.

The facts are stated in the opinion.

Messrs. Watson & Young and E. T. Conmy, for appellant:

The statements relied upon to show fraud and deceit in inducing plaintiff to purchase the land in question are not actionable, being merely "words of praise," "dealers' talk," and "puffing."

Kerr, Fr. & Mistake, p. 84; Van Horn v. Keenan, 28 Ill. 448; Miller v. Craig, 36 Ill. 111; Vernon v. Keys, 12 East, 632, 104 Eng. Reprint, 246; Noetling v. Wright, 72 Ill. 391; Miller v. Craig, 36 Ill. 111; Mayo v. Wahlgreen, 9 Colo. App. 506, 50 Pac. 43; Buxton v. Jones, 120 Mich. 522, 79 N. W. 980; Stevens v. Alabama State Land Co. 121 Ala. 450, 25 So. 995; Moore v. Turbeville, 2 Bibb. 602, 5 Am. Dec. 642; 20 Cyc. 51-54; Bossingham v. Syck, 118 Iowa, 192, 91 N. W. 1047; Else v. Freeman, 72 Kan. 666, 83 Pac. 409; Wightman v. Tucker, 50 Ill. App. 75; Crown v. Carriger, 66 Ala. 590; Ott v. Pace, 43 Mont. 82, 115 Pac. 37; Saunders v. Hatterman, 24 N. C. (2 Ired. L.) 32, 37 Am. Dec. 404; Brown v. Bledsoe, 1 Idaho, 746; Tretheway v. Hulett, 52 Minn. 448, 54 N. W. 486; Parker v. Moulton, 114 Mass. 99, 19 Am. Rep. 315; Davis v. Reynolds, 107 Me. 61, 77 Atl. 409; Armstrong v. White, — Ind. App. —, 34 N. E. 847; Lake v. Security Loan Asso. 72 Ala. 207; Williams v. McFadden, 23 Fla. 143, 11 Am. St. Rep. 345, 1 So. 618; Cagney v. Cuson, 77 Ind. 494; Hartman v. Flaherty, 80 Ind. 472; Shade v. Creviston, 93 Ind. 591; Picard v. McCormick, 11 Mich. 68; Doran v. Eaton, 40 Minn. 35, 41 N. W. 244; Union Nat. Bank v. Hunt, 76 Mo. 439; Heald v. Yumisko, 7 N. D. 428, 75 N. W. 806; Beare v. Wright, 14 N. D. 26, 69 L.R.A. 409, 103 N. W. 632, 8 Ann. Cas. 1057; Heyrock v. Surerus, 9 N. D. 28, 81 N. W. 36; Dowagiac Mfg. Co. v. Mahon, 13 N. D. 516, 101 N. W. 903.

Where a vendee has had an opportunity to see and inspect a piece of land, he can-

not later be heard to complain that he has been deceived as to its character and value.

Harvey v. Smith, 17 Ind. 272; 20 Cyc. 32; Moore v. Turbeville, 2 Bibb. 602, 5 Am. Dec. 642; Morrill v. Madden, 35 Minn. 493, 29 N. W. 193, 37 Minn. 282, 34 N. W. 25; Anderson v. McPike, 86 Mo. 293; Fisher v. Dillon, 62 Ill. 379; Buxton v. Jones, 120 Mich. 522, 79 N. W. 980; Realty Invest. Co. v. Shafer, 91 Neb. 798, 137 N. W. 873; Long v. Warren, 68 N. Y. 426; Brown v. Smith, 109 Fed. 26; Scott v. Walton, 32 Or. 460, 52 Pac. 180; Lee v. McClelland, 120 Cal. 147, 52 Pac. 300; Peak v. Gore, 94 Ky. 533, 23 S. W. 356; Woodson v. Winchester, 16 Cal. App. 472, 117 Pac. 565; Fisher v. Dillon, 62 Ill. 379; McKibbin v. Day, 71 Neb. 280, 98 N. W. 845; Long v. Kendall, 17 Okla. 70, 87 Pac. 670; Francois v. Cady Land Co. 149 Wis. 115, 135 N. W. 484; Saunders v. Hatterman, 24 N. C. (2 Ired. L.) 32, 37 Am. Dec. 404; Parker v. Moulton, 114 Mass. 99, 19 Am. Rep. 315; Shephard v. Goben, 142 Ind. 318, 39 N. E. 506; Long v. Warren, 68 N. Y. 426; Wren v. Moncure, 95 Va. 369, 28 S. E. 588; Wright v. Boltz, 87 Ark. 567, 113 S. W. 201.

The statements relied upon to show fraud and deceit are statements made without the scope of the agent's authority and are not binding in any way on this defendant.

Merritt v. Wassenich, 49 Fed. 785; Roberts v. Rumley, 58 Iowa, 301, 12 N. W. 323; Wharton, Agency, § 163; Rice v. Peninsular Club, 52 Mich. 87, 17 N. W. 708; Chaffe v. Stubbs, 37 La. Ann. 656; Rust v. Eaton, 24 Fed. 830; Reitz v. Martin, 12 Ind. 306, 74 Am. Dec. 215; Hurley v. Watson, 68 Mich. 531, 36 N. W. 726; Snow v. Warner, 10 Met. 132, 43 Am. Dec. 417; Story, Agency, §§ 126, 138 and note; Dickinson County v. Mississippi Valley Ins. Co. 41 Iowa, 286; Beringer v. Meanor, 85 Pa. 223; Weise's Appeal, 72 Pa. 351; Dozier v. Freeman, 47 Miss. 647; Davidson v. Porter, 57 Ill. 300; Mechem, Agency, § 137; Plano Mfg. Co. v. Root, 3 N. D. 165, 54 N. W. 924; Reese v. Medlock, 27 Tex. 120, 84 Am. Dec. 611; Henry v. Lane, 62 C. C. A. 625, 128 Fed. 250; State, Decker, Prosecutor, v. Fredericks, 47 N. J. L. 469, 1 Atl. 470; Titus & Scudder v. Cairo & F. R. Co. 46 N. J. L. 393; Dyer v. Duffy, 39 W. Va. 148, 24 L.R.A. 339, 19 S. E. 540; Advance Thresher Co. v. Roger, 123 La. 1067, 49 So. 709; Americus Oil Co. v. Gurr, 114 Ga. 624, 40 S. E. 780; Seibold v. Davis, 67 Iowa, 560, 25 N. W. 778; Monson v. Kill, 144 Ill. 248, 33 N. E. 43; Brown v. Grady, 16 Wyo. 151, 92 Pac. 622; Bowles v. Rice, 107 Va. 51, 67 S. E. 575; Batty v. Carswell, 2 Johns. 48; Schaeffer v. Mutual Ben. L. Ins. Co. 38 Mont. 459, 100 Pac. 225;

Devinney v. Reynolds, 1 Watts & S. 328; National Union F. Ins. Co. v. John Spry Lumber Co. 235 Ill. 98, 85 N. E. 256; Williams v. Kerrick, 105 Minn. 254, 116 N. W. 1026; Tondro v. Cushman, 5 Wis. 279; Kelly v. Troy F. Ins. Co. 3 Wis. 254; Samson v. Beale, 27 Wash. 557, 68 Pac. 184; 31 Cyc. 1363, 1364; Lansing v. Coleman, 58 Barb. 619; Court v. Snyder, 2 Ind. App. 440, 50 Am. St. Rep. 247, 28 N. E. 718; Daniels v. Bruce, — Ind. App. —, 93 N. E. 675; Dodd v. Farlow, 11 Allen, 426, 87 Am. Dec. 726.

The extent of a real estate broker's, or sales solicitor's, authority is limited simply to the procuring of purchasers for the land.

Larson v. Newman, 19 N. D. 153, 23 L.R.A. (N.S.) 849, 121 N. W. 204; Ballou v. Bergvndsen, 9 N. D. 289, 83 N. W. 10; Brandrup v. Britten, 11 N. D. 376, 92 N. W. 453; Plano Mfg. Co. v. Root, 3 N. D. 165, 54 N. W. 924.

The statements relied upon to show fraud and deceit were made, if at all, by one Weese, a subagent duly appointed by this defendant, who was the agent for one Charles E. Gibson, the owner of the land in question; and the principal alone, if anybody, is liable for the acts and statements of the subagent.

Kuhnert v. Angell, 10 N. D. 59, 88 Am. St. Rep. 675, 84 N. W. 579; Mechem, Agency, §§ 193, 197; 1 Am. & Eng. Enc. Law, 981; Barnard v. Coffin, 141 Mass. 37, 55 Am. Rep. 443, 6 N. E. 364; Renwick v. Bancroft, 56 Iowa, 527, 9 N. W. 367; Nelson v. Title Trust Co. 52 Wash. 258, 100 Pac. 730; Eastland v. Maney, 36 Tex. Civ. App. 147, 81 S. W. 574; Fritz v. Chicago Grain & Elevator Co. 136 Iowa, 699, 114 N. W. 193; Williams v. Moore, 24 Tex. Civ. App. 402, 58 S. W. 953; Renwick v. Bancroft, 56 Iowa, 527, 9 N. W. 367; McKinnon v. Vollmar, 75 Wis. 82, 6 L.R.A. 121, 17 Am. St. Rep. 178, 43 N. W. 800; Clark & S. Agency, § 345, (d) p. 377; Bound v. Simkins, — Tex. Civ. App. —, 151 S. W. 573; National Bank v. Johnson, 6 N. D. 180, 69 N. W. 49; Davis v. King, 66 Conn. 465, 50 Am. St. Rep. 104, 34 Atl. 107; Schloss Bros. & Co. v. Gibson Dry Goods Co. 6 Ala. App. 155, 60 So. 436; Michael v. Crawford, — Tex. Civ. App. —, 150 S. W. 465; Tippecanoe Loan & T. Co. v. Jester, 180 Ind. 357, L.R.A.1915E, 721, 101 N. E. 915; Wright v. Isaacks, 43 Tex. Civ. App. 223, 95 S. W. 55; Breck v. Meeker, 68 Neb. 99, 93 N. W. 993; 31 Cyc. 1427; Calhoon v. Buhre, 75 N. J. L. 439, 67 Atl. 1068; Bank of California v. Western U. Teleg. Co. 52 Cal. 280; Gum v. Equitable Trust Co. 1 McCrary, 51, Fed. Cas. No. 5,867; Corcoran v. Hinkel, 4 Cal. Unrep. 360, 34 Pac. 1031; Davis v. King, 66 Conn. 465, 50 Am. St. Rep. 104, L.R.A.1917F.

34 Atl. 107; Fanset v. Garden City State Bank, 24 S. D. 248, 123 N. W. 686; Fairchild v. King, 102 Cal. 320, 36 Pac. 649; Smith v. National Bank, 191 Fed. 226.

There is nothing in the record by which a jury is warranted in finding the statements of Weese were fraudulently made, or made with intent to deceive this plaintiff.

20 Cyc. 24-27; Miller v. Howell, 2 Ill. 499, 32 Am. Dec. 37; Tone v. Wilson, 81 Ill. 529; Weatherford v. Fishback, 4 Ill. 175; Owings v. Thompson, 4 Ill. 502; Anderson v. McPike, 86 Mo. 293; Nelson v. Minneapolis Street R. Co. 61 Minn. 167, 63 N. W. 486; Stubbs v. Johnson, 127 Mass. 219; Kelly v. Pioneer Press Co. 94 Minn. 448, 103 N. W. 330; Brown v. Bledsoe, 1 Idaho, 746.

Messrs. M. O. Freerks and Buck & Jorgenson, for respondent:

Plaintiff had a cause of action for deceit.

Fargo Gas & Coke Co. v. Fargo Gas & E. Co. 4 N. D. 219, 37 L.R.A. 593, 59 N. W. 1066; Roberts v. Holliday, 10 S. D. 576, 74 N. W. 1034; Hunt v. Barker, 22 R. I. 18, 84 Am. St. Rep. 812, 46 Atl. 46; Tacoma v. Tacoma Light & Water Co. 17 Wash. 458, 50 Pac. 55; Speed v. Hollingsworth, 54 Kan. 436, 38 Pac. 406; Sockman v. Kiem, 19 N. D. 317, 124 N. W. 64; Luncheon v. Wocknitz, 21 S. D. 285, 111 N. W. 632; McCabe v. Desnoyers, 20 S. D. 581, 108 N. W. 341; Liland v. Tweto, 19 N. D. 551, 125 N. W. 1032; Beare v. Wright, 14 N. D. 26, 69 L.R.A. 409, 103 N. W. 632, 8 Ann. Cas. 1057; Chilson v. Houston, 9 N. D. 503, 84 N. W. 354; Gustafson v. Rustemeyer, 70 Conn. 125, 39 L.R.A. 644, 66 Am. St. Rep. 92, 39 Atl. 104; Andrew D. Meloy & Co. v. Donnelly, 119 Fed. 458; Shelton v. Healey, 74 Conn. 265, 50 Atl. 742; Lovejoy v. Isbell, 73 Conn. 368, 47 Atl. 682.

Defendant is liable for the statements and representations of Mr. Weese.

Union Trust Co. v. Phillips, 7 S. D. 225, 63 N. W. 903; Wyckoff v. Johnson, 2 S. D. 91, 48 N. W. 837; Joslin v. Miller, 14 Neb. 91, 15 N. W. 214; Kickland v. Menasha Wooden Ware Co. 68 Wis. 34, 60 Am. Rep. 831, 31 N. W. 471; Elwell v. Chamberlin, 31 N. Y. 619; Butler v. Maples, 9 Wall. 766, 19 L. ed. 822; Judd v. Walker, 114 Mo. App. 128, 89 S. W. 558; People v. Terwilliger, 59 Misc. 617, 110 N. Y. Supp. 1034; Darks v. Scudder-Gale Grocer Co. 146 Mo. App. 246, 130 S. W. 430; Concord Bank v. Gregg, 14 N. H. 331; Clogston v. Martin, 182 Mass. 469, 65 N. E. 839; Reynolds v. Mayor, L. & Co. 39 App. Div. 218, 57 N. Y. Supp. 106; Green v. Des Garets, 210 N. Y. 79, 103 N. E. 964, reversing judgment in 146 App. Div. 956, 131 N. Y. Supp. 1118; Dzuris v. Pierce, 216 Mass. 132, 103 N. E. 296; Foix v. Moeller, — Tex. Civ. App. —,

159 S. W. 1048; *Sargent v. Barnes*, — Tex. Civ. App. —, 159 S. W. 366; *Kleine Bros. v. Gidcomb*, — Tex. Civ. App. —, 152 S. W. 462; *Haynor-Mfg. Co. v. Davis*, 147 N. C. 267, 17 L.R.A.(N.S.) 193, 61 S. E. 54; *Feil v. Northwest German Farmers Mut. Ins. Co.* 28 N. D. 355, 149 N. W. 358; *Akin v. Johnson*, 28 N. D. 203, 148 N. W. 535.

Weese was an instrumentality of the defendant company, and his acts were the acts of that company to the same extent as if the work that was done by him had been accomplished by a machine belonging to the defendant.

Munroe v. Adamo, 136 Ky. 252, 124 S. W. 296; *Jewell v. Colonial Theater Co.* 12 Cal. App. 681, 108 Pac. 527; *Leterman v. Charlottesville Lumber Co.* 110 Va. 769, 67 S. E. 281; *Pierce v. State Nat. Bank*, 25 Okla. 44, 105 Pac. 195; *Whitney v. Woodmansee*, 15 Idaho, 735, 99 Pac. 968; *Eddy v. American Amusement Co.* 9 Cal. App. 624, 90 Pac. 1115; *Fitzpatrick v. Manheimer*, 157 Mich. 307, 122 N. W. 83; *National German American Bank v. Lang*, 2 N. D. 71, 40 N. W. 414.

Burke, J., delivered the opinion of the court:

Plaintiff is a resident of Indiana, fifty years of age, and a farmer by occupation. The defendant is a well-known real estate brokerage company, with offices in Minneapolis, Jamestown, and other places. Mr. Weese was their agent under the terms of a written appointment, which will be hereinafter set forth. His duties were to bring prospective buyers to North Dakota, and plaintiff was one of his customers. When Weese and plaintiff arrived at Court-enay they were joined by Mr. De Nault, manager of the Jamestown office of the defendant company, in an automobile, and plaintiff was shown several tracts of land. Among those tracts was one known as the Hamilton farm and another known as section 35, 143-65. Plaintiff personally examined both of those tracts, especially the Hamilton farm, upon which he made a thorough examination of the soil with a spade. There is some dispute as to the extent of his examination of section 35, which, however, we do not consider material to a determination of this appeal. Plaintiff returned to Indiana, and after some negotiations decided that he would purchase the Hamilton farm at around \$50 an acre. However, by the time he had decided to make the purchase the Hamilton farm had been disposed of to other parties, and Weese suggested that he take in place thereof section 35, which he had seen upon his visit to North Dakota, at a price of \$32.50 per acre. This purchase was accordingly made. L.R.A.1917F.

Something over a year later plaintiff brought this action, alleging that he had been deceived by Weese as to the character of the soil and subsoil and the value of section 35, alleging that if the land had been as represented to him it would have been worth \$40 per acre, whereas in truth and fact it was not worth to exceed \$20 per acre, wherefore he demands judgment for the difference, \$12,800. Upon a trial to a jury, plaintiff recovered judgment for the sum of \$4,800. Defendant appeals, assigning numerous errors, of which, however, we need mention but one group,—those relating to the scope of the authority of the agent, Weese.

As already stated, defendants are real estate brokers, with main offices in Minneapolis, and a branch office at Jamestown, North Dakota. They employed Weese under a written appointment, headed, "Authorization of Sales Solicitor," and reading in part as follows:

During the year 1910, or until written notice given to you, you are hereby authorized to act as sales solicitor, to solicit applications and secure buyers in the county of . . . for the purchase of lands in North Dakota, South Dakota, and Minnesota, which Wells & Dickey Company has for sale. For the services in obtaining the applications for the purchase of lands the said Wells & Dickey Company agrees to pay you in the case where, as a direct result of your efforts, sales of such land are finally consummated, . . . the sum of \$1 per acre. . . . It is hereby understood and agreed that sales are not fully closed, and the commissions are not payable, until the entire cash payments have been made to this company at its office in Minneapolis, Minnesota, or Jamestown, North Dakota, accompanied by the execution and delivery to it of the required notes and contracts, or mortgages, and the acceptance on the part of the purchaser of the titles to be conveyed. It is understood and agreed that the foregoing commission will be paid only in case you bear all the traveling, entertainment, and general expenses incidental to bringing purchases to this company. . . . *No advertisement or other representation on your part that you are for any purposes an agent of said company will be permitted, the term 'sales solicitor' being invariably used, and any violation of this provision shall of itself revoke this appointment and terminate your authority thereunder.*

[Signed] Wells & Dickey Company,

By _____

I accept the foregoing appointment upon the terms above stated. _____

Appellant insists that the sale was made after a personal examination of the land, and that if any misrepresentations regarding the land were made, the same consisted of merely "trade talk," but more especially it insists that if any statements were made by Weese which could be construed to be fraudulent, the same were not within the scope of his authority, and not binding upon the defendant. In this we think appellant is correct. There is no claim that the defendant personally made any misrepresentations, nor that Mr. Weese's authority was anything excepting that shown by the written appointment which we have quoted. It is well settled that a party dealing with the agent of a corporation must, at his peril, ascertain what authority the agent possesses, and is not at liberty to charge the principal by relying upon the agent's assumption of authority, which may prove to be entirely unfounded. *Rice v. Peninsular Club*, 52 Mich. 90, 17 N. W. 708; *Mechem, Agency*, § 137; *Plano Mfg. Co. v. Root*, 3 N. D. 165, 54 N. W. 924.

An examination of the appointment of Mr. Weese shows that his authority was limited to the duties of a sales solicitor. In *Samson v. Beale*, 27 Wash. 557, 68 Pac. 184, it is said: "An agent with restricted power to sell a tract of land at a given price has no power to bind his principal by any representation as to the quantity or quality of the land."

At 31 Cyc. 1363, 1364, it is said: "The authority to sell land must be strictly pursued, and acts outside of the authority will not bind the principal."

In *Mayo v. Wahlgreen*, 9 Colo. App. 506, 50 Pac. 40, it is said: "Where vendor's agent has misrepresented lands sold by him, and there is no attempt on the part of the purchaser to rescind, he may bring his action for deceit only against the agent, unless he can trace some connection between the principal and the agent, and thereby

charge the principal with responsibility for the agent's misrepresentations."

In *National Iron Armor Co. v. Bruner*, 19 N. J. Eq. 335, it is said: "An agent with restricted power to sell a tract of land at a given price has no power to bind his principal by any representation as to the quantity or quality of the land."

See also *Lansing v. Coleman*, 58 Barb. 619, a leading case, wherein it is said: "To hold that a person not authorized to make a sale, but simply to advertise the property for sale and procure some one to negotiate with the owner, can make representations or warranties binding upon the owner, without his authority or knowledge, would be too dangerous. The well-known office of such an agent is merely to initiate a negotiation, not to complete one. The parties proposing in such a case to purchase are necessarily referred to the principal for the actual negotiation, and there is no hardship in requiring, but, on the contrary, common prudence and justice to the vendor would seem to demand, that the purchaser should go to him for the facts which are to influence the purchase."

See also *Ballou v. Bergvendsen*, 9 N. D. 285, 83 N. W. 10; *Brandrup v. Britten*, 11 N. D. 376, 92 N. W. 453; *Larson v. Newman*, 19 N. D. 153, 23 L.R.A.(N.S.) 849, 121 N. W. 204; *Kuhnert v. Angell*, 10 N. D. 59, 88 Am. St. Rep. 675, 84 N. W. 579; 1 Am. & Eng. Enc. Law, 981; *Fanset v. Garden City State Bank*, 24 S. D. 248, 123 N. W. 688.

Without going further into the case, it is sufficient to say that plaintiff under the proofs cannot maintain this cause of action against the defendant, and a verdict should have been directed accordingly.

Judgment of the trial court is reversed, and the proceedings ordered dismissed.

Petition for rehearing denied September 22, 1915.

Annotation—Implied or ostensible authority of agent for the sale of land as to representations.

I. Introduction, 962.

II. General rules, 963.

III. Agents with limited authority, 970.

IV. Rule that principal who accepts benefit of contract must accept burdens, 971.

I. Introduction.

It is assumed in this note that the relation of agency actually exists; hence, cases which turn upon the existence of the relation have been excluded, unless, in those in which it is determined that an agency exists, the further question whether the principal is bound by the representations of the agent is decided. L.R.A.1917F.

The note is not concerned, except incidentally, with the effect of the representations; that is, whether, assuming the principal to be responsible therefor, they are of such a nature as to entitle the purchaser to the relief sought. Many questions connected with the effect of representations have been treated in the notes in this series of

reports. See L.R.A. Indexes under the title, "Vendor and Purchaser," subtitle, "Rights, remedies, and liabilities of the parties." See particularly the note to *Ballard v. Lyons*, 38 L.R.A.(N.S.) 301, discussing misrepresentation as to location of property, and the notes to which reference is therein made.

Nor is the note concerned with representations made by an agent through connivance with the principal. In this connection it is stated in *Fulton v. Fisher* (1911) 151 Iowa, 429, 131 N. W. 662, that if there is connivance between the principal and his agent the principal is chargeable with the misrepresentations of his agents.

Although there seems reason for making a distinction between real estate brokers and regular agents, such a distinction is very infrequently made; the great majority of the cases consider brokers the same as other agents. In *Martin v. Ince* (1912) — *Tex. Civ. App.* —, 148 S. W. 1179, it was held not error to refuse an instruction to the effect that any misrepresentations of the character of the land made by the agent could not be binding upon the owners, if the agent was employed merely to find a purchaser for the land, and had no authority to make any sale or exchange of plaintiff's land. The court stated that representations as to the character of the land certainly were within the scope of the agent's duty to find a purchaser for it. The action was by the vendors to recover on purchase money note, in which the vendee asked for the cancellation of the note and a judgment over against the vendors for the amount which land given in exchange was worth, at the date of the exchange, in excess of the value of the land purchased.

A broker is treated as an agent with limited powers in *Harrigan v. Dodge* (1914) 216 Mass. 461, 103 N. E. 919. It is there stated that a real estate agent or broker is not an agent of general powers, and that as a rule he has no authority to bind his principal beyond the terms of the specific authority conferred upon him by the agreement for employment; that the relation between a landowner and the real estate agent or broker naturally imports a single transaction for a definite and strictly limited purpose, with circumscribed instructions within which conduct must be rigorously confined, and no hardship is wrought either upon the broker or those with whom he deals by adherence to this rule. It is further stated that the very nature of the employment is such that

a third party has an implied notice that he is dealing with a special agent of restricted authority, and hence he must ascertain at his peril the bounds of that authority. The action in this case, however, did not deal with representations.

The power of a real estate broker to make a contract of sale is discussed in the note to *Weatherhead v. Ettinger*, 17 L.R.A.(N.S.) 210, and supplementary note to *Jasper v. Wilson*, 23 L.R.A.(N.S.) 982.

The implied or ostensible authority of an agent to bind his principal as to a covenant in the sale of real property is discussed in the note to *Ayers v. Southern P. R. Co.* ante, 954.

II. General rules.

In determining the binding effect of representations made by an agent for the sale of land, two principles are involved. The owner may be held bound (a) upon the theory that the representations were within the scope of the agent's authority; or (b) in actions in which the owner is claiming the benefit of the contract, the decision may be merely that the owner cannot take advantage of the contract without becoming liable for the representations which induced it. It is apparent that the latter principle is not as far-reaching in its consequences as is the former, but in an appropriate action the latter serves to bind the owner as effectually as the former. The present note deals exhaustively with the former principle only, but in dealing with this it has been necessary to refer to cases involving the latter. Indeed, it is not always clear which principle is relied upon as the basis for the decision.

It is a general principle applicable to agency that acts done by the agent within the scope of his authority are binding upon the principal. *Meechem, Agency*, 2d ed. § 710. When, therefore, an owner of land has conferred an agency upon another to make a sale of the land, the question is whether the representation involved is within the scope of the authority conferred. As stated in *Wimple v. Patterson* (1909) — *Tex. Civ. App.* —, 117 S. W. 1034: "Generally speaking, it may be said that for material and false representations made by his agent, as fully as for such representations made by himself in person, the principal is responsible if he authorized the agent to make them, or if they were made by the agent in the course of his employment as such. When so made by the agent, such representations are to be treated

as the representations of the principal, and whether the principal, if he made such representations, or his agent, if he made them, knew them to be false, or made them innocently, believing them to be true, is of no importance in determining the liability of the former for damages actually suffered, where the representations were intended to induce, and did induce, a buyer to purchase property he otherwise would not have purchased of the principal. In such a case, if the representations were fraudulently made, the liability of the principal need not be rested upon the tort, but may be referred to the contract, for, whether made innocently or deceitfully, such representations as against the seller operate as a warranty." In *Mitchell v. Coleman* (1917) — **Ark.** —, 192 S. W. 231, where there was a conflict as to whether the person dealing with the purchaser was the owner's agent, the court concludes that the evidence shows that he was the owner's agent and represented the owner while showing the purchaser the farm, and states that "the representations he made concerning the land were therefore binding upon the appellee." Again it is stated that "under familiar rules of law the principal is bound by the acts and declarations of his agent while acting within the scope of his authority." The representations in this case were as to the value of the land and as to the acreage of fruit-bearing trees, but whether these were the representations made by the agent does not clearly appear. The action in this case was one to recover the amount of notes given to evidence part of the purchase price, in which the purchaser filed a cross complaint to recover damages for fraud in the sale of the land. In *Griswold v. Gebbie* (1889) 126 Pa. 353, 12 Am. St. Rep. 878, 17 Atl. 673, the court states: "That a principal is responsible for the misrepresentations of his agent within his authority is beyond question, and the better opinion is that, as to third parties affected by his acts or words, it is the apparent scope of his authority, and not his actual instructions, that must govern."

Many representations have been held to be within the scope of the authority of an agent for the sale of land, hence binding upon the principal.

Representations as to timber, fruit-bearing trees, and plants.

In *Copeland v. Tweedle* (1912) 61 Or. 303, 122 Pac. 302, an action by the vendee to rescind the conveyance, the owner of land was held bound by the represen-

tation of her agent as to the amount of timber on the land. The court states: "It is beyond dispute that this representation was made while Corcoran [the agent] was empowered by the defendant Ellen Tweedle to procure a purchaser for the land in question. It was within the scope of his authority to describe the land to an intending purchaser and to state what it contained in the way of improvements or timber, or the like. Without making some such representations, it would be impracticable to procure a purchaser. There is nothing in the writing between him and his sister limiting the usual and general authority thus given. The legal deduction from Corcoran's statement so made is that it affects the defendant Ellen the same as if she was there personally present and made it herself. She is bound by this representation of her authorized agent, it being within the fair and reasonable scope of his authority. She placed it in the power of Corcoran to make a misleading statement with intent to deceive, and that being the case, she cannot complain if he did defraud the plaintiff. . . . Although perfectly innocent of fraud herself, yet, having placed her brother [the agent] in a position to defraud by putting her land in his hands for sale, the loss resulting from his deception must fall upon her as between herself and another equally innocent."

See also *Haskell v. Starbird* (1890) 152 Mass. 117, 23 Am. St. Rep. 809, 25 N. E. 14, *infra*, as to representations with reference to timber.

In *Cady v. Rainwater* (1917) — **Ark.** —, 196 S. W. 125, an action to rescind a contract of purchase of land because of the false and fraudulent representation of an agent as to the value of the land, the number of fruit-bearing trees thereon, and the income obtained therefrom, the court states that "the principal is responsible for the damages growing out of the false and fraudulent misrepresentations of his agent within the scope of his authority. The representations made by Vestal [the agent] in the instant case as to the number of trees in the orchard, the yearly income, etc., were clearly within the scope of his authority." The agent involved in this case was a real estate broker, who had obtained permission to sell the land for a stated sum, all over that sum to go to the broker.

See *Mitchell v. Coleman* (1917) — **Ark.** —, 192 S. W. 231, *supra*, as to representations as to fruit-bearing trees.

In *Millard v. Smith* (1906) 119 Mo. App. 701, 95 S. W. 940, an owner of land

was held bound by the representations of an agent for the sale thereof as to the number and character of ginseng plants on the land, the chief value of the land consisting in the plants in question. The court states that the owner had confirmed the sale by her agent by receiving the proceeds and executing and delivering a deed conveying her interest in the property, "and it seems to us that she is in no position to deny the agency of Millard." The action was one by the vendor to recover on a note that was given as part of the purchase price.

Representations as to minerals.

In *Kleine Bros. v. Gidcomb* (1913) — **Tex. Civ. App.** —, 152 S. W. 462, an action by a purchaser against the principal and the agent to recover a cash payment made by him, in which the principal alone appealed from a judgment in favor of the purchaser, the principal was held bound by the representations of the agent as to gold deposits on adjoining land. The court stated that the agent was authorized by the principal to sell the land; that he was provided with copies of assays and other data indicating the presence of valuable gold deposits on land immediately contiguous to that offered for sale, and was sent forth by his principal to seek buyers, and in his efforts to sell he made the statement related by the purchaser in his evidence. The court continues that under these circumstances the owner cannot be heard to say that the agent whom he sent forth was in fact only agent as long as he did right.

In *Law v. Grant* (1875) 37 **Wis.** 548, 7 **Mor. Min. Rep.** 56, a case involving representations by one other than the owner that the land was mineral land, the court states that if the person making the representations acted as the agent of the owner in negotiating the sale, the owner "is responsible for all the means employed by his agent to effect the sale. If the agent effected it by means of false representations, or fraud of any other description, although without authority from the plaintiff to do so, and although the plaintiff was entirely ignorant that he had done so, the legal status of the plaintiff is precisely the same as it would have been had he made the false representations, or committed the fraudulent acts to the same end, in person." It was held, however, in this case, that the person making the representations did not act as the agent of the owner in negotiating the sale.

L.R.A.1917F.

Representations as to boundaries and location.

In *Green v. Worman* (1900) 83 **Mo. App.** 568, an action by the vendor to recover a balance on the purchase price in which the vendee set up a counterclaim for damages by reason of false representation by an agent as to the boundaries of the tract sold, the court states: "The authority of an agent in the absence of special instructions must be determined by the nature of the business he is delegated to transact. . . . Newkirk [the agent] was clothed with power to negotiate a sale or exchange of the lands, and no restrictions were imposed upon him so far as the evidence discloses. The power to negotiate the sale of the land includes all the usual and necessary means of executing the power. . . . In the sale or exchange of a tract of land, it is usual and necessary that the seller point out to the prospective buyer the boundaries of the tract; that he exhibit the thing he offers for sale to the view and inspection of the prospective buyer. Newkirk undertook to do this very thing, and in doing so he represented that the spring and the 4 or 5 acres of bottom land were inside the boundary lines and belonged to the tract. Plaintiffs are bound by these representations."

In *Firebaugh v. Bentley* (1913) 65 **Or.** 170, 130 **Pac.** 1129, an action by a vendee to set aside a deed, it is stated that "the plaintiff had a right to rely upon the representations of the agents of the defendants as to the true location of the land, for such statements were within the ordinary scope of the authority of real estate brokers." The court, referring to the case of *Copeland v. Tweedle* (1912) 61 **Or.** 303, 122 **Pac.** 302, stated that that case was grounded on the fraud of the seller's agent, although the seller herself was innocent, while in the *Firebaugh Case* there was a mutual mistake of the vendor and vendee as to boundary; but that such difference was not sufficient to warrant a different decision. Accordingly, a rescission of the transaction was granted.

An owner was held bound by representations as to boundary where such representations were made by one to whom the agent was directed by the owner for the purpose of showing the land, the court treating the representations as if made by the agent himself. *Lofland v. Greenwood* (1916) — **Tex. Civ. App.** —, 181 S. W. 517. The action was one by the purchaser in damages to recover the excess which he had paid on the theory that the land contained more acres than

it actually contained. A recovery was sustained.

A land company which had given a surveyor "full authority to survey land, establish boundaries, lease lands, and sell them," was held bound by the boundaries as thus fixed by the surveyor and represented by him, the court stating that "the general power thus shown in the surveyor made his statement in the premises the statement of the company." *New York & T. Land Co. v. Gardner* (1894) — *Tex. Civ. App.* —, 25 S. W. 737. The action in this case was one between grantees of the land company to try title.

An owner of land who referred a prospective purchaser to an agent to point out the land to him was held bound by the representations of the agent as to the boundaries of the land, in *Beatty v. Ireland* (1912) 152 App. Div. 588, 137 N. Y. Supp. 456. It does not appear, however, that the agent was authorized to sell. The case, therefore, is not strictly in point in the present note.

The action in *Law v. Grant* (Wis.) supra, was one by the vendor to foreclose a mortgage given for a balance of the purchase price. This case is relied upon in the subsequent Wisconsin case of *McKinnon v. Vollmar* (1889) 75 Wis. 82, 6 L.R.A. 121, 17 Am. St. Rep. 178, 43 N. W. 800, as authority for the decision in that case that a vendee may rescind the conveyance and recover the purchase price of land, where an agent of the vendor in pointing out the land pointed out the wrong tract.

In *Gunther v. Ullrich* (1892) 82 Wis. 222, 33 Am. St. Rep. 32, 52 N. W. 88, it is stated that an owner of property is liable to respond for any damages resulting from the fraudulent misrepresentations of his agent with respect to the situation of the land which is the subject of the sale, and it matters not whether the misrepresentation was intentional or not. The action in this case is stated to be one to recover damages against the vendor; it seems, however, to have been merely an action to recover the purchase price, the vendee having tendered to the vendor a reconveyance of the land.

In *Stelting v. Bank of Sparta* (1908) 136 Wis. 369, 117 N. W. 798, an action to rescind a contract for the purchase of real estate on the ground that an agent had pointed out the wrong land, the court states that the agent's employment undoubtedly included authority to do the things ordinarily done in such cases to procure a purchaser for the property, L.R.A.1917F.

and whether by fraud or mistake he pointed out the wrong land, upon the contract being made on the faith of his act, the mistake or fraud became in effect that of the defendant.

An agent with full authority to seek purchasers for and make sales of lots, each of which according to the plat had a frontage of 25 feet, was held to have authority to make an amended plat in which each lot had a frontage of 50 feet, so as to bind his principal, to a purchaser of two of the lots, which the agent represented to have a frontage of 100 feet, to convey 100 feet frontage, although the amended plat was abandoned. *Vaught v. Paddock* (1911) 98 Ark. 10, 135 S. W. 331.

See *Sandford v. Handy* (1840) 23 Wend. (N. Y.) 260, *infra*.

See *Haskell v. Starbird* (1840) 152 Mass. 117, 23 Am. St. Rep. 809, 25 N. E. 14, *infra*, as to representations in regard to location of land.

Representations as to acreage.

In *Caughron v. Stinespring* (1915) 132 Tenn. 636, L.R.A.1916C, 403, 179 S. W. 152, an owner of land was held liable, in an action to recover damages for a deficiency in acreage, for the representation as to acreage by one whom he had appointed exclusive agent to procure a purchaser or sell the land, the court stating that the owner is bound by the statement of his agent as to the representation of acreage.

In *Griswold v. Gebbie* (1889) 126 Pa. 353, 12 Am. St. Rep. 878, 17 Atl. 673, one who was empowered to engage a real estate broker to make sale of a country seat was held authorized to give the broker a description of the place, including its acreage, so as to bind the owner, in an action in deceit because of the fact that the place contained a much less acreage. The court, however, stated that the question did not really arise as to the binding effect of the agent's representations upon the principal, as there was testimony not only that the owner knew of the preparation of a circular by her agent, in which the acreage was stated, but also that she had herself given it to parties who inquired about the property, and that under this evidence the jury could hardly fail to find that, whether it was within the agent's original authority or not, the owner had ratified his action.

It is stated in *Judd v. Walker* (1905) 114 Mo. App. 128, 89 S. W. 558, an action against both principal and agent, to be "a familiar principle that false and

fraudulent representations of an agent, when acting within the scope of his authority, bind his principal; and to represent the acreage of a tract of land in his hands for sale is within the scope of authority of a real estate agent, beyond question." The principal knew of the representations, and executed a deed describing the land as containing the number of acres represented by the agent, and took from the agent a writing protecting him against any liability for so doing. The action was one by the vendee to recover the amount of money he had thus paid in excess of the actual acreage. Upon appeal this case was affirmed by the supreme court. (1908) 215 Mo. 314, 114 S. W. 979. The court relies also upon the principle "that a principal cannot take any benefit arising by virtue of the false and fraudulent representation of his agent within the scope of his authority, although he may have been no party to the representations. He cannot adopt and take benefit for a contract or sale brought about and entered into by such fraud of the agent on his behalf, and at the same time repudiate the fraud upon which the transaction was built."

Representations as to the character and value.

The owner of land was held liable in *Rush v. Leavitt* (1917) 99 Kan. 498, 162 Pac. 310, in an action in damages for false representation made to the purchaser by an agent as to the character and value of the land sold, the court stating that the deceit practised by the agent constituted a tort committed in the course of his employment, for which his principal was liable, even if he had no knowledge of the fraud.

An owner of land is held bound by the representations of his agent for the sale thereof that the land is good farming land, and that only a small part of it would overflow during storm, in *Sargent v. Barnes* (1913) — Tex. Civ. App. —, 159 S. W. 366; but this holding is based, in part, at least, upon the ratification of the contract by the principal.

In *Sandford v. Handy* (1840) 23 Wend. (N. Y.) 260, an agent employed for the special purpose of obtaining subscriptions to a project of forming a joint stock company in relation to land was held entitled to use the ordinary means of accomplishing the object of his appointment, so as to bind his principal by representations as to the location and quality of the land, the court stating that the owner must have expected that

the agent would speak of the property, its situation, quality, etc.

It was urged in one case that even though the principal might be held liable in an action of contract, he cannot be held liable for the representations in an action in deceit. *Haskell v. Starbird* (1890) 152 Mass. 117, 23 Am. St. Rep. 809, 25 N. E. 14, in which an owner was held liable in damages in an action in tort for false and fraudulent representations made by an agent, who had been authorized by the owner to sell the land. The court stated that "if the false representations were made by Rockwell [the agent], they were made by him while acting in the scope of his authority in making a sale of land which the defendant employed him to sell, and the instruction properly held the defendant answerable for the damage occasioned thereby. . . . The defendant urges

that even if in an action of contract the false representations of Rockwell as his agent might render the defendant responsible as the principal, he cannot thus be made responsible in an action of tort for deceit, and that in such action the misrepresentation must be proved to have been that of the principal. It is sufficient to say that no such point was presented at the trial, nor do we consider that any such distinction exists." The representations involved in this case were as to the value of the land, as to the timber thereon, and its location with reference to a village. The agent testified that he had made the representations in question, and that the owner had made the representations to him, so that the agent had express authority for the representations. The discussion of the court, however, does not base the liability upon the ground of express authorization. On this point the court states that "while the principal may not have authorized the particular act, he has put the agent in his place to make the sale, and must be responsible for the manner in which he has conducted himself in doing the business which the principal intrusted to him. . . .

The rule that a principal is liable civilly for the neglect, fraud, deceit, or other wrongful act of his agent, although the principal did not in fact authorize the practice of such acts, is quoted with approbation by Chief Justice Shaw in *Locke v. Stearns* (1840) 1 Met. (Mass.) 560, 35 Am. Dec. 382. That a principal is liable for the false representations of his agent, although personally innocent of the fraud, is said by Mr. Justice Hoar in *White v. Sawyer* (1860) 16 Gray

(Mass.) 589, to be settled by the clear weight of authority."

See *Martin v. Ince* (1912) — **Tex.** Civ. App. —, 148 S. W. 1178, *supra*, as to representations in regard to character of land.

In *McNeile v. Cridland* (1895) 168 **Pa.** 16, 31 Atl. 939, an owner of land was held bound by the representations of his agent for the sale thereof to the effect that the house was built on solid and not on made ground, a well-built house, etc.,—representations that were untrue. The court states: "It is well settled that the principal is bound by the acts of his agent within the scope of the authority that he is held out to the world to possess, even notwithstanding the latter acted contrary to instructions. One who authorizes another to act for him, in a certain class of contracts, undertakes for the absence of fraud in the agent acting within the scope of his authority." After thus stating the rule the court referred to the other rule that a principal cannot avail himself of the benefit of the agent's act and at the same time repudiate his authority. The action was one by the vendor to foreclose a mortgage.

In *Dzuris v. Pierce* (1913) 216 **Mass.** 132, 103 N. E. 296, an action to set aside an exchange of real estate, the agent for the vendor had stated to the vendee that the apartment house which was the subject of the exchange had marble entrance and stairs. The court states with reference to this that "the statement as to the marble stairs was made by mistake, and was in no way authorized by the defendants [vendors]. But this is an immaterial circumstance, for if such misstatement is of consequence, the principal is bound by it."

In *Cerriglio v. Pettit* (1912) 113 **Va.** 533, 75 S. E. 303, where the agent, who the purchaser supposed was representing him, was in fact representing the vendor, it was held error to refuse an instruction to the effect that if the jury should find that the agent represented the vendor in the transaction without the knowledge of the purchaser, upon the principle that a principal is bound by representations of his agent made either in the scope of his employment or in furtherance of the object for which he was employed, the owner would be as much bound by any false representations made by such agent as if the representations had been made by the owner himself. The fact that the agent may have been honestly deceived by the owners does not alter the case. The representations here were as to the L.R.A.1917F.

value of the property. The action was one to recover damages for the fraud and deceit.

In *Mullens v. Miller* (1882) L. R. 22 Ch. Div. (**Eng.**) 194, the vendor brought an action in specific performance against the purchaser, who defended on the ground of misrepresentation as to the value of the property by the agent. The court, in discussing the power of the agent to describe the property, says: "A man employs an agent to let a house for him; that authority, in my opinion, contains also an authority to describe the property truly, to represent its actual situation, and, if he thinks fit, to represent its value. That is within the scope of the agent's authority; and when the authority is changed, and instead of being an authority to let it becomes an authority to find a purchaser, I think the authority is just the same. I think the principal does thereby authorize his agent to describe, and bind him to describe truly, the property which is to be the subject disposed of; he authorizes the agent to state any fact or circumstance which may relate to the value of the property." After stating that a representation was made by the agent, who was authorized to make the representation, if it was true, but who had no authority from his principal to state any falsehood, the court continued: "If he did state any falsehood on behalf of his principal, and if he thereby induced a purchaser to enter into a contract, he did that which now prevents the principal from saying that the agreement shall be specifically performed. That, I do not hesitate to say, is my view of the law." There was in this case a false representation made by the vendor in person. Because of this false representation and those of the agent, specific performance was refused. The representations made by the agent related to the rental value of the premises, and also to an offer which it was alleged the vendor had received from another.

In *Weeks v. Currier* (1898) 172 **Mass.** 53, 51 N. E. 416, a bill in equity to have certain conveyances set aside, a vendor is stated to be "affected by a false and fraudulent representation made by another while acting as his agent within the scope of his authority, as if he had made it himself." The vendor was accordingly held bound by the representations of his agent as to the price which the property conveyed had previously brought, and the rental value, and those to the effect that there were only certain named encumbrances upon the

property, all of which representations were false.

See *Mitchell v. Coleman* (1917) — **Ark.** —, 192 S. W. 231 and *Cady v. Rainwater* (1917) — **Ark.** —, 196 S. W. 125, *supra*.

Representations as to title.

The principal is held bound for representations by the agent that the property is free from encumbrances except for certain mortgages, in an action to recover the loss resulting to the vendee from the representation, in *John Gund Brewing Co. v. Peterson* (1905) 130 **Iowa**, 301, 106 N. W. 741. The vendee, by way of counterclaim in an action by the vendor upon an independent cause of action, sought to recover the amount of the lien upon the property. In answer to the contention of the vendor that it was not bound by the representations of its agent, the court states that the agent had authority to negotiate a sale, "and as such bound his principal to any misrepresentations made while negotiating the sale within the scope of his apparent authority; and this, we think, comprehends statements as to the condition of the title to the property he was proposing to sell." The person heretofore spoken of as the vendor was not in fact the vendor, but a mortgagee who was negotiating a sale of the property for the real owner, the mortgagor. In answer to the contention that the agent was the agent of the owner and not of the mortgagee, the court states that the agent had authority to negotiate a sale for the owner to the end that the mortgagee's claim might be satisfied, and as such bound his principal (the mortgagee).

See *Weeks v. Currier* (**Mass.**) *supra*.

But it is held not to be within the scope of the authority of an agent to rent or sell property to represent that the title to the property is in another than his principal. *Tondro v. Cushman* (1856) 5 **Wis.** 279. The rule is stated broadly in this case that an agent to rent or sell property has no authority to make representations about the title; but it appears that the representations that were made were to the effect that the title was in another, and were set up by the tenants in an action by the principal for rent as a defense, the tenants having acquired the title of the other person in whom the agent represented the title to be.

In *Iowa R. Land Co. v. Fehring* (1904) 126 **Iowa**, 1, 101 N. W. 120, an action in ejectment against one who

claimed to have purchased the land from another relying upon representations of an agent of the plaintiff that the plaintiff did not own the land, the court states that the only averment with reference to the agent's authority contained in the answer is that he "was agent for the sale of their lands in Greene county, Iowa." Continuing, it is stated that "from the mere agency to sell, power to waive claim of title is not to be inferred, and the most that he was authorized to say was that he had not been directed to sell. Besides, there is no allegation that the agent was advised of the purpose of the inquiry, or that plaintiff was intending, or likely, to rely upon his response, or that this was made in bad faith. In these circumstances, the reply cannot be made the basis of a plea in estoppel."

Miscellaneous representations.

In *Reeves v. Kelly* (1874) 30 **Mich.** 132, an action upon a promissory note given by the defendant to a son of the plaintiff, the defendant gave notice of defense that the note was given for the purchase price of land, of which the son falsely and fraudulently represented he was the owner, but to which he had no title whatever. It was shown in evidence that the bargaining by the defendant for the land was with the plaintiff, to whom the son had sent the defendant, with the statement that he could make a bargain with the father, and whatever bargain should be made he would agree to. The court states that this authorized the defendant to regard the father as the son's agent for the purpose of making a bargain, and bound the latter by his statements.

In *Adams v. Barber* (1911) 157 **Mo. App.** 370, 139 S. W. 489, where a real estate broker was claimed to have acted both as agent of the vendor and of the purchaser, there was held no error in an instruction to the effect that if the broker was the agent of the vendor alone in making the trade, or was the agent of both the vendor and the purchaser, "then the representations and statements made by Fishburn [the broker] to plaintiff while acting on behalf of the defendant were binding on the defendant." Apparently the representations of the broker relied upon in this case were representations to induce the purchaser not to investigate the land, but to rely upon a description thereof given by the vendor.

See *O'Daniel v. Streeby* (1914) 77 **Wash.** 414, L.R.A.1915F, 634, 137 **Pac.**

1025, *infra*, as to power of an agent employed to sell real property to bind his principal by representations as to fixtures. See note appended to this case in L.R.A.1915F, 634, as to power of agent employed to sell real property to bind his principal as to fixtures.

See *Concord Bank v. Gregg* (1843) 14 N. H. 331, *infra*.

In *Hoyer v. Ludington* (1893) 100 Wis. 441, 76 N. W. 348, a principal was held not bound by the representations of his agent for the sale of land not with reference to the subject-matter of the agency, but wholly in reference to creating and organizing a corporation to purchase the land.

In *Wilson v. Shocklee* (1910) 94 Ark. 301, 126 S. W. 832, a wife was held not bound by the agreement of her husband upon a sale of his real estate to waive a vendor's lien for the unpaid purchase money. It seems, although this is not clear, that the husband had represented the title to be in himself, and that he would waive the lien.

An owner who has authorized brokers to sell his real estate is not bound by statements of the brokers to a purchaser as to what disposition could be made of the property after the purchase. *Columbia Sav. Bank & T. Co. v. True* (1917) — S. C. —, 93 S. E. 389.

III. Agents with limited authority.

In some cases the authority to sell is limited. This was the case in *HODSON v. WELLS & D. Co.* ante, 958. In cases of limited authority, the question arises whether the person dealing with the agent is charged with notice of the limitation. The court in *HODSON v. WELLS & D. Co.* takes the position that the person is so charged with notice.

An agent authorized to sell property only upon terms reported to the owner and assented to by him is held in *National Iron Armor Co. v. Brumer* (1868) 19 N. J. Eq. 331, to be a special agent, and it is held that an agent with restricted power to sell a tract of land has no power to bind his principal by any representations as to the quantity or quality of the land; accordingly, the owner was held not bound by the representations of the agent as to the frontage of the property. The action was by the vendee for specific performance, with compensation for a deficiency. It appears that the agent submitted the offer of the purchaser to the owners and that they authorized the making of the contract. The question of notice to the purchaser is not discussed, but it is L.R.A.1917F.

stated that "making a contract as agent, at a fixed price, and the approval of such contract by the defendants, does not hold him out to the world as an agent to sell at any other price, or to vary the terms of sale. It is every day's practice for an owner of real estate to authorize an agent to sell it at a certain price, a given part in cash and the rest on credit. The agent cannot bind the principal to a sale on any other terms. The purchaser must ascertain, at his own peril, the power of the agent. And if the agent's contract on these terms is approved, and adopted by the principal, the purchaser has no right to infer from that fact that the agent has power to alter the terms of the contract."

It is unnecessary in some cases to decide the question of constructive notice, where it is shown as a fact that the person dealing with the agent had notice of the limited authority. In *Samson v. Beale* (1902) 27 Wash. 557, 68 Pac. 180, the purchaser knew at the time he offered to buy the property that the offer would have to be submitted to the owners for their approval or rejection before any further steps could be taken. The court states that it was thus manifest to him then that the agents had not full power even to conclude the terms of a sale without submission to the owners. Under these circumstances the purchaser was held not entitled to rely upon representations made by the agents as to the foundation of the building. The agents had in their possession the architect's plans for the building, which represented the foundation to be constructed as the agents stated; and it was urged that the fact that these plans were in the possession of the agents should be taken as evidence that the agents were authorized to make the representations which it is claimed were made. The purchaser, however, had been told who made the plans, and it appearing that this person was easily accessible to him, the argument was denied. In answer to the argument that the agents had authority to bind the principle by any representations, the court states that "authority to sell must exist by reason of special authorization, and the evidence here discloses no further authority concerning a sale than to receive and submit offers to purchase. The authority was certainly limited, as the agent was not empowered to close the terms of a sale without the approval of the principal." This case is distinguished from the subsequent *Washington* case of *O'Daniel v. Streeby* (1914)

77 Wash. 414, L.R.A.1915F, 634, 137-Pac. 1025, in which it is held that an agent to negotiate the sale of real estate has authority to bind his principal by representations that a refrigerator, shelving, screens, and lumber, which had in fact been placed on the property by a tenant and were removable thus by him, belonged to the property, so as to charge the principal in damages for the misrepresentation. The court in the later case states that in the Samson Case the agent's representations were as to the physical condition of the house; that "the representation of the agent was not, as here, confined to an indication of the very subject-matter of the negotiation for the purpose of inspection, but went to its physical condition. The one was within the apparent scope of the agent's authority. The other was not."

In *Cooke v. School Comrs.* (1844) 6 Ill. 537, an action by the school commissioners to recover on bonds given to the school district by a purchaser of land therefrom, the inhabitants of the district were held not answerable for false representation by the commissioner as to the existence of a mill site upon the land. The court states that all the commissioner had to do was "to advertise and sell the same [land] in separate lots, according to the division and valuation of the trustees, as designated upon the map, for the best price he was able to obtain, by inducing, as far as was proper, a fair competition among the purchasers at the sale. If he did more than that he exceeded his authority, and the inhabitants of the township are not answerable for a false representation which the law did not require, or authorize him to make; and which, at most, amounted only to matter of judgment or opinion." It is then stated that to have entitled the vendees to release they should have shown that the misrepresentation was such that care and prudence could not have provided against the deception, as the law will not extend its protection to those who through negligence or inattention to their business suffer an advantage to be taken of their credulity.

The principal has in some cases been held not bound by the fraudulent representations of his agent because of a written contract signed by the parties, containing a stipulation that no agent has authority to make any representation not contained in the contract, and no representation not contained in the contract shall be binding upon the seller. Where the vendee has read over the con-

tract and understands its terms and signs the same, he cannot hold the principal liable for representations previously made by the agent. *Colonial Development Corp. v. Bragdon* (1914) 219 Mass. 170, 106 N. E. 633. In the opinion of the lower court in *McClurg v. Futer* (1913) 52 Pa. Super. Ct. 485, a principal was held not bound by the representations of his agent that there was a common alley on the rear of the premises sold and that it had sewer connections with the city sewer, where a written contract of sale was signed by the principal in which nothing was said as to the alley or sewer, and where it was not asserted that these items were omitted from the agreement by fraud or mistake, but it does not appear that error was predicated on this holding; at least there is no discussion of it in the opinion of the appellate court beyond the statement of approval of the lower court's opinion. But in *Shepard v. Pabst* (1912) 149 Wis. 35, 135 N. W. 158, the purchaser of land is held not precluded from obtaining relief because of misrepresentations by the agent in pointing out the wrong land to him, by a provision in the contract that he has inspected the premises and in making the purchase and executing the contract he is not relying on any representations made by the vendor, or by any agent or servant thereof, and explicitly waives any claim on that account; since in such a case the agent's fraud avoids the assent to this, as well as to the other recitals and stipulations of the contract, which the buyer signs under the influence of the misrepresentation as to the identity of the land.

IV. Rule that principal who accepts benefit of contract must accept burdens.

A majority of the cases discussed in the foregoing subdivisions in which the representations were held binding upon the principal were cases in which the principal was seeking the benefits of the contract, and it would have been sufficient to hold the principal on the theory that he must accept the burdens with the benefit. The cases, however, are not based on this theory, but on the broad ground that the representations were within the scope of the agent's authority, hence binding upon the principal. If the principal is held bound by the representations of the agent on the theory that he is accepting the benefits of the contract, the form in which the action arises becomes important. The principle under consideration is very

clearly stated in *Mayo v. Wahlgreen* (1897) 9 Colo. App. 506, 50 Pac. 40, in an action in deceit by one who purchased land from an agent against the principal, as follows: "As a general proposition, a principal is not responsible for the deceit practised by his agent, unless there is something in the nature of the engagement, the terms of the employment, or the powers conferred, broad enough to include a power on the part of the agent to deal with the property in such manner that the principal, in good morals and equity, ought to be bound by what the agent may have said. There are many cases which hold the principal responsible for the fraud and misrepresentation and acts of the agent when he accepts the fruits of the contract, and refuses to surrender. As the cases put it, he may not be permitted to reap the harvest and refuse to pay for the seed. When those decisions are examined, it will be seen there was an attempt on the part of the vendee to rescind the sale, and, the vendor refusing, he was held liable for the representations. . . . Where, however, there is no attempt on the part of the vendee to rescind, but he affirms the sale, he can bring his action for deceit only against the agent who has been guilty of the misrepresentations, unless he is able to trace some connection between the principal and the agent, and thereby charge the former with responsibility for what the agent may have said or done. An innocent principal, who has simply authorized an agent to sell property, cannot be charged in an action of deceit for the agent's wrongs, unless in some manner he be connected with them." In this case one who had the right of disposition of real estate providing he paid the owner a certain price was held not empowered to bind the owner by representations as to the character of the real estate in question. It is expressly stated, however, that the person thus having the right to dispose of the property was not the owner's agent to sell the property according to the well-understood meaning of the term "agent."

In *Cortes Co. v. Thannhauser* (1891) 45 Fed. 730, it is stated that a vendor who is seeking to recover the purchase price of property sold upon misrepresentations by an agent is seeking to enforce a contract that is tainted by the agent's fraud; that the action proceeds upon the theory that he was the vendor's agent in making the sale, and the vendor

cannot repudiate his act while seeking to obtain the fruit.

In *Isenbeck v. Burroughs* (1914) 217 Mass. 537, 105 N. E. 595, the court bases its decision, in part, at least, upon the fact that the principal obtained the benefit from the agent's representations, and this although the action was one in tort to recover damages, and not for rescission. The action in this case was tort by the vendee against a firm of real estate brokers for false and fraudulent representations in that they had falsely represented to him that they were acting as agents for the owners of the property, that the lowest price for which the owners would sell the estate, or, rather, the equity of redemption therein, was \$35,000; that the plaintiff believed this, and in consequence thereof and in reliance thereon bought the equity of redemption for that price; but that in fact the price fixed by the owners was only \$25,000, and the owners received only that sum, the brokers receiving the remaining \$10,000. A part of the transaction was carried on by an agent for the brokers, and it is stated that if "Randall was acting for the defendants in negotiating with the plaintiff, and if the defendants took the benefit of false and fraudulent representations made by Randall to the plaintiff to induce him to pay the higher price, it could be found that the defendants were responsible for these representations as if made by themselves."

In case of representations as to the land included in a sale made by one of several co-owners, it is stated that the court cannot presume that the other co-owners authorized the one making the sale to make the representation he did make; that while such representations made by an agent to sell would arm a purchaser with the right to set off, recoup, and in many cases with the right to rescind, it could not confer a right as against the other co-owners to have the contract so reformed as to embrace the land pointed out as contained within the tracts sold, unless the other co-owners authorized or ratified such representations. *Bridges v. McClendon* (1876) 56 Ala. 327.

In action by the vendee for rescission of the transaction, the vendee is frequently granted relief on the theory now under consideration; that is, that the vendor cannot retain the fruits of the agent's representations and not be responsible for such representations. In *Wolfe v. Pugh* (1884) 101 Ind. 293, it is stated that "when a principal

authorizes an agent to do a certain thing, he is answerable for and bound by the acts and representations of the agent in accomplishing that end, even though the agent is guilty of fraud in bringing about the results. Having given such authority, the principal is responsible for the fraudulent as well as the fair means used by the agent, if they are in the line of accomplishing the object of the agency. Having put the agent in a position where he may perpetrate a fraud upon innocent third parties, the principal will not be allowed, as against such third parties, to retain the fruits of the fraud and defeat a claim for reparation by saying that he justifies the end, but not the means, used by the agent. Conceding that the principal is innocent of any active fraud, yet, when a case arises that he or an innocent third party must suffer by the fraud of the agent, the principal who conferred authority upon the agent must suffer the loss, rather than the innocent third party. This the principal may generally avoid by submitting to a rescission of the contract, and restoring what he may have received as the fruit of the agent's bad faith. To thus bind the principal by the fraud of the agent is not to bind him beyond the scope of the agency. In such case the agent does not exceed his authority, but perpetrates a fraud in the exercise of his authority to accomplish the object of the agency, and in such case the principal is liable for the fraud, although he may not have directed it nor had knowledge of it. The fraud of the agent becomes the fraud of the principal as to third parties."

Accordingly, the vendee has been granted a rescission of the contract—

—where the agent fraudulently misrepresented the location, quality, and general character of the land. *Ibid.*

—where an agent for the sale of a grist mill misrepresented the facts as to water power connected with the mill, and as to the title. *Concord Bank v. Gregg* (1843) 14 N. H. 331.

In *Ackermann v. Stickling* (1913) 183 Ill. App. 26, one who had signed a contract for the purchase of property, upon learning that the description in the contract did not cover the property which was represented to him to be covered thereby, repudiated the contract, and was refunded his cash payment by the agent. The action in the case was by the principal against the agent to recover this cash payment on the theory that it had been wrongfully refunded

to the purchaser. The principal was held bound by the representation of his agent as to the property covered by the description, but the principal himself had been guilty of deception in representing to his agent that the description covered the property in question.

This rule has been applied in the case of a special agent. *Concord Bank v. Gregg* (N. H.) supra. In this case it is stated that "it is not quite clear that there is not evidence in the case from which a jury might find that Head [the agent] had authority to make such representation. . . . We place no great reliance upon this, however, because we are of the opinion that, notwithstanding Head was a special agent for the sale, the plaintiff is chargeable with his fraudulent acts and declarations, done and made for the purpose of effecting the sale. Were it otherwise, the principal would never be liable for the frauds of a special agent, unless he commissioned him to commit a fraud. . . . If, however, it were settled that the principal was not answerable in damages for the fraudulent representations of his special agent, made while conducting the business committed to his agency, that would not relieve the plaintiff from this defense. Even if that were so, the principal could not avail himself of the fraud of the agent, and hold the other party to the contract thus fraudulently procured; and all the defendant asks here is that he should be discharged from the contract." Accordingly, there was a judgment for the defendant, in an action by the vendor upon a note given to evidence the purchase price, where the defendant reconveyed the property and asked to be relieved of the contract.

The nature of the action in *Bennett v. Judson* (1860) 21 N. Y. 238, is not clear from the report of that case, but apparently it was an action to recover damages against the principal for expenses incurred because of the fraudulent representations of the agent. The court states that there was no evidence that the defendant authorized or knew of the alleged fraud committed by his agent in negotiating the exchange of land, but continues: "Nevertheless, he cannot enjoy the fruits of the bargain without adopting all the instrumentalities employed by the agent in bringing it to a consummation. If an agent defrauds the person with whom he is dealing, the principal, not having authorized

or participated in the wrong, may no doubt rescind, when he discovers the fraud, on the terms of making complete restitution. But so long as he retains the benefits of the dealings he cannot claim immunity on the ground that the

fraud was committed by his agent, and not by himself."

As stated in subdivision II. *supra*, cases decided upon this theory are not exhaustively considered in this note.

W. A. E.

NEW HAMPSHIRE SUPREME COURT.

RALPH G. CARPENTER

v.

MARGUERITE PAUL CARPENTER.

(— N. H. —, 101 Atl. 628.)

Appeal — exceptions not noted — consideration.

1. The supreme court cannot consider exceptions not noted in the bill of exceptions transmitted to it.

For other cases, see Appeal and Error, IV. o, 2, in Dig. 1-52 N. S.

Judgment — finality — rehearing.

2. A decree of divorce does not, in the absence of the fixing of a special date for it to do so, become final until the end of the term so as to be beyond the reach of a motion for rehearing.

For other cases, see Judgment, VII. f, in Dig. 1-52 N. S.

New trial — divorce — hearing as to perjury.

3. The court may open a divorce decree to ascertain if it was procured by perjured testimony without retrying the whole case.

For other cases, see New Trial, V. f, in Dig. 1-52 N. S.

Appeal — insufficiency of evidence — how objection taken.

4. An objection for insufficiency of evidence must be made before submission of the case, to be available on appeal.

For other cases, see Appeal and Error, V. c, in Dig. 1-52 N. S.

Trial — view — in other states.

5. Permitting the trier of facts to view the locus in quo in another state is not so far beyond the jurisdiction of the court as to vitiate all subsequent proceedings.

For other cases, see Evidence, V. in Dig. 1-52 N. S.

Same — view by court sitting as jury.

6. A judge sitting as a jury in the trial of a case may take a view of the locus in quo without statutory authority.

For other cases, see Evidence, V. in Dig. 1-52 N. S.

Definition — view.

7. A view is a method of procedure conducted in the absence of the court as an aid in the ascertainment of the truth from the physical act of inspection, which does not require the exercise of the judicial

powers of a court at the time for its proper performance.

For other cases, see View, in Dig. 1-52 N. S.

Appeal — view out of state — waiver.

8. The taking of a view in another state is waived by failure to except to the granting of a motion for the taking of such view.

For other cases, see Appeal and Error, VII. k, in Dig. 1-52 N. S.

Same — experiments at view — waiver.

9. The making of experiments at a view is waived by failure to object until the decree is entered.

For other cases, see Appeal and Error, VII. k, in Dig. 1-52 N. S.

(June 30, 1917.)

EXCEPTIONS by libellant to rulings of the Superior Court for Carroll County made during the trial of a suit for divorce which resulted in a verdict for libellee. Overruled.

The libel, as a ground for divorce, alleged that adultery was committed at Magnolia, Massachusetts. Witnesses for libellant testified to acts of libellee. On July 11, 1916, the court, in reliance upon this evidence, granted libellant a divorce, but suspended the decree for thirty days. On the 7th day of August a motion was filed for a withdrawal of the order of divorce and for a rehearing on the ground that the witnesses could not see what they testified to because of the physical situation of the locus in quo. A view, which was taken in the presence of counsel for both sides, was ordered, and on September 10 and 23 experiments were made to determine the truth of the statements made by the witnesses. A further view was taken and experiments made on October 30th. The court on November 6th ordered vacation of the decree of divorce and dismissal of the libel. A bill of exceptions was filed by libellant December 12th, and on the 20th a motion was filed to set aside the decree of November 6th, which was denied.

Further facts appear in the opinion.

Messrs. Nathaniel E. Martin, Michael J. Sughrue, Henry F. Hurlburt, and Carroll A. Wilson, for libellant:

The decree of July 11, 1916, being a final decree, could not thereafter be attacked by motion to amend or vacate, or by any other proceeding purporting to impair its finality, and the jurisdiction of the

Note. — As to view outside the territorial jurisdiction, see annotation following this case, post, 984.

L.R.A.1917F.

trial judge over the cause was thereafter at an end, so that the decree of November 6, 1916, purporting to vacate the final decree of July 11 and to enter a new final decree, was a nullity, and should be set aside.

Zeitlin v. Zeitlin, 202 Mass. 205, 23 L.R.A. (N.S.) 569, 132 Am. St. Rep. 490, 88 N. E. 762; *Ashuelot R. Co. v. Cheshire R. Co.* 59 N. H. 409; *Wells v. Pierce*, 27 N. H. 503; 2 Dan. Ch. Pl. & Pr. 6 Am. ed. pp. 1019, 1476; *Taylor v. Sharp*, 3 P. Wms. 371, 24 Eng. Reprint, 1106; 2 Maddock, Ch. Pr. 630, 709; *Ogilvie v. Herne*, 13 Ves. Jr. 563, 33 Eng. Reprint, 405; *Willis v. Parkinson*, 3 Swanst. 233, 36 Eng. Reprint, 843; *Ollerenshaw v. Harrop*, L. R. 9 Ch. 480; *Bright & Co. v. Sellar* [1904] 1 K. B. 6, 72 L. J. Ch. N. S. 921, 89 L. T. N. S. 431, 20 Times L. R. 12, 52 Week. Rep. 148; *Clapp v. Thaxter*, 7 Gray, 384; *Brooks v. Howard*, 55 N. H. 69; *Lakin v. Lawrence*, 195 Mass. 27, 80 N. E. 579; *Marshall Engine Co. v. New Marshall Engine Co.* 203 Mass. 410, 89 N. E. 548; *Fairbanks v. Newhall*, 222 Mass. 598, 111 N. E. 385; *Jones v. Davenport*, 45 N. J. Eq. 77, 17 Atl. 570; *Pitman v. Thornton*, 65 Me. 95; *Gilpatrick v. Glidden*, 82 Me. 201, 19 Atl. 166; *Simpson v. Downs*, 5 Rich. Eq. 421; *Mead v. Arms*, 3 Vt. 148, 21 Am. Dec. 581; *Parsons v. Stevens*, 107 Me. 65, 78 Atl. 347; *Pillsbury v. Springfield*, 16 N. H. 565; *Newton v. Worcester*, 160 Mass. 516, 48 N. E. 274; *Thurston v. Blunt*, 216 Mass. 264, 103 N. E. 478.

If the trial judge had any power to enter any decree on November 6, having once found the facts in favor of the libellant and entered a final decree thereon, he could not thereafter, without a second trial of the cause, make a new finding of facts in favor of the libellee, enter a new final decree upon those facts, and thereby deprive the libellant of his right to a second trial in case the first decree should be set aside.

Mathews v. Smith, 2 Younge & J. 426; *Bothwell v. Boston Elev. R. Co.* 215 Mass. 467, L.R.A.—, —, 102 N. E. 605, Ann. Cas. 1914D, 275; *Robinson v. Trofitter*, 106 Mass. 51; *Beard v. American Type Founders Co.* 123 Ill. App. 50; *Wray v. Hill*, 85 Ind. 546; *Insky v. Chatkoff*, 84 N. Y. Supp. 253; *Public Bank v. Birnbaum*, 117 N. Y. Supp. 237; *Ela v. Ela*, 63 N. H. 116; *Bickford v. Bickford*, 74 N. H. 448, 69 Atl. 579; *Fowler v. Towle*, 49 N. H. 507; *Bohlen v. Metropolitan Elev. R. Co.* 121 N. Y. 546, 24 N. E. 932; *Heath v. New York Bldg. Loan Bkg. Co.* 146 N. Y. 260, 40 N. E. 770; *Fannon v. McNally*, 33 App. Div. 609, 53 N. Y. Supp. 1032; *Travers v. Wormer*, 13 Ill. App. 39; *Beard v. American Type L.R.A.* 1917F.

Founders Co. 123 Ill. App. 50; *Lawrence v. Corbelle*, 28 Idaho, 329, 154 Pac. 495; *Hurley v. Kennally*, 186 Mo. 225, 85 S. W. 357; *Sugden v. St. Leonards*, L. R. 1 Prob. Div. 154, 45 L. J. Prob. N. S. 49, 34 L. T. N. S. 372, 24 Week. Rep. 60; *Smith v. Smith*, L. R. 7 Prob. Div. 84, 51 L. J. Prob. N. S. 31, 46 L. T. N. S. 696, 30 Week. Rep. 688; *Los Angeles County v. Lankershim*, 100 Cal. 525, 35 Pac. 153, 556; *Pico v. Sepulveda*, 66 Cal. 336, 5 Pac. 515; *Hole v. Takekawa*, 165 Cal. 372, 132 Pac. 445; *Irving v. Askew*, L. R. 5 Q. B. 208, 39 L. J. Q. B. N. S. 118, 18 Week. Rep. 467; *Wray v. Hill*, 85 Ind. 546; *Martindale v. Palmer*, 52 Ind. 411; *Houston v. Roach*, 11 Ky. L. Rep. 52; *State ex rel. Shreveport Cotton Oil Co. v. Blackman*, 110 La. 266, 34 So. 438; *Yorke v. Yorke*, 3 N. D. 343, 55 N. W. 1095.

The trial judge had no power on November 6 to afford relief upon any motion not granted by him; he had no power to take the course of litigation into his own hands, and to determine the rights of the parties in matters not presented to him for determination.

Mitchell v. Hackett, 14 Cal. 661; *Wright v. Hawkens*, 36 Ind. 264; *Lawrence v. Corbelle*, 28 Idaho, 329, 154 Pac. 495; *State ex rel. Shreveport Cotton Oil Co. v. Blackman*, 110 La. 266, 34 So. 438.

Assuming that the trial judge upon cause shown had, on November 6, the power to vacate the decree of July 11 on proper grounds, he had no power to set that decree aside on the ground that perjured testimony was given at the trial of the case, particularly in view of the fact that the truth or falsehood of such alleged perjured testimony was the fact in issue at the original trial.

Adams v. Adams, 51 N. H. 388, 12 Am. Rep. 134; *Sheafe v. Sheafe*, 29 N. H. 269; *Richmond v. Bowen*, 54 N. H. 99; *Folsom v. Folsom*, 55 N. H. 78; *Demerit v. Lyford*, 27 N. H. 541; *Russell v. Dyer*, 39 N. H. 528; *Zeitlin v. Zeitlin*, 202 Mass. 205, 23 L.R.A. (N.S.) 569, 132 Am. St. Rep. 490, 88 N. E. 762; *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93; *Flower v. Lloyd*, L. R. 10 Ch. Div. 327, 39 L. T. N. S. 613, 27 Week. Rep. 496; *Holmes v. Holmes*, 63 Me. 420; *Mengel v. Mengel*, 145 Iowa, 737, 120 N. W. 72, 122 N. W. 899; *Gelwicks v. Gelwicks*, 160 Iowa, 675, 142 N. W. 409; *Orr v. Orr*, 75 Or. 137, 144 Pac. 753, 146 Pac. 964; *Robinson v. Robinson*, 77 Wash. 663, 51 L.R.A. (N.S.) 534, 138 Pac. 288; *Whittley v. Whittley*, 60 Misc. 201, 111 N. Y. Supp. 1078; *Walker v. State*, 43 Ind. App. 605, 86 N. E. 502; *Pico v. Cohn*, 91 Cal. 129, 13 L.R.A. 336,

25 Am. St. Rep. 159, 25 Pac. 970, 27 Pac. 537.

The judge had no power to take a view in a divorce action.

Thurston v. Blunt, 216 Mass. 284, 103 N. E. 478; Newton v. Worcester, 169 Mass. 516, 48 N. E. 274; Batchelder v. Manchester Street R. Co. 72 N. H. 329, 56 Atl. 752; Cheshire Nat. Bank v. Jaynes, 224 Mass. 14, 112 N. E. 500; Jenkins v. Bushby [1891] 1 Ch. 484, 60 L. J. Ch. N. S. 254, 64 L. T. N. S. 213, 39 Week. Rep. 321; Timson v. Wilson, L. R. 38 Ch. Div. 72, 59 L. T. N. S. 76, 36 Week. Rep. 418; London General Omnibus Co. v. Lavell [1901] 1 Ch. 135, 70 L. J. Ch. N. S. 17, 83 L. T. N. S. 453, 17 Times L. R. 61, 18 R. P. C. 74; State v. Landry, 29 Mont. 218, 74 Pac. 418; Buffalo Structural Steel Co. v. Dickinson, 98 App. Div. 355, 90 N. Y. Supp. 268; Smith v. St. Paul City R. Co. 32 Minn. 1, 50 Am. Rep. 550, 18 N. W. 827, 4 Am. Neg. Cas. 220; Meier v. Weikel, 22 Ky. L. Rep. 953, 59 S. W. 496; Garcia v. State, 34 Fla. 311, 16 So. 223; Farwell v. Sturgis Water Co. 10 S. D. 421, 73 N. W. 916; Peterson v. Lott, 11 Ga. App. 536, 75 S. E. 834; Brady v. Shirley, 14 S. D. 447, 85 N. W. 1002.

The judge had no power to take a view beyond the territorial limits of New Hampshire, at Magnolia, Massachusetts.

Lee v. Wells, 15 Gray, 459; Share v. Anderson, 7 Serg. & R. 43, 10 Am. Dec. 421; Rainey v. Ridgeway, 151 Ala. 532, 43 So. 843; Ex parte Parker, 6 S. C. 472; Adams v. Kyzer, 61 Miss. 407; Buchanan v. Jones, 12 Ga. 612; Shaw v. Spencer, 57 Wash. 587, 107 Pac. 383; Price v. Bayless, 131 Ind. 437, 31 N. E. 88; Rockford, R. I. & St. L. R. Co. v. Coppinger, 66 Ill. 510; Stoke v. Robinson, 6 Times L. R. 31; Batchelder v. Currier, 45 N. H. 460; Ensign v. Faxon, 224 Mass. 145, 112 N. E. 948; William Cramp & Sons Ship & Engine Bldg. Co. v. Curtiss Marine Turbine Co. 228 U. S. 645, 57 L. ed. 1003, 33 Sup. Ct. Rep. 722; Burgess v. Burgess, 71 N. H. 293, 51 Atl. 1074; Malins v. Dunraven, 9 Jur. 690; State v. Hawthorn, 134 La. 979, 64 So. 873; Phillips v. Thralls, 26 Kan. 780; Dunlap v. Rumph, 43 Okla. 491, 143 Pac. 329.

Having taken these views, whether with-in his power as a judge or not, the judge had no power to treat the same as independent evidence, and to consider them as a basis of his decree of November 6.

Hale v. Wyatt, 78 N. H. 214, 98 Atl. 379; State v. Horn, 43 Vt. 20; Shafer v. Eau Claire, 105 Wis. 239, 81 N. W. 409; Morss v. Morss, 11 Barb. 510; Gray v. Crockett, 35 Kan. 66, 10 Pac. 452; Dabney v. Mitchell, 66 Ala. 495; Dewey v. Wil-
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liams, 43 N. H. 384; Hattie v. Leitch, 16 Sc. Sess. Cas. 4th series, 1128; London General Omnibus Co. v. Lavell [1901] 1 Ch. 135, 70 L. J. Ch. N. S. 17, 83 L. T. N. S. 453, 17 Times L. R. 61, 18 R. P. C. 74; Denver Omnibus & Cab Co. v. J. R. Ward Auction Co. 47 Colo. 446, 107 Pac. 1073, 19 Ann. Cas. 577; Elston v. McGlaughlin, 79 Wash. 355, 140 Pac. 396, Ann. Cas. 1916A, 255; First Nat. Bank v. Clifton Armory Co. 14 Ariz. 360, 128 Pac. 810, Ann. Cas. 1915A, 1061; Atlantic & B. R. Co. v. Cordele, 125 Ga. 373, 54 S. E. 155; Molalla Electric Co. v. Wheeler, 79 Or. 478, 154 Pac. 686; Stanford v. Felt, 71 Cal. 249, 16 Pac. 900.

The trial judge had no power to direct or permit experiments going to the issues in the case to be made in his presence at the view, or to treat the same as evidence in the case.

Moore v. Chicago, St. P. & K. C. R. Co. 93 Iowa, 484, 61 N. W. 992; Hughes v. General Electric Light & P. Co. 107 Ky. 485, 54 S. W. 723; Hayward v. Knapp, 22 Minn. 5; Louisville R. Co. v. Hallahan, — Ky. —, 119 S. W. 200; Meier v. Weikel, 22 Ky. L. Rep. 953, 59 S. W. 496; Wilson v. United States, 53 C. C. A. 652, 116 Fed. 484; People v. Gallo, 149 N. Y. 106, 43 N. E. 529; Hays v. Territory, 7 Okla. 15, 54 Pac. 300; State v. Landry, 29 Mont. 218, 74 Pac. 418; State v. Perry, 121 N. C. 533, 61 Am. St. Rep. 683, 27 S. E. 997; State v. Bertin, 24 La. Ann. 46; Sasse v. State, 68 Wis. 530, 32 N. W. 849; Garcia v. State, 34 Fla. 311, 16 So. 223.

Messrs. Martin P. Howe and W. H. Smart also for libellant.

Messrs. Streeter, Demond, Woodworth & Sulloway and Walter I. Badger for libellee.

Walker, J., delivered the opinion of the court:

Many of the questions argued by the libellant are not properly before the court. It is ordinarily essential, under our practice, that parties desiring to litigate questions of law in this court, which were involved in the trial of the case, should unequivocally take an exception to the ruling of which they complain, and that the record should show they did so. A mere objection, not followed by an exception, is unavailing. "Under the well-established practice of this state, unless exception is taken and noted, it is conclusively understood that the ruling is accepted as the law of the case." Lee v. Dow, 73 N. H. 101, 105, 59 Atl. 376; Story v. Concord & M. R. Co. 70 N. H. 364, 380, 48 Atl. 288; Cheshbrough v. K. & C. Mfg. Co. 77 N. H. 387, 92 Atl. 332.

Whether an exception was taken is a question of fact for the trial court to find and report, and argument upon the transfer of a case that an exception was intended to be taken is irrelevant and futile. Consequently the fact that the libellant objected to the granting of the motion for a rehearing, and to the taking of a view, and to the proceedings thereunder, is of no materiality here, since it appears from the bill of exceptions that no exceptions were interposed or allowed to any of the matters now complained of, until the filing of the bill of exceptions December 12, 1916.

But it is argued that, although the libellant took no exception to the action of the court in entertaining the libellee's motion for a rehearing of the case, after the decree of July 11, 1916, granting a divorce to the libellant, it is still permissible for him to take the position that upon the filing of that decree the court's jurisdiction of the case was at an end, and hence that the decree of November 11, 1916, vacating the first decree and ordering a dismissal of the bill, was a nullity. One sufficient reason why this position is unsound, even if there were no others, is that under the practice prevailing in the superior court a decree for divorce, like other decrees or verdicts, does not become *res judicata* and final until the end of the term when the parties are entitled to judgment if the litigation is at an end, or until a special order is made for judgment on a specified date during term time. In Hillsborough county the practice is to regard the first day of each month as judgment day. Whatever the ancient practice may have been in this respect, by which the enrolment of a decree was regarded as a final act, it is not of binding effect when a different practice prevails. As no special day had been appointed when the decree should become effective as a judgment, the case had not been finally disposed of when the rehearing was had and the order made annulling the first decree and dismissing the libel. The case had not been fully disposed of (*Haynes v. Thom*, 28 N. H. 386, 399), but was still before the court and subject to such orders as justice might require (*Adams v. Adams*, 51 N. H. 388, 396, 12 Am. Rep. 134). It is not true, therefore, as suggested in argument that the status of the parties as husband and wife was finally changed the instant the decree of divorce was entered. The court having found that justice required that the decree of divorce should be vacated, its power to make the last decree cannot be doubted.

The distinction between this case and *Folsom v. Folsom*, 55 N. H. 78, is obvious. That was an application for a retrial of a

divorce case, which had been heard and determined at a former term of court, upon the ground of perjury; and upon the allegations of the petition it was held that as a matter of law the petition could not be granted. It would hardly be regarded as commendable practice in this state to hold that the court, after having technically entered a decree of divorce, could not revoke it during the term upon being convinced that he had been grossly imposed upon by the libellant and his witnesses. Such practice would be useful for no apparent purpose other than that of promoting injustice, and for that reason it does not prevail in this state. "The notion that when judgment had been given and enrolled no amendment could be made at a subsequent term (3 Bl. Com. 407) was long ago abandoned." *Owen v. Weston*, 63 N. H. 599, 603, 56 Am. Rep. 547, 4 Atl. 803.

It appears, moreover, that the decree of divorce was suspended on July 13th for thirty days from July 11th, the day it was entered, in order to permit the libellee to file her motion for a rehearing. While this motion was pending, and while the case was being reconsidered and reheard, no suggestion was made by anyone that the power of the court came to an end when the thirty-day limitation expired, as is now argued by the libellant. Until the questions raised on the rehearing were determined, the case remained open, in accordance with the understanding of the parties, the undoubted intention of the court, and the recognized practice in this state. *Eastman v. Concord*, 64 N. H. 263, 8 Atl. 822. No question of jurisdiction is involved in this contention, requiring further discussion.

But it is claimed that the libellee's motion for further proceedings after the first decree was entered was in legal effect an application for a new trial, and that by granting the motion the court could only proceed upon that theory and hear the case *de novo*. If it is conceded that a retrial of the whole case might have been ordered by the court after it was convinced that a serious error of fact had been introduced at the first trial, it is clear that such an order was not the only method by which the error could be corrected. *Lisbon v. Lyman*, 49 N. H. 553. That no misunderstanding might be indulged as to what the court intended to do, if he found that some of the libellant's witnesses had testified falsely at the first trial, upon whose testimony he had relied in concluding that the libellee had committed adultery, the court stated expressly at a hearing as to the scope of the questions presented by the motion, that "I shall vacate my decree and order the libel dismissed if I am satisfied that by the

balance of probabilities the libellant has not made out his case."

Other remarks by the court were made at the same time of similar import, and no exception or objection was made, on the theory now suggested that the court could only order a new trial. It is difficult to understand how counsel could have been misled in this respect or have been taken by surprise, when the court ordered the first decree vacated and the libel dismissed. It is certain that this court can draw no such inference. If the exception which the libellant took to the last decree might be held to cover the objection, it must be overruled.

Nor can the question whether the evidence warranted the court in vacating the decree and ordering the bill dismissed be now considered, since it appears that there was not "any claim as to the insufficiency of evidence to warrant a reconsideration of the first decree and dismissal of the bill made, until December 20, 1916," several days after the last decree was entered. To have the benefit of an exception upon that ground it must be taken before the case is submitted; otherwise the objection is deemed to be waived. *Head & D. Co. v. New England Breeders' Club*, 75 N. H. 449, 75 Atl. 982; *Moynihan v. Brennan*, 77 N. H. 273, 90 Atl. 964.

Perhaps the principal contention of the libellant is in support of the proposition that the court, in taking a view in Massachusetts, attempted to perform judicial acts which for want of territorial jurisdiction were absolutely void, and that it is immaterial whether the libellant excepted to that procedure or not, since absolute want of power is not remedied by consent, and may be taken advantage of at any time during the trial or subsequently by collateral attack. While it is true that when it appears a court has no jurisdiction of the subject-matter of a suit, the proceeding will be dismissed, even if no objection is made (*Burgess v. Burgess*, 71 N. H. 293, 51 Atl. 1074), the question is whether the taking of a view in another state is so far beyond the jurisdiction of the court that it renders all subsequent proceedings in the case, including the verdict and judgment, absolutely void, or whether it is at most merely an irregularity in the trial, which is obviated by the consent of the parties, or by the absence of objection thereto. The solution of this question depends very materially upon the object or purpose of a view. If it is to transfer the trial with all its incidents to the place to be inspected, little doubt would arise that it could not, for many reasons, take place outside the state; but, if it is merely to enable the jury or the trier of the facts to acquire some spe-

cial information material to the case by inspection alone that could not be conveniently or satisfactorily presented in the court room, the fact that the inspection in the absence of the court occurred in another state would seem to have little legitimate bearing on the power of the court to try the merits of the case. Whether a referee or master or a judge may conduct a trial, in whole or in part, outside the state, it is unnecessary to decide. Many instances of such procedure have occurred, apparently by consent of the parties.

In some sense the purpose of a view is the acquisition by the jury of a special and restricted kind of evidence, which the trial court in its discretion finds may be of use to the jury in reaching a verdict. The jury are not sent out to get evidence generally, or to examine physical facts not authorized in the order. They do not hear oral testimony; no witnesses are examined; no arguments are made. They merely see such physical objects as are properly shown to them, and receive impressions therefrom. They get a mental picture of the locality, which as sensible men they carry back to the court room and use in their deliberations as evidence. It would therefore be senseless to say that in this restricted sense the information thus gained by actual inspection is not evidence which the trier of the fact is authorized to use in reaching a verdict, and which counsel are entitled to comment upon in argument. The acquisition of such evidence does not depend upon the oaths of witnesses, is not tested by cross-examination, and presents no questions of law calling for a ruling of the court on the grounds of admissibility or relevancy. The court as such has no function to perform when such evidence is presented, for it depends entirely upon the jury's ability to observe what is pointed out to them. No trial is had while the view is in progress, and the court is not in session at the place of the view for the trial of the case.

The procedure by which special evidence of the character indicated becomes available is in fact based upon a useful rule of necessity, without which much valuable information clearly bearing upon the trial of cases would be withheld from the tribunal charged with the duty of deciding the facts. It provides a method by which evidence of a peculiar and restricted character may be obtained in the absence of the court and without the observance of the rules deemed essential in the production of evidence given in court. It may not be inaccurate to say that this procedure is anomalous, but is justified in fact as a necessary exception to the general rule that evidence must be

produced in court subject to numerous judicial restrictions and directions.

There is much apparent conflict in the language used by courts in defining the object or purpose of ordering or permitting views to be taken. In some of the authorities it is said that a view is, in no proper sense, intended to furnish evidence, but to afford a means by which the jury can better understand and apply the strictly legal evidence already in the case or to be thereafter submitted. This restrictive language is derived from Stat. 4 & 5 Anne, chap. 16, § 8, where in the discretion of the court jurors may be ordered to take a view of the "place in question, in order to their better understanding the evidence that will be given upon the trials of such issues." Similar expressions occur in the statute law of many of the states. In this state the statute provides that "In the trial of actions involving questions of right to real estate, or in which the examination of places or objects may aid the jury in understanding the testimony, the court, on motion of either party, may, in their discretion, direct a view of the premises by the jury, under such rules as they may prescribe." Pub. Stat. chap. 227, § 19.

It is not clear how this distinction proves the proposition that the information derived from a view is not for all practical purposes evidence, or that it is not as much evidence as similar information conveyed by an inspection of a physical object exhibited to the jury in court.

Other authorities hold that the information obtained by the jury upon a view is as much evidentiary in its character as the sworn testimony of witnesses regularly received in court, while still other courts regard it as evidence to be considered like sworn testimony, subject to the qualification that alone it is not sufficient to support a verdict. For cases in support of these differing opinions, see note in 42 L.R.A. 385. While the purpose of a view is not to obtain "evidence" in the broad sense of that term, or to permit the jury to use their power of observation while taking a view to discover material facts not apparent from the actual situation of the things under observation, it is difficult to understand why the impressions made upon their minds by an inspection of a physical object regularly pointed out to them should not be permitted, in a legal sense, to have the force of evidence, when as a matter of simple mental reasoning honest jurymen could reach no other result. If the object is black when seen by the jury it would be absurd to expect them to find that it was white, in the absence of evidence indicating that they had been imposed upon. L.R.A.1917F.

An instruction that, although they knew from an authorized observation of it that it was black, they could not, as a matter of law, find it was of that color, because they had no legal evidence of it, would strike the ordinary mind as a strange and unreasonable doctrine, based upon a refinement in legal reasoning subversive of the just and practical administration of justice. "There is no sense in the conclusion that the knowledge which the jurors acquired by the view is not evidence in the case." 1 Thomp. Trials, § 893; 2 Wigmore, Ev. § 1168; Tully v. Fitchburg R. Co. 134 Mass. 499; 7 Enc. Pl. & Pr. 581. There is little merit in the contention that the libellant had no means of knowing what impressions the evidence produced by the view had upon the justice, and hence that no way was open to meet or explain them; for this is equally true when a jury takes a view.

A more extended discussion of this subject or a critical examination of the cases outside this jurisdiction which seem to be germane is unnecessary, because the unquestioned practice in this state shown by the cases is determinative of the question. A view is one means of obtaining a certain class of evidence. Information thus acquired by the jury, which is material to the issue and necessarily involved in the subject-matter of the view, has been recognized as evidence in the following cases, among others, without a suggestion that its use as such was open to doubt: Cook v. New Durham, 64 N. H. 419, 420, 13 Atl. 650; Concord Land & Water Power Co. v. Clough, 70 N. H. 627, 47 Atl. 704; Flint v. Union Water Power Co. 73 N. H. 483, 485, 62 Atl. 788; Lane v. Manchester Mills, 75 N. H. 102, 106, 71 Atl. 629; City Bowling Alleys v. Berlin, 78 N. H. 169, 170, 97 Atl. 976; Osman v. W. H. McElwain Co. — N. H. —, 99 Atl. 287.

Nor is it important to inquire whether the power of the court to order an inspection of objects located at a distance from where the trial is had is an inherent and necessary power of the court under the common law, or whether it is derived from the statute, or whether it may be justified on both grounds in conjunction; since whatever theory is adopted as a matter of historical investigation, no one can question the existence of the power in this state, or successfully contend that it does not afford a reasonably convenient method of securing essential and material evidence. "If the established practical construction is theoretically wrong, the case is one of a class in which it is proper to act upon the maxim that common opinion and common practice may be accepted as conclusive evidence of what the law is." Tyler v. Flanders, 58

N. H. 371, 373; Gleason v. Emerson, 51 N. H. 405.

The argument is presented that the statute does not authorize a judge, when trying a case without a jury, to take a view, and that the common law does not permit such procedure. In short the position is that he has no jurisdiction to take a view, however important such procedure may be in the particular case. But the discussion of that proposition, which is in direct conflict with the uniform practice in the courts of this state since the foundation of the government, under the statute, or under the common law, would be of no practical use. The trier of facts, whether the court, referees, or masters, as well as juries, has been permitted in accordance with the principle of utilizing the best inventible procedure, to view material objects in order to ascertain the truth. See *Adams v. Bushey*, 60 N. H. 290, where a referee took a view in the absence of the parties, and the report was sustained. A contrary doctrine would seem to rest upon the most technical and unsatisfactory reasoning. A judge when taking a view acts simply as a trier of facts; he is *pro hac vice* the jury. See *Fowler v. Towle*, 49 N. H. 507, 523; *Pub. Stat. chap. 204, §§ 8, 9*.

But it is argued, with great apparent confidence, that the judge exceeded his territorial jurisdiction when he took the view in Massachusetts. It must be borne in mind that he did not hold court or try the case in that state. When he was there the court was in recess. And so far as the argument is based upon that assumption it is clearly fallacious, as shown above. It cannot be supported upon that ground, unless when a view is taken by the jury it is correct to say that the trial is transferred to the locality inspected, although the presiding justice is not present, no testimony is taken, and none of the usual and necessary methods incident to a trial are observed. A legal trial in common-law countries presupposes and is predicated upon the presence of a presiding justice under whose directions the case is tried. If no such person is present it would be a clear misnomer to say that there could be a legal trial. *People v. Thorn*, 156 N. Y. 286, 42 L.R.A. 368, 50 N. E. 947. There was no attempted trial of the case in Massachusetts.

All that the judge did was to go to Magnolia without the objection of the libellant, as the record shows, and in the presence of the parties or their attorneys observe the situation of the premises in its bearing upon the disputed question whether witnesses who had testified for the libellant could see the libellee in certain locations about the hotel from the positions they said they

occupied. This act, it is urged, he had no jurisdictional power to do, and authority to do it could not be conferred by the consent, waiver, or express request of the parties, and hence that the fatal effect of such an act may be taken advantage of without a formal exception. While it is true that the jurisdiction of a court of the subject-matter of a suit when it exists is alone conferred by the law, and its absence may be taken advantage of at any stage of the proceedings, and if it is conceded that a court cannot exercise its judicial functions outside the prescribed limits of its jurisdiction, the inquiry is whether the justice, when he made the inspection at Magnolia, was exercising a judicial power that he could only exercise in New Hampshire. Did the prescribed territorial limits of the superior court of Carroll county in the trial of causes preclude him as the trier of the facts in this case from taking a view at a point beyond those limits?

It cannot be successfully maintained that this doctrine of jurisdiction is so inelastic as to render a view, ordered by the court of one county to be taken within the limits of another, void for want of territorial jurisdiction. Where both parties were residents of Grafton county and the suit was brought in Belknap county, the trial in the latter county was not arrested when the jurisdictional irregularity was shown on defendant's motion for a change of venue. The decisive question in that case was what justice required under the circumstances. It was not treated as a fundamental question of jurisdiction. *Whitcher v. Union Grange Fair Asso.* 77 N. H. 405, 92 Atl. 735. In *Wheeler & W. Mfg. Co. v. Whitcomb*, 62 N. H. 411, and in *Bishop v. Silver Lake Min. Co.* 62 N. H. 455, the bringing of an action in a wrong county was not regarded as such a serious defect that it could not be transferred to the proper county. The irregularity was capable of being obviated. Reasonable procedure justified such action. *St. Louis & S. F. R. Co. v. McBride*, 141 U. S. 127, 35 L. ed. 659, 11 Sup. Ct. Rep. 982. If the case of *Little v. Dickinson*, 29 N. H. 56, is in conflict with these cases, it must be regarded as overruled by them. Indeed, in the present case the trial which lasted many days was held in Merrimack county for the convenience of all parties concerned, without objection or dissent by anyone.

In *Kimball v. Fisk*, 39 N. H. 110, 122, 123, 75 Am. Dec. 213, proceedings for the appointment of a guardian of an insane person were held by the judge of probate upon days other than those specified by the statute for the holding of the probate court; and, in holding that the acts of the judge

were legal, the court said: "If it should be regarded as irregular that business should be done by the judge of probate on days not appointed by the law, still this is hardly to be regarded as a matter affecting the jurisdiction of the court over the subject-matter. If the proceedings would be set aside on motion seasonably made in the probate court, or in this court on appeal, still the court has not acted beyond its jurisdiction. The defect is not one necessarily fatal, since it may be waived or released; and consequently, so long as the proceedings remain, and are not set aside on motion or appeal, all parties are bound by them, and they cannot be treated as nullities when they are incidentally brought in question."

The question was not one of the power of the court to act upon the subject presented, but of its power to act at a particular time. It was a question of procedure, and not of jurisdiction. A similar illustration is furnished by *Harris v. Parker*, 66 N. H. 324, 23 Atl. 81, where it was claimed that the appointment of a commissioner in insolvency was unauthorized; but the appellants, having submitted their claims to him with a full knowledge of the facts, were held to have waived their right to object to the appointment made by a court having jurisdiction of the subject-matter. See also *State v. Richmond*, 26 N. H. 232, 243; *Bruce v. Cloutman*, 45 N. H. 37, 84 Am. Dec. 111; *Rowe v. Page*, 54 N. H. 190, 196; *White v. White*, 60 N. H. 210; *Lombard v. Maguire Penniman Co.* — N. H. —, 99 Atl. 295; *Sanderson v. Nashua*, 44 N. H. 402.

It may be said that these cases are not directly in point and do not establish the rule that a view may be properly taken in another state. They show, however, that many defects of a jurisdictional character are not fundamental, since they may be obviated by the consent or the waiver of the parties, and that it is not true in an unqualified sense that jurisdiction may not be acquired by consent, or that when jurisdiction of the subject-matter and the parties is once acquired, it may be lost by methods of procedure in the trial, which justice clearly requires. If, in order to ascertain the truth upon a material issue, the judge deemed it important that, as the trier of the fact, he should personally inspect the relative position of houses and other physical objects located in Massachusetts, it is not perceived why it should be held that he was absolutely precluded from doing so, because the case was pending within the territorial limits of New Hampshire. If, while trying a case in one county he can order the jury to take a view in another county, or take a view himself in

another county in a case tried without a jury,—a well-recognized practice,—why is he or the jury entirely disqualified to perform the same act across the geographical boundary line in another state? The only suggested answer is that it is inherently impossible for a court to try cases beyond the territorial limits of its jurisdiction. This argument is based upon the false assumption that a view is equivalent to a judicial trial, while it is apparent that the trial is in fact suspended in order that a view may be taken. The presiding justice does not often accompany the jury on a view; no sworn evidence is received, and no arguments are made.

A view, therefore, is a method of procedure conducted in the absence of the court as an aid in the ascertainment of the truth from the physical act of inspection, which does not require the exercise of the judicial powers of a court at the time for its proper performance. If such is a correct exposition of a view when taken within the state, its essential character remains when it occurs without the state. The territorial jurisdiction of the court is as fully preserved as it is when the court admits the testimony of a civil engineer as to physical conditions observed by him in another state, or where maps, plans, and photographs are introduced for the inspection of the jury. If for any reason such a view is an irregularity, it may be waived, and was waived in this case. See authorities, *supra*.

The numerous cases referred to by the libellant, which it is claimed sustain his contention, are not of convincing importance. The most of them relate to orders made beyond the limits of the jurisdiction, which it was held were of a judicial character, and many of which, upon that question even, are open to serious doubt; as, for instance, the case of *Dunlap v. Rumph*, 43 Okla. 491, 143 Pac. 329, where it was held that a judge could not approve and sign a "case-made" while he was in Chicago, although the parties agreed that it was correct, and that it should be approved by him in that city; in *Price v. Bayless*, 131 Ind. 437, 31 N. E. 88, it was held that a judge cannot issue a restraining order while he is in Michigan; in *Shaw v. Spencer*, 57 Wash. 587, 107 Pac. 383, that a judge cannot hear a motion for a new trial in another county; in *Buchanan v. Jones*, 12 Ga. 612, that the granting of a writ of certiorari outside the state is a void act; in *Adams v. Kyzer*, 61 Miss. 407, that the chancellor for one district has no power to hear and determine a motion to dissolve an injunction in another; in *Share v. Anderson*, 7 Serg. & R. 43, 10 Am. Dec. 421, that a justice of the peace cannot take the acknowledgment of

a deed in a county for which he was not appointed, but see *Odiorne v. Mason*, 9 N. H. 24; in *Rainey v. Ridgeway*, 151 Ala. 532, 43 So. 843, that an order of a judge of probate extending the time for signing a bill of exceptions is void when made outside the limits of his jurisdiction; and in *Lee v. Wells*, 15 Gray, 459, that a judge of probate cannot issue a warrant of insolvency while in another county. Some of the cases depend upon a construction of special statutes. *Ex parte Parker*, 6 S. C. 472; *Phillips v. Thralls*, 26 Kan. 780; *Rockford, R. I. & St. L. R. Co. v. Coppinger*, 66 Ill. 510. The case of *State v. Hawthorn*, 134 La. 979, 64 So. 873, was an indictment for stealing a bull, and it was deemed important by both parties that the jury should see the animal, which at the time of the trial was across the river, in the state of Mississippi. The court denied the request of both parties for a view, and upon appeal it was held that no error appeared, the court saying: "The jury, as such, could not have exercised its functions in another state, where also it would have been beyond the supervision and control of the court."

While the case might have been put upon the ground that the trial court properly exercised its discretion in denying the request, the reason given in the opinion is not convincing; since the only function the jury could exercise in Mississippi was that of seeing the bull; and whether, while performing that simple act, the immediate supervision of the court would be necessary, is not apparent. It is evidence that the foregoing cases have little bearing upon the present case, in which the trial court did not make any judicial orders or conduct any part of the trial in another jurisdiction.

It might be interesting to compare the cases above referred to with other cases where a more liberal practice seems to prevail; as, for instance, *Bate Refrigerating Co. v. Gillette (C. C.)* 28 Fed. 673, where it was held to be the universal practice to permit a master to act outside the territorial jurisdiction of the court and to take testimony in foreign countries. This was followed in *Consolidated Fastener Co. v. Columbian Button & Fastener Co. (C. C.)* 85 Fed. 54. In *People v. Thorn*, 156 N. Y. 286, 42 L.R.A. 368, 50 N. E. 947, it was held that a view by a jury of the premises where the crime was committed is not a part of the trial in such a sense that it could not be taken in the absence of the respondent. If an action is brought in a wrong county, the error is not fatal. With the consent of the parties the trial may proceed. *Bishop v. Silver Lake Min. Co.* 62 N. H. 455. But see *Malins v. Dunraven* (1845) 9 Jur. 690, L.R.A.1917F.

which is not a satisfactory or convincing decision.

If it were determined that for some jurisdictional reason a New Hampshire jury is disqualified to take a view outside the state, and that all subsequent proceedings in the case before the same jury are absolutely void, though no one raises an objection on that ground, much surprise would undoubtedly be created among the resident members of the profession; for the practice has prevailed in this state by common consent and approval for many years. And the fact that the question has not been raised or discussed in any of our reported cases is cogent evidence that it has not been deemed to be debatable. *State v. Sawtelle*, 66 N. H. 488, 32 Atl. 831, 10 Am. Crim. Rep. 347, was an indictment for murder in the first degree, in which the respondent was convicted and sentenced to be hanged. Able counsel defended him, and took and argued various exceptions, which were overruled. The trial was presided over by Chief Justice Doe and Associate Justice Bingham, and during its progress the jury were sent into the state of Maine to view localities which it was claimed were material to the issue on trial. No one seemed to have entertained a doubt of the propriety or legality of the proceeding; no objections were interposed to it. If it had been understood that the fundamental jurisdiction of the court was lost or suspended in consequence of the view, it is unaccountable that in a case of such importance that objection was not suggested or entertained by anyone connected with the trial. Numerous other instances have been called to our attention where juries have taken views outside the state with the consent of the parties; in fact, it is not inaccurate to say that it is the general practice in this state, whenever the court deems it useful and no objection is interposed. Whether it is an irregularity in procedure for the reason that the court has no extra-territorial power, and may not be able to compel the parties and the officers in charge of the jury to go outside the state, is not a question determinative of its power to try the case and render judgment therein; often an extraterritorial view has been taken with the consent of the parties.

"Where a court has jurisdiction of the cause and the parties, and proceeds erroneously, the judgment, notwithstanding the error, is binding until it is vacated or reversed. This distinction is well settled." *Smith v. Knowlton*, 11 N. H. 191.

"When it is once made to appear that a court has jurisdiction both of the subject-matter and of the parties, the judgment which it pronounces must be held conclusive and binding upon the parties thereto and

their privies, notwithstanding the court may have proceeded irregularly, or erred in its application of the law to the case before it. It is a general rule that irregularities in the course of judicial proceedings do not render them void." *Cooley, Const. Lim.* 587.

"Irregularities, which is but another word for illegalities, in the proceedings in an action, furnish everywhere ground of exception to the party whose rights are affected by them, and the irregular proceedings are at once set aside, on motion of the proper party. But it is a general rule that if a party who has ground to move the court to set aside any process or proceeding of any kind neglects to make his application in a reasonable time, after the facts have come to his knowledge, he is deemed to waive the exception by the delay, and will be forever precluded to make the objection afterwards." *State v. Richmond*, 26 N. H. 232, 243.

See also *Sanderson v. Nashua*, 44 N. H. 492; *Kimball v. Fisk*, 39 N. H. 110, 75 Am. Dec. 213; *State v. Buzzell*, 59 N. H. 65, 4 Am. Crim. Rep. 410; *State v. Albee*, 61 N. H. 423, 428, 60 Am. Rep. 325; *State v. Almy*, 67 N. H. 274, 280, 22 L.R.A. 744, 28 Atl. 372.

But when "the court does not possess the legal power to decide the question involved, then jurisdiction cannot be acquired by consent." *Brown, Jurisdiction of Courts*, § 47; *Hobart v. Frost*, 5 Duer, 672; *Smith v. Knowlton*, 11 N. H. 191; *Morse v. Presby*, 25 N. H. 299; *Crowell v. Londonderry*, 63 N. H. 42; *Warren v. Glynn*, 37 N. H. 340; *Bickford v. Franconia*, 73 N. H. 194, 80 Atl. 98; *Hutchinson v. Manchester Street R. Co.* 73 N. H. 271, 276, 60 Atl. 1011; *Fowler v. Brooks*, 64 N. H. 423, 10 Am. St. Rep. 425, 13 Atl. 417; *State v. Shattuck*, 45 N. H. 205; *Voorhees v. Jackson*, 10 Pet. 449, 473, 9 L. ed. 490; 1 Black, Judgm. § 244.

As it appears from the bill of exceptions that the libellant took no exception to the granting of the libellee's motion that the court take a view of the premises in Massachusetts, he waived his right to object to such procedure, even if it is conceded that it was what is termed an "irregularity." And as the territorial jurisdiction of the court was not lost or impaired by the view in such a sense that no exception would be necessary to bring the matter to the attention of the court, the contention of the libellant upon this point is unavailing.

Whether there were irregularities at the view cannot be considered at this stage of the case, in the absence of any objection and the exception thereto. It has been argued that certain experiments were resorted to at the view which were improper and ought not to have been made. As no L.R.A.1917F.

objection was made to that practice until after the decree was entered, the argument is superfluous. But upon the question of the legality of experiments made while a view is being taken, see *Flint v. Union Water Power Co.* 73 N. H. 483, 485, 62 Atl. 788; *Concord Land & Water Power Co. v. Clough*, 70 N. H. 627, 47 Atl. 704. The claim that the libellant had no opportunity to take the necessary exceptions except while the court was in Massachusetts and without power to act judicially is without merit, since he could have applied to the court in this state within a reasonable time for the allowance of his exception. He was not prevented from making the attempt.

Several affidavits of persons who had examined the premises at Magnolia, to the effect it was physically impossible that witnesses for the libellant could have seen what they testified they saw, were introduced in support of the libellee's motion for a rehearing; and it appears from the bill of exceptions that the court considered them in connection with the experiments made at the view. But it does not appear that they were considered as independent evidence. So far as the view demonstrated that the statements were true, it is not apparent what substantial error was committed. Moreover, it is to be noted that in the trial of divorce cases "the court has never been governed by strict rules of evidence or practice, and has always exercised a broad discretion, as well in the admission of evidence as in other respects." *Warner v. Warner*, 69 N. H. 137, 138, 44 Atl. 908.

In accordance with this principle, if for no other reason, the exception to the use made of the affidavits by the court must be overruled.

Several exceptions to the evidence were regularly taken at the original trial, and are now insisted upon. But they do not appear to be of sufficient importance to warrant extended discussion, especially in view of the fact that the strict rules of evidence are not applicable to divorce trials. *Warner v. Warner*, supra.

It appears that petitions to the probate court for Carroll county have been filed, asking for the appointment of a guardian of the minor son of the parties, and that subsequently the libellee filed in the superior court a petition for legal separation and maintenance, and for the custody of her minor son. By agreement of the parties the question is transferred in this case whether the probate court has authority to appoint a guardian over the minor son pending a decision upon the petition filed in the superior court. No orders upon these petitions have been made in either court. The probate court has not appointed a

guardian, nor has the superior court appointed a custodian. That the probate court has power generally to appoint a guardian of a minor "whenever there is occasion," of both his person and estate (Pub. Stat. chap. 178, §§ 1, 6) is not denied; nor is it denied that the superior court in a divorce proceeding may appoint a temporary or permanent custodian of the child of the parties (Pub. Stat. chap. 176, § 4; Laws 1907, chap. 31). Whatever distinction there may be between the powers and duties of a guardian and those of a custodian, under the statutes, it is clear that it was the purpose of the legislature to authorize the superior court to appoint the latter in a divorce proceeding. If the probate court should, as it probably would, appoint the

same person as guardian, the contentions of the parties upon this subject would doubtless be ended; and the same result would be reached if the probate court should appoint a guardian deemed by the libellee to be unfit for the trust, since upon appeal to the superior court the matter of guardianship would be finally determined, as well as the question of custody. In this view of the matter it is not advisable to decide at this time the question, which is somewhat irregularly presented, as it may become of no practical importance to the parties.

Exceptions overruled; libel dismissed.

All concur.

Annotation—View outside the territorial jurisdiction.

The decision in *CARPENTER v. CARPENTER*, ante, 974, that a judge trying a divorce case may take a view without the state seems to be without any direct authority, although, as will be seen from the opinion, the court states that in the important murder case of *State v. Sawtelle* (1891) 66 N. H. 488, 32 Atl. 831, 10 Am. Crim. Rep. 347, the jury were sent into the state of Maine to take a view, and that "no one seemed to have entertained a doubt of the propriety or legality of the proceeding; no objections were interposed to it."

In *State v. Hawthorn* (1914) 134 La. 979, 64 So. 873, it was held that the trial judge properly refused to permit the jury to go into the state of Mississippi to view a bull alleged to have been stolen by the defendant in the state of Louisiana. The court said: "The district attorney made and the defendant joined in the request, which was overruled by the judge on the ground that the locus of the animal was out of the jurisdiction of the court. We think that there was no error in the ruling. The jury, as such, could not have exercised its functions in another state, where also it would have been beyond the supervision and control of the court. The bull was beyond the jurisdiction of the court, and, if the animal was not brought to the Louisiana side of the river, it was not the fault of the judge."

In England it is sufficient ground for change of venue that a view will be necessary in the county to which the change is desired.

Thus, in *Malins v. Dunraven* (1845) 9 Jur. (Eng.) 690, where one of the grounds on which a change of venue was

asked to another county was that a view would be necessary in such other county, it was held that the court could not direct a view out of the county even by consent.

So, in *Reg. v. Sheldon* (1875) 32 L. T. N. S. (Eng.) 27, it was held to be a sufficient reason for a change of venue in a criminal case that a view would be necessary in another county.

It has been held under statute, however, that a view may be granted out of the county. Thus, in *People v. Bush* (1887) 71 Cal. 602, 12 Pac. 781, it was held that there was no error in a homicide case, where there had been a change of venue, to cause a view to be taken out of the county of trial, where the statute authorized a view of any place, etc.

Similarly it was held proper to order a view without the county, where the statute authorized a view "whenever, in the opinion of the court, it is proper for the jurors to have a view of the place at which any material fact occurred." *Jones v. State* (1894) 51 Ohio St. 331, 38 N. E. 79, where the court said: "The words are broad enough to authorize a jury to be sent anywhere, and no reason is apparent why a jury might not be sent to any place where a material fact occurred, if within the jurisdiction of this state."

In *Young v. Pennsylvania F. Ins. Co* (1916) 269 Mo. 1, 187 S. W. 856, where it was held that there was no error in the refusal of the trial court to order a view in a certain city (out of the county), it does not appear whether the case was governed by statute or not, nor whether the lack of power given as the reason of the trial court's decision was

that the place was out of the county or not. The court there said: "Whilst it is true the trial court seems to have put his refusal upon the ground that he was not empowered to make such an order, yet, although he put it upon that ground, his refusal amounted to nothing more than a denial to defendant of a mere discretionary right, and if under the facts there was no abuse of a sound legal discretion in the refusal, the defendant is not harmed by the statement of an erroneous ground by the court. The refusal, upon whatever ground put, was

not an abuse of a sound legal discretion. The court should not have stopped the trial of this case for practically two or three days to permit a jury to go from Mexico, Missouri, to St. Louis, Missouri, to examine the wreckage of this house."

For the general subject of view by jury, see the note to *People v. Thorn*, 42 L.R.A. 368. For unauthorized view by juror or jury as ground for new trial or reversal, see the note to *Driscoll v. Gatecomb*, L.R.A.1915B, 702.

B. B. B.

NEW JERSEY COURT OF ERRORS AND APPEALS.

STATE OF NEW JERSEY, Plff. in Err.,
v.
FREDERICK HART.

(— N. J. —, 101 Atl. 278.)

Criminal law — right of state to review acquittal.

A writ of error does not lie to review an acquittal in a criminal case even though it was due to error, where the Constitution provides that no person shall after an acquittal be tried for the same offense.

For other cases, see Appeal and Error. I. 6, in Dig. 1-52 N. S.

(June 18, 1917.)

ERROR to the Supreme Court to review its judgment dismissing a writ of error to review a judgment of the Court of Quarter Sessions for Mercer County acquitting defendant of the crime of seduction. Affirmed.

The facts are stated in the opinion.

Mr. Martin P. Devlin, for the State:

The state has, at common law, the right to a writ of error to review the law as laid down by the lower court, particularly when its application of the law controls an acquittal of a defendant.

Winchester's Case, Cro. Car. 504, 79 Eng. Reprint, 1035; *Rex ex rel. Wyndham v. Mann*, 4 Maule & S. 337, 105 Eng. Reprint, 858; *Rex ex rel. Mills v. Brice*, 1 Chitty, 354; *Reg. v. Millis*, 10 Clark & F. 534, 8 Eng. Reprint, 844, 8 Jur. 717, 17 Eng. Rul. Cas. 66; *Reg. v. Chadwick*, 11 Q. B. 205, 116 Eng. Reprint, 452, 17 L. J. Mag. Cas.

Note.—The constitutionality of a statute giving the state the right to appeal in a criminal case is considered in the note to *Ex parte Bornee*, L.R.A.1915F, 1093.

Generally as to the right of a state to appeal in a criminal case, see note to *People ex rel. Hodson v. Miner*, 19 L.R.A. 342. L.R.A.1917F.

N. S. 33, 12 Jur. 174, 2 Cox, C. C. 381; *Reg. v. Houston*, 2 Craw. & D. (Ir.) 191; *State v. Buchanan*, 5 Harr. & J. 317, 9 Am. Dec. 534; *Com. v. Capp*, 48 Pa. 53; *People v. Stone*, 9 Wend. 182; *People v. Mather*, 4 Wend. 229, 21 Am. Dec. 122; *People v. Corning*, 2 N. Y. 9, 49 Am. Dec. 364; *State v. Zabriskie*, 43 N. J. L. 369, 43 N. J. L. 640, 39 Am. Rep. 610; *State v. Meyer*, 65 N. J. L. 233, 52 L.R.A. 346, 47 Atl. 485.

Mr. William J. Crossley for defendant in error:

Kallsch, J., delivered the opinion of the court:

The defendant in error was indicted for seduction. On his trial in the quarter sessions court of Mercer county the trial judge directed the jury to acquit him. The state sued out a writ of error in the supreme court to the court of quarter sessions, which writ was dismissed by the supreme court upon the ground that, in order for the state to secure a review of a trial error, it must be able to have a bill of exceptions and a writ of error based thereon to remove the case to that court, and since the statute makes no such provision, and there being no such practice at common law as a writ of error in favor of the Crown after an acquittal on the merits, the writ was improperly sued out. The state now brings the record up for review before us on a writ of error sued out of this court to the supreme court. At common law a bill of exceptions was not allowable in a criminal case. Error was assignable only upon the record. The bill of exceptions had its origin in the Statute Westm. II. 13 Edw. I. chap. 31.

Tidd, in vol. 2 on Practice, p. 911, in commenting on this statute, says: "This statute extends to inferior courts, and to trials at bar, as well as those at nisi prius; but it has been doubted whether the statute extends to criminal cases."

In *Rex v. York, Willes*, Rep. 533, 125 Eng. Reprint, 1306, Lord Chief Justice Willes, in discussing the scope of chapter 31, on page 535, says: "My brother Abney cited 2 Co. Inst. 424, and Savile, 2, where it was holden that the Statute of Westm. II. chap. 30, concerning nisi prius, does not extend to the King, and that although the act is general, yet a nisi prius cannot be granted where the King is a party, or where the matter toucheth the right of the King, without a special warrant from the King or the consent of the Attorney General. He said likewise that chapter 31 of the same act, concerning bills of exceptions, was never thought to extend to the Crown. And he mentioned some cases where such pleas had been denied, and said that he thought that the Stat. 9 Anne, chap. 20, extending this statute to writs of mandamus, etc., rather strengthened the objection."

In 2 Inst. 427, Lord Coke says: "This act doth extend as well to the demandant or plaintiff as to the tenant or defendant in all actions real, personal, or mixed."

And in *Rex v. Preston-on-the-Hill*, Cas. t. Hardw. 249, 95 Eng. Reprint, 180, Lord Hardwicke on page 251, on an information in the court of exchequer, said that when he was attorney general he had known a bill of exceptions allowed, "but then," said his Lordship, "they are properly civil suits for the King's debt," etc. But a bill of exceptions cannot be allowed by the justices of peace at the quarter sessions on the hearing of an appeal against an order of removal.

In *Vane's Case*, 1 Lev. 68, 83 Eng. Reprint, 300, J. Kelyng 15, 84 Eng. Reprint, 1060, Sid. 85, 82 Eng. Reprint, 985, who was tried for high treason, the court refused to seal a bill of exceptions, because, they said, criminal cases were not within the statute, but only actions between party and party. This matter is fully discussed in a learned and exhaustive note by Mr. Evans in volume 3 of Evans's Statutes, pp. 341 et seq., 1829 ed. On page 342 the learned commentator says: "From the language of the statute itself, I certainly should not infer its application to criminal cases. . . . The general feeling of the profession upon the subject is most strongly evinced by the fact of no such bill of exceptions having been tendered for a very long period of time, although many important questions of criminal law have been discussed with great warmth, and with strong feelings of opposition to the opinions of the court, of which the much agitated question of the functions of the jury in cases of libel previous to the Statute of George III. is perhaps the most prominent instance."

Chitty, in volume 1 of his excellent treatise on Criminal Law, on page 508, says:

"When an exception is made by any party to a witness which is overruled by the court, the opposite side have, at least in civil proceedings, the power of appealing from his decision by tendering a bill of exceptions. This document the judge must in civil cases seal by virtue of 13 Edw. I. chap. 31, and it will operate like a writ of error. But it seems to be the better opinion that this provision does not extend to any criminal case, and is certainly inadmissible on indictments for treason and felony. It has indeed been allowed on an indictment for a misdemeanor, but the propriety of this allowance has been disputed."

In *Alleyne's Case*, Dears. C. C. 1852-1856, Lord Campbell, Ch. J., on page 509, says: "A bill of exceptions could not lie, for the Statute of Westminster II. is confined to civil cases."

Under the ancient English practice, trial errors in criminal cases were reviewable by the taking of a special verdict or by a case reserved, which is illustrated by the following instances: In *Rex v. Hodgson*, 1 Leach. C. L. 6, a case decided in 1730, there was a special verdict upon an indictment against several defendants jointly indicted, tried, and convicted. The question was whether under the evidence they were all equally guilty. The report of the case states: "In order to avoid the expense which attends the drawing up and arguing a special verdict, the counsel agreed to submit the point to the consideration of the judges in the shape of a reserved case."

In *Reg. v. Bernard*, 1 Fost. & F. 252, the defendant's attorney submitted seven legal questions to the trial court to be reserved, the seventh of which was concerning a certain letter which was claimed to have been improperly received in evidence, upon which Lord Campbell, Ch. J., sitting with Pollock, C. B., Erle, J., and Crowder, J., and a jury, remarked: "There appears to be no objection to reserving any of those points except the seventh; but that point, as you must be aware, was argued before us, and we were unanimously of opinion that the letter was admissible. All the other points which you have raised are very fit indeed for the consideration of the fifteen judges."

And so it was held by the courts of the state of New York prior to the passage of a statute providing for bills of exceptions in criminal cases, that no bill of exceptions could be taken in a criminal case. *People v. Holbrook*, 13 Johns. 90; *People v. Vermilyea*, 7 Cow. 108; *Ex parte Barker*, 7 Cow. 143.

A consideration of the history of the origin and development of bills of exceptions in this state is highly important as bearing

upon the question as to what the common law was on the subject prior to the Constitution of 1776.

The first act relating to bills of exceptions was passed in 1797, and is to be found in Patterson's Laws, p. 245, entitled "An Act Directing Bills of Exceptions to Be Sealed." This act, though somewhat narrower in its terms than the English Parent Act of Westminster II. in that the New Jersey statute confines its operation to causes where a writ of error lies to a higher court, whereas the English statute is general in that regard. In all other respects, however, the Act of 1797 is, in substance, a copy of the earlier English statute.

An examination of the early reports of criminal cases in this state shows an absence of bills of exceptions in such cases until 1849, when in *West v. State*, 22 N. J. L. 212, for the first time, manifestly, in a criminal case under review, with a return of the record, came a bill of exceptions, which the reporter says was signed by virtue of the Act of 1848.

Looking into the practice which prevailed in criminal cases in this state prior to the passage of the Act of 1848, we find that it was analogous to the practice which prevailed in England before the Revolution of 1776, so far as it was consonant with our changed form of government. The practice was for the trial judge or court to take a special verdict, reserving the questions of law for the opinion of the judges, or to certify a stated case asking for an advisory opinion. See *State v. Guild*, 10 N. J. L. 175, 18 Am. Dec. 404.

That the consensus of opinion of both bench and bar of this state was that the act of 1797 did not provide for bills of exceptions in criminal cases is not only confirmed by the practice above alluded to, but also by the Statute of 1848 (Pamph. Laws, 1848, p. 226), entitled "An Act Directing Bills of Exceptions to Be Sealed in Certain Criminal Cases."

Section 1 of this act declares: "That the act entitled 'An Act Directing Bills of Exceptions to Be Sealed' passed March 7, 1797, and each and every of the provisions thereof, shall be taken, deemed and adjudged to extend to trials of indictments for crimes and misdemeanors which by law are punishable by imprisonment at hard labor."

Section 2 of the act provides for the taking of an exception on the trial of an indictment for any crime or misdemeanor included within the provisions of the first section of the act, and for the return of the bills of exceptions, with a writ of error.

In 1855 the legislature by an act entitled "A Supplement to an Act Approved April the 16th, 1848, and Entitled 'An Act Regu-

lating Proceedings and Trials in Criminal Cases,'" declared that the act passed in 1797 shall be taken, deemed, and adjudged to extend to trials of indictment for treason, murder, or other crimes punishable with death, misprision of treason, manslaughter, sodomy, rape, arson, burglary, robbery, forgery, perjury, and subornation of perjury, and in express terms repealed the Act of 1848. Pamph. Laws, 1855, p. 648.

It is obvious that the effect of this declaration of the legislature and the repeal of the Act of 1848 precluded the taking of bills of exceptions in cases of misdemeanor, and not mentioned in the above category of crimes.

In 1863 the legislature, after declaring that the Act of 1797 shall apply to criminal cases, extended the right to a bill of exceptions on the trial of any indictment for any crime or misdemeanor. Pamph. Laws, 1863, p. 311; Nixon's Dig. p. 228, §§ 49, 50.

By § 90 of the Criminal Practice Act of the Revision of 1877, p. 284, it is provided that §§ 242-246 of the act entitled "An Act to Regulate the Practice of Courts of Law" shall be deemed taken and adjudged to extend to trials of indictment for crimes and misdemeanors which by law are punishable by imprisonment at hard labor. This obviously left all cases of misdemeanor, punishable by fine only or by imprisonment only, or by fine and imprisonment, without the benefit of bills of exceptions. But by a later statute found in the Revision of 1877, p. 1298, § 90 of the Criminal Practice Act was repealed, and § 91 of the same act was amended, with the result that bills of exceptions for trial errors are allowable "on the trial of any indictment . . . in any court of this state, for any crime or misdemeanor." It is to be noted that the right of review for trial errors on bills of exceptions in criminal cases is given by the statute of this state solely to the defendant.

These statutes were enacted after the adoption of the Constitution of 1844. They essentially broadened the operation of a writ of error in favor of a person convicted of crime.

In view of the constitutional provision (art. 1, § 10) that no person shall, after an acquittal, be tried for the same offense, it is clear that it is not within the constitutional power of legislative authority to confer by statute any such right on the state.

It is no answer to the prosecutor's claim to the right to review a trial error to say that, because the Crown at common law was not entitled to a bill of exceptions in a criminal case, therefore no writ of error would lie in its behalf. For it has already been sufficiently pointed out that bills of

exceptions in criminal cases were unknown to the common law, and to the criminal procedure of this state until the Statute of 1848. But as to the right of the Crown to a writ of error at common law for a trial error in a criminal case, there seems to be some diversity of opinion. It is the consensus of judicial opinion that the sole function of a writ of error at common law was to bring up for review errors appearing on the face of the record. In *Rex v. Wilkes*, 4 Burr. 2550, 98 Eng. Reprint, 339, Lord Mansfield, *inter alia*, said: "Till the third of Queen Anne, a writ of error in any criminal case was held to be merely *ex gratia*. . . . But in the third of Queen Anne ten of the judges were of opinion 'that in all cases under treason and felony, a writ of error was not merely of grace, but ought to be granted.' . . . It cannot issue now without a fiat from the Attorney General, who always examines whether it be sought merely for delay or upon a probable error. . . . In a misdemeanor, if there be a probable cause, it ought not to be denied; this court would order the Attorney General to grant his fiat. But, be the error ever so manifest in treason or felony, the King's pleasure to deny the writ is conclusive."

The headnote to the case *Re Piggott*, decided in 1868, 11 Cox, C. C. 311, reads: "The granting of a writ of error is part of the prerogative of the Crown. If, therefore, the Attorney General of England or the Lord Lieutenant of Ireland refuse to grant it, the Lord Chancellor has no jurisdiction to review that decision."

Bishop, in the second edition of his valuable treatise on Criminal Procedure (vol. 1, § 1191), in commenting on the English practice relating to the writ of error, says: "It never was granted except when the King, from justice when there really was error, or from favor where there was no error, was willing the judgment should be reversed. After writ of error granted, the Attorney General never made any opposition because either he had certified there was error and then he could not argue against his own certificate, or the Crown meant to show favor, and then he had orders not to oppose. The King, who alone was concerned as prosecutor, and who had the absolute power of pardon, having thus expressed his willingness that the judgment should be reversed, the court of King's Bench reversed it upon very slight and trivial objections, which could not have prevailed if any opposition had been made, or if the precedent had been of any consequence."

But enough has been said to demonstrate that a writ of error even in a case of mis-

demeanor did not, under the English practice, issue, as a matter of course, upon the application of a convicted defendant, and that the writ was resorted to by the Crown to show favor to the convicted person, and to bring about a reversal of the judgment against him. Singularly enough it does not appear that the writ was ever used by the Attorney General to reverse a judgment of acquittal, until the cases of *Reg. v. Mills*, 10 Clark & F. 534, 8 Eng. Reprint, 844, 8 Jur. 717, 17 Eng. Rul. Cas. 66, decided in 1843, *Reg. v. Chadwick*, 11 Q. B. 205, 116 Eng. Reprint, 452, 17 L. J. Mag. Cas. N. S. 33, 12 Jur. 174, 2 Cox, C. C. 381, decided in 1846, and *Reg. v. Houston*, 2 Craw. & D. 191, the latter case being a judgment on demurrer in favor of the defendant. In none of these cases was the question raised as to the right of the Attorney General to take the writ. And because of this situation counsel for the state argues that it must be accepted as a fact that the right of the Crown to take the writ in case of an acquittal is indisputable.

To a similar contention of counsel made in *People v. Corning*, 2 N. Y. 9, 49 Am. Dec. 364, dealing with the precise question under discussion, the court of appeals, through Bronson, J. (2 N. Y. on page 17), said: "The weight of authority seems to be against the right of the government to bring error in a criminal case. The absence of any precedent for it, either here or in England, until within a very recent period, fully counterbalances, if it does not outweigh, the fact that the right has lately been exercised in a few instances without objection. And in three of the four states where the question has been made the courts have decided that the right does not exist."

But even if it assumed that it was the practice in England for the Attorney General to take a writ of error in a criminal case, where the defendant was acquitted, we must not overlook the fact that this power so exercised sprung from a governmental policy to carry out the royal prerogative of the King, and was used either to favor or oppress a subject. Such a policy could not, consistently with our free form of government, have become embedded in the administration of law in this state. And while we recognize in full measure the functions of a writ of error as they existed at common law up to the time of the adoption of the Constitution of 1776, the procedure relating thereto is of statutory regulation.

Whatever doubt may exist whether the King under the common law could have a writ of error in a criminal case after judgment of acquittal of the defendant, it has been, as declared in the opinion of the supreme court, the unquestioned practice in

this state, recognized and acquiesced in by bench and bar, that no such writ would lie in favor of the state to review a judgment of acquittal. Since the Constitution declares that no person shall, after an acquittal, be tried for the same offense, no legislation can be constitutionally enacted giving the right of review in cases where there has been an acquittal.

Counsel for the state argues that the word "acquittal" in the Constitution signifies legal acquittal, and that, where it appears that a trial error has occurred which led to an acquittal, it cannot be properly said that there was an acquittal within the meaning of the constitutional sense of the word. To adopt this view would lead to a nullification of the benefit of the constitutional provision. The obvious design of the framers of the Constitution was to prevent oppression. Where an acquittal is had in a court of competent jurisdiction having jurisdiction of the person and the crime with which he is charged, it is an acquittal within the meaning of the constitutional provision, even though such acquittal was the product of trial errors.

In the case of *State v. Meyer*, 65 N. J. L. 233, 52 L.R.A. 346, 47 Atl. 485, the defendant was convicted in the court of quarter

sessions, and took a writ of error to the supreme court, where the judgment of the quarter sessions was reversed. Thereupon the prosecutor of the pleas sued out a writ of error from this court to reverse the judgment of the supreme court, and the defendant moved to dismiss the writ on the ground that the state was not entitled to a writ of error in a criminal case. This court justified the propriety of the taking of the writ by the state by virtue of an Act of 1799 (*Patterson's Laws*, 345): "That errors happening in the supreme court of this state shall be heard, rectified and determined by the court of appeals in the last resort in all causes of law."

It is to be observed that the defendant in that case was convicted in the court of first instance, and that it was an intermediate court, whose action was subject to review by this court, which reversed the judgment. This case is therefore no authority for the proposition advanced by counsel for the state, that a writ of error may be prosecuted by the state where an acquittal is the result of misdirection by the court.

For the reasons given, the judgment of the Supreme Court dismissing the writ of error is affirmed.

TEXAS SUPREME COURT.

TEXAS COMPANY, Plff. in Err.,
v.

W. H. DAUGHERTY et al.

(— Tex. —, 176 S. W. 717.)

Tax — oil and gas in place — liability of grantee.

1. A conveyance for a present consideration of the oil, gas, coal, and other minerals in and under a particular tract of land, together with the right of ingress and egress for the purpose of operating for minerals, under penalty of forfeiture unless operations are begun within a specified time, which may be saved for a limited time by certain payments, which is declared to be intended not as a mere franchise, but as a conveyance of the property and privileges described, vests in the grantee a defeasible

Note.—The question whether the interest of one other than the owner of the soil, in mineral in situ, is an independent subject of taxation, is discussed in the notes to *Wolfe County v. Beckett*, 17 L.R.A. (N.S.) 688, and *Washburn v. Gregory Co.* L.R.A. 1916D, 307.

Other questions growing out of the severance of the interest in the mineral from the interest in the surface are treated in notes cited in the L.R.A. Indexes, under the title, "Mines."
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fee in the oil and gas in the ground, so as to render it taxable to him.

For other cases, see *Taxes*, I. c, 1, in *Dig* 1-52 N. S.

Mines — conveyance of oil and gas.

2. Oil and gas in place beneath the surface are capable of conveyance as realty, separate from the surface.

For other cases, see *Mines*, II. b, 1, in *Dig* 1-52 N. S.

(May 21, 1915.)

ERROR to the Court of Civil Appeals for the Second Supreme Judicial District, affirming a judgment of the District Court for Wichita County in favor of defendants in an action brought to enjoin them from enforcing the collection of certain taxes assessed against plaintiff upon several oil leases held by it. Affirmed.

The facts are stated in the opinion.

Messrs. Robert A. John and Mathis & Kay, for plaintiff in error:

The instrument, viewed as a whole, is clearly a grant of an option, and not a conveyance of the mineral rights in the land.

Witherspoon v. Staley, — Tex. Civ. App. —, 156 S. W. 557; *National Oil & Pipe Line Co. v. Teel*, 95 Tex. 586, 68 S. W. 979, 22 Mor. Min. Rep. 263; *Emery v. League*, 31 Tex. Civ. App. 474, 72 S. W. 603; *Steel-*

smith v. Gartlan, 45 W. Va. 27, 44 L.R.A. 107, 29 S. E. 978, 10 Mor. Min. Rep. 315; Huggins v. Daley, 48 L.R.A. 320, 40 C. C. A. 12, 99 Fed. 606, 20 Mor. Min. Rep. 377; Florence Oil & Ref. Co. v. Orman, 19 Colo. App. 79, 73 Pac. 628; 27 Cyc. 724.

Oil leases, including the one in this case, are not conveyances of the oil in situ, but conveyances only of the right to explore and, if discovered, produce the same, when for the first time the oil so produced becomes the subject of ownership and thereby the property of an individual.

Burnham v. Hardy Oil Co. — Tex. Civ. App. —, 147 S. W. 331; Nonamaker v. Amos, 73 Ohio St. 163, 4 L.R.A.(N.S.) 981, 112 Am. St. Rep. 708, 76 N. E. 949, 4 Ann. Cas. 170; Northwestern Ohio Natural Gas Co. v. Ullery, 68 Ohio St. 259, 67 N. E. 494, 22 Mor. Min. Rep. 647; Federal Oil Co. v. Western Oil Co. 112 Fed. 373, 22 Mor. Min. Rep. 25, 67 C. C. A. 428, 121 Fed. 674, 22 Mor. Min. Rep. 429, 13 Am. Neg. Rep. 698; Wagner v. Mallory, 169 N. Y. 501, 62 N. E. 585, 22 Mor. Min. Rep. 42; Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 122 Am. St. Rep. 144, 84 N. E. 53; Thornton, Oil & Gas, § 24; Emery v. League, 31 Tex. Civ. App. 474, 72 S. W. 603; National Oil & Pipe Line Co. v. Teel, — Tex. Civ. App. —, 67 S. W. 545; Roberts v. McFadden, 32 Tex. Civ. App. 47, 74 S. W. 107; Hodges v. Brice, 32 Tex. Civ. App. 358, 74 S. W. 590; Eclipse Oil Co. v. South Penn Oil Co. 47 W. Va. 84, 34 S. E. 923, 20 Mor. Min. Rep. 234; Huggins v. Daley, 48 L.R.A. 320, 40 C. C. A. 12, 99 Fed. 606, 20 Mor. Min. Rep. 377; Williams v. Triche, 107 La. 92, 31 So. 926; Foster v. Elk Fork Oil & Gas Co. 32 C. C. A. 560, 61 U. S. App. 576, 90 Fed. 178; Smith v. Root, 66 W. Va. 633, 30 L.R.A.(N.S.) 176, 66 S. E. 1005; Bettman v. Harness, 42 W. Va. 433, 36 L.R.A. 566, 26 S. E. 271, 18 Mor. Min. Rep. 500; Parrish Fork Oil Co. v. Bridgewater Gas Co. 51 W. Va. 583, 59 L.R.A. 566, 42 S. E. 655, 22 Mor. Min. Rep. 145; Kelley v. Ohio Oil Co. 57 Ohio St. 317, 39 L.R.A. 765, 63 Am. St. Rep. 721, 49 N. E. 399.

A chattel real or a privilege growing out of real estate, though of ascertainable value, is not subject to taxation unless made so by some legislative act.

State v. Downman, — Tex. Civ. App. —, 134 S. W. 787; Baker & Co. v. Panola County, 30 Tex. 91; Sanford's Appeal, 75 Conn. 590, 54 Atl. 739; Kansas Natural Gas Co. v. Neosho County, 75 Kan. 335, 89 Pac. 750; De Witt v. Hays, 2 Cal. 463, 56 Am. Dec. 352; Willis v. Com. 97 Va. 667, 34 S. E. 460; Hamilton Mfg. Co. v. Lowell, 185 Mass. 114, 69 N. E. 1080; Hancock County v. Imperial Naval Stores Co. 93 Miss. 822, 17 L.R.A.(N.S.) 693, 136 Am. L.R.A.1917F.

St. Rep. 561, 47 So. 177; Boreel v. New York, 2 Sandf. 552; Clove Springs Iron Works v. Cone, 56 Vt. 603; Ashe-Carson Co. v. State, 138 Ala. 108, 35 So. 38; Silva v. Hawn, 10 Cal. App. 544, 102 Pac. 952; 22 Cyc. 668; Ex parte Gay, 5 Mass. 419; Doe ex dem. Allender v. Sussan, 33 Md. 11, 3 Am. Rep. 171; 2 Kent, Com. 342.

Messrs. James L. Autry and Theodore Mack also for plaintiff in error.

Messrs. B. F. Looney, Attorney General, and G. B. Smedley, Assistant Attorney General, for defendants in error:

Oil in place is a mineral and is susceptible of separate ownership from the ownership of the surface.

Thornton, Oil & Gas, 2d ed. §§ 18-20; 27 Cyc. 629; Southern Oil Co. v. Colquitt, 28 Tex. Civ. App. 292, 69 S. W. 169; Cox v. Robinson, 105 Tex. 426, 150 S. W. 1149; Murray v. Allred, 100 Tenn. 100, 39 L.R.A. 249, 66 Am. St. Rep. 740, 43 S. W. 355, 19 Mor. Min. Rep. 169; Kelley v. Ohio Oil Co. 57 Ohio St. 317, 39 L.R.A. 765, 63 Am. St. Rep. 721, 49 N. E. 399; Wagner v. Mallory, 169 N. Y. 501, 62 N. E. 584, 22 Mor. Min. Rep. 42; Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466.

Oil leases are a conveyance of the oil in place.

Benavides v. Hunt, 79 Tex. 383, 15 S. W. 396; Staley v. Darden, 57 Tex. Civ. App. 142, 121 S. W. 1136; Southern Oil Co. v. Colquitt, 28 Tex. Civ. App. 292, 69 S. W. 169; Gracioso Oil Co. v. Santa Barbara Oil Co. 155 Cal. 140, 20 L.R.A.(N.S.) 211, 99 Pac. 483; Wolf County v. Beckett, 127 Ky. 252, 17 L.R.A.(N.S.) 688, 105 S. W. 447; Harvey Coal & Coke Co. v. Dillon, 59 W. Va. 605, 6 L.R.A.(N.S.) 628, 53 S. E. 928.

Minerals in place, owned separately from the surface, are taxable against their owners.

State v. Downman, — Tex. Civ. App. —, 134 S. W. 787.

If the oil leases do not amount to conveyances of estates in land, but merely grant the right for a term of years to enter upon the land and take oil from it, and so are chattels real, they are nevertheless taxable under the statutes of this state against their owner.

State v. Downman, — Tex. Civ. App. —, 134 S. W. 787, 231 U. S. 353, 58 L. ed. 264, 34 Sup. Ct. Rep. 62; Gracioso Oil Co. v. Santa Bara Co. 155 Cal. 140, 20 L.R.A.(N.S.) 211, 99 Pac. 483; Re Indian Territory Illuminating Oil Co. 43 Okla. 307, 142 Pac. 997; Harvey Coal & Coke Co. v. Dillon, 59 W. Va. 605, 6 L.R.A.(N.S.) 628, 53 S. E. 928; Wolf County v. Beckett, 127 Ky. 252, 17 L.R.A.(N.S.) 688, 105 S. W. 447.

The oil leases, even though they may be

technically chattels real and personal property, have a fixed location in Wichita county, and are taxable there.

Galveston v. J. M. Guffie Petroleum Co. 51 Tex. Civ. App. 642, 113 S. W. 585; *State v. Higgins Oil & Fuel Co.* — Tex. Civ. App. —, 116 S. W. 617; *Guarantee L. Ins. Co. v. Austin*, — Tex. Civ. App. —, 165 S. W. 53; *Re Hall*, 116 App. Div. 729, 102 N. Y. Supp. 5, 189 N. Y. 552, 82 N. E. 1127; *Paris v. Norway Water Co.* 85 Me. 330, 21 L.R.A. 525, 35 Am. St. Rep. 371, 27 Atl. 143; *Western U. Teleg. Co. v. Hopkins*, 160 Cal. 106, 116 Pac. 557; *Winnipegosee Lake Cotton & W. Mfg. Co. v. Gifford*, 64 N. H. 337, 10 Atl. 849.

Mr. J. T. Montgomery also for defendants in error.

Mr. D. Edward Greer, *amicus curiæ*.

Phillips, J., delivered the opinion of the court:

The question presented by the case for decision is whether the interests or rights conferred upon the Texas Company in virtue of a number of so-called oil leases constituted property subject to taxation in its hands.

The instruments in question were respectively executed by owners of lands in Wichita county as grantors, duly acknowledged and recorded; the wife joining where the property constituted any part of a homestead. In each instance the grantor, by the terms of the instrument, "granted, bargained, sold, and conveyed" to the Texas Company, as grantee, "all the oil, gas, coal, and other minerals in and under" the particular tract of land, which was fully described, for a valuable consideration, consisting of a stated amount acknowledged to have been paid (in the particular lease shown in the record as a form, and to which all of them substantially corresponded, \$100), and certain stipulated royalties, together with the exclusive right of ingress and egress at all times for the purpose of drilling, mining, and operating for such minerals and the conduct of all operations and the erection of appliances and structures in that connection, and for the laying of all pipe lines necessary for the production, mining, storing, and transportation thereof, with the privilege of renewing and removing all such structures at will. Each instrument contained the following habendum clause: "To have and to hold, all and singular, the above-described premises, rights, properties, and privileges, and all such as are hereinafter specified, under the said grantee, and the heirs, successors, and assigns of such, forever, upon the following terms."

Under penalty of forfeiture of "the rights L.R.A.1917F.

and estates hereby granted," it was provided that operations for the drilling of a well for oil or gas should be begun within one year from the time of the delivery of the instrument, the forfeiture to be saved, however, notwithstanding such operations should not be commenced within that period, by the payment by the grantee of \$25 per quarter for a period not exceeding three years, with the further provision that the conveyance should be in full effect for twenty years from the discovery of oil, gas, or other minerals, and as much longer as they should be produced in paying quantities, in the event the grantee, or its successors or assigns, should sink a well or shaft and make such discovery within the limits of time, or the extension thereof, stipulated. A concluding clause in each instrument was as follows: "This lease is not intended as a mere franchise, but is intended as a conveyance of the property and privileges above described for the purposes herein mentioned, and it is so understood by all parties hereto."

The owners of the fee of all the land described in the several so-called leases had rendered them for taxation for the current year at their fair market value, subject to the rights and privileges conferred upon the grantee under such instruments. In assessing the value of the lands against the owners of the fee, their value as oil bearing, or prospective oil bearing, lands, as evidenced by the royalty interests of such owners under the instruments, was considered, and taxes had been paid by such owners accordingly. In that valuation, however, the value of the rights and privileges conferred by these instruments upon the grantee therein was not included.

The question is to be resolved, in our opinion, by the determination of whether the instruments involved conferred upon the plaintiff in error an interest in the lands therein respectively described. If their effect, at most, was but the creation in its favor of a mere franchise or privilege to devote the land to a certain use, with the usufructuary right, as a part of its use and enjoyment, to appropriate a portion of such oil and gas as might be discovered, such franchise or privilege was taxable against the owner of the fee as a part of the land, just as any other such valuable right or privilege belonging to land is, unless otherwise distinctly provided by statute, so taxable under article 7504, Rev. Stat. 1911, which declares that "real property, for the purpose of taxation, shall be construed to include the land itself, whether laid out in town lots or otherwise, and all the buildings, structures, and improvements, or other fixtures of whatsoever kind thereon, and all the

rights and privileges belonging or in any wise appertaining thereto, and all mines, minerals, quarries and fossils in and under the same."

The rights and privileges belonging to land contribute in a very substantial way to its value. They largely cause it to yield its income, and it is the theory of our statute, therefore, that their value shall be included in the valuation of the land for taxation in the hands of the owner. They do not escape taxation by this method; on the contrary, they are subjected to its burden through the inclusion of their value in the assessment of the land; and they are taxed against the owner of the land because the legislature has deemed it proper for him to bear the charge in view of their essential contribution to its value. This is plainly the effect of the decision in *State v. Austin & N. W. R. Co.* 94 Tex. 530, 62 S. W. 1050, where, before the enactment of the statute providing for the taxation of intangible assets, attempt was made to tax the franchise of a railroad company separate from its real estate. After quoting present article 7504, Chief Justice Gaines, upon this question, said: "It seems to us the plain purpose of the article last quoted to require that in assessing real estate for taxation, whether held by a natural person or a corporation, there shall not only be included in the valuation the value of the land itself merely as land together with the improvements thereon, but also all franchises and privileges appurtenant thereto and all the advantages for a profitable prosecution of the business to which it is appropriated. As a rule, the value of improved real estate is proportionate to the net income which it will yield. The value of a railroad is not the mere value of its right of way, roadbed, and superstructure, its depot grounds and structures thereon, considered by themselves, but the value of all these as an operating, 'going concern,' this value being in general determinable by the profits which result from its operation. The statute requires all property to be assessed 'at its true and full value,' and in effect defines that value to be what it would probably sell for at a voluntary sale for cash. Persons proposing to sell or buy a railroad, in forming their opinion as to its value, would doubtless consider the condition of its physical properties, but would ultimately reach their conclusion upon the question by a careful estimate of the probable net income which its operation will produce. There are no special 'rights and privileges belonging to or in any wise appertaining' to the great mass of the real property of the state, such as farming lands and town or city lots, but the terms are applicable to L.R.A.1917F.

the real estate of railroad companies, and suggest the thought that the legislature had such property in mind when it inserted the provision, and that it was intended that, in valuing a railroad for taxation, the valuation should include every right and privilege which was exercised in producing its income, and that it was not intended to disassociate the soul from the body of the living concern, and value by itself the lifeless remains."

We accordingly turn to an examination of the instruments for the purpose of determining their legal effect. It will be observed that they constitute no mere demise of the premises for a given period, as in the case of an ordinary leasehold. Nor do they amount simply to a grant of the right to prospect upon the land for oil or gas and reduce those substances to possession and ownership. They deal with the oil, gas, and other minerals "in and under" the land as property in the ground, capable of ownership and subject to be conveyed, for, as such, in unmistakable terms they are "granted, sold, and conveyed" to the grantee for a stated consideration acknowledged to have been paid, valuable in itself and independent of the royalties stipulated as payable to the grantor in the event of the discovery of such minerals, or any obligation imposed upon the grantee to explore for them. For the purpose of making the exploration and producing all the oil, gas, and other minerals that might be within the ground, and the erection of all structures necessary thereto, as well as their storing and transportation, the possession of the land itself is likewise granted, with no limitation upon the number of wells or shafts that the grantee might sink, or the extent of its operations in that connection, and consequently no qualification of its right of possession to all such parts of the surface, except that no well should be drilled nearer than 200 feet from the house or barn on the premises without the consent of both parties, as might be necessary to its full use by the grantee for the purposes named. The rights of the grantee are made subject to forfeiture, if operations for the drilling of a well for oil or gas are not begun within one year from the delivery of the instrument, or if the payment of the amount provided in lieu of such commencement is not made; but the sinking of a well or shaft and the discovery of any of the minerals named, within the period of one year or the extension thereof provided for, in each instance renders the instrument effective for twenty years and as much longer as such minerals shall be produced in paying quantities. This constituted the

entire grant as one capable of indefinite duration.

While such is the evident effect of the instruments when looked at as they should be, from their "four corners," the parties were plainly desirous of giving further emphasis to their character as "conveyances" of property, as distinguished from a mere grant of a license or privilege. With the obvious intention of placing their construction beyond the pale of any doubt, they incorporated the provision already noted, that "this lease is not intended as a mere franchise, but is intended as a conveyance of the property and privileges above described for the purposes herein mentioned, and it is so understood by all the parties hereto."

It will be further noted that no condition is expressed or act required of the grantee which preceded the vesting of such estates as the instruments created. Upon penalty of forfeiture of "the rights and estates hereby granted," the grantee was required to begin operations for the drilling of a well for oil or gas within one year, or pay a stipulated amount, quarterly, during the extension period provided; but it was the manifest purpose of the parties that the estate created should constitute a present grant, and that the grantee should perform these acts after taking possession, which rendered them conditions subsequent.

A fee may pass by deed upon a condition subsequent to the same extent as though the condition did not exist, subject to the contingency of being defeated according to the condition. And here, if any property was conveyed, there was a present grant, but liable to be defeated by the grantee's failure to perform the requirement in respect to beginning operations for the drilling of a well for oil or gas, or, in lieu thereof, making the quarterly payment provided. The grant amounted to a defeasible title in fee to the oil and gas in the ground, if oil and gas in place are capable of ownership and conveyance.

This brings us to the consideration of the latter question, and the contention of the plaintiff in error that these substances are incapable of ownership as property until severed or extracted from the ground, and that therefore these instruments conferred upon it no more than a mere use of the surface of the ground and the right to take them from it, amounting only to a privilege belonging to the land and taxable as a part of it against the owner of the fee, but vesting it with the title to no property whatever. It may be marked, we think with propriety, that this position is in marked contrast with the solemn assertion of the instruments themselves, exhibited in L.R.A.1917F.

the record by means of a common form evidently prepared by the plaintiff in error for use in its business operations, that they were not intended as "mere franchises," but as "conveyances of the property and privileges described, and were so understood by all parties thereto." However, we pass over that to the determination of the naked question.

It is no longer doubted that oil and gas within the ground are minerals. They have peculiar attributes not common to other minerals because of their fugitive nature or vagrant habit, the disposition to wander or percolate, and the possibility of their escape from beneath one part of the surface of the earth to another. Nevertheless, they are to be classed as minerals. Thornton, Oil & Gas, § 18; Murray v. Allred, 100 Tenn. 100, 39 L.R.A. 249, 66 Am. St. Rep. 740, 43 S. W. 355, 19 Mor. Min. Rep. 169; Stoughton's Appeal, 88 Pa. 198; People ex rel. Carrell v. Bell, 237 Ill. 332, 19 L.R.A. (N.S.) 746, 86 N. E. 593, 15 Ann. Cas. 511.

In place, they lie within the strata of the earth, and necessarily are a part of the realty. Being a part of the realty while in place, it would seem to logically follow that, whenever they are conveyed while in that condition or possessing that status, a conveyance of an interest in the realty results. It is generally conceded that, for the purpose of ownership and conveyance of solid minerals, the earth may be divided horizontally as well as vertically, and that title to the surface may rest in one person and title to the strata beneath the surface containing such minerals in another. Because of the fugitive nature of oil and gas, some courts, emphasizing the doctrine that they are incapable of absolute ownership until captured and reduced to possession, and analogizing their ownership to that of things *ferre nature*, have made a distinction between their conveyance while in place and that of other minerals, holding that it created no interest in the realty. But it is difficult to perceive a substantial ground for the distinction. A purchaser of them within the ground assumes the hazard of their absence through the possibility of their escape from beneath the particular tract of land, and, of course, if they are not discovered, the conveyance is of no effect, just as the purchaser of solid mineral within the ground incurs the risk of its absence, and therefore a futile venture. But let it be supposed that they have not escaped, and are in repose within the strata beneath the particular tract, and capable of possession by appropriation from it. There they clearly constitute a part of the realty. Is the possibility of their escape to render them while in place incapable of conveyance, or

is their ownership while in that condition, with the exclusive right to take them from the land, anything less than ownership of an interest in the land? Conceding that they are fluent in their nature and may depart from the land before brought into absolute possession, will it be denied that, so long as they have not departed, they are a part of the land? Or when conveyed in their natural state, and they are in fact beneath the particular tract, that their grant amounts to an interest in the land? The opposing argument is founded entirely upon their peculiar property, and therefore the risk of their escape. But how does that possibility alter the character of the property interest which they constitute while in place beneath the land? The argument ignores the equal possibility of their presence, and that the parties have contracted upon the latter assumption; that, if they are in place beneath the tract, they are essentially a part of the realty, and their grant, therefore, while in that condition, if effectually at all, is a grant of an interest in the realty. In other words, the question, it seems to us, reduces itself to this: If the oil and gas, the subject of the conveyance, are in fact not beneath or within the land, and are therefore not capable of being reduced to possession, the conveyance is of no effect. But if they have not departed and are beneath it, they are as a part of the realty; and their conveyance while in place, if the instrument be given any effect, is consequently the conveyance of an interest in the realty. There could be no warrant for denying effect to such instruments as these, and, granting them effect, they are therefore to be considered as conveyances of such an interest.

The possibility of the escape of the oil and gas from beneath the land before being finally brought within actual control may be recognized, as may also their incapability of absolute ownership in the sense of positive possession, until so subjected. But nevertheless, while they are in the ground, they constitute a property interest. If so, what is the nature of it in the hands of the original owner? It embraces necessarily the privilege or right to take them from the ground. But is that its extent or sole character? While they lie within the ground as a part of the realty, is the ownership of the realty to be denominated, as to them, a mere license to appropriate, as distinguished from an absolute property right in the corpus of the land? With the land itself capable of absolute ownership, everything within it in the nature of a mineral is likewise capable of ownership, so long as it constitutes a part of it. If these minerals are a part of the realty L.R.A.1917F.

while in place, as undoubtedly they are, upon what principle can the ownership of the property interest which they constitute while they are beneath or within the land be other than the ownership of an interest in the realty?

We are not dealing with conveyances of simply the right to take the oil and gas from the ground. These instruments purported to be a grant of the oil and gas themselves in the ground. If while in place they constituted an interest in the realty, that interest was subject to sale and conveyance, the purchaser assuming the risk of reducing them to possession. The instruments throughout treat these minerals in the ground as property, and bespeak the purpose to give the grantee absolute dominion over them, not merely when severed from the realty and reduced to personality, but while in their natural state; and the interest granted was furthermore expressed as one capable of being assigned and conveyed by the grantee. There was imposed no limit upon the grantee's right to the oil and gas, save as to the royalty payable to the grantor; it could take them out to any extent, at all times, and from beneath any part of the land, with the single limitation that no well should be drilled nearer than 200 feet from the house or barn on the premises, except by the grantor's consent. Such a vested interest in the minerals in the ground, forming in their natural state a part of the land, with absolute dominion over them while in that state, and with the further unlimited right to their appropriation, plainly constitutes property and all that is recognized in proprietorship, and equally amounts to an interest in the land itself.

As pointed out in *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576, the analogy between deposits of oil and gas and things *feræ naturæ* is, at best, a limited one. The difference between them is that things *feræ naturæ* are public property, and all have an equal right to reduce them to possession and ownership, while the right to the oil and gas beneath his land is an exclusive and private property right in the landowner, inhering in virtue of his proprietorship of the land, and of which he may not be deprived without a taking of private property. While there is a conflict of authority upon the question we have discussed, the views expressed are believed to be amply sustained.

In *Thornton on Oil and Gas*, a standard work upon the subject, in § 19, it is said: "Oil and gas, until severed from the realty, are as much a part of it as coal or stone. So long as they remain in the ground, outside of an artificial receptacle at least, as

the casing of a well or a pipe line, they must be treated as a part of the realty underneath the surface of which they lie. So much so are they a part of the realty, as we shall repeatedly see hereafter, that a conveyance of them in their natural state in the earth requires all the formalities of a conveyance of any other interest in the same real estate."

Again, in § 20 of the same work, this is announced: "The owner of the surface is the owner of the gas and oil beneath it; but if they escape into the land of another, he ceases to be owner of them. They are the subject of grant or conveyance, just as much so as the grant or conveyance of coal or stone buried in the soil of the same tract of land."

In Gould on Waters, § 291, it is stated: "Petroleum oil, like subterranean water, is included in the comprehensive idea which the law attaches to the word 'land,' and will be protected as a part of the soil in which it is found. Like water it is not the subject of property, except while in actual occupancy, and a grant of either water or oil is not a grant of the soil or of anything for which ejectment will lie. The same is true of natural gas. A lease of land for the purpose of mining oil, coal, rock, or carbon oil passes a corporeal interest which is the proper subject of an action of ejectment, and a proportionate share of the oil to be produced by an oil well is an interest in land, a parol sale of which is void under the Statute of Fraud."

In Stoughton's Appeal, 88 Pa. 198, after advertising to the classification of oil as a mineral and its therefore being a part of the realty, the supreme court of Pennsylvania said: "In this it is like coal or any other natural product which in situ forms part of the land. It may become, by severance, personalty, or there may be a right to use or take it originating in custom or prescription, as the right of a life tenant to work opened mines, or to use timber for repairing buildings or fences on a farm, or for firebote. Nevertheless, whenever conveyance is made of it, whether that conveyance be called a lease or deed, it is, in effect the grant of part of the corpus of the estate, and not of a mere incorporeal right."

In Blakley v. Marshall, 174 Pa. 425, 34 Atl. 564, 18 Mor. Min. Rep. 350, the same court held: "An oil lease investing the lessee with the right to remove all the oil in place in the premises in consideration of his giving the lessors a certain per centum thereof is in legal effect a sale of a portion of the land, and the proceeds represent the respective interests of the lessors in the premises." To the same effect is Jennings v. Bloomfield, 199 Pa. 638, 49 Atl. 135. L.R.A.1917F.

In Heller v. Dailey, 28 Ind. App. 555, 63 N. E. 490, a case which involved an oil and gas contract not materially different from the instruments in this case, and which purported to convey the oil and gas in place under a particular tract of land, the court, while fully recognizing the doctrine which forms the basis of the contention here of the plaintiff in error, that the absolute ownership of these minerals does not exist until they are reduced to actual possession, said: "The oil and gas in their free and natural state within the land constitute a part of it, though they be fluent and liable to depart to other land, there to be taken into possession through wells made for such purpose. The right to take such minerals from the land constitutes an interest in the land. The instrument under consideration does not create a mere personal privilege to take the minerals from the land. It is an exclusive and assignable interest in land. If with propriety it can be called a license, it must be a license coupled with an interest in land. By its terms the contract is a grant of the minerals in and under the land. If, by such general terms, all of a specified solid mineral, as coal, in and under the land, were granted, it would be a grant of real estate; . . . but, because of the fluidity and fugitiveness of petroleum and natural gas, the absolute ownership of these mineral substances within the land cannot be acquired without reducing them to actual control, so that a distinction must be and is made between these elusive minerals in and under the ground and the solid minerals in place in the earth. Therefore a grant of all the oil and gas in and under a tract of land is not a grant of any particular specific substance, as would be a grant of the coal in and under certain land. . . . While, for reasons which we have sought to state, we do not regard the contract in suit as a grant of land, or as a lease properly so called, but do regard it as a grant of a right in the nature of an incorporeal hereditament, operative from the time of its execution and during the accomplishment of its purpose as a transfer of an exclusive right to search for, take, and appropriate the minerals mentioned in the instrument, under whatever technical common-law term it may most properly be classed, it must be held to be a conveyance of an interest in land, within the meaning of our statutes."

Williamson v. Jones, 39 W. Va. 231, 25 L.R.A. 222, 19 S. E. 436, affirms the same rule; it being remarked, with respect to these minerals, that it is only when they escape out of the possession of the owner that the right of property is gone. Wilson v. Youst (Wilson v. Hughes), by the same

court, reported in 43 W. Va. 826, 39 L.R.A. 292, 28 S. E. 781, announces a like holding. It is contended by the plaintiff in error that *Wilson v. Youst* has been in effect overruled by the supreme court of West Virginia in the later case of *Harvey Coal & Coke Co. v. Dillon*, 59 W. Va. 605, 6 L.R.A. (N.S.) 628, 53 S. E. 928, and such may be the operation of the latter decision, though it is not in terms so stated. It is to be remarked, however, that the instrument considered in the *Dillon* Case granted merely the right to mine certain minerals without purporting to convey the minerals themselves in place, and this characteristic is more than once emphasized by the court in its opinion. Prior to the decision in the *Dillon* Case, the same court had decided *State v. Low*, 46 W. Va. 451, 33 S. E. 271, a case not adverted to in the *Dillon* opinion. There a conveyance of the oil and gas in place in a tract of land of the same character as embodied in these instruments was reviewed for the purpose of determining whether it created an interest in land which was subject to taxation against the grantees. It was held that the conveyance amounted to a defeasible title in fee to the oil and gas, taxable against the grantees as an interest in the land.

The supreme court of Illinois adheres to the view that these minerals in place are not capable of distinct ownership, and that a conveyance of them is not a grant of the minerals themselves in the ground, but to such part thereof as the grantee may find. *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9, 122 Am. St. Rep. 144, 84 N. E. 53. Yet the same court has held that such a conveyance, with the right to go upon the land and occupy it for the purpose of prospecting, if of unlimited duration, or if such right, under the terms of the lease, is capable of having unlimited duration, amounts to a grant of a freehold interest in the land. *Ibid.*; *Bruner v. Hicks*, 230 Ill. 536, 120 Am. St. Rep. 332, 82 N. E. 888. In *People ex rel. Carrell v. Bell*, 237 Ill. 332, 19 L.R.A. (N.S.) 746, 86 N. E. 593, 15 Ann. Cas. 611, the question was directly involved of whether the rights created by such a conveyance amounted to an interest taxable as land against the grantee, separate from the fee taxable against its owner. The conveyance there was of the oil and gas under a certain tract of land, for the consideration of the payment of a royalty to the grantors; the premises to be held for one year, and so long thereafter as oil or gas might be found thereon in paying quantities, constituting, as is the case in the instruments before us, a term capable of unlimited duration. In that state by statute such a mining right (as it is there classed) L.R.A.1917F.

is taxable separately. The statute, however, did not undertake to define the property classification of such a right, whether it constituted personal property or an interest in land. The named question, therefore, of the character of the property right, was necessary to be determined. The court held that the conveyance amounted to the grant of a freehold interest, which should be assessed and taxed as real estate against the grantees. See also *Guffey v. Smith*, 237 U. S. 101, 59 L. ed. 856, 35 Sup. Ct. Rep. 527, decided April 5, 1915. According to these decisions, it is immaterial whether there is any such thing as absolute ownership of oil and gas in place. They plainly announce that the conveyance of such minerals in place, with a right to the use of the land for their extraction from the earth, which may prove, under the instrument, of unlimited duration, creates a freehold interest in the land itself; and the last-named decision as clearly rules that such interest is taxable as realty, and against the person who owns and may enjoy it.

It is assumed in the argument that because of the decision of this court in *National Oil & Pipe Line Co. v. Teel*, 95 Tex. 586, 68 S. W. 979, 22 Mor. Min. Rep. 263, and its refusal of writs of error in the cases of *O'Neil v. Sun Co.* 58 Tex. Civ. App. 167, 123 S. W. 172, and *Witherspoon v. Staley*, — Tex. Civ. App. —, 156 S. W. 556, it is committed to the proposition that oil and gas in place are not susceptible of grant, and their conveyance creates no property interest in the land, but only a bare right or privilege to go on the land and mine for such minerals and reduce them to possession. The case of *Southern Oil Co. v. Colquitt*, 28 Tex. Civ. App. 292, 69 S. W. 169, involved the question of whether the proper joinder of the wife was necessary in a conveyance of such minerals in place under a tract constituting a homestead, together with the right to make use of the land for the purpose of their production from the earth. The court of civil appeals for the fifth district held that it was, for the reason that such a conveyance amounted to the grant of an interest in the land itself. This court refused writ of error. It could have done so only under the view that the interest created by the instrument was an interest in the realty itself, requiring for its validity the joinder of the wife because of the homestead character of the realty. In *O'Neil v. Sun Co.* the question was the right of the Sun Company to oil from a well bored upon a tract to which it held a clear and unforfeited right under a lease. The court of civil appeals for the fourth district held that the instrument, though it purported to grant and convey the title to the oil and gas

under the land, only conferred a right to exploit the ground and acquire title to the oil by its extraction from it. Under the facts of the case it was manifest that the Sun Company was entitled to the oil, whatever might be the technical classification of its right. There are essential elements of difference between the contract considered in that case and the instruments here under review. It possessed all of the characteristics of a contract for exploitation, with the right to take the oil and gas in the ground, with such right depending upon the company's performance of the contract. Here the instruments express a present grant of the minerals in place for a consideration which was valuable and independent of any obligation resting upon the grantee, emphasized by the parties as a conveyance of property, and not the grant of a mere franchise by a distinct provision asserting such to be its character. The same distinction exists with respect to the instrument considered in *Witherspoon v. Staley*, as well as that reviewed in *National Oil & Pipe Line Co. v. Teel*. In the former case the court of civil appeals held that a

forfeiture of the right created under the contract had clearly accrued. We concurred in that view, and upon that ground refused the writ of error. In *National Oil & Pipe Line Co. v. Teel*, the contract was supported by only a nominal consideration other than the mere promise of the lessee to perform certain acts, but for the performance of which he was not bound. The contract was construed properly as the creation of a mere option which permitted the acquisition of an interest on performance of conditions, a mere optional right to acquire an interest in land,—a character of instrument plainly distinguishable from those here presented.

It is our conclusion that these instruments had the effect to confer upon the plaintiff in error an interest in the several tracts of land described, the value of which was assessable against it for taxation.

The judgments of the District Court and Court of Civil Appeals are therefore affirmed.

Petition for rehearing denied.

ALABAMA SUPREME COURT.

MYRTLE BROWN, Appt.,
v.

DWIGHT MANUFACTURING COMPANY.

(— Ala. —, 76 So. 292.)

Landlord and tenant — implied duty to repair — custom.

A duty to repair will not be implied against a landlord from the fact that for some time prior to and after the letting it had been his custom to make repairs on the leased property.

For other cases, see Landlord and Tenant, III. a, in Dig. 1-52 N. 8.

(June 21, 1917.)

APPEAL by plaintiff from a judgment of the Circuit Court for Etowah County in favor of defendant in an action brought to recover damages for injury to plaintiff's health for which defendant was alleged to be responsible. Affirmed.

The facts are stated in the opinion.

Mr. J. M. Miller for appellant.

Messrs. Dortch, Martin, & Allen for appellee.

Note. — As to effect of making repairs to impose on landlord implied duty to keep the leased premises in repair, see annotation following this case, post, 998.
L.R.A.1917F.

Sayre, J., delivered the opinion of the court:

Plaintiff (appellant) sued defendant for damages, alleging in the several counts of her amended complaint as follows, in substance: That defendant had rented a certain dwelling house to her father, of whose family she was a member; that for many years prior to the rental aforesaid defendant had been accustomed to attend to dry closets which it had constructed and maintained for the occupants of its tenant houses, including the house let to appellant's father; "that the custom of defendant to attend said closets had been so uniform and had existed for such a length of time as to make it the duty of defendant to attend said closets used by plaintiff and members of the family occupying said house;" that for the next three or four months defendant continued to care for "said closets," and then failed or refused to do so, as a proximate consequence of which "said closets" became offensive and unhealthy, and caused plaintiff to become sick, etc. The trial court sustained demurrers to the several counts of the amended complaint, whereupon plaintiff took a nonsuit, reserving her appeal upon the record.

Though a landlord is bound to exercise diligence to prevent injury to the person or property of the tenant of one part of the premises by reason of the condition or use made by him of the other part (1 Tiffany,

Land. & T. p. 622), in the absence of special stipulation, and apart from the results of latent defects, known to him and concealed from the tenant, the landlord is under no responsibility to his tenant as regards the condition of the leased premises at the time of the lease, nor is he under obligation afterwards to keep the premises in a condition satisfactory to the tenant. *Anderson v. Robinson*, 182 Ala. 615, 47 L.R.A. (N.S.) 330, 62 So. 512, Ann. Cas. 1915D, 829; *Hart v. Coleman*, 192 Ala. 447, 68 So. 315; 1 *Tiffany*, Land. & T. p. 574. "The lessee's eyes are his bargain." *Moore v. Weber*, 71 Pa. 429, 10 Am. Rep. 708.

The evident theory of the complaint is that plaintiff's lessor, the defendant, failed to keep the premises let to plaintiff's father in repair, and that the custom alleged had the effect of importing into the contract of lease a stipulation on the part of defendant to care for the closet on the premises. Assuming that the duty plaintiff would impose on defendant falls within the proper scope of an engagement to make repairs, for plain-

tiff so contends, and at least a stipulation to do the thing upon a failure to do which plaintiff counts would be in the nature of a stipulation to repair, still the facts alleged fail to show a duty to repair. "The tendency of modern decisions is not to imply covenants which might and ought to have been expressed, if intended. A covenant is never implied that the lessor will make any repairs. *Sheets v. Selden*, 7 Wall. 423, 19 L. ed. 168. "That the lessor makes repairs, voluntarily or at the lessee's request, does not tend to show any agreement by him to make repairs." 1 *Tiffany*, Land. & T. p. 582.

So, then, even though plaintiff's action is in tort, her complaint states no duty breached, for that the custom alleged had not the effect to impose any obligation upon defendant, and defendant's demurrer taking the point was well sustained.

Anderson, Ch. J., and *McClellan* and *Gardner*, JJ., concur.

Annotation—Effect of making repairs to impose on landlord implied duty to keep the leased premises in repair.

In a note in 34 L.R.A. (N.S.) 806, there is considered the somewhat similar question as to the effect of the abandonment by the lessor of an attempt to repair the leased premises, on his liability for personal injuries due to the bad repair of the premises, where he was originally under no legal obligation to make repairs. And see also note in L.R.A. 1917B, 225, as to the liability of the landlord to the tenant for damage by water, and a note in the same volume, page 236, as to the liability of the landlord to tenant for damage by water where due to faulty construction, and where due to bursted water pipes, see note in same volume, page 244. The question of the liability to the tenant for sickness due to the unsanitary condition of the leased premises is the subject of a note in L.R.A. 1917A, 994, and the landlord's liability for injuries caused by lack or insufficiency of fire escapes is the subject of a note in L.R.A. 1917C, 1153. And in general as to an implied covenant as to the condition of the premises, see *Charlow v. Blankenship*, L.R.A. 1917D, 1149, and footnote thereto, which refers to many other notes bearing on the question.

At common law, the rule of caveat emptor applies to leases of real estate; and, in the absence of fraud, deceit, or concealment by the lessor, the lessee

takes the leased premises in the condition in which they are in, without right or recourse to the lessor for defects therein not amounting to a nuisance, and no duty is imposed upon the lessor to keep the leased premises in repair unless he expressly covenants so to do. Such duty is not imposed by the fact that he has voluntarily made repairs at the request of the tenant, where under no legal obligation originally to make the same.

For example, the custom of the lessor to attend to dry closets constructed and maintained by him for the occupants of tenant houses does not have the effect of importing into a lease of one of the houses an agreement to look after the closet appurtenant thereto. *Brown v. Dwight Mfg. Co.* ante, 997.

The fact that the lessor repaired the steps of a tenant imposed on him no obligation to put on a conductor or to change a gooseneck projecting from the gutter in the eaves, to prevent the water from falling on such steps, and hence he is not liable for personal injuries received by a tenant slipping and falling on the steps due to ice accumulating there from a leakage from the gutter. *Hannaford v. Kinne* (1908) 199 *Mass.* 63, 85 N. E. 187. Nor does it constitute an admission by the lessor of any duty to keep the leased premises in repair for

him gratuitously to make repairs. *Phelan v. Fitzpatrick* (1905) 188 *Mass.* 237, 108 *Am. St. Rep.* 469, 74 *N. E.* 326. Nor is the making of repairs evidence that the lessor agreed to keep the premises in repair. *Galvin v. Beals* (1905) 187 *Mass.* 250, 72 *N. E.* 969, 17 *Am. Neg. Rep.* 55. And the fact that the lessor voluntarily and at the request of the lessee made certain repairs does not furnish evidence from which an inference may be drawn that there was a general contract with the lessor to make all repairs necessary to keep the leased premises tenantable. *Moore v. Weber* (1872) 71 *Pa.* 429, 10 *Am. Rep.* 708.

Nor does the fact that the lessee, after

signing the lease, made a demand upon the lessor to make certain repairs, which the latter complied with, operate to make a new or collateral contract that the lessor should keep the leased premises in repair. *Watson v. Admiral* (1901) 61 *App. Div.* 429, 70 *N. Y. Supp.* 662.

An agreement by the lessor to repair the porch to the leased premises after the porch rail had been broken off and the accident complained of had happened, does not amount to anything but a gratuity, where the lessor was under no original obligation to keep the premises in repair. *Quinn v. Crowe* (1900) 88 *Ill. App.* 191. A. G. S.

ARKANSAS SUPREME COURT.

W. H. SNETZER, Appt.,

v.

T. J. GREGG et al.

(— Ark. —, 196 S. W. 925.)

Public improvements — assessment — personal property.

1. Since personal property cannot be benefited by a levee to protect the property in a city from the flood water of a river, it cannot be subjected to an assessment to pay for the improvement.

For other cases, see *Public Improvements*, III. c, in *Dig.* 1-52 *N. S.*

Statute — invalid in part — effect on residue.

2. The inclusion of personal property in a statute providing for the assessment of property to pay for a public improvement does not invalidate the entire statute if the statute provides that, should it be decided that the assessment cannot be levied upon any species of property mentioned in the statute, then the assessment shall be levied on the property which can be legally assessed.

For other cases, see *Statutes*, I. c, 2, in *Dig.* 1-52 *N. S.*

(June 25, 1917.)

A PPEAL by complainant from a decree of the Chancery Court for Jackson County in defendants' favor in an action brought to restrain them from enforcing the provision of a special statute creating an improvement district. Affirmed.

The facts are stated in the opinion.

Messrs. Hillhouse & Boyce, for appellant:

Taxation for local improvements must be

Note. — As to what property other than realty may be assessed for the construction and maintenance of levees, see annotation following this case, post, 1003. L.R.A.1917F.

confined to real estate to be benefited by the proposed improvement. Personal property is not subject to taxation for that purpose.

Ft. Smith Light & Traction Co. v. McDonough, 119 *Ark.* 258, 177 *S. W.* 926; 1 *Page & J. Taxn. by Local & Special Assessments*, § 2; *Carson v. St. Francis Levee Dist.* 59 *Ark.* 536, 27 *S. W.* 590; *Memphis Land & Timber Co. v. St. Francis Levee Dist.* 64 *Ark.* 265, 42 *S. W.* 763; *Kirst v. Street Improv. Dist.* 86 *Ark.* 15, 109 *S. W.* 526; *Less Land Co. v. Fender*, 119 *Ark.* 21, 173 *S. W.* 407; *Cribbs v. Benedict*, 64 *Ark.* 555, 44 *S. W.* 707; *Hamilton, Special Assessments*, § 275.

Improvement districts have only such powers as are expressly conferred by statute.

Lewis v. Rieff, 114 *Ark.* 369, 169 *S. W.* 1184; *Nakdimen v. Ft. Smith & V. B. Bridge Dist.* 115 *Ark.* 194, 172 *S. E.* 272; *Word v. Drainage Dist.* 110 *Ark.* 416, 161 *S. W.* 1057; *Sembler v. Water & Light Improv. Dist.* 109 *Ark.* 90, 158 *S. W.* 972; *White v. Loughborough*, 125 *Ark.* 61, 188 *S. W.* 10; *Martin v. Reynolds*, 125 *Ark.* 163, 188 *S. W.* 4; *Macon v. Patty*, 57 *Miss.* 378, 34 *Am. Rep.* 451.

In the establishment of improvement districts it is not necessary that the legislature set out in specific terms all the objects and purposes of the act.

Carson v. St. Francis Levee Dist. 59 *Ark.* 532, 27 *S. W.* 590; *Wilson v. William R. Compton Bond & Mortg. Co.* 103 *Ark.* 460, 146 *S. W.* 110.

Messrs. John W. Stayton and Joseph M. Stayton, for appellees:

The legislature has power to form an improvement district comprising territory located wholly without a city or town, or lying both within and without a city.

Shibley v. Ft. Smith & V. B. Dist. 96 *Ark.* 424, 132 *S. W.* 444.

Considered from this point of view, no

reason, inferentially or otherwise, arises against assessing personal property for local improvements. Nor can it be said that any constitutional limitation upon the power of taxation would prevent the assessment against personalty, for an assessment is not a tax.

Cribbs v. Benedict, 64 Ark. 562, 44 S. W. 707; Excelsior Planting & Mfg. Co. v. Green, 39 La. Ann. 455, 1 So. 873; Carson v. St. Francis Levee Dist. 59 Ark. 532, 27 S. W. 590; Sudberry v. Graves, 83 Ark. 348, 103 S. W. 728; Shibley v. Ft. Smith & V. B. Dist. supra; George v. Young, 45 La. Ann. 1232, 14 So. 137; Buras Levee Dist. v. Mialeghvich, 52 La. Ann. 1292, 27 So. 790; Hughes v. Caddo Levee Dist. 108 La. 146, 32 So. 218; Page & J. Taxn. by Local & Special Assessments, p. 876; Little Rock v. Katzenstein, 52 Ark. 107, 12 S. W. 198; Improvement Dist. v. Offenhauser, 84 Ark. 257, 105 S. W. 265; Parkview Land Co. v. Road Improv. Dist. 92 Ark. 100, 122 S. W. 241; Oliver v. Chicago, R. I. & P. R. Co. 89 Ark. 466.

The legislature may undertake to say what the plan shall be, without consulting property owners, or it may delegate that duty to the directors.

Sudberry v. Graves, 83 Ark. 348, 103 S. W. 728; Shibley v. Ft. Smith & V. B. Dist. supra; Carson v. St. Francis Levee Dist. 59 Ark. 532, 27 S. W. 590.

McCulloch, Ch. J., delivered the opinion of the court:

The general assembly of 1917 enacted a special statute creating an improvement district designated as the Newport levee district, for the purpose of constructing a levee to protect property in the city of Newport and vicinity from inundation by water overflowing White river. The city of Newport constituted mainly, although not wholly, the territory embraced in the boundaries of the district. The territory is described by metes and bounds, and appellant, who is the owner of real estate in the district, instituted this action to restrain the board of commissioners from proceeding according to the terms of the statute.

It is contended that the statute is void because it authorizes the assessment of personal property, as well as real estate, to raise funds with which to pay for the construction and maintenance of the levee. The statute is novel in this respect, for the attempt to tax personal property for a local improvement has never been undertaken in this state. The statute provides that the assessors of the district "shall at once proceed to assess the benefit accruing to the lands, lots and parts of lots, railroad tracks and rights of way and tramroads in said

district, by reason of the construction of such improvement, and also the benefit accruing to the personal property in said district by reason of such improvement."

It also provides that the assessors "shall make a list of such lands, lots and parts of lots, railroad tracks and rights of way and tramroads, and a separate list of such personal property in books to be provided by said board of directors for that purpose, showing a description of the same, the name of the owner or owners of such lands, lots and parts of lots, railroad tracks and rights of way and tramroads, and the name of the owner of such personal property, and the amount of the benefit assessed thereon by said board of assessors, and shall file said list with the secretary of said boards of directors."

The question is, therefore, squarely presented whether or not personal property can be subjected to taxation for local improvement. This has not heretofore been attempted in this state, as we have already said, nor can we find in the books any example of an attempt in other states to tax personal property as such for the purpose of defraying the expenses of local improvements. In the state of Louisiana a tax on cotton per bale grown on lands in a levee district for the purpose of maintaining the levees which protected the land, and also a special tax on oysters taken from beds protected by an improvement for the maintenance of which the tax is levied, has been upheld by the courts of that state. Excelsior Planting & Mfg. Co. v. Green, 39 La. Ann. 455, 1 So. 873; Buras Levee Dist. v. Mialeghvich, 52 La. Ann. 1292, 27 So. 790. In one of those cases, however, the tax was sustained on the principle that the subject-matter was the product of the land, and in the other, on the principle that the state had the power to prescribe the terms and conditions upon which oysters should be removed from lands of the state, the oysters being protected in the beds, as it was shown by the proof in the case, and in that sense was a product of the land; and the cotton grown on the land, being a product, was taxed as such. In the case upholding the tax on cotton (Excelsior Planting & Mfg. Co. v. Green, supra), the court said: "The legislature, doubtless, concluded that the cotton produced on land would be as reasonable and fair a measure of the extra benefit derived by such land as any other, and that this cotton, having been protected during the whole season of its growth by the levees, had enjoyed a benefit which formed a just basis for its assessment. In this the legislature certainly acted within the range of its power and in thorough conformity with the principles of special assessment. The only ques-

tion was now and when to apportion and collect the assessment on such cotton. The simplest and most practical method was evidently that adopted, to wit, to apportion it on the ginned bale, which is the mercantile form to which all cotton is reduced for marketable purposes."

In the other case cited, in which the tax on oysters was upheld, the court said: "Another objection to the assessment is that oysters are not the produce of alluvial lands, and that if they are they are not the produce of lands which are subject to taxation, for the reason that they are cultivated on land belonging to the state. We may, without deep research, find marked analogy between the cultivation of the oyster and that of crops. Their beds are on submerged lands, and they require as much, or nearly as much, care and cultivation as crops. It is true that the fisherman need know nothing of the labors of the plow, and the cultivation of the ground, but his work is among the oyster beds laid very near the shore, and his oysters, if not produced directly by the land, are very much aided by the favorable situation in which they are placed; that is, in the territory protected by the levees, as before stated. We agree with counsel that they are not the produce of the land in the sense that plants are by it given life, but we are, as we take it, justified in holding that from the very fact that these lands are owned by the state, and as such, not subject to taxation, gives rise to the right specially to assess them. Being the property of the state, she may well impose the condition that those who occupy them shall pay an assessment tax for public improvement. The defendant is not in the position of a fisherman who occupies and owns land. He cannot prevent the state from imposing such condition, in so far as he is concerned, and such assessment on her own lands, as may be deemed to the interest of all concerned."

It is thus seen that tax on the products of the land is treated as an indirect tax on the benefit accruing to the land by virtue of the improvement; and if it be conceded to be reasonable and lawful to impose the tax on that theory, this is far from unholding a tax on personal property independent of its connection with the real estate, for the purpose of defraying the expenses of a local improvement. We are clearly of the opinion that it could not be done. It is said in many decisions that the right to levy a special tax on property to pay the cost of local improvements can be justified only on the theory of special benefits to the property thus taxed. That doctrine has been repeatedly announced in the decisions of this L.R.A.1917F.

court. *Kirst v. Street Improv. Dist.* 86 Ark. 1, 109 S. W. 526.

It follows that personal property cannot be taxed, for the reason that it cannot be specially benefited by a local improvement. The owner may be benefited in the enjoyment of the use of his personal property in that locality, but the property itself derives no benefit. A horse has the same value situated, for the time being, within the bounds of an improvement district, or outside of it. Money deposited in a bank, or commercial paper, is of the same value whether held in a city embraced in an improvement district or elsewhere, and a stock of merchandise is worth its market value wherever situated, regardless of a local improvement. The construction of the improvement may result in increased conveniences for handling the personal property; but the benefit, after all, is to the owner, and not to the property. The situs of personal property follows the domicile of the owner. It may be located one day inside of an improvement district and the next day it is found elsewhere, and it has no fixed situs like real estate within the meaning necessary to constitute it the subject-matter of special assessments based on benefits. Special assessments are levied on the property itself, and not against the owner as a personal liability; and the benefit must be to the property itself, rather than to the owner, in order to justify the special taxation. It is otherwise as to general taxation; for the taxation of every species of property is justified, however transitory its situs may be within the jurisdiction of the sovereignty which undertakes to impose the tax. Mr. Hamilton in his textbook on this subject (*Hamilton, Special Assessments*, § 275) makes the unqualified statement that one of the cardinal rules for special assessments is that they can be levied only on real estate. In *Page & Jones on Taxation by Assessment* (vol. 1, § 548), the contrary view is stated, but no authority is cited, except the Louisiana cases, which, as we have already seen, do not sustain that view. The authors concede the rule established by a great number of cases to be that special tax for local improvement must be confined to real estate. That is the view expressed by the supreme court of Mississippi in *Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 461. In the case of *Ft. Smith Light & Traction Co. v. McDonough*, 119 Ark. 258, 177 S. W. 926, we said: "It must readily be conceded, and it is conceded by appellee, that taxation for local improvement must be confined to real estate to be benefited by the proposed improvement. Personal property is not subject to taxation for that purpose, nor was it attempted in the enact-

ment of the statute under consideration to tax personalty."

That statement was unnecessarily broad upon the issues involved in that particular case, and it amounted to mere dictum, but we think it was a correct statement of law on the subject, and we reannounce it now as being correct. Assessments for local benefits must be confined to real estate receiving peculiar benefits from the improvement to be constructed and maintained, and must be limited to those benefits, and personal property cannot be taxed for that purpose. It does not follow, however, from this declaration against the validity of the attempt to tax personal property, that the whole statute is void. Appellant is not complaining as the owner of personal property, and does not allege that he is the owner of that character of property, but sues as the owner of real estate to resist the levy of the special tax on his land. One of the sections of the statute reads as follows: "If, upon a contest by any property owner in said district, as to the legality or constitutionality of the assessment of benefits levied on any class or species of property under this act, for the construction and maintenance of the improvements contemplated by this act, or for the payment of the indebtedness of the district, such assessment of benefits should be held by the court of final resort to be illegal and unconstitutional, then the property in the district which can be legally and constitutionally assessed to defray the cost of construction and maintenance of such improvements and to discharge the indebtedness of the district only shall be assessed to defray such cost and to discharge such indebtedness."

But for the provision just quoted, it would follow that the whole statute is void because the legislature had determined that it was appropriate and just to tax all of the property, both real and personal, for the construction of the improvements, and we could not see that the legislature would have passed the statute with the authority to tax personal property eliminated. This declaration incorporated by the lawmakers into the statute presents an altogether different question, for it expresses the purpose of the lawmakers to the effect that, even if the personal property cannot be taxed, it is not only practicable to construct the improvement out of the taxation or the benefits accruing to real estate, but that it is just to do so. We have then in the statute two legislative determinations,—one, that it is just and fair to include benefits to personalty in the scheme of taxation, and also that if that cannot be done under the law, it is equally just to pay for the con-

struction of the improvements with funds derived from the taxation on benefits accruing to real property alone. This is not the delegation of legislative authority to the courts, nor is it an inconsistent alternative. It is a positive declaration of the purpose of the legislature to put the law into force to the full extent of its constitutional power.

The following statement on this subject is found in 8 R. C. L. § 123: "Occasionally the legislature expressly states its will that the valid provisions of a statute shall be enforced in spite of any judicial determination that certain sections of the act are unconstitutional. Such an expression of the will of the legislature is generally carried out by the courts."

The only authority cited by the text-writer is the case of *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 37 L.R.A. (N.S.) 466, 117 Pac. 1101, 2 N. C. C. A. 823, 3 N. C. C. A. 599, and that is the only authority we can find on the subject. We are not prepared to say that the rule stated by the text-writer can be given general application so as to apply to all cases where the lawmakers may see fit to incorporate such a declaration into a statute, but we do say that when applied to a statute like this, it constituted a legislative determination of its full purpose, and that that declaration can and should be carried into effect. Under a statute like that, a part of the law which is not swept away by the courts as being in conflict with the Constitution is declared to be in force, and there is no mistaking the legislative will in that respect.

We are of the opinion, therefore, that this statute is not rendered unconstitutional as a whole merely because the legislature has exceeded its power in attempting to tax a species of property which is not subject to special taxation. Other questions concerning the validity of the statute were raised in the pleadings below, but it is conceded now that they are unfounded. One is that the description of the boundaries of the district are uncertain; and it is conceded in that respect, too, that the description can be made certain by resort to extraneous investigation to locate the objects referred to in the description.

We agree with counsel that the boundaries are sufficiently pointed out to be made definite, and that the creation of the district is not void on that account. *Freeze v. Improvement Dist.* 126 Ark. 172, 189 S. W. 660. There is nothing brought to our attention, therefore, which impairs the validity of the statute so far as herein indicated, and the chancery court was correct

in its decision refusing to enjoin the proceedings under the statute. Appellant does not claim to be the owner of personal prop-

erty, and is, therefore, not asking for relief on that account.

Decree affirmed.

Annotation—What property other than realty may be assessed for the construction and maintenance of levees.

The personal liability of a property owner to pay assessments laid upon real property for local improvements is treated in the notes to *Ivanhoe v. Enterprise*, 35 L.R.A. 58; *Brookings v. Natwick*, 18 L.R.A.(N.S.) 1259; and *Bangor v. Peirce*, 29 L.R.A.(N.S.) 770.

It will be seen that in *SNETZER v. GREGG*, ante, 999, the court condemns the effort to tax personal property for a local improvement.

In *Excelsior Planting & Mfg. Co. v. Green* (1887) 39 La. Ann. 455, 1 So. 873, quoted in *SNETZER v. GREGG*, the court said further: "It is vain to say that a bale of cotton is personal property, and that local assessments can only be levied on real estate. There exists no such constitutional or other restriction on the legislative power. . . . When, as in the instant case, the particular personal property assessed has enjoyed a benefit from the works, to which it owes its existence and preservation, and when the legislature has, in the exercise of its judgment, determined that it should contribute for such benefit, no principle or precedent can be found which would justify a court in overruling its decision."

In *Landry v. Henderson* (1902) 109 La. 143, 33 So. 115, it was held that authority granted to a levee district to impose a local contribution on sugar, molasses, and syrup did not warrant the imposition of a contribution on sugar cane, and that the penalties against those who removed from the district produce on which the local assessment had not been paid were not incurred by so removing sugar cane.

In *State ex rel. Schenck v. Shawnee County* (1910) 83 Kan. 199, 110 Pac. 92, it was held that in levee proceedings under the Act of 1909 a city might be assessed for benefits to its streets, consequent upon the construction of the levee, and for the benefits to its water mains, hydrants, and electric-light fixtures within the drainage district, as the water mains, hydrants, and electric-light fixtures of the city were private property, owned by it in its corporate capacity; they had a permanent situs within the drainage district, and constituted "property" and "other property liable to assessment" within the meaning of L.R.A.1917F.

ing of the act. And it was held that there was no constitutional or other impediment to the assessment of such property for benefits conferred by an improvement of the kind in question.

It may be noted that it appears in *Tate v. Levee Comrs.* (1904) 84 Miss. 388, 36 So. 395, that the first tax to provide for the payment of bonds issued by the levee commissioners of the Yazoo-Mississippi delta was a tax of 13 mills on the dollar of all property, real and personal, in the front, and of 9 mills on the dollar in the back, counties.

In *Tate v. Levee Comrs.* (Miss.) supra, there was sustained a privilege tax for the board of levee commissioners of the Yazoo-Mississippi delta on cotton-seed oil mills of \$50, where the capital did not exceed \$30,000.

And a privilege tax imposed for levee purposes on liquor dealers in the levee district was sustained in *Levee Comrs. v. Houston* (1902) 81 Miss. 619, 33 So. 491.

But a percentage tax on the gross earnings of an insurance company doing business in the levee district was held not to be a privilege tax within the statute authorizing such a tax by the board of levee commissioners of the Yazoo-Mississippi delta, as such a tax means only one that may be paid in advance before exercising the privilege. *Johnston v. Hartford F. Ins. Co.* (1915) 109 Miss. 808, 69 So. 686.

An assessment upon a railroad track for levee purposes is not invalid as a tax on personal property as including ties, angle bars, and rails, where the statutes declare "that the right of way of a railroad and all tracks, sidetracks, turnouts, and other things situated on and appurtenant thereto, shall be included within the meaning of the term 'railroad track,' and that the same shall be held to be real estate for the purposes of taxation." *St. Louis Southwestern R. Co. v. Red River Levee Dist.* (1907) 81 Ark. 562, 99 S. W. 843.

"Taxable lands" comprise buildings on lands, so as to authorize the inclusion of the buildings in making an assessment for taxation, for, in legal contemplation, buildings are a part of the land. *Mason v. Police Jury* (1854) 9 La. Ann. 368.

B. B. B.

IDAHO SUPREME COURT.

SAMUEL KEYSER, Doing Business under the Name of the American Grocery Company, Appt.,

CITY OF BOISE, Resp't.

(— Idaho, —, 165 Pac. 1121.)

Municipal corporations — revocation of license for gasolene pump in street.

A municipal corporation having, in the absence of statute, no authority to permit the erection of a gasolene pump in a street, its purported license for that purpose may be revoked at pleasure, although expense has been incurred on the faith of it.

For other cases, see Municipal Corporations, II. c. 4, b. (1), in Dig. 1-52 N. S.

(June 12, 1917.)

A PPEAL by plaintiff from a judgment of the District Court for Ada County sustaining a demurrer to and dismissing a bill brought to enjoin defendant from removing by force a gasolene pump installed by plaintiff on a public street under a permit issued by the defendant city. Affirmed.

The facts are stated in the opinion.

Mr. Van W. Hasbrouck for appellant.

Mr. Charles F. Reddoch for respondent.

Budge, Ch. J., delivered the opinion of the court:

The appellant filed a complaint in the district court, setting up the following facts: That he was conducting a grocery business in Boise city; that respondent is a municipality in Ada county; that on the 4th day of May, 1915, the council of said city passed a resolution, upon his application, permitting and authorizing him to install a gasolene tank for the purpose of selling gasolene to automobilists and others; that pursuant to this permit, and relying thereon, he purchased a gasolene tank and pump and employed a skilled plumber to install the same; that the installation thereof was completed on the 13th day of May, 1915, with the exception of replacing the cement of the sidewalk around it; that during the installation thereof two members of the city council were present and assisted him in lining up the pump with the walk; that one of the councilmen came to him and stated that he was authorized by the council to investigate the pump, which he did, and stated to appellant that he would report the matter to the council; that said councilman came back to appellant's place of business and stated that the council objected to the pump on account of

its appearance and the long arm projecting from it; that appellant removed the arm, and agreed with the council that he would not use the galvanized iron which came with the pump, for covering the same, as the council considered it unsightly; that thereafter the council, without any notice to appellant, on the 14th day of May, 1915, held a special meeting and passed a resolution directing appellant to remove the pump, so installed, within two days from the date of said resolution, and that, in the event of his failure so to do, the street commissioner was directed and ordered to remove the pump and place the street in its previous condition, at the expense of appellant; that, unless restrained by this court, said resolution would be carried into effect, to the great wrong and injury of appellant, and in violation of his rights under said permit; that the action of the council in ordering the pump removed was without authority of law, was wholly null and void and in violation of appellant's constitutional rights, and deprived him of the right of due process of law; that he had no speedy or adequate remedy at law; that the purported resolution of May 14, 1915, did not state the correct state of facts, in that it purported to state that the council directed and instructed appellant not to install an inside pump of the type and character intended to be installed; that, on the contrary, the council never made any objection to the character or the type of pump not being an outside pump until their purported resolution of May 14, 1915; that appellant prior to said date had no notice from the council that the pump was not in accordance with the ordinance of the city, or not a proper pump for said purpose; that, on the contrary, the pump and tank were inspected by the chief of the fire department of said city and by members of the city council; that the city and members of its council had ample opportunity to observe, and did observe, the almost complete installation of the tank and pump before the passing of said purported resolution on May 14, 1915, where and when appellant first received information, by his voluntary appearance at said council meeting, that the maintenance of the pump would not be permitted; that the council and city have authorized installations, and, under said authorizations, there have been installed in said city pumps of the same type and character as the pump installed by the appellant; that appellant had performed all the conditions on his part to be performed under said permit, and prayed for a temporary restraining order, restraining the city from the threatened acts set forth in the complaint, and for an order to show cause why the temporary re-

Note. — As to gasolene stations, see annotation following this case, post, 1005. L.R.A.1917F.

straining order should not be made absolute.

Respondent demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action, injunctive or otherwise. The demurrer was sustained, and, appellant refusing to plead further, judgment was entered dismissing the action. This is an appeal from the judgment.

Appellant assigns the following errors: That the court erred in sustaining the demurrer to the complaint, and in rendering judgment in favor of respondent. The only question for this court to determine is whether or not the complaint states a cause of action.

The authorities dealing with the question raised by the demurrer are conflicting, but we are of the opinion that the sounder rule, and the rule supported by the better reasoned cases, is to the effect that the streets, from side to side and end to end, belong to the public, and are held by the municipality in trust for the use of the public. The city is therefore without authority, in the absence of a legislative enactment expressly permitting it, to grant a private person or corporation a permit to erect or maintain a permanent obstruction in a public street or thoroughfare for a purely private purpose; we have no such statute in this state. It follows that anyone obtaining a permit from the city for the private use of a public street, as in this case, takes the same with notice that it is subject to revocation at the will of the city, and, indeed in this view, it matters not whether the use is made in accordance with a permit or without one, the use is merely permissive in either event, and revocable at any time without notice. If the person making such private use of a street goes to expense, he does so at his own risk, and he will not be heard to complain that his property is being taken without due process of law.

The holder of a permit to install an obstruction in a public street or thoroughfare, for a private purpose, acquires no property or contractual right by reason of the issuance to him of such permit, and whenever the city authorities, in their discretion, deem it necessary, as a proper police measure, to vacate and revoke such permit, the

holder of the same has no alternative, but must comply with the order of revocation. 3 McQuillin, Mun. Corp. § 1319; Elster v. Springfield, 49 Ohio St. 82, 30 N. E. 274; Denver v. Girard, 21 Colo. 447, 42 Pac. 662; Lacy v. Oskaloosa, 143 Iowa, 704, 31 L.R.A.(N.S.) 853, 121 N. W. 542; Hibbard, S. B. & Co. v. Chicago, 173 Ill. 91, 40 L.R.A. 621, 50 N. E. 256; Tell City v. Bielefeld, 20 Ind. App. 1, 49 N. E. 1090; Winter v. Montgomery, 83 Ala. 589, 3 So. 235; Ainley v. Hackensack Improv. Commission, 64 N. J. L. 504, 45 Atl. 807; Eddy v. Granger, 19 R. I. 105, 28 L.R.A. 517, 31 Atl. 831; South Highland Land & Improv. Co. v. Kansas City, 100 Mo. App. 518, 75 S. W. 383; New York v. United States Trust Co. 116 App. Div. 349, 101 N. Y. Supp. 574; Emerson v. Babcock, 66 Iowa, 257, 55 Am. Rep. 273, 23 N. W. 656; Norfolk v. Chamberlain, 89 Va. 196, 16 S. E. 730; Ely v. Campbell, 59 How. Pr. 333.

It may be that a different rule would apply if the municipality had been given the right to grant such a permit by statute. Some cases have gone to the extent of announcing a rule contrary to the one herein expressed, apparently upon the theory that a municipality has a right, in the absence of a statute authorizing it, to grant an irrevocable license, or permit of a private use of the streets, so long as such use does not materially interfere with the use thereof by the public. 3 McQuillin, Mun. Corp. § 1319; Buffalo v. Chadeayne (Buffalo Super. Ct.) 27 N. Y. S. R. 60, 7 N. Y. Supp. 501; Spencer v. Andrew, 82 Iowa, 14, 12 L.R.A. 115, 47 N. W. 1007; First Nat. Bank v. Emmetsburg, 157 Iowa, 555, L.R.A. 1915A, 982, 138 N. W. 456; Smith v. Jefferson, 161 Iowa, 245, 45 L.R.A.(N.S.) 792, 142 N. W. 220, Ann. Cas. 1916A, 97.

While the latter view has some very plausible arguments in its favor, we are not in accord with it, for, as indicated above, the former view is supported by the weight of modern authority and by sound legal principle.

The complaint therefore does not state a cause of action, and the demurrer was properly sustained. The judgment is affirmed. Costs awarded to respondent.

Morgan and Rice, JJ., concur.

Annotation—Gasolene stations.

Gasolene stations have but recently come into existence, and there appears to have been scarcely any litigation in regard to them, as a search upon every aspect of the law relating to them has L.R.A.1917F.

revealed but one case in addition to KEYSER v. BOISE, ante, 1904.

Gasolene stations apparently first came into contact with the law by locating outside the sidewalk of the abut-

ting owner's premises, thus causing the question to be raised as to the right of a municipality to grant and revoke a permit to so locate a gasoline station.

As stated in *KEYSER v. BOISE*, the rule supported by the better reasoned cases is to the effect that a city is without authority, in the absence of a legislative enactment expressly permitting it, to grant a private person or corporation a permit to erect or maintain a permanent obstruction in a public street or thoroughfare for a purely private purpose.

And a city which has not been given by statute authority to permit the erection of a gasoline pump in a street may revoke at pleasure its purported license for that purpose, although expense has been incurred on the faith of it. *Ibid.*

That the legislature has power to confer authority upon a municipality to grant a permit to install a gasoline station in a street was conceded in *New Orleans v. Shuler* (1916) 140 La. 657, 73 So. 715, the question being as to whether it had done so. It was there held that the authority of a city to adopt an ordinance forbidding, unless by permission of the council, the placing of a gasoline pump on the outer edge of a sidewalk, and requiring, as one condition of such permission, the payment of

an annual fee to the city, was delegated to the city by the following provisions of its charter: "The city shall also have all powers, privileges, and functions which, by or pursuant to the Constitution of this state, have been or could be granted to or exercised by any city. The legislative, executive, and judicial powers of the city shall extend to all matters of local and municipal government, it being the intent thereof that the specifications of particular powers by any other provision of this charter shall never be construed as impairing the effect of the general grant of powers of local government hereby bestowed."

Generally, as to the power of a municipal corporation to grant or lease space on a street or sidewalk for business purposes, see note to *Chapman v. Lincoln*, 25 L.R.A.(N.S.) 400.

As to the power of a municipality to revoke a license to carry on business, see note to *Peginis v. Atlanta*, 35 L.R.A.(N.S.) 716.

As to the storage of oil, gasoline, or gas as a nuisance because of its explosive or combustible quality, see note to *Whitemore v. Baxter Laundry Co.* 52 L.R.A.(N.S.) 930. G. V. I.

KANSAS SUPREME COURT.

M. ALEXANDER, Appt.,

v.

JOHN CLARKSON et al.

(100 Kan. 294, 164 Pac. 294.)

Judgment — res judicata.

1. All matters involved in the litigation reported in *Alexander v. Clarkson*, 96 Kan. 174, are res judicata.

For other cases, see *Judgment*, II. in *Dig.* 1-52 N. S.

Set-off — judgments.

2. Before one judgment can be set off against another judgment, there must be mutuality in those judgments and no contravening equities.

For other cases, see *Set-off and Counterclaim*, II. in *Dig.* 1-52 N. S.

Garnishment — acquiring claim against debtor.

3. Where a garnishment proceeding has been commenced by filing a petition, giving bond, and service of summons, but the gar-

nishee makes no answer and issues are not joined, no judgment entered, and no execution issued, the garnishee acquires no claim against the debtor in such abortive garnishment proceeding by acquiring an assignment of a judgment against the debtor rendered in another action.

For other cases, see *Garnishment*, II. a, in *Dig.* 1-52 N. S.

Judgment — assignment — consideration.

4. If a judgment is assigned as security for a bona fide antecedent indebtedness, the consideration for such assignment is sufficient.

For other cases, see *Contracts*, I. c, 2, in *Dig.* 1-52 N. S.

Lien — attorneys — notice.

5. Section 484 of the General Statutes of 1915, amending § 395 of the General Statutes of 1901, is an enlargement, and not a restriction, of the methods of service of notice of an attorney's lien, and the service of a written notice of such lien upon the attorneys of record for the adverse party is sufficient.

For other cases, see *Attorneys*, II. c, 2, in *Dig.* 1-52 N. S.

Set-off — judgments — mutuality.

6. In certain prior litigation one of the defendants herein had recovered a judgment against the present plaintiff, and an

Headnotes by DAWSON, J.

Note. — As to set-off against judgment in hands of assignee, see annotation following this case, post, 1010. L.R.A.1917F.

attorney's lien had been properly served on the plaintiff, and subject to that lien the successful defendant in the prior case had assigned his judgment to a bank's trustee as security for a bona fide indebtedness of long standing. After the attachment of this lien, and after the assignment of the judgment, the plaintiff acquired by assignment a judgment against his judgment creditor and another, and commenced a proceeding against the debtors under the judgment assigned to him and against the attorneys holding the lien on the judgment against him and against the trustee holding that judgment. In this latter proceeding the plaintiff sought to have the merits of the original judgments reconsidered, which in effect meant to open them, and to set off the judgment he had acquired against two of the defendants against the judgment against himself, and to restrain the enforcement of the judgment against him. Held, that the former judgments were *res judicata*, that the judgment against him and the one he had acquired were not mutual, and that the contravening equities based on the prior assignment of the judgment against him and the attorney's lien thereon would not permit a set-off between the judgments.

For other cases, see Set-off and Counterclaim, 11, in Dig. 1-52 N. S.

(April 7, 1917.).

APPEAL by plaintiff from a judgment of the District Court for Cowley County in favor of defendants in an action brought to adjust partnership matters between plaintiff and his defendant partners, and to restrain defendants from proceeding to enforce the collection of a judgment to which plaintiff was subjected in a partnership accounting suit. Affirmed.

The facts are stated in the opinion.

Messrs. J. T. Lafferty and Hackney & Moore for appellant.

Messrs. Jackson & Noble and S. C. Bloss for appellees.

Dawson, J., delivered the opinion of the court:

This case is the aftermath of prior litigation, a full summary of which is set forth in *Alexander v. Clarkson*, 96 Kan. 174, 150 Pac. 576. This prior litigation had two main aspects: One was an accounting suit between the plaintiff and some of the present defendants as his partners in the milling business, and the other was an action by the First National Bank of Winfield against those defendant partners, to recover on certain promissory notes evidencing certain of the partnership indebtedness, and in which action the plaintiff, Alexander, had not been made a party defendant because of a private agreement between Alexander and the bank to that effect. In the partnership accounting case one of Alexander's part-

ners, John Clarkson, obtained a judgment against him. The attorneys for Alexander's partners have a lien for their services on that judgment. In the bank's case a judgment was entered against Alexander's partners, and that judgment has been assigned to Alexander. Subject to the attorneys' lien in the partnership case the judgment in favor of John Clarkson and against Alexander has been assigned to J. E. Jarvis, president of the Cowley County National Bank of Winfield, as trustee for his bank. The attorneys' lien and the Jarvis assignment antedate the assignment to Alexander.

After the appeals in the bank case and the partnership accounting case were disposed of in *Alexander v. Clarkson*, supra, decided July 10, 1915, the present action was commenced by the plaintiff against his former partners and their attorneys and the trustee to whom the judgment against plaintiff had been assigned. The petition rehearsed certain features of the earlier litigation, and narrated the plaintiff's situation as decreed by those judgments, and that the supreme court had refused to consider certain errors assigned in his appeal because the motion for a new trial was filed more than three days after the judgments were rendered, although filed within three days after the formal journal entry of judgment reciting the terms of the decree was approved by the trial court. The petition is cumbered to a considerable degree with what the plaintiff chooses to urge as the wrongs, hardships, and injustice to which he had been subjected as a result of the earlier litigation, and concludes with a prayer that the partnership accounts be recast, and that a new decree be entered therein, adjusting the partnership matters between the plaintiff and his defendant partners, and that he be given credit for the amount of the bank's judgment against the Clarksons, and assigned to him, and that the defendants be restrained from proceeding to enforce the collection of the judgment to which he was subjected in the partnership accounting suit. Issues were joined, and the trial court's judgment reads:

"First. That as between the Cowley County National Bank and Alexander the equities in the case [are] with the bank.

"Second. That as between the attorneys' lien claim and Alexander, the equities were in favor of the attorneys' lien.

"Third. That the judgment rendered on the 6th day of March, 1914, and dated back to September 19, 1913, was *res judicata* as to all questions involved in this case."

The plaintiff appeals. With his alleged grievances touching the earlier and concluded chapters of the ten years' litigious warfare between Alexander and the Clark-

sons and their creditors, we have no present concern. Our only jurisdiction at present is to review the correctness of the judgment which we have just quoted. There are two important ends in view in every lawsuit, the first is that it be decided right; and the second, which is only less important than the first, is that it be decided. *New v. Smith*, 97 Kan. 580, 155 Pac. 1080. All the matters which were litigated between the parties in the partnership accounting suit and in the bank's case are concluded by the judgments entered therein, and are now res judicata. Those judgments determined for all time the sum which Alexander must pay to Clarkson or his assignee, and what the Clarksons must pay the First National Bank or its assignee. It is no longer a matter of any concern that Alexander had a private agreement with the First National Bank, whereby the bank refrained from making him a defendant in its action against his partners to recover on the partnership notes, or that he and the bank official forgot or lied about that matter when the Clarksons sought to prove it, nor can the predicament in which Alexander now finds himself on account of that private agreement affect the rights of the parties as crystallized in the judgments in the earlier litigation. And it is no longer of any judicial consequence that Alexander's motion for a new trial in the earlier litigation was out of time. Those judgments, being final, cannot now be modified or disturbed.

Let us then turn to the questions involved in this appeal.

There is no objection to an equitable proceeding to set off one judgment against another unless intervening rights are prejudiced thereby. *Hillis v. First Nat. Bank*, 54 Kan. 421, 423, 38 Pac. 565; *Kansas City, Ft. S. & M. R. Co. v. Murray*, 57 Kan. 697, 47 Pac. 835; 15 R. C. L. 820. But since the trustee of the Cowley County National Bank had secured an assignment of Clarkson's judgment against Alexander, and it was also subjected to a timely lien before Alexander acquired the assignment of the First National Bank's judgment against Alexander, we see no way to set off these respective judgments against each other. In *Schuler v. Collins*, 63 Kan. 372, 374, 65 Pac. 663, it is said: "The existence of mutual judgments does not entitle a party to have one set off against the other arbitrarily as a matter of right. Whether application for set-off is by motion or through a proceeding in equity, it is to be determined upon equitable considerations, and is only allowed when it will promote substantial justice. This was the ruling in *Herman v.*

Miller, 17 Kan. 328, where it was said that 'the exercise of that power is, in a measure, discretionary, and it will not be exercised in cases in which it would be inequitable so to do.' See cases cited, and also *Boyer v. Clark*, 3 Neb. 167; *Lundberg v. Davidson*, 68 Minn. 328, 71 N. W. 395, 72 N. W. 71; *Pirie v. Harkness*, 3 S. D. 178, 52 N. W. 581; *Hroch v. Aultman & T. Co.* 3 S. D. 477, 54 N. W. 269; *Bartlett v. Pearson*, 29 Me. 9; *Freeman, Judgm.* 427-467; *Black, Judgm.* §§ 954, 1000." p. 374.

'Other decisions are to the same effect. *Pheiffer v. Harris*, 11 Bush, 400; *Silver v. Krellman*, 89 App. Div. 363, 85 N. Y. Supp. 945; *Goldman v. Tobias* (Sup.) 88 N. Y. Supp. 991; *Elms v. Arn*, — Okla. —, 158 Pac. 1150.

See also a 12-page note on the subject of setting off one judgment against another in 109 Am. St. Rep. 137 et seq.

In some jurisdictions the matter is regulated by statute. *First Nat. Bank v. Krieger*, 28 Ky. L. Rep. 612, 89 S. W. 733. Sometimes it is held that where judgments are strictly mutual, an assignment is subject to the judgment debtor's right to set off another judgment, which he has obtained against his judgment creditor (23 L.R.A. 335, note; 15 R. C. L. 823); but where the judgments are not mutual, the ordinary rule seems to be, and ought to be, that a bona fide assignee, especially where the element of priority is involved, is protected. In 15 R. C. L. 823, 824, it is said: "The setting off of one judgment against another is not a legal right, but is a matter of grace, and the question whether a set-off should or should not be decreed rests in the sound discretion of the court to which the application is made. . . . The action of a court of law in granting or refusing a set-off is governed by the principles of equity and justice, and allowed only where good conscience requires it. It will never be permitted when the effect would be to deprive a party of his legal rights. Accordingly, in the exercise of the power of set-off, equitable rights of persons not parties to the suit may be considered and protected. Since good conscience is far from requiring that an attorney's claim for services in securing the judgment should yield to the claim of those holding rights adverse to his clients, it is a general rule that a judgment creditor cannot defeat the attorney's lien, even by giving the attorney notice of an intended set-off."

The judgments here sought to be set off against each other are not mutual between Alexander and the Clarksons. They were never coexistent cross demands in the hands of Alexander and Clarkson. One is a judg-

ment in favor of John Clarkson against Alexander. The other is a judgment in favor of the First National Bank against the Clarksons. Clarkson has parted with his interest in his judgment. The bank has parted with its interest in its judgment. There was no mutuality in these judgments when rendered. There is certainly none now. The rights of third parties attached before this proceeding to set off was begun, and before the present cause of action—the acquisition of the bank's judgment by Alexander—arose.

We discern nothing tangible in plaintiff's claim under a garnishment proceeding commenced by the First National Bank to garnishee Clarkson's claim against Alexander. The record does not disclose that issues were ever joined in that proceeding, nor any judgment entered therein. Counsel for defendants assert that the garnishment proceeding was abandoned, and plaintiff's petition in this action infers the same where he pleads "that the plaintiff never filed any answer in garnishment in that bank case because he did not and could not know whether he was indebted to the said John Clarkson or not until the matters in controversy should thereafter be ascertained by the final determination of this court in said first-named equity action."

There being no answer, no issues joined, no judgment by default or otherwise, no execution in the garnishment proceeding, we see no way to use it as an offset to the judgment against Alexander; and the general finding of the trial court is against the plaintiff on his claim to any right found on this abortive garnishment proceeding. *Hutchinson v. Nelson*, 63 Kan. 327, 65 Pac. 670.

The evidence shows that Jarvis holds the legal title to the Clarkson judgment against Alexander as trustee for his bank, which is, and for many years has been, a creditor of John Clarkson to the extent of \$10,000, and that the indebtedness was originally incurred in furtherance of the defunct partnership business. Indeed, at one time, as security for this indebtedness, Jarvis's bank had a lien on a mill the title to which stood in Clarkson's name, but the mill was subjected to the satisfaction of the partnership debts and sold as partnership property. Surely this was a sufficient consideration for the assignment, whether it was merely as security for Clarkson's indebtedness or in diminution thereof, and it is certainly quite obvious that the equities as between Jarvis and Alexander are with Jarvis as found by the trial court.

It is next urged that the attorneys' lien on the Clarkson judgment against Alexander is invalid because the service of notice

was insufficient. The assignee of this judgment might raise this question, but Alexander's only concern therewith is to be on his guard against paying the judgment without considering the attorneys' lien thereon. If Alexander should pay the judgment in full, regardless of this notice, and the attorneys having the lien should seek to hold him thereon,—to make him pay a second time on account of it,—his present question as to the sufficiency of the notice would be all-important. This view, however, is not presented by counsel for defendants, and it may be proper to consider the question as presented. The statute provides: "Such notice must be in writing, and may be served in the same manner as a summons, and upon any person, officer or agent upon whom a summons under the laws of this state may be served, and may also be served upon a regularly employed salaried attorney of the party." Gen. Stat. 1915, § 484.

The written notice of the attorneys' lien was served upon Alexander's attorneys of record in the action in which the judgment was rendered and in which the attorneys' services were performed. It was filed in court. Alexander knew about it. His counsel knew about it. All this was before Alexander procured an assignment of the judgment which he seeks to offset against the Clarkson judgment. In *Noftzger v. Moffett*, 63 Kan. 354, 65 Pac. 670, it is said that service of a written notice of an attorney's lien on the attorney of record for the adverse party is sufficient. The new statute takes nothing from the old (Gen. Stat. 1901, § 395), but adds that the notice must be in writing, and that it may be served as above provided. That the notice be in writing is imperative. The manner of service is not so important, the chief consideration being the fact of service, that notice be brought home to the party adjudged to pay, and here there is no doubt on that point. It seems that the legislature intended that notice might be served upon any regularly employed salaried attorney for the litigant, although the latter was not the attorney in the particular litigation. We feel quite positive that the legislature did not intend to limit, but to enlarge, the methods of giving notice. However, it seems clear that only the assignee of the Clarkson judgment can question the sufficiency of the service of the notice of the attorneys' lien. If the lien should fail, the trustee of the Cowley County National Bank would take the entire interest of the Clarkson judgment, and his right thereto is unassailable by Alexander.

This disposes of the questions directly

concerned in the present case, and nothing approaching the gravity of reversible error can be discerned. We do not think it proper to extend this opinion by attempting to fol-

low counsel for plaintiff through the wide range of their discussion of the merits or demerits of the antecedent litigation.

The judgment is affirmed.

Annotation—Set-off against judgment in hands of assignee.

This note is supplemental to the note to *Benson v. Haywood*, 23 L.R.A. 335, where the earlier cases are collected.

This note does not cover cases of judgment or other claims against the assignee.

Assignees protected.

It will be seen that in *ALEXANDER v. CLARKSON*, ante, 1006, the assignee was protected against set-off claimed by the judgment debtor under a later assignment of a judgment against the assignor.

A judgment will not be set off against one which was assigned before the first-mentioned judgment was entered.

Holly v. Cook (1893) 70 *Miss.* 590, 13 So. 228; *Walton v. Catron* (1907) 125 *Mo. App.* 501, 102 S. W. 1058; *Jaeger v. Koenig* (1900) 33 *Misc.* 82, 67 *N. Y. Supp.* 172; *Matthews v. Russell* (1896) 17 *Pa. Co. Ct.* 590; *Greene v. Harris* (1887) 16 *Can. S. C.* 714 (both claims arising out of the same transaction).

Similarly a judgment will not be set off against an earlier judgment on a claim assigned in good faith before the later judgment was recovered. *Anglo-American Provision Co. v. Davis Provision Co.* (1901) 112 *Fed.* 574.

And where a claim (afterwards reduced to judgment) has been assigned before the maturity of a claim against the assignor, such latter claim may not be set off against it. *Ellis v. Kerr* (1895) 11 *Tex. Civ. App.* 349, 32 S. W. 444.

So, one having a mortgage and assignment of a claim before a judgment against the assignor was assigned will not be forced to have such judgment set off against the judgment on his own claim. *Laubsch v. West New York Silk Mill Co.* (1894) 57 *N. J. L.* 234, 30 *Atl.* 550.

Where, after a judgment for defendant for costs on discontinuance had been assigned, the plaintiff recovered a judgment against the defendant, this may not be set off against the first judgment, as it did not exist when the first judgment was assigned. *Re McDonogh* (1910) 138 *App. Div.* 291, 122 *N. Y. Supp.* 1033.

Where at the time of assignment of judgment against A to the plaintiffs, an assigned judgment in A's favor against L.R.A.1917F.

them had been satisfied by execution of their property by sale to the assignee, they were not allowed to set up their judgment against the judgment against them. *Miller v. Rosebrook* (1907) 136 *Iowa*, 158, 113 *N. W.* 771.

Where a judgment was assigned to one equitably entitled to it, it will not be set off against judgments against the assignor. *Gauche v. Milbrath* (1900) 105 *Wis.* 355, 81 *N. W.* 487.

Set-off against assignee.

In *Clark v. Raison* (1907) 126 *Ky.* 486, 104 S. W. 342, it was held that a claim created before notice of the assignment, and which could have been pleaded against the assignor, might be set off against an assigned judgment under the Kentucky statute.

But in *Anglo-American Provision Co. v. Davis Provision Co.* (Fed.) supra, it was held, where the complainant had failed in one action to plead as a counterclaim the claim upon which he afterwards recovered judgment in another action, that he would be deemed to have waived the right to set off his claim as against an assignee of the judgment against him.

A judgment in favor of members of a firm was set off against an assigned judgment against one of such firm in a case where the claim resulting in the last-named judgment might have been one against the firm. *Collins v. Campbell* (1902) 97 *Me.* 23, 94 *Am. St. Rep.* 458, 53 *Atl.* 837.

Under the Ohio statute a judgment creditor may set off his judgment against a judgment in the hands of an assignee where the assignment was made after both judgments were recovered. *Haker v. Serhant* (1904) 20 *Ohio C. C. N. S.* 446.

Similarly, in *Scholle v. Pino* (1898) 9 *N. M.* 393, 54 *Pac.* 335, where the facts are not fully reported, it was held that if, after both "judgments or claims are matured, one party assigns his judgment or claim," a set off will be allowed notwithstanding such assignment.

A having a judgment against B, B bought a judgment against A and C; thereafter A assigned part of his judgment, and his attorney had a lien upon it. It was held that as B's equity was

the older he might set off his judgment except as against the attorney who had a lien. *Brown v. Lapp* (1905) 28 Ky. L. Rep. 409, 89 S. W. 304.

In a case arising under the Massachusetts statute allowing a resident citizen a special right to bring a cross action when sued by a nonresident, the court said and held: "We cannot say as matter of law that the mere fact of an assignment of the demand of the original plaintiff to a third person after the bringing of a suit, which gave the defendant a statutory right to bring a cross action with a view of setting off a demand coeval with that on which he had been sued, would prevent the allowance of a set-off of the judgments. In the absence of anything but the mere fact of an assignment, it seems equitable to say that the assignee took subject to the defendant's right to bring his cross action under the statute and have the judgments set off." *Franks v. Edinberg* (1903) 185 Mass. 49, 69 N. E. 1058.

Cross judgments in one action.

Two judgments in an action will be set off though one was assigned to the attorney, particularly where the assignor was insolvent. *Hopper v. Ersler* (1894) 1 N. Y. Anno. Cas. 192, 38 N. Y. Supp. 176.

But the rule seems different in Texas. Thus, where there was judgment for the plaintiff in justice's court for \$200, and he filed in court an assignment of his cause of action, and on appeal the plaintiff had judgment in the county court for only \$165, with costs to the appellant in the county court, it was held that in the absence of equitable grounds which were not pleaded, there was no error in directing that the amount of the plaintiff's judgment should be paid to his assignee. *Missouri, K. & T. R. Co. v. Cassinoba* (1907) 44 Tex. Civ. App. 625, 99 S. W. 888.

Fraudulent assignment to prevent set-off.

If an assignment of a judgment is a sham, the debtor ought to be allowed to set off offsets acquired since said judgment against the insolvent assignor. *Trammell v. Chamberlain* (1910) 60 Tex. Civ. App. 238, 128 S. W. 429.

In *Grant v. McAlpine* (1881) 46 U. C. Q. B. 284, a set-off was allowed where the assignment of a verdict was not in good faith, but for the purpose of preventing a set-off.

Tort and contract.

While there is no rule against setting off a judgment in tort against one in L.R.A.1917F.

contract, the court ought not to allow it unless satisfied that substantial justice is being done. Thus, in *Reed v. Smith* (1908) 158 Fed. 889, the court declined to set off a judgment in a state court of another state on contract recovered by the plaintiff and another and assigned to the plaintiff, against a judgment for libel and slander recovered in the refusing court.

An assigned claim in tort afterwards reduced to judgment is not subject to set off by an earlier judgment in contract, as it was assigned before liquidated into a judgment. *Davidson v. Lee* (1913) — Tex. Civ. App. —, 162 S. W. 414.

An unliquidated claim in tort against an assignor of a judgment ought not to be set off against the judgment, where it is not shown that the tort occurred prior to the assignment and that the assignor was insolvent at the time of the assignment. *Bramblett v. Slemp* (1908) 32 Ky. L. Rep. 1329, 108 S. W. 339.

An assignee of a judgment from an insolvent assignor for malicious prosecution takes it subject to having set off against it a known claim on contract subsequently reduced to judgment which could not be set off in the tort action. *Whitehead v. Jessup* (1896) 7 Colo. App. 460, 43 Pac. 1042.

Notice.

"Although an obligor, after receiving notice of the assignment of a demand he is owing, may buy valid claims against the assignee to be used as a set-off against his (the obligor's) debt owing to the assignee, he will not, after notice of the assignment, be allowed to buy up claims against the assignor and set them off against such debt in the hands of the assignee." *Bramblett v. Slemp* (1908) 32 Ky. L. Rep. 1329, 108 S. W. 339.

An assignee for value of a judgment against A without notice of a judgment against his assignor in favor of A ought not to have his judgment set off. *Davidson v. Lee* (Tex.) supra.

When, as between the assignees of reciprocal judgments, the prior assignee took without notice of a secret equity in pursuance of which the second assignee received his assignment, the first assignee was allowed to set off his judgment against the judgment of the second assignee. *Skinner v. Chase* (1898) 6 Pa. Super. Ct. 279.

A judgment will be set off against an assignee of another judgment when he took with notice of the rights which

were reduced to the first-mentioned judgment. *Coonan v. Loewenthal* (1905) 147 Cal. 218, 109 Am. St. Rep. 128, 81 Pac. 527; *Wabash R. Co. v. Bowring* (1903) 103 Mo. App. 158, 77 S. W. 106 (assignee the attorney).

An assignee of a judgment against a debtor, which is properly collectable from one whose position is virtually that of surety, takes such judgment subject to the set-off of a joint and several claim upon a different transaction owned by the surety against both the principal debtor and the assignor, who were both insolvent, where the assignee took his assignment with full notice of such joint and several claim.

Fleming v. Stansell (1896) 13 Tex. Civ. App. 558, 36 S. W. 504.

In the absence of notice given by the assignee of a judgment to the judgment debtor before the latter has obtained a judgment against the assignor, the last-mentioned judgment may be set off against the first judgment. *Martin v. Wells, F. & Co. Exp.* (1892) 3 Ariz. 355, 28 Pac. 958, where the court said that the statute which provided that "in case of an assignment of a thing in action, the action of an assignor shall be without prejudice to any set-off or other defense existing at the time of or before notice of the assignment," "simply expressed what was the equitable doctrine of assignments in the absence of a statute."

See also *Clark v. Raison* (1907) 126 Ky. 486, 104 S. W. 342, supra, under "Set-off against assignee."

Where at the time of the assignment to the defendant of a judgment against A, he did not know that a judgment against him in favor of A had been assigned to the plaintiff, he may counterclaim his judgment, as an action upon a judgment is an action upon contract under the statute providing that "if the action is founded upon a contract which has been assigned by the party thereto . . . a demand existing against the party thereto . . . at the time of the assignment thereof, and belonging to the defendant, in good faith, before notice of the assignment, must be allowed as a counterclaim to the amount of the plaintiff's demand if it might have been so allowed against the party . . . while the contract belonged to him." *Wyckoff v. Williams* (1910) 136 App. Div. 495, 121 N. Y. Supp. 189.

Attorneys.

In *Gauche v. Milbrath* (1900) 105 Wis. 355, 81 N. W. 487, the court ob-

served: "Where the judgments are in actions having no connection with each other, the equitable right of the attorney, who has rendered services and incurred expenses in obtaining one of such judgments, to be paid out of it, is deemed superior to the right of the judgment debtor to have that judgment paid by applying upon it the judgment owned by him against his judgment creditor."

A judgment for costs assigned to the attorney should not have a judgment in another action set off against it. *Winterson v. Hitchings* (1895) 1 N. Y. Anno. Cas. 193, 38 N. Y. Supp. 171.

And see as to an attorney who had a lien, *Brown v. Lapp* (1905) 28 Ky. L. Rep. 409, 89 S. W. 304, supra, under "Set-off against assignee."

Where A recovered a judgment against B and others and died, and B thereafter recovered a judgment against A's executors and assigned a part of it to his attorneys for their services, it was held that, on set-off of the two judgments the part belonging to the attorneys would not be set off. *Ex parte Wells* (1894) 43 S. C. 477, 21 S. E. 334.

A judgment assigned by an insolvent to his attorneys for their fees will not be set off against judgments and claims bought and recovered after the arrangement with such attorneys had been agreed upon. *Dutton v. Mason* (1899) 21 Tex. Civ. App. 389, 52 S. W. 651.

The firm of A and B got judgment against the firm of C and D, and assigned the same, one-half to their attorneys, and B assigned his remaining share to E. Thereafter C and D recovered a judgment against B. It was held that the latter judgment could not be set off against the attorneys, it not appearing that the claims on which the second judgment was entered were in existence when their contract was made, but that E's interest was subject to a set-off. *McManus v. Cash* (1908) 101 Tex. 261, 108 S. W. 800.

In *L. Bucki & Son Lumber Co. v. Atlantic Lumber Co.* (1904) 63 C. C. A. 62, 128 Fed. 332, it was held that an assignment of a demand, before the entry of judgment upon it, to an attorney who had a statutory lien thereon, gives to the assignee a superior equity to that of a party claiming a right to set-off a judgment previously recovered against the assignor, and prevents the right of set-off from accruing, since there can be no right of set-off under judgment until both exist.

But an assignee of a judgment without notice of any assignment of any

claim against him was allowed to set it off against a judgment entered after the assignment and which itself had been assigned to the attorneys. *Haskins v. Jordan* (1898) 123 Cal. 157, 55 Pac. 786.

In New York, two judgments in an action will be set off though one was assigned to the attorney, particularly where the assignor was insolvent. *Hopper v. Ersler* (1894) 1 N. Y. Anno. Cas. 192, 38 N. Y. Supp. 176.

Miscellaneous.

An assignment of a judgment by an insolvent is subject to all the equities existing between the parties to the judgment. *Ellis v. Kerr* (1895) 11 Tex. Civ. App. 349, 32 S. W. 444.

If the matter of set-off of judgments is not clear, but is complicated, the parties will be remitted to their suit in equity. *Kretsch v. Denofrio* (1910) 137 App. Div. 617, 122 N. Y. Supp. 242.

Where rights of third parties have intervened, the court will not permit the set-off of judgments where there has

been laches. *Schuler v. Collins* (1901) 63 Kan. 372, 65 Pac. 662.

A judgment is *res judicata* to an assignee suing thereon. *Porter v. Bagby* (1893) 50 Kan. 412, 31 Pac. 1058.

One who has assigned a judgment against the plaintiff before the beginning of the plaintiff's action cannot counterclaim such judgment. *Goldman v. Tobias* (1904) 88 N. Y. Supp. 991.

An assignee for creditors having obtained judgment against a bank of conversion of stock, the bank was not allowed to set off its claims against the assigned estate allowed to it by the decree settling that estate, as this would give an inequitable preference. *First Nat. Bank v. Krieger* (1905) 28 Ky. L. Rep. 612, 89 S. W. 733.

In *Crecelius v. Bierman* (1897) 72 Mo. App. 355, the assignment of judgment was invalid.

Gregory v. Cuppy (1900) — Iowa, —, 82 N. W. 1016, is too fragmentary to be of value. B. B. B.

OKLAHOMA SUPREME COURT. (Division No. 1.)

MISSOURI, KANSAS, & TEXAS RAIL-
WAY COMPANY, Plff. in Err.
v.
W. W. BRADSHAW.

(37 Okla. 317, 132 Pac. 327.)

Abatement — suit in sister state.

1. Where an action by a creditor against his debtor is brought in a court of this state, and jurisdiction of the defendant is acquired, and subsequently an action is commenced in a court of a sister state, in which the plaintiff here is there made defendant, and the defendant here is there served with garnishment process, the subject-matter being the same, said latter action can neither be pleaded in bar nor in abatement of the former. In such cases the maxim, "*Qui prior est tempore potior est jure*," controls. For other cases, see *Abatement and Revival*, in *Dig. 1-52 N. S.*

Same — comity — prior jurisdiction.

2. Where actions are properly instituted and are pending in courts of different jurisdictions or sovereignties, the rule of comity is not allowed to influence the proceedings

of the court whose jurisdiction first attaches.

For other cases, see *Abatement and Revival*, in *Dig. 1-52 N. S.*

(May 6, 1913.)

ERROR to the Coal County Court to review a judgment in favor of plaintiff in an action brought to recover wages alleged to be due and unpaid, in the defense of which defendant set up a judgment in a garnishment proceeding in the state of Missouri. Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. Clifford L. Jackson, W. R. Allen, and M. D. Green, for plaintiff in error:

The judgment against the plaintiff in error as garnishee in the Missouri case is a valid defense to this action.

Chicago, R. I. & P. R. Co. v. Sturm, 171 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797; *Harris v. Balk*, 198 U. S. 215, 49 L. ed. 1023, 25 Sup. Ct. Rep. 625, 3 Ann. Cas. 1084; *Hadacheck v. Chicago, B. & Q. R. Co.* 74 Neb. 385, 104 N. W. 878; *Williams v. St. Louis & S. W. R. Co.* 109 La. 90, 33 So. 94; *Missouri, K. & T. R. Co. v. Swartz*, 53 Tex. Civ. App. 389, 115 S. W. 275; *Ely v. Hartford L. Ins. Co.* 128 Ky. 799, 110 S. W. 265; *Howland v. Chicago, R. I. & P. R. Co.* 134 Mo. 474, 36 S. W. 29; *St. Louis Southwestern R. Co. v. Vanderberg*, 91 Ark. 252,

Headnotes by SHARP, C.

Note. — For garnishment proceedings and an action to recover the debt pending in different states or countries as sustaining plea in bar or abatement, see annotation following this case, post, 1016.
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120 S. W. 993; Baltimore & O. R. Co. v. Freeze, 169 Ind. 370, 82 N. E. 761.

Mr. G. T. Ralls, for defendant in error:

The Missouri court acquired no jurisdiction over the defendant in error or the money due him by the plaintiff in error by virtue of the writs of attachment and garnishment.

McBee v. Purcell Nat. Bank, 1 Ind. Terr. 288, 37 S. W. 55; Central Trust Co. v. Chattanooga, R. & C. R. Co. 68 Fed. 685; Session Laws 1910, p. 19; Missouri P. R. Co. v. Malthy, 34 Kan. 125, 8 Pac. 235.

Sharp, C., filed the following opinion:

This action was originally brought by defendant in error, plaintiff below, against the plaintiff in error, defendant below, in a justice of the peace court on February 19, 1910. Service of summons being had, and the defendant not appearing, judgment was rendered February 24, 1910, in favor of plaintiff and against defendant for \$57.55. From this judgment defendant appealed to the county court of Coal county; its appeal bond being filed and approved March 3d thereafter, and the transcript and bond filed in the county court on March 4th. On April 28th defendant company filed in the county court its answer, which contained: (1) A general denial; (2) a plea in bar, setting up pending garnishment proceedings, brought March 24, 1910, in a justice of the peace court in Jackson county, Missouri, in which the plaintiff in the county court was defendant, and the railway company was garnishee. To said answer were attached copies of the notice of garnishment, statement of claim, affidavit in attachment, attachment bond, writ of attachment, and transcript, together with certificates of both the justice of the peace and clerk. From these records offered in evidence, notwithstanding the allegations contained in defendant's answer, it does not appear that the garnishee had ever filed its answer therein, or that service by publication was ever obtained or attempted to be had upon the defendant in the garnishment proceedings. The order of attachment contains a summons clause, but from the officer's return it appears that he was unable, after diligent search, to find the defendant. This order was returned on the return day thereof. The following orders continuing the cause were made: "April 8th, '10, cont. to April 16th, '10, for answer of garnishee. April 16th, '10, cont. to April 30th, for answer of garnishee." The certificates of both the justice of the peace and the clerk were dated April 27, 1910. The case was tried in the county court, both parties announcing ready for trial July 6, 1910, and on the same day L.R.A.1917F.

a verdict was returned in favor of plaintiff for \$57.55. The only evidence offered at the trial on the part of the defendant was the authenticated copy of the proceedings pending in the Missouri court.

Was the pendency of the foreign garnishment proceedings a bar to plaintiff's right of recovery? Obviously, no. Neither could said proceedings have properly been pleaded in abatement of the action, on account of the fact that said action was brought subsequent to the institution of plaintiff's action. The proper rule in such cases is that one who has been sued by his creditor cannot plead in abatement of the suit the fact that after it was commenced he was summoned in a foreign jurisdiction as garnishee in an action against the plaintiff, and that the maxim, "*Qui prior est tempore potior est jure*," controls in such cases. To hold otherwise would inevitably bring about confusion, if not conflict, in the jurisdiction of courts that would embarrass and prove a hindrance in the administration of justice.

The leading case upon the principle involved is that of Wallace v. Mc'Connell, 13 Pet. 136, 10 L. ed. 95, where an action was commenced in the district court of the United States for Alabama, and by a subsequent trustee process in one of the state courts of Alabama the defendant was summoned as a garnishee of the plaintiff; whereupon the pending proceedings of trustee process were pleaded *puis darrein*, continuance in the United States court, and a demurrer to this plea was sustained by the court. The plea showed that the proceedings on the attachment were instituted after the commencement of suit. It is said in the opinion: "The jurisdiction of the district court of the United States, and the right of the plaintiff to prosecute his suit in that court, having attached, that right could not be arrested or taken away by any proceedings in another court. This would produce a collision in the jurisdiction of courts that would extremely embarrass the administration of justice. If the attachment had been conducted to a conclusion and the money recovered of the defendant before the commencement of the present suit, there can be no doubt that it might have been set up as a payment upon the note in question. And if the defendant would have been protected *pro tanto* under a recovery had by virtue of the attachment, and could have pleaded such recovery in bar, the same principle would support a plea in abatement of an attachment pending prior to the commencement of the present suit. The attachment of the debt, in such case, in the hands of the defendant would fix it there, in favor of the attaching creditor, and the defendant

could not afterwards pay it over to the plaintiff. The attaching creditor would in such case acquire a lien upon the debt, binding upon the defendant, and which the courts of all other governments, if they recognize such proceedings at all, could not fail to regard. If this doctrine be well founded, the priority of suit will determine the right. The rule must be reciprocal; and where the suit in one court is commenced prior to the institution of proceedings under attachment in another court, such proceedings cannot arrest the suit; and the maxim, 'Qui prior est tempore potior est jure,' must govern the case. This is the doctrine of this court in the case of *Renner v. Marshall*, 1 Wheat. 216, 4 L. ed. 75, and also in the case of *Beaston v. Farmers' Bank*, 12 Pet. 102, 9 L. ed. 1017, and is in conformity with the rule that prevails in other courts in this country, as well as in the English courts; it is essential to the protection of the rights of the garnishee, and will avoid all collisions in the proceedings of different courts, having the same subject-matter before them. *Embree v. Hanna*, 5 Johns. 101; *Bowne v. Joy*, 9 Johns. 221, and the cases there cited. In the case now before the court, the suit was commenced prior to the institution of proceedings under the attachment. The plea was therefore bad, and the demurrer properly sustained." See also *Campbell v. Emerson*, 2 McLean, 30, Fed. Cas. No. 2,357; *Greenwood v. Rector*, Hempst. 708, Fed. Cas. No. 5,792.

In *Wood v. Lake*, 13 Wis. 94, after reviewing a number of cases, it was noted by the court that in said cases the actions were commenced and pending in courts of the same jurisdiction. The court said: "Where they are instituted and pending in courts of different jurisdictions or sovereignties, no such practice prevails, and no rule of comity is allowed to influence the proceedings of the court whose jurisdiction first attaches." The court then reviews the doctrine announced by the Supreme Court of the United States in *Wallace v. M'Connell*, supra, and concludes: "It may be said that the court was then speaking of the effect of such subsequent action as a bar. But I can see no good ground for distinguishing between their operation in that respect and when they are relied upon for the purpose of securing a stay of the proceedings in the first action. It would be irrational and absurd to say that the court which had first acquired jurisdiction should arrest its proceedings, because the court of another government, having concurrent jurisdiction over the same subject-matter and parties, had subsequently attempted to take jurisdiction of the case." L.R.A.1917F.

This answers correctly any contention which might be made that the only effect that should be given the defense set up, and in part sustained by the proffered testimony, notwithstanding the allegations of the answer, would be to abate or stay the proceedings in the county court until after the final decision of the Missouri court. Pending garnishment proceedings subsequently brought in a foreign jurisdiction can neither be pleaded in bar nor in abatement of the action first brought by the creditor against his debtor.

In *Whipple v. Robbins*, 97 Mass. 107, 93 Am. Dec. 64, as here, both suits were in state courts, and it was held that a subsequent trustee process was no answer to a prior action brought in Massachusetts. The court in the course of the opinion, after reviewing the decision of the Supreme Court in *Wallace v. M'Connell*, supra, said: "From these principles it follows that, if the prior institution and pendency of the present action had been disclosed to the court in Connecticut, the trustee process ought to have been defeated. We must presume that the tribunals of that state would have recognized the rule that their subsequent trustee process could not be pleaded *pais darrein continuance*, or otherwise made available, here, to arrest or take away the plaintiff's right to prosecute the present action; and consequently that they would not have subjected the trustee to a double liability against which he could in no way protect himself, if by their judgment charged as trustee. In short, we are bound to believe that court would have adopted the rule of *Wallace v. M'Connell*, supra, that the subsequent trustee process is no answer to the prior action in another jurisdiction, and the necessary corollary from it that a prior action commenced in one state must be a bar to a subsequent process in another to charge the defendant as the trustee of the plaintiff in the prior action. But the trustee did not make any disclosure of the pendency of the present suit. He withheld from the court in Connecticut this fact, essential to a fair adjudication. He allowed himself to be defaulted, and his payment under such circumstances must be regarded as voluntary, if not collusive, and therefore no protection against the present action. *Wilkinson v. Hall*, 6 Gray, 568."

The proceedings of the courts of this state may be availed of by the defendant company in its answer in the garnishment action in the Missouri court, and we doubt not that the courts of that state would give full faith and credit to said proceedings. At least, we may not anticipate that such would not be done; and only by a failure

so to do could the rights of the plaintiff in error be prejudicially affected, its only defense being the pending garnishment proceedings.

Our conclusions render unnecessary a consideration of the remaining questions.

The judgment of the trial court should be affirmed.

Per Curiam:

It is so ordered.

Annotation—Garnishment proceedings and an action to recover the debt pending in different states or countries as sustaining plea in bar or abatement.

This note, being confined to actions and proceedings in different states or countries, does not include the cases which merely involved actions and proceedings in different districts of the same state, though the decisions in these cases have to some extent influenced the decisions in the cases within the scope of the note. This note, of course, does not undertake to discuss the effect upon one action or proceeding of a judgment rendered in another, though the assumption of the court as to the jurisdiction is occasionally alluded to because of its bearing on the authority of the case upon the question under discussion. As to recovery of judgment for exempt claims pending garnishment proceedings in another state, see note to *Becker v. Illinois C. R. Co.* 35 L.R.A.(N.S.) 1154.

In considering the question under annotation, Federal courts are considered foreign to state courts.

Abatement or bar of action by prior garnishment proceedings.

In determining whether or not a case is authority against the view that a prior garnishment proceeding will sustain a plea in abatement against a subsequent action in another state by the principal defendant against the garnishee, it is important to observe whether or not the case was decided upon the assumption or holding that the court in the garnishment proceeding had jurisdiction. Of course, if the case is decided on the assumption, whether correct or not, that the court of the other state had no jurisdiction in the garnishment proceeding, it is of very little if any value on the question of abatement, since that, as a practical question, presupposes that the court had jurisdiction of the garnishment proceeding. Doubtless in some of the cases in the present note in which the decision against the plea in abatement was upon the assumption or holding that the court of the other state had no jurisdiction, that assumption or holding was erroneous, L.R.A.1917F.

tested by the present rule on the subject; but that fact does not serve to extend their authority against abatement to a case where it is conceded or held that the court had jurisdiction in the garnishment proceeding.

As shown in the notes which have considered the question as to where a debt is garnishable, appended to *Illinois C. R. Co. v. Smith*, 19 L.R.A. 577; *Goodwin v. Claytor*, 67 L.R.A. 209; *Baltimore & O. R. Co. v. Allen*, 3 L.R.A.(N.S.) 608; *Steer v. Dow*, 20 L.R.A.(N.S.) 264; and *Starkey v. Cleveland, C. C. & St. L. R. Co.* L.R.A.1915F, 880,—there was formerly a great conflict of opinion as to the conditions essential to confer jurisdiction in garnishment, a conflict which has now, however, to a great extent been dissipated.

The general rule is that an action in one state will not be abated by the pendency in another of a prior one between the same parties for the same cause of action. 1 Cyc. 36.

But while there is a conflict on the points, the weight of authority seems to sustain an exception to this general rule, and to hold that the pendency of garnishment proceedings in one state will abate an action subsequently commenced in another by the principal defendant in the garnishment proceedings against the garnishee, if the court had jurisdiction of the garnishment. To that effect are: *Mattingly v. Boyd* (1858) 20 How. (U. S.) 123, 15 L. ed. 845; *Hacker v. Stevens* (1849) 4 McLean, 535, Fed. Cas. No. 5888; *German Bank v. American F. Ins. Co.* (1891) 83 Iowa, 491, 32 Am. St. Rep. 316, 50 N. W. 63; *Harvey v. Great Northern R. Co.* (1892) 50 Minn. 405, 17 L.R.A. 84, 52 N. W. 905; *Embree v. Hanna* (1809) 5 Johns. (N. Y.) 99; *Dealing v. New York, N. H. & H. R. Co.* (1887) 3 N. Y. S. R. 386; *Irvine v. Lumbermen's Bank* (1841) 2 Watts & S. (Pa.) 190; *Lowry v. Lumbermen's Bank* (1841) 2 Watts & S. (Pa.) 210; and see *Norman v. Pennsylvania F. Ins. Co.* (1911) 237 Mo. 576, 141 S. W. 618.

Williams v. Ingersoll (1882) 89 N. Y. 508; *Douglass v. Phenix Ins. Co.* (1893) 138 N. Y. 209, 20 L.R.A. 118, 34 Am. St. Rep. 448, 33 N. E. 938, cited *infra*, though denying the plea in abatement, are not authority against the view, nor opposed to the *Embree* Case *supra*, on the point, since they were decided upon the holding, or assumption, whether correct or not, that the court in the garnishment proceeding had no jurisdiction. In fact, these cases seem to recognize the authority of the *Embree* Case upon the assumption of jurisdiction in the garnishment proceeding.

In *Embree v. Hanna* (1809) 5 Johns. (N. Y.) 99, Judge Kent, in stating that had there been a recovery by virtue of the attachment such recovery could have been pleaded in bar of the subsequent action, said: "The same principle will support a plea in abatement of an attachment pending and commenced prior to the present suit. The attachment of the debt in the hands of the defendant, fixed it there in favor of the attaching creditors; the defendant could not afterwards lawfully pay it over to the plaintiff. The attaching creditors acquired a lien upon the debt, binding upon the defendant, and which the courts of all other governments, if they recognize such proceedings at all, cannot fail to regard. *Qui prior est tempore potior est jure*. . . . If we were to disallow a plea in abatement of the pending attachments, the defendant would be left without protection, and be obliged to pay the money twice; for we may reasonably presume that if the priority of the attachment in Maryland be ascertained, the courts in that state would not suffer that proceeding to be defeated by the subsequent act of the defendant going abroad and subjecting himself to a suit and recovery here. The present case affords a fair opportunity for the settlement and application of a general rule on the subject. It is admitted by the case that the plaintiff is now the real owner of the whole debt due from the defendant; that he owes a large debt to the attaching creditors; and that the defendant is a resident in Maryland. There is then no ground to presume any collusion between the defendant and the creditors who attached; and there is no pretense that the plaintiff was not timely notified of the pendency of the attachment, or that the attachment is not founded on a bona fide debt, equal at least in amount to the one due from the defendant. If the force and effect of a foreign L.R.A.1917F.

attachment is, then, in any case to be admitted as a just defense, it would be difficult to find a sufficient reason for overruling a plea in abatement in the present case."

And in *Harvey v. Great Northern R. Co.* (1892) 50 Minn. 405, 17 L.R.A. 84, 52 N. W. 905, the court said that "the pendency of a prior action by foreign attachment in another jurisdiction which binds the debt may always be set up by way of defense to a suit by the defendant in the attachment to recover the same debt. This constitutes an exception to the general rule that *lis pendens* in a foreign court is not a good plea. . . . This rule is essential to prevent a collision in the jurisdiction of courts, as well as for the protection of a party summoned as garnishee or trustee, who might otherwise, without any fault of his own, be in danger of being compelled to pay the debt twice."

The view of the preceding cases, however, is opposed by the following cases, which decide or declare on general principles, and apparently without reference to the question of jurisdiction in the garnishment proceeding, that prior garnishment will not abate the action; *Lynch v. Hartford F. Ins. Co.* (1883) 17 Fed. 627; *Crawford v. Slade* (1846) 9 Ala. 887, 44 Am. Dec. 463; *Herlow v. Orman* (1885) 3 N. M. 471, 6 Pac. 935; *Barnsdall v. Waltemeyer* (1905) 73 C. C. A. 515, 142 Fed. 415 (dictum); *Howland v. Chicago, R. I. & P. R. Co.* (1896) 134 Mo. 474, 36 S. W. 29.

It was so held in the *Howland* Case, notwithstanding that the court expressly found and held that the court in the garnishment proceeding had jurisdiction. But see *Williams v. Ingersoll* and *Douglass v. Phenix Ins. Co.* (N. Y.) *supra*.

There is, perhaps, an implication to the same effect in *Boyd v. Royal Ins. Co.* (1892) 111 N. C. 372, 16 S. E. 389, where the court stated in effect that in any judgment that may be rendered against the defendant provision should be made to protect it from having to pay twice,—once under the judgment of the North Carolina court and once under the judgment of the Virginia court in which the garnishment proceeding was pending. It is not clear, however, from the report whether the garnishment was pleaded in bar or abatement.

In *Lynch v. Hartford F. Ins. Co.* (1883) 17 Fed. 627, the court stated that *Embree v. Hanna* was decided upon the authority of English cases which referred to domestic actions, and that

this decision was made before the law in this country had been settled that the courts of the state are to be considered as foreign to each other and the courts of the United States as foreign to those of the states in this matter.

In refusing to decide, because unnecessary under the facts, whether or not a prior garnishment of a debtor in a state court which has not passed the final judgment against the garnishee constitutes good ground for plea in abatement of an action in a Federal court against garnishee by his creditors to enforce his claim, the court in *Barnsdall v. Waltemeyer* (1905) 73 C. C. A. 515, 142 Fed. 415, said: "It is difficult to perceive how these facts can sustain a plea in abatement, because a stream may not rise higher than its source. One who sues a creditor and garnishees the latter's debtor in a state court has no greater or better right to enforce the claim against the debtor than the latter's creditor had. If the creditor had brought a prior action against his debtor in the state court, that fact would not have sustained a plea in abatement of a subsequent action between the same parties to enforce the same claim in a Federal court, and it is not perceived how a garnishment of the debtor by a creditor of his creditor can furnish ground for a better plea. While there is a conflict of decisions upon this question, and the earlier authorities . . . are to the contrary, the later decisions, and the weight of authority and of reason, seem to support this view."

The decision in *North British Mercantile Ins. Co. v. First Nat. Bank* (1893) 3 Tex. Civ. App. 293, 22 S. W. 992, is merely to the effect that a garnishment proceeding in which the original creditor was the principal defendant will not abate an action by one to whom the claim had been assigned prior to the garnishment. The court distinguished the cases where the original creditor, and not an assignee, brought the subsequent action.

While, as above shown, there is some conflict as to whether or not a prior garnishment proceeding is pleadable in abatement, it is agreed that it is not pleadable in bar.

Thus, in *Ervine v. Lumbermen's Bank* (1841) 2 Watts & S. (Pa.) 190; *Lowry v. Lumbermen's Bank* (1841) 2 Watts & S. (Pa.) 210, it was held that such prior proceedings cannot be pleaded in bar even where there was jurisdiction of garnishment proceedings, but that they must be pleaded in abatement.

So also, a fortiori, where there was L.R.A.1917F.

lack of jurisdiction in the garnishment proceedings it has been held that such prior proceedings will not sustain a plea in bar of a subsequent action. *Missouri P. R. Co. v. Sharitt* (1889) 43 Kan. 375, 8 L.R.A. 385, 19 Am. St. Rep. 143, 23 Pac. 430; *Chicago, R. I. & P. R. Co. v. Campbell* (1897) 5 Kan. App. 423, 49 Pac. 321; *Osgood v. Maguire* (1874) 61 N. Y. 524; and see also *Henderson v. Canadian P. R. Co.* (1916) — Sask. L. R. —, 30 D. L. R. 62.

And a prior garnishment in another state is not a bar to an action against the garnishee by his creditor where under the statute laws of the state where the garnishment was had it is manifest that the judgment against the garnishee amounts to nothing more than a lien on the funds in his hands, and even that is a provisional one, to take effect only in case that other funds which are first chargeable shall prove insufficient. *Meriam v. Rundlett* (1833) 13 Pick. (Mass.) 511. The court stated, however, that the garnishee might have good ground for an abatement or stay of proceedings.

The courts which hold that a plea in abatement is not the proper remedy very generally admit the necessity, upon the assumption that the court in the other state had jurisdiction of the garnishment proceedings, of protecting the defendant against double liability.

In *Chicago, R. I. & P. R. Co. v. Sturm* (1899) 174 U. S. 713, 43 L. ed. 1145, 19 Sup. Ct. Rep. 797, in reversing the Kansas supreme court, which held that there was no jurisdiction in the garnishment proceedings and that therefore they could not be pleaded in answer, the court said: "How proceedings in garnishment may be availed of in defense,—whether in abatement or bar of the suit on the debt attached, or for a continuance of it, or suspension of execution,—the practice of the states of the Union is not uniform. But it is obvious and necessary justice that such proceedings should be allowed as a defense in some way."

So, in all ordinary cases a continuance should be granted ex comitate in order that plaintiffs in foreign attachment may have opportunity to make their attachment available. *Lynch v. Hartford F. Ins. Co.* (Fed.) supra.

So also in *Herlow v. Orman* (1885) 3 N. M. 471, 6 Pac. 935, the court said that the action may be maintained notwithstanding pendency of trustee suit in another state, but that the courts will be careful to see that the trustee is not

subjected to any danger of being compelled to pay his debt twice.

And in *Crawford v. Slade* (1846) 9 Ala. 887, 44 Am. Dec. 463, the court said that when the fact of an attachment pending for the same debt is made known to the court where the creditor of the garnishee has brought suit, it will either suspend all proceedings until the attachment suit is determined or render judgment with a stay of execution, which can be removed, or made perpetual, in whole or in part, as the exigencies of the cases may require. And as this course is equally safe, and productive of less delay, it would seem to be the most eligible.

Also see *Carrol v. McDonogh* (1822) 10 Mart. La. 609, which holds that proceedings against garnishee should be stayed until decision is ascertained of an attachment pending in another state against the same funds, in an action by a third person against the garnishee's creditor.

In *Brodnax v. Thomason* (1846) 1 La. Ann. 382, it was held that there should be a suspension of execution against the defendant in an action on debt until the extent of his liability as garnishee in garnishment proceedings in another state is ascertained.

And see *Robeson v. Carpenter* (1828) 7 Mart. N. S. (La.) 30, to the same effect.

And in *Howland v. Chicago, R. I. & P. R. Co.* in holding that there should be no abatement, but that judgment should be entered with a stay of execution pending outcome of garnishment proceedings, the court said: "To allow the defendant in the second suit to plead the attachment in the first in abatement would frequently lead to unavoidable embarrassment because . . . peradventure, no judgment might ever be rendered in the attachment suit, and consequently the plaintiff in the second suit would have his suit abated and he be mulcted in costs, and then have to renew his suit, perhaps after great delay."

From its citation of *Crawford v. Slade* (Ala.) supra, and other cases, some of which are not within the scope of the present note because they involved a garnishment in another district of the same state, it would seem that the court in this case might sanction a suspension of proceedings until the determination of the garnishment.

But to secure a stay of execution on grounds of pending garnishment proceedings in another state, it is incumbent on the plaintiff.

bent upon defendant in the action to prove in the trial court the fact of the pendency of such proceedings. *Norman v. Pennsylvania F. Ins. Co.* (1911) 237 Mo. 576, 141 S. W. 618.

And in *Hixon v. Schooley* (1857) 26 N. J. L. 461, it was held that record of commencement of garnishment in another state without proof that it was still pending was insufficient to stay an action.

Nor is it sufficient to stay an action if the return of the attachment fails to show that the very debt sued upon was attached. *Hixon v. Schooley* (N. J.) supra; *Bailey v. Pennsylvania R. Co.* (1904) 70 N. J. L. 308, 58 Atl. 83; *Naylor v. Pennsylvania R. Co.* (1904) 70 N. J. L. 312, 58 Atl. 84.

Abatement of garnishment proceedings by prior action.

A prior action in another state was held to abate subsequent trustee process in *American Bank v. Rollins* (1868) 99 Mass. 313.

And in *Whipple v. Robbins* (1867) 97 Mass. 107, 93 Am. Dec. 64, it was said that if it had been pleaded, a prior action commenced in another state would have been a bar to a subsequent trustee process. The court stated that this followed as a necessary corollary to the rule adopted in *Wallace v. M'Connell* (1839) 13 Pet. (U. S.) 136, 10 L. ed. 95, that a subsequent garnishment is no answer to a prior action in another jurisdiction.

Abatement or bar of action by subsequent garnishment proceedings.

An action will not be abated or barred by subsequent garnishment proceedings in another jurisdiction. *Wallace v. M'Connell* (U. S.) supra; *Campbell v. Emerson* (1839) 2 McLean, 30, Fed. Cas. No. 2,357; *Greenwood v. Rector* (1855) Hempst. 708, Fed. Cas. No. 5,792; *Wood v. Lake* (1860) 13 Wis. 85; *Missouri, K. & T. R. Co. v. Bradshaw*, ante, 1013.

It would be irrational and absurd to say that the court which had first acquired jurisdiction should arrest its proceedings because the court of another government having concurrent jurisdiction over the same subject-matter and parties had subsequently attempted to take jurisdiction of the case; and particularly would this be so when the court which at first attained jurisdiction is clothed with ample power, and would, if asked, give the plaintiff in the second action the relief to which they might be entitled. *Wood v. Lake* (Wis.) supra.

Where a suit in one court is commenced prior to the institution of proceedings under attachment in another, the maxim, "qui prior est tempore potior est jure," governs, and such proceeding cannot arrest the suit. *Wallace v. M'Connell* (U. S.) supra. This doctrine, the court added, is essential to the protection of the rights of the garnishee, and will avoid all collisions in the proceedings of different courts having the same subject-matter before them.

And in *Campbell v. Emerson* (following *Wallace v. M'Connell* as authority), the court said that to sustain a plea in abatement of suit that subsequent garnishment proceedings were commenced would make it easy in many cases to oust the jurisdiction of courts of the United States by issuing attachments in the state courts, which would be taking from nonresidents of the state a right to sue in the Federal courts, which right is guaranteed by the Federal Constitution and acts of Congress.

So, in *Greenwood v. Rector* (1855) *Hempst.* 708, *Fed. Cas. No.* 5,792, it was said that "it would certainly be an extraordinary procedure if an action in this court could be defeated by a subsequent proceeding in a state court. Such a pretension cannot be tolerated. The jurisdiction of this court, and the right of the plaintiffs to prosecute their suit therein, having attached, that right certainly cannot be arrested or taken away by any proceedings in another court; for the effect of such a practice would be to produce collision in the jurisdiction of courts that would embarrass the administration of justice. State courts can no more interfere in our business and proceedings than we can in theirs."

But in *Cole v. Flitercraft* (1877) 47 Md. 312, the court said that the above statements by the court in *Wallace v. M'Connell* "were doubtless correct as far as applied to the facts then before the court, and to the courts in which the conflict of jurisdiction then occurred as between Federal and state courts in the same state, but it is very doubtful whether they are applicable to courts of entirely distinct governments. It depends entirely upon the comity of the courts of the several states what effect may be given to the pending process of the court of one state in another. There is not, as far as we are advised, any legal obligation on a state court to suspend its action in a case between its suitors because a suit is pending in another state for the same property between other parties."

Abatement or bar of garnishment proceedings by subsequent action.

And conversely, garnishment proceedings will not be abated or barred by a subsequent action pending in another state. *Willard v. Sturm* (1896) 96 Iowa, 555, 65 N. W. 847 (see *Chicago, R. I. & P. R. Co. v. Sturm* (1889) 174 U. S. 713, 43 L. ed. 1145, 19 Sup. Ct. Rep. 797, appeal from judgment in favor of *Sturm* rendered in Kansas courts, where defense was garnishment proceedings, in *Willard v. Sturm*, and which held that an action by a creditor against his debtor was abated by the prior garnishment proceeding, in which such debtor was summoned as garnishee); *Datz v. Chambers* (1893) 3 Pa. Dist. R. 353.

J. H. B.

WASHINGTON SUPREME COURT.
(Department No. 2.)

GRACE E. ANDERSON, Appt.,
v.

NORTHERN PACIFIC RAILWAY COMPANY, Resp't.

(88 Wash. 139, 152 Pac. 1001.)

Carrier — negligence — crystallized drawbar.

1. A carrier cannot be held to be negligent because a drawbar which broke allowing the train to part, to the injury of a passenger, was found to be crystallized,

since crystallization is a latent defect which would not have been discovered by inspection.

For other cases, see Carriers, II. g, 1, c, in Dig. 1-52 N. S.

Same — failure to fasten safety chains.

2. A carrier is not liable for death of a passenger by the breaking of a drawbar which allowed the train to separate into two parts because the safety chains were not fastened at the point of separation, if the jerk which broke the drawbar would also have broken the chains had they been fastened.

For other cases, see Carriers, II. g, 1, c, in Dig. 1-52 N. S.

Note. — The liability of a carrier for injury resulting from the negligent or meddlesome act of a fellow passenger, is treated in the notes to *Sura v. Milwaukee Electric L.R.A.* 1917F.

R. & Light Co. 37 L.R.A.(N.S.) 724, and *Pruett v. Southern R. Co.* 49 L.R.A.(N.S.) 810.

The general subject of presumption of

Same — leaving brake apparatus exposed.

3. A railroad company is not negligent in leaving apparatus which works the air brakes exposed on the rear platform of an excursion train, if it locks the door leading to the platform.

For other cases, see *Carriers, II. g, 1, c, in Dig. 1-52 N. S.*

Same — res ipsa loquitur — act of passenger.

4. The doctrine res ipsa loquitur does not apply to render a railroad company liable for the death of a passenger thrown from the train by the sudden setting of the emergency brake, if the accident is shown to have been due to a passenger's meddling with the brake apparatus.

For other cases, see *Evidence, II. h, 1, b, (1), in Dig. 1-52 N. S.*

(November 17, 1915.)

APPEAL by plaintiff from a judgment of the Superior Court for Chehalis County dismissing an action brought to recover damages for the death of plaintiff's husband alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. W. H. Abel, T. H. McKay, and Taggart & Phillips, for appellant:

The evidence shows the railway company did not exercise the high degree of care required of it.

Jordan v. Seattle, R. & S. R. Co. 47 Wash. 503, 92 Pac. 284; Mueller v. Washington Water Power Co. 56 Wash. 556, 106 Pac. 476; 6 Cyc. 591-593, 618; Northern P. R. Co. v. Hess, 2 Wash. 383, 26 Pac. 866, 10 Am. Neg. Cas. 401; Valentine v. Northern P. R. Co. 70 Wash. 98, 126 Pac. 99; Williams v. Spokane Falls & N. R. Co. 39 Wash. 77, 80 Pac. 1100; Payne v. Spokane Street R. Co. 15 Wash. 523, 46 Pac. 1054; Sears v. Seattle Consol. Street R. Co. 6 Wash. 228, 33 Pac. 389, 1081, 7 Am. Neg. Cas. 86; Connell v. Seattle, R. & S. R. Co. 47 Wash. 510, 92 Pac. 377; 2 Hutchinson, Carr. 3d ed. § 957; Paine v. Geneva, W. S. F. & C. L. Traction Co. 115 App. Div. 729, 101 N. Y. Supp. 204; 1 Bailey, Personal Injuries, §§ 982, et seq.; Cone v. Delaware, L. & W. R. Co. 81 N. Y. 206, 37 Am. Rep. 491; The Joseph B. Thomas, 81 Fed. 588; Grand Trunk R. Co. v. Cummings, 106 U. S. 700, 27 L. ed. 266; 10 Rose's Note (U. S.) 438; Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co. 27 Fla. 1, 17 L.R.A. 33, 9 So. 661.

Where the negligence of two persons con-

curs, causing injury to a third person, he may recover from either or all.

Jones v. Spokane, P. & S. R. Co. 69 Wash. 12, 124 Pac. 142; Goe v. Northern P. R. Co. 30 Wash. 654, 71 Pac. 182, 13 Am. Neg. Rep. 471; Williams v. Ballard Lumber Co. 41 Wash. 338, 83 Pac. 323; Keane v. Seattle, 55 Wash. 622, 104 Pac. 819; Akin v. Bradley Engineering & Machinery Co. 48 Wash. 97, 14 L.R.A.(N.S.) 586, 92 Pac. 903; Eskildsen v. Seattle, 29 Wash. 583, 70 Pac. 64, 12 Am. Neg. Rep. 366; Rice v. Puget Sound Traction, Light & P. Co. 80 Wash. 47, L.R.A.1916A, 797, 141 Pac. 191; Thoresen v. St. Paul & T. Lumber Co. 73 Wash. 100, 131 Pac. 645, 132 Pac. 860; 8 Enc. Ev. 875; 29 Cyc. 487; Louisville, N. A. & C. R. Co. v. Lucas, 119 Ind. 583, 6 L.R.A. 193, 21 N. E. 968, 3 Am. Neg. Cas. 240; 37 Cyc. 300; Hayes v. Hyde Park, 153 Mass. 514, 12 L.R.A. 249, 27 N. E. 522; Atwood v. Washington Water Power Co. 79 Wash. 427, 140 Pac. 343; Murray v. Wishkah Boom Co. 76 Wash. 605, 137 Pac. 130; Pastene v. Adams, 49 Cal. 87; Olson v. Gil Home Invest. Co. 58 Wash. 157, 27 L.R.A.(N.S.) 884, 108 Pac. 140; Wellington v. Pelletier, 26 L.R.A.(N.S.) 719, 97 C. C. A. 468, 173 Fed. 908.

The doctrine of res ipsa loquitur applies.

Gleeson v. Virginia Midland R. Co. 140 U. S. 435, 35 L. ed. 458, 11 Sup. Ct. Rep. 859; Riggs v. Northern P. R. Co. 60 Wash. 292, 111 Pac. 162; LaBee v. Sultan Logging Co. 51 Wash. 81, 29 L.R.A.(N.S.) 408, 97 Pac. 1104; Wodnik v. Luna Park Amusement Co. 69 Wash. 638, 42 L.R.A.(N.S.) 1070, 125 Pac. 941; Graaf v. Vulcan Iron Works, 59 Wash. 325, 109 Pac. 1016; Anderson v. McCarthy Dry Goods Co. 49 Wash. 398, 16 L.R.A.(N.S.) 931, 126 Am. St. Rep. 870, 95 Pac. 325; McGinn v. New Orleans R. & Light Co. 118 La. 811, 13 L.R.A.(N.S.) 605, 43 So. 450; Thomas v. Cincinnati, N. O. & T. P. R. Co. 91 Fed. 206; Galveston, H. & S. A. R. Co. v. Young, 45 Tex. Civ. App. 430, 100 S. W. 993; Shearm. & Redf. Neg. 59; Paducah Traction Co. v. Baker, 130 Ky. 369, 18 L.R.A.(N.S.) 1185, 113 S. W. 450; Brown v. Union P. R. Co. 29 L.R.A.(N.S.) 808, note; Costikyan v. Rome, W. & O. R. Co. 35 N. Y. S. R. 163, 12 N. Y. Supp. 693; Fitch v. Mason City & C. L. Traction Co. 124 Iowa, 665, 100 N. W. 619; Feldschneider v. Chicago, M. & St. P. R. Co. 122 Wis. 423, 99 N. W. 1034, 16 Am. Neg. Rep. 630; 2 Enc. Ev. 912.

The railway company had, and could exer-

negligence from injury to a passenger is treated in the notes to McGinn v. New Orleans R. & Light Co. 13 L.R.A.(N.S.) 601; Brown v. Union P. R. Co. 29 L.R.A.(N.S.) 808; and Lee Line Steamers v. Robinson, L.R.A.1917F.

L.R.A.1916C, 364; and see later cases Pointer v. Mountain R. Constr. Co. L.R.A.1917B, 1091, and United R. & Electric Co. v. Phillips, L.R.A.1917C, 384.

cise, an implied police power to preserve order. It was bound to exercise the highest degree of care demanded by the circumstances, to protect its passengers from injury, including injury from the acts of fellow passengers.

Kelly v. Navy Yard Route, 77 Wash. 148, 137 Pac. 444; *Bevard v. Lincoln Traction Co.* 74 Neb. 802, 3 L.R.A.(N.S.) 318, 105 N. W. 635, 19 Am. Neg. Rep. 366; *Ferry Cos. v. White*, 99 Tenn. 256, 38 L.R.A. 427, 41 S. W. 583, 3 Am. Neg. Rep. 279; *Meyer v. St. Louis, I. M. & S. R. Co.* 4 C. C. A. 221, 10 U. S. App. 677, 54 Fed. 116; *St. Louis, I. M. & S. R. Co. v. Greenthal*, 23 C. C. A. 100, 40 U. S. App. 554, 77 Fed. 150; *Jansen v. Minneapolis & St. L. R. Co.* 112 Minn. 496, 32 L.R.A.(N.S.) 1206, 128 N. W. 828; *Sure v. Milwaukee Electric R. & Light Co.* 148 Wis. 1, 37 L.R.A.(N.S.) 724, 133 N. W. 1098, Ann. Cas. 1913A, 1074; *Simmons v. New Bedford*, 97 Mass. 361, 93 Am. Dec. 99; *Anderson v. South Carolina & G. R. Co.* 81 S. C. 1, 61 S. E. 1096; *Glenne v. Boston Elev. R. Co.* 207 Mass. 497, 32 L.R.A.(N.S.) 470, 93 N. E. 700.

It is ordinarily a question for the jury whether, under all the facts and circumstances shown, the defendant was guilty of negligence, and whether such negligence was the proximate cause of the injury complained of.

33 Cyc. 751; *Mitchell v. Tacoma R. & Motor Co.* 9 Wash. 120, 37 Pac. 341; *Carroll v. Centralia Water Co.* 5 Wash. 613, 32 Pac. 609, 33 Pac. 431; *Roberts v. Spokane Street R. Co.* 23 Wash. 325, 54 L.R.A. 184, 63 Pac. 506; *McQuillan v. Seattle*, 10 Wash. 464, 45 Am. St. Rep. 799, 38 Pac. 1119; *Larkin v. Chicago & G. W. R. Co.* 118 Iowa, 652, 92 N. W. 891.

Messrs. George T. Reid, J. W. Quick, and L. B. da Ponte, for respondent:

The doctrine *res ipsa loquitur* does not apply.

Stangy v. Boston Elev. R. Co. 220 Mass. 414, 107 N. E. 933.

The proximate cause of Mrs. Story's injuries was the wanton act of the drunken passenger in uncoupling the car, and not the failure to have the car fastened to the other car by stay chains, or because of any defect in the brakes.

McDonnell v. New York C. & H. R. R. Co. 35 App. Div. 147, 54 N. Y. Supp. 747, 5 Am. Neg. Rep. 220; *Porter v. Chicago & W. M. R. Co.* 80 Mich. 156, 20 Am. St. Rep. 511, 44 N. W. 1054, 4 Am. Neg. Cas. 96; *Dean v. Oregon R. & Nav. Co.* 38 Wash. 565, 80 Pac. 842; *Sure v. Milwaukee Electric R. & Light Co.* 148 Wis. 1, 37 L.R.A.(N.S.) 724, 133 N. W. 1098, Ann. Cas. 1913A, 1074. L.R.A.1917F.

Main, J., delivered the opinion of the court:

The plaintiff brought this action for the purpose of recovering damages for the death of W. C. Anderson, her husband, which it is claimed was caused by the negligence of the defendant. After the issues were joined the cause came on for trial before the court and a jury. At the conclusion of the plaintiff's evidence the defendant challenged the sufficiency thereof, and moved for a nonsuit. This motion was sustained, and a judgment was entered dismissing the action. From this judgment, the plaintiff appeals.

The facts are substantially as follows: On the 23d day of July, 1914, the respondent ran an excursion train from Aberdeen to Moclips; the occasion being that of the butchers' and grocers' picnic. This train, as first made up, consisted of fifteen coaches, the largest of which had a seating capacity which would accommodate about eighty persons. Before the train left Aberdeen, and owing to the number of people who desired to board the train, the respondent company caused another coach to be attached to the rear end of the train. The train as thus made up then consisted of sixteen coaches. All the coaches were connected with the automatic air-brake system. At the rear end of the train a rubber hose extended, which was the air-pipe line. This end of the hose was hooked over the railing around the platform of the rear car. On the end of the hose was what is termed an angle cock. By the use of this angle cock the air may be applied from the rear end of the train in cases of emergency, and it may be used by the train crew for signal purposes from that platform.

The railing around the platform of the last coach attached to the train was provided with an adjustable gate. When the train left Aberdeen, it appears that the gate for use in the railing of this car was missing. Soon thereafter one of the brakemen secured a gate and took it out on the platform for the purpose of adjusting it to the opening. This gate was not of a size to fit the space into which it was to be put. The brakeman returned it into the interior of the car, and thereupon locked the rear door of the coach so that passengers could not get out upon the rear platform.

Some time after the brakeman had locked the door three or four young men, or boys, as they are sometimes referred to in the evidence, approached the back door from the interior of the car, and found it locked. One of the young men said, "This door is locked." Whereupon another replied, "I have a key that will fit it;" and the lock was turned, and the young men went out on the rear platform. The youngest of these

boys or young men was about twenty years of age, and was a grown man in stature. After these young men had been on the rear platform for some ten or fifteen minutes, one of them took hold of the angle cock which was on the end of the air hose and "turned it wide open," thus setting the air brakes in emergency on the train and causing it to stop quite suddenly. The setting of the air in this manner caused the cars to jerk with such force as to break the eyes out of the drawbar at the end of the second coach from the head end of the train, causing the train to part between the second and third coaches just as the deceased was in the act of stepping across, so that he fell between the coaches and was killed.

The appellant contends that the respondent was guilty of negligence in a number of particulars, and claims that the cause should have been submitted to the jury. The particulars in which the appellant claims the respondent was negligent will now be noticed.

It is claimed that the drawbar which broke was defective, in that it had become crystallized, and that the broken surface shows certain small holes or pockets. The evidence shows that crystallization is a latent defect, and that it is a condition to be expected in steel which has been subjected to continuous pressing stress. The holes which appear upon the broken surface, the evidence shows, were caused by the air forced in when it was molded, or might have been caused from pieces of sand. The evidence also shows that all steel has more or less holes in it. The evidence does not show that the holes in this particular drawbar were materially more numerous or different in character from those found in steel castings of the same character. The evidence does show that such holes will weaken the tensile strength of the casting, but does not show that the tensile strength of the casting broken was less than that of other drawbars. The evidence does not show that the drawbar which broke was of a size, strength, or appearance different from other drawbars. If the drawbar which broke was crystallized, this was a latent defect which would not have been discovered by inspection. The evidence fails to show a state of facts relative to the drawbar which would establish negligence or from which negligence might reasonably be inferred.

It is next claimed that there was negligence in that the safety chains between the cars where the break occurred had not been fastened. The safety chains referred to are a couple of chains, one on each side of the drawbar, and are to be connected up when the cars are coupled together. The purpose of these chains is to hold the train to-

gether if the regular coupling should become detached. On this phase of the case it appears that, even if the chains had been fastened, they would not have prevented the train spreading, because, as the evidence shows, anything "that would break both eyes out of the coupler would be sufficient to more than break the safety chains." Setting of the air in emergency on the rear of the train when the engine is pulling the train forward will cause the cars to begin to jerk, which jerking gets heavier toward the engine. This train, as stated, consisted of sixteen coaches; and the break occurred between the second and third coaches from the engine.

It is also claimed that it was negligence to have the angle cock exposed over the railing of the rear platform. To this contention there are two answers. One is that the brakeman, by locking the door, had exercised all necessary precaution to prevent passengers from being on that platform. The other is the general principle of law often asserted by the courts that a carrier is not bound to anticipate that a passenger will intentionally meddle or interfere with the machinery of the train. In *Sure v. Milwaukee Electric R. & Light Co.* 148 Wis. 1, 37 L.R.A. (N.S.) 724, 133 N. W. 1098, Ann. Cas. 1913A, 1074, it was said: "The general principle often decided is that a carrier is not bound to anticipate that a passenger will intentionally meddle or interfere with the machinery of the car or train; that the meddler becomes thereby a trespasser, and, if injury results to another passenger by his act, the carrier will not be liable in the absence of any other ground of negligence. Carriers are rightly held to a high degree of diligence, but they are not held responsible for the lawless acts of third persons not under their control, which they could not reasonably anticipate,"—citing authorities.

It is also contended that a condition of rowdiness existed upon the train, and that the opening of the angle cock was a result of such rowdiness. The trial court in passing upon this question said: "So far as the alleged misconduct of the boys on the platform is concerned, the court is not impressed with the idea that there was any rowdiness on the train whatever, but just some playful conduct on the part of some boys there that did not amount to rowdiness and did not appear to attract the attention of anybody until this accident occurred."

The view expressed by the trial court is amply sustained by the evidence. To use the language of one of the witnesses: "There was just an ordinary picnic crowd, everybody happy, having a good time, and

all the boys were cutting up and hitting each other on the head like boys will do."

In this connection the case of *Kelly v. Navy Yard Route*, 77 Wash. 148, 137 Pac. 444, is cited; but the facts in that case are so different from those in the present case that the rule there stated is not applicable.

Finally, reliance is placed upon the doctrine of *res ipsa loquitur*. It is a well-known rule that, where a passenger is injured, and it is shown that the injury was caused by some person or thing connected with the carrier's railroad or business of transportation, a presumption of negligence will arise. In this case, however, the appellant did not rely upon the presumption, but introduced evidence showing the cause which produced the accident. But this was a definite fact. In such a case the doctrine of *res ipsa loquitur* does not apply. In *Stangy v. Boston Elev. R. Co.* 220 Mass. 414, 107 N. E. 933, it is said: "The case at bar is not within the doctrine of *res ipsa loquitur*, which oftentimes is enough to support a finding of negligence on the part of a common carrier. *Rust v. Springfield Street R. Co.* 217 Mass. 116, 104 N. E. 367; *Bell v. New York, N. H. & H. R. Co.* 217 Mass. 408, 104 N. E. 963. That doctrine does not establish liability where a definite cause is clear on the evidence. It applies only when the cause, although unexplained, does not happen according to common experience without fault on the part of the defendant. The case at bar is not an in-

stance of an unsuccessful attempt to prove the precise cause, which would not bar the plaintiff from relying upon appropriate presumptions, but it is a case where inferences are excluded because the cause is disclosed to be a definite fact. *Cassady v. Old Colony Street R. Co.* 184 Mass. 156, 163, 63 L.R.A. 285, 68 N. E. 10, 14 Am. Neg. Rep. 559; *Galligan v. Old Colony Street R. Co.* 182 Mass. 211, 65 N. E. 48; *Winship v. New York, N. H. & H. R. Co.* 170 Mass. 464, 49 N. E. 647; *Cook v. Newhall*, 213 Mass. 392, 395, 101 N. E. 72; *Buckland v. New York, N. H. & H. R. Co.* 181 Mass. 3, 62 N. E. 955. In cases of this sort such fact must be shown to be the result of the defendant's negligence before there can be recovery."

There is no doubt but that the general rule is that a carrier must exercise the highest degree of care and foresight for the safety of its passengers which is compatible with the practical operation of its trains or cars. The evidence in this case fails to disclose that the respondent did not meet the requirements of this rule. The proximate cause of the accident was the meddlesome act of a passenger which the carrier, in the exercise of the highest degree of care, could not have anticipated.

The judgment will be affirmed.

Morris, Ch. J., and Mount, Holcomb, and Parker, JJ., concur.

Petition for rehearing denied.

IOWA SUPREME COURT.

WILLIAM WILLIAMS, by Next Friend,
Appt.,
v.

CHICAGO GREAT WESTERN RAILROAD
COMPANY.

(175 Iowa, 101, 156 N. W. 877.)

Negligence — unsafe premises — licensee.

1. One injured while viewing a wreck on a railroad cannot claim the rights of a licensee because on other occasions he had used the path passing the place of the wreck under circumstances implying a license, if, at the time of the injury, he had no business upon the path.

For other cases, see Negligence, I. c, 2, in Dig. 1-52 N. S.

Same — attractive nuisance — railroad wreck.

2. A railroad company is not bound to guard a recent wreck on its right of way,

Note. — For wreck as attractive nuisance, see annotation following this case, post, 1031.

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consisting of overturned freight cars, to prevent injury to children who may congregate about it out of curiosity, on the theory that it is an attractive nuisance, if there is nothing about the condition to indicate danger to persons who approach it. *For other cases, see Negligence, I. c, 2, in Dig. 1-52 N. S.*

(March 20, 1916.)

APPEAL by plaintiff from a judgment of the District Court for Pottawattamie County sustaining a motion to direct a verdict for defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Killpack & Northrop and H. L. Robertson, for appellant:

The situation disclosed in the evidence shows a dangerous situation, attractive to children, coming within the principle of the turntable and attractive nuisance cases; and the bent rail under such terrific pressure should have suggested danger to the

ordinarily prudent person; and the court erred in holding that no danger or injury could have been anticipated by the defendant, and that it was not negligent.

Brown v. Rockwell City Canning Co. 132 Iowa, 631, 110 N. W. 12; *Edgington v. Burlington, C. R. & N. R. Co.* 116 Iowa, 410, 57 L.R.A. 561, 90 N. W. 95; *Booth v. Union Terminal Co.* 126 Iowa, 8, 101 N. W. 147; *Clampit v. Chicago, St. P. & K. C. R. Co.* 84 Iowa, 71, 50 N. W. 673; *Thomas v. Chicago, M. & St. P. R. Co.* 103 Iowa, 649, 39 L.R.A. 399, 72 N. W. 783; *Scott v. St. Louis, K. & N. W. R. Co.* 112 Iowa, 54, 83 N. W. 818, 8 Am. Neg. Rep. 391; *Ashbach v. Iowa Teleph. Co.* 165 Iowa, 473, 146 N. W. 441; *Ferrell v. Dixie Cotton Mills*, 157 N. C. 528, 37 L.R.A.(N.S.) 64, 73 S. E. 142, 3 N. C. C. A. 306; *Cahill v. E. B. & A. L. Stone & Co.* 153 Cal. 571, 19 L.R.A.(N.S.) 1094, 96 Pac. 84; *Walsh v. Pittsburg R. Co.* 221 Pa. 463, 32 L.R.A.(N.S.) 559, 70 Atl. 826; *Mattson v. Minnesota & N. W. R. Co.* 95 Minn. 477, 70 L.R.A. 503, 111 Am. St. Rep. 483, 104 N. W. 443, 5 Ann. Cas. 498, 18 Am. Neg. Rep. 511; *Snipps v. Minneapolis & St. L. R. Co.* 164 Iowa, 530, 146 N. W. 468; *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154, 19 N. W. 257; *Kelly v. Southern Wisconsin R. Co.* 152 Wis. 328, 44 L.R.A.(N.S.) 487, 140 N. W. 60; *Gould v. Schermer*, 101 Iowa, 582, 70 N. W. 697, 2 Am. Neg. Rep. 136; *Overhouser v. American Cereal Co.* 118 Iowa, 422, 92 N. W. 74; *Harriman v. Pittsburgh, C. & St. L. R. Co.* 45 Ohio St. 11, 4 Am. St. Rep. 507, 12 N. E. 451; *Davis v. Chicago & N. W. R. Co.* 58 Wis. 646, 46 Am. Rep. 687, 17 N. W. 406; *Lane v. Atlantic Works*, 111 Mass. 136.

The court should not have assumed, as a matter of law, that there was no negligence or danger threatened, because that was a question upon which reasonable men would readily differ.

Garner v. Kratzer, 163 Iowa, 559, 145 N. W. 72.

Messrs. Carr, Carr, & Evans and Saunders & Stuart, for appellee:

The evidence of use of premises without objection is evidence of a license, and not an invitation. The only duty owed to a licensee is to refrain from wilful and wanton injury.

Brown v. Rockwell City Canning Co. 132 Iowa, 631, 110 N. W. 12; *Croft v. Chicago, R. I. & P. R. Co.* 132 Iowa, 687, 108 N. W. 1053, 20 Am. Neg. Rep. 534; *Burner v. Higman & S. Co.* 127 Iowa, 580, 103 N. W. 802; *Herzog v. Hemphill*, 7 Cal. App. 116, 93 Pac. 899; *Shults v. Chicago, B. & Q. R. Co.* 91 Neb. 587, 136 N. W. 834.

No violation of defendant's duty to such persons as were using its right of way as a thoroughfare is shown, because the evi-

dence fails to show that the presence of the wreck or the rail was, in itself, a danger to those persons enjoying the alleged license.

Plaintiff is not entitled to recover under the doctrine of the turntable cases.

Brown v. Rockwell City Canning Co. 132 Iowa, 631, 100 N. W. 12; *Hart v. Mason City Brick & Tile Co.* 154 Iowa, 741, 38 L.R.A.(N.S.) 1173, 135 N. W. 423; *Wood v. Independent School Dist.* 44 Iowa, 27.

Gaynor, J., delivered the opinion of the court:

This is an action to recover damages for personal injury. It is claimed that the defendant, while operating a railway, had a wreck on its road in the city of Council Bluffs, near a point where Sixth avenue crosses Third street; that in such wreck one of the rails on defendant's line of track was thrown into a curved position, and held thereby the strain of the wreckage upon it, and remained in such curved position for some hours; that the wreck was at a point where defendant's right of way had, for many years, been used by pedestrians as a place for public travel,—all with the full knowledge of the company,—and that the company had full knowledge of the condition in which the rail was left, and its danger to the traveling public; that, in the exercise of reasonable care for the safety of persons generally, the defendant should have known of the danger in leaving the rail in its strained, curved position; that, with such knowledge, it permitted the rail to remain in such position without guard or any person to keep the traveling public from approaching it; that while plaintiff was passing the rail in the condition hereinbefore described, it was suddenly relieved of its strain, and immediately sprang with great violence from said curved position to a straight line, and injured the plaintiff. Defendant filed a general denial. At the close of the testimony, the court sustained a motion to direct a verdict for the defendant on the ground that no negligence, on the part of the defendant, had been shown, and that no situation had been disclosed wherein the defendant could be reasonably held to anticipate danger to anyone. Thereupon the plaintiff's petition was dismissed, and judgment entered against him for costs. Plaintiff appeals, and assigns error upon the action of the court in so holding.

The evidence submitted is substantially as follows: At about 9:30 in the morning of the accident, on the corner of Sixth avenue and Third street, two freight cars were wrecked and tipped over on defendant's line. The remainder of the train from which the wrecked cars were thrown, went on and left them. The wreck was in plain

sight of defendant's roundhouse, not more than 100 yards therefrom. The scene of the accident was about three blocks from the Third Street School. The wreck caused one of the rails to curve upward and outward. One of the ends of the rail was fastened down by spikes, and the other end concealed, either in the pile of wreckage, or under the car. It had been in that condition for about three hours before the plaintiff arrived. Immediately upon plaintiff's arrival, he stopped by the curved rail. Two men came along and put their hands upon the rail, and it immediately sprang out with great violence and struck the plaintiff and injured him. Plaintiff, at the time of the accident, was about eleven years old and a schoolboy. The injury occurred about 12:30 in the afternoon. During this noon hour, after the boy had dinner, he left his home to go to school. He went down where the cars were wrecked, not having heard of the wreck before. He did not need to go that way to school. There was no railing or guard around the wreckage, and there was no one to keep persons from approaching the wreckage. There is no evidence that anyone connected with the company knew of this bent rail. There is evidence that for many years the public traveling on foot had used defendant's right of way, and that there was a footpath that plaintiff had used prior to this time, running near the place where this wreckage was, and which, before that time, he had used in carrying dinner to his father, who worked at some point beyond the place of the wreck.

The plaintiff bases his right to recover on the theory that the wreck, as left by the defendant upon the right of way, was a thing attractive to children of the age of the plaintiff, and was dangerous, and should have been guarded. There is some suggestion in argument that the plaintiff had a right to be where he was at the time of the injury because he had, previous to that time, passed over the track or path in close proximity to the place where the wreck occurred, in carrying dinner to his father at some point beyond the wreck; that because he had used this path for that purpose before he was not a trespasser at the time he was injured, and that the company owed him some duty to keep the path so used free from dangers imperiling the safety of those who were using the path under an implied license. But it is apparent from this record that the plaintiff was not, at the time, pursuing any right which he acquired, if he acquired any as licensee, so we give no attention to this phase of the case.

Plaintiff relies and must rely for his recovery upon what is known as the law of L. R.A.1917F.

dangerous and attractive agencies. Appellant calls our attention to and relies upon the doctrine so ably announced in *Edgington v. Burlington, C. R. & N. R. Co.* 118 Iowa, 410, 57 L.R.A. 561, 90 N. W. 95, and cases therein cited. In that case are reviewed nearly all the authorities bearing upon the question here under consideration, and since the opinion was filed it has been uniformly followed by this court. In every case in which the question there determined has been before this court for review, the doctrine announced has been fully recognized and adhered to. See *Fishburn v. Burlington & N. W. R. Co.* 127 Iowa, 483, 103 N. W. 481; *Brown v. Rockwell City Canning Co.* 132 Iowa, 631, 110 N. W. 12; *Anderson v. Ft. Dodge, D. M. & S. R. Co.* 150 Iowa, 465, 130 N. W. 391; *Hart v. Mason City Brick & Tile Co.* 154 Iowa, 741, 38 L.R.A.(N.S.) 1173, 135 N. W. 423; *Ashbach v. Iowa Teleph. Co.* 165 Iowa, 473, 146 N. W. 441. We are fully persuaded that the doctrine announced in that case is not only a correct doctrine, but one just and humane, and fully in line with the best-reasoned cases in other jurisdictions.

An examination of the authorities shows a recognition and application of the following well-established rules:

First. It is the duty of each member of organized society to use his own property so as not to injure, unnecessarily, the property or person of another. It is all expressed in the doctrine, so long recognized that it has become axiomatic: "*Sic utere tuo ut alienum non lædas*;" no man is at liberty, under the law, to use his own property so as to endanger the property or person of another. This doctrine had its origin and growth in and out of necessity, and the necessity for it was found in the growth and development of our social organization. When men came together in social compact, it was found that the fullest enjoyment of social right and duty can be attained only when each is required to conduct himself and manage and control the property over which he was given the individual right of supervision, so that the rights and interest and welfare of other members of the social compact may not be interfered with or impaired unreasonably or unnecessarily; that each must exercise his own individual right, with due regard for and in recognition of the right of others to the fullest enjoyment of their rights of person and property within the limits of the social compact. This rule does not impinge upon nor impair the right of the individual to the exclusive enjoyment of his own property, unmolested and undisturbed by others. But, in the exercise of this right, an obligation, under the law, rests upon him, as a member of

the social compact, to exercise his rights in a manner that may not unfairly and unreasonably or unnecessarily imperil the safety or welfare of another. Every right given to the individual in a social compact is given and held under this restriction.

In the management and control of property, the owner has a right to determine for himself the use to which it shall be put, and the condition in which it will be maintained, providing he does not violate this fundamental doctrine. To this end, he is required, as a member of the social compact, to exercise reasonable care in the discharge of this duty. When this duty is discharged, his obligation is discharged, and beyond this he assumes no liability, no matter what happens. In any particular case, the question involved is: Has the party discharged this obligation, or has he failed to discharge it? Having discharged his obligation, he has not failed in any duty that he owes to others, but, failing to discharge it, he is held responsible as for negligence.

Negligence always presupposes a duty and a failure to discharge that duty. Therefore, before we can fix liability for the doing or the failure to do a particular act, we must first ascertain whether or not, under the law, it was the duty of the party to do the thing charged, or not to do the thing charged. As said before, everyone has an absolute right to the exclusive possession, management, and control of his own property. He owes no active duty in this to one who wrongfully comes upon his property,—one who is a mere trespasser. If one enters upon the property of another unbidden, he violates the right of the other to the exclusive possession and control of his own property. He becomes a mere trespasser upon the rights and domain of the other, and assumes all the risks incident to such trespass, and he must be held to have assumed all the dangers which he encounters in such wrongful proceeding. Having violated the right of the other to the exclusive possession and enjoyment of his property, he cannot be heard to say that, in violating that right, he encountered hidden dangers which resulted in his injury. Thus it is held that one who, without authority, without license or permission, "officially or needlessly" interferes or meddles with the property of another to which he has no legal right, has no complaint if he is thereby injured.

One who enters upon the property of another can only complain of the manner in which another maintains his property, when he is able to show that he is rightfully upon the other's property by invitation or otherwise. This invitation need not be expressed. L.R.A.1917F.

It may be implied from the relationship or the conduct of the parties. The invitation may be found in the conduct of the party, in the use of his property, and in the manner in which it is maintained. As said in the Edgington Case: "If . . . the owner take away the fence, throwing his lot open in unused and unimproved condition, leaving the public to swarm over and across it and children to play upon it, he cannot be held innocent of wrong if by his act this semipublic use of his property is made hazardous to human life, and he fails to take reasonable precaution against the danger thus occasioned."

The duty to maintain it in a safe condition is measured by the use to which the property is put, and the danger to others which may be reasonably anticipated to result from the condition in which it is kept. No one questions "the rules which assure to a person dominion over his own property and deny protection to the trespasser in his wrongdoing." These are of most ancient origin, and are just. But, however exclusive the right of the owner of property, real or personal, to deal with it as he likes, yet his dealing is always subject to the Latin maxim hereinbefore set out.

In every case of the kind we are dealing with now, in so far as the conduct of the party is involved, the question is: Did he violate any duty that he owed to the general public, or to particular individuals, in the manner in which he managed, controlled, or left his property touching which he is charged with negligence? The relationship of men to property and to each other is so multifarious, so varied, that even the best-pronounced general rule for their government is found to involve much difficulty in its application.

II. We gather further from the case heretofore referred to, that if one maintains upon his place a dangerous place or instrumentality, and, without warning against such dangers, invites another to come while the place or instrumentality remains exposed or unguarded, without warning or protecting him against such danger, he is liable to the one so invited, if, without fault on his part, he receives injuries therefrom. We gather the converse of this proposition that, if one wrongfully, without leave or license, unbidden, enters upon the premises of another upon which there is a dangerous place or instrumentality, he assumes all the hazards of the place—this upon the theory that he is a trespasser upon the property and rights of the other, and the other owes him no duty except not to actively or willfully inflict the injury upon him.

This brings us to the question, What constitutes an invitation? These authorities

hold that one who maintains upon his place, and permits to remain exposed, something dangerous when approached or used, and of such an attractive character that he knows, or, as a reasonably prudent man should know, will invite the attention of children and draw them to it, because of their sportive and playful natures, impliedly invites them to come; that in exposing such an instrumentality, with the knowledge that it will attract children, he occupies the same position when they come as if he had beckoned to them and they followed. We are not here discussing the question of contributory negligence on the part of the child. We will assume the child too young to be chargeable with negligence. We are not dealing with a trespassing child, for no one is a trespasser who comes by invitation of the owner. All the cases of attractive nuisance seem to rest upon the thought that exposing anything of a character that appeals to children's nature and, by appealing, draws them to it, is, in its very nature, an implied invitation to them to come. It is not material in an inquiry of this kind whether the children had been accustomed to come or not; whether it had remained a long time or a short time. The question is: Did the party charged expose to the public a thing of such an attractive nature that, as a reasonably prudent man, he should have known that it would draw children to it, and, having drawn them there, they were likely to be injured from the character of the instrumentality?

These cases of attractive nuisance deal only with children who are not sufficiently mature and discreet to have legal capacity to assume a risk. If one is of mature age, or of sufficient age to know and appreciate the danger that attended his act, even though attracted by the instrumentality, he cannot complain if he is injured. He cannot go into a place the danger of which he appreciated and understands, even though attracted to it, and recover if he is injured.

The material facts of the instant case are that two freight cars were wrecked and tipped over on defendant's line. The wreck caused one of the rails to curve upward and outward; one of the ends being fastened by spikes, and the other concealed either in the pile of wreckage or under the car. This condition had remained about three hours before plaintiff's arrival. Plaintiff heard of the wreck, and came down out of curiosity to view it. The only purpose he had in coming there was to view the wreck. When he arrived, he stopped by the curved rail. Two men came along and put their hands upon the rail, and it immediately sprang out with great violence, and struck the plaintiff and injured him. What these men

did when they placed their hands upon the rail does not appear. The fact disclosed is simply that they placed their hands upon it, and that immediately it sprang out. Plaintiff, at the time, was eleven years of age and a schoolboy. The injury occurred at about 12:30 at noon, during the noon hour. After dinner, he left his home to go to school. This wreckage was not in the line of travel to reach the school. He, therefore, did not need to come this way to reach the school. The wreck was about three blocks from the school. There was no railing or guard around the wreck, and no one there to keep persons from approaching the wreck. There is no evidence that anyone connected with the company knew of this bent rail. There is evidence that for many years the public traveling on foot had made a beaten pathway by the place where this wreck was lying; that plaintiff had, prior to this time, used this path in carrying dinner to his father at some point beyond, not disclosed; that he was not using the path at this time for the purpose of travel; that he had come to the wreckage out of curiosity alone, and for the purpose of viewing it. We are asked, under this record, to say that the defendant knowingly permitted a dangerous instrumentality to be or remain upon its right of way; that the thing was, as left, in and of itself, of such an attractive character that it would appeal to the sportive and playful instincts of children, and draw them to it; that the defendant, as a reasonably prudent person knew, or should have known, this, and that, upon their coming, their safety would be imperiled. It is the law that if one is a trespasser upon the property of another, the owner owes him no duty until he is discovered there and in a place of peril. Then his duty to him begins, and this duty is to exercise reasonable care, after discovering him, not to inflict injury upon him. Even an infant upon the premises of another as a mere trespasser, without leave or license or invitation, without the knowledge of the owner, cannot complain of injuries received while there, unless the injuries can be traced to some active negligence on the part of the owner of the property after discovering his presence. See *Burner v. Higman & S. Co.* 127 Iowa, 580, 103 N. W. 802, in which it is said: "Neither the owner nor the occupant of property is bound to keep it in such condition as that no one may be injured thereby. Liability is predicated only on failure upon the part of the party charged to perform some duty which he owes to the one who is injured. If one, therefore, goes upon premises without invitation, express or implied, the owner or occupant thereof is under no duty to look out for his safety; and, if he be

injured while there without lawful right or as a bare licensee, no recovery can be had." Citing *Thomp. Neg.* §§ 946, 1075.

The general rule, also, is that a bare licensee to use the premises of another, for the sole purpose and benefit of the licensee, imposes no obligation upon the owner to keep the premises in a safe condition for the use of such licensee. He takes it as he finds it, and, if injured by conditions there existing at the time he assumed to exercise his license, he cannot complain. See also *Brown v. Rockwell City Canning Co.* 132 Iowa, 631, 110 N. W. 12. In this last case it is said, speaking of the plaintiff: "There was no invitation to him to be in the annex for the purpose of husking corn, for there was no corn there to husk. It is unquestioned that he and the other boys were there out of idle curiosity, and, while their presence there may not be necessarily imputed to them as a fault, it did not impose on the defendant any particular duty to look out for their safety, in the absence of reasonable knowledge or anticipation that their safety would be imperiled by the maintenance and operation of its machinery. We find nothing in the record to indicate that the superintendent of the defendant, or that Harrison, the representative of the Globe Company, or the employees assisting in the installation of the machinery, had any knowledge that the boys were playing about the machinery, or doing any acts with reference to it which involved them in any peril. The boys were, as already suggested, in the building, not in pursuance of any implied invitation, but for their own purposes, and no duty arose with reference to them until the employees of defendant had some reason to anticipate that they would be endangered by the operation of the machinery. In determining this question it is entirely immaterial to consider whether the boys were *sui juris* or not, for the injury is not as to the ability and capacity of the trespasser, but rather the duty of the one who is charged with the negligent act."

Thomas v. Chicago, M. & St. P. R. Co. 93 Iowa, 248, 61 N. W. 967. In this case, the person alleged to be injured was a boy about three years and ten months old. He was playing upon an open, uncovered bridge, located on defendant's main line road. The child went upon the track and the bridge, and was in plain sight of the station and at all points along the road leading from the station to the place of the accident. The defendant's employees, with knowledge that children were upon the track, started the train; the engine running backward and with a pilot attached. In disposing of the case, the court said: "If they were trespassers [meaning the children], then the

company owed them no duty until its employees actually saw them upon the track, and in a place of danger. Then, and not till then, did any active duty on the part of the defendant's employees commence. It has long been the established rule in this state that a railroad company is not required to keep a lookout for trespassers, and that it is not negligent in failing to discover them upon its track. This is an undoubted rule, sustained by an unbroken line of authorities."

The court further said: "There is no question of contributory negligence . . . in this case. The infant was of such tender years that it was not *sui juris* and . . . as a matter of law it should be held, . . . not guilty of contributory negligence in going upon the track. . . . In determining this question of duty, it is entirely immaterial whether the trespasser is *sui juris* or not, for the inquiry is not as to the ability and capacity of the trespasser, but rather the duty of the one who is charged with the negligent acts. For this reason the better considered cases hold that it is entirely immaterial that the trespasser is an infant, idiot, or lunatic, in determining whether he was a trespasser."

The court further said: "In order that we may not be misunderstood, it is perhaps well to say that there is an apparent exception to the general rule above stated, in what are known as the 'Turntable Cases.' But we think the exception is not in fact an exception, but rather an extension of the principle to cover a different state of facts. In the turntable and other like cases, the defendants are held liable because the nature of the machine or agency which caused the injury was such as was well calculated—was of such a nature, and left in such a position, that it was likely—to attract children. The temptation thus presented to children is, in the cases just referred to, made to take the place of an express invitation to an adult, and with much reason."

In *Wendt v. Akron*, 161 Iowa, 338, particular point at page 345, 142 N. W. 1027, this rule is recognized. It is said: "The general rule . . . is that an owner of premises owes to a licensee no duty as to the condition of such premises save that he should not knowingly let him run upon a hidden peril, or wantonly cause him harm,"—citing *Gwynn v. Duffield*, 66 Iowa, 713, 55 Am. Rep. 286, 24 N. W. 523; *Thomas v. Chicago, M. & St. P. R. Co.* 93 Iowa, 248, 61 N. W. 967; *Connell v. Keokuk Electric R. & P. Co.* 131 Iowa, 622, 109 N. W. 177; *Brown v. Rockwell City Canning Co.* 132 Iowa, 637, 110 N. W. 12; *Anderson v. Ft. Dodge, D. M. & S. R. Co.* 150 Iowa, 465, 130 N. W. 391; and in that case it is said:

"These cases involve the question as to the use of dangerous premises and whether the persons injured thereon were trespassers, bare licensees, or licensees by invitation. In the Connell Case a boy was injured by an electric wire, and the court instructed the jury that if the place where the plaintiff was injured was resorted to by persons generally, of which the defendant had knowledge, then it was the duty of the defendant, to exercise ordinary care to prevent danger, and a failure to exercise such care would constitute negligence. This is on the theory that plaintiff was more than a bare licensee."

See *Herzog v. Hemphill*, 7 Cal. App. 116, 93 Pac. 899.

These rules, however, are subject to modification, that, in case of an infant—one of tender years and not capable of using judgment and discretion—one may be liable if he exposes upon his premises, at a place where he knows children are in the habit of congregating and playing, a dangerous instrumentality or pitfall. This rests on the thought that, with the knowledge of the fact that children are congregating there and engaged in playing, connected with the further fact that they are too young to have judgment and discretion and appreciate dangers even when exposed, he is guilty of a culpable wrong in allowing the thing to exist in such proximity to the playground. All reasonably thoughtful and prudent men know, or must know, that children are liable to be injured by instrumentalities or places so left. The bare license doctrine does not always apply to infants. This exception, however, does not apply to the case at bar; for there is no evidence here that the children were in the habit of playing in the vicinity of this wreck, or of congregating there, or that defendant had any notice or knowledge of any such condition as would bring it within the rule.

There is no actionable negligence involved in the wrecking of this train, nor in the tearing up of the track, or the bending of the rail. These, so far as the record discloses, were the result of unavoidable casualty. But, whether the wrecking of the train was the result of carelessness or negligence on the part of the defendant company is wholly immaterial, for the reason that in the wrecking of the train it violated no duty it owed to the plaintiff or to the public. The gravamen of the complaint is that, after the train had been wrecked and these two cars thrown from the track, and the rail bent in the position in which it was found, the defendant was guilty of actionable negligence in permitting it to remain so, unguarded and unprotected. These were ordinary box cars thrown from the track upon defendant's right of way and left there. L.R.A.1917F.

There is no complaint, nor is there any evidence, that these cars, in and of themselves, as left there upon the right of way, were left in any position to suggest peril to anyone who approached them, or passed along the path in the vicinity of them. There is nothing to indicate that the position of the cars suggested any necessity for a railing or guard to protect the public or anyone passing in this path from injury. The only complaint is that one of the rails of the track had been bent in the wreck so as to extend upward and outward; one end fastened by spikes to the ties and the other end concealed under the cars or wreckage. There is no evidence that anyone in the employ of the company knew of this bent rail, nor was there anything shown which would suggest, from the nature of the wreck, that they should have known of the existence of this bent rail, or that the condition in which it was left involved danger. In fact, the record discloses that the rail had remained in the position in which it originally was for three hours before the accident; that it remained in that condition unchanged until some parties, whose names are not disclosed, came along and interfered with it. The record is that two men came along and put their hands upon it. What they did when they put their hands upon it is not disclosed, but it is apparent that it was loosened, and sprang from its fastening and injured the boy.

There was nothing in this wreck and in the condition in which it was left that brings it within the rule of attractive agencies likely to draw to it children for the purpose of play, or that would appeal to the sportive and playful nature of a child. So far as this wreck was concerned, so far as any knowledge of it is traced to the defendant, it was an inanimate piece of matter; thrown in a pile upon defendant's right of way, with none of the characteristics of the toy, and was on defendant's own premises. No childish instincts were called into life by its presence. The instinct of curiosity is an instinct in all human beings, whether mature or immature. There was nothing to suggest danger to one who came to the place of the wreck; and, if it could be said that there was, it is not shown to have come to the knowledge of the defendant company. It was not placed there by the defendant for its purposes, nor can any actionable wrong be imputed to the defendant for its being there. The whole doctrine of attractive nuisance seems to rest upon the thought that the defendant is liable if he knowingly places in an exposed position, and at a place where children are likely to congregate, a dangerous instrumentality; and this liability rests on the

further thought that he is bound to know, appreciate, and understand the natural instincts of the child to play, and that it will be attracted by such agencies and drawn to it by this subtle influence. Therefore, when he sets in active motion these childish instincts, he is bound in law to guard the child against injury which may come to it in following the promptings of its childish nature. Thus, if the child is attracted across the boundary of defendant's line by a dangerous and attractive thing placed, kept, or maintained upon his premises, he owes a legal duty to the child to guard it against injury therefrom; that by so placing and leaving it, he invites the child to come. His liability rests upon the thought that he has exposed a thing of danger in an open place accessible to a child. He has clothed it in attractive garments which appeal to the childish mind. He is charged with liability because of the imputed knowledge of the habits of children to use a thing, so temptingly presented, as a plaything; and he is liable because he has invited the child, by his conduct, to amuse itself with the thing left so dangerously exposed. This is the basis of the claim upon which the defendant is charged with liability as for negligence, in a suit for injuring a child where, if the person injured had been an adult, no liability would attach.

We do not mean to depart from the rule in which it is held that liability attaches where a party leaves upon his own premises a thing of danger, when he knows that children are accustomed to come upon his place for the purpose of play, even though not attracted by any instrumentality placed there by him. That presents another phase of the law, which is well recognized. We are dealing now with the liability which is found to rest upon what is known as the "law of attractive agencies." The law

clearly distinguishes between children too young to have judgment and discretion and those who are old enough to exercise their faculties. In all cases, even of trespass, the tender years of the child are subjects for consideration, both when we consider the conduct of the child and the cause from which the injury arose.

In all cases, the law is careful for the safety of human life, and to protect children of tender years from injury. But the extent of this solicitude does not remove the protection of the law from others. Even entertaining the highest consideration for the safety of the child, and imposing upon others the duty to exercise care for their protection, we cannot overlook the fact that the defendant in this case is not shown to have been guilty of any actionable wrong in what it did, and, though the action is a sad one, we cannot hold the defendant liable without proof of actionable wrong on its part. The showing here did not impose upon the defendant a duty to guard this wreck, and there is nothing in the wreck itself that any ordinary mind could conceive to be attractive, or an invitation to children to come and play. There is nothing in it which could serve as an invitation to this boy to come and use it for any childish reason. It is not shown that the company had any knowledge that it was in the least dangerous, even to a child invited there. It had remained but a few hours. The child came as an idle spectator, prompted by the curiosity that led others there to view the wreck.

We find nothing upon which to rest liability, and, in this conclusion, we rest our holding that the case ought to be, and is, affirmed.

Ladd, Sallinger, and Preston, JJ., concur.

Annotation—Wreck as attractive nuisance.

The general subject of attractive nuisance, or the "turntable doctrine" so-called, including the question, What are attractive nuisances within the meaning of that doctrine? is discussed in the note to *Cahill v. E. B. & A. L. Stone & Co.* 19 L.R.A.(N.S.) 1094.

Many other notes on particular phases of that doctrine may be found by consulting the L.R.A. Indexes under the title "Negligence," and other cases may be found by consulting the L.R.A. Digest under the same title.

Generally, as to the duty of property owner to trespassing child, see notes to *Walsh v. Pittsburg R. Co.* 32 L.R.A. L.R.A.1917F.

(N.S.) 559, and *Martin v. Hughes Creek Coal Co.* 41 L.R.A.(N.S.) 274.

The view is taken in *WILMES v. CHICAGO G. W. R. Co.* ante, 1024, that there was nothing in the wreck in question, consisting of two freight cars tipped over on a railroad right of way, that brings it within the rule of attractive nuisances likely to draw to it children for the purpose of play, or that would appeal to the sportive and playful nature of a child. None of the cases in this note expresses disapproval of the attractive-nuisance doctrine except *Wilmot v. McPadden* (Conn.) *infra*.

In *Gates v. Northern P. R. Co.* (1908)

37 Mont. 103, 94 Pac. 751, employees left a worn-out car bottom side up near the track on a sloping embankment, and an eleven-year-old child, alleged to have been attracted to it, was killed when it toppled over. It was held that, in order to bring the case within the turntable doctrine, it was necessary to allege and prove not only that the car was especially attractive to children, but also that the child was too young to appreciate the danger; and that defendant knew, or in the exercise of ordinary care ought to have known, of its unusually attractive character. This court approved of the turntable doctrine, and expressed the opinion that, from the circumstances proved, if the complaint contained the proper allegations, the jury might properly have found that the defendant should have had such knowledge or have apprehended and foreseen that the car would be especially and unusually attractive to children.

The decision in *Cleveland, C. C. & St. L. R. Co. v. Ballentine* (1898) 28 C. C. A. 572, 56 U. S. App. 266, 84 Fed. 935, 4 Am. Neg. Rep. 735, does not involve the attractive-nuisance or turntable doctrine. There an engine collided with a train of tank cars filled with petroleum, setting them on fire, and a boy seventeen and a half years of age, who out of curiosity went to see the conflagration, was injured by an explosion. The court stated: "The railway company owed to him no active duty,—only the duty to abstain during his presence on the premises from positive wrongful acts which might result in injury to him. It was not bound to remove the burning cars to another part of its yards, either in the discharge of any duty towards him, or, so far as the record discloses, in discharge of duty towards anyone. All was done that could reasonably be demanded when general and repeated warnings were given of danger from explosion. The company was not in duty bound to engage a constabulary force to drive the crowd from its premises."

It is held in *Wilmot v. McPadden* (1906) 79 Conn. 367, 19 L.R.A.(N.S.) 1101, 65 Atl. 157, that persons engaged in the demolition of a building which is left with standing chimneys on Saturday night are not, although the building is uninclosed, bound to anticipate that children may during the next day trespass upon the premises, undermine the chimneys, and be injured by their fall, so as to be bound to protect against such an occurrence. This court does not

appear to approve of the attractive-nuisance doctrine, and expresses the opinion that the plaintiff's intestate, whether regarded as a mere licensee or a trespasser, assumed all risk of danger which was incident to the then condition of the premises, notwithstanding his age of seven and one-half years.

In denying an owner's liability under the attractive-nuisance doctrine, for injury to a thirteen-year-old child sustained by collapse of an old frame building which he and others were destroying for the purpose of taking and carrying away the wood, the court in *Devine v. Armour & Co.* (1910) 159 Ill. App. 74, said: "The fourth count is based on the principle of attractions dangerous to children, to whom, even if trespassers and intermeddlers, the owner owes a duty to exercise care that they be not injured. Assuming that the count states a good cause of action despite the fact that it alleges that children enter such premises to carry away wood only when expressly permitted to do so, and fails to charge that such permission was granted, the allegation of a dangerous attraction has not, in our judgment, been proved. While the question of what is or is not such an attraction is ordinarily a question for the jury (*Stollery v. Cicero & P. Street R. Co.* (1909) 243 Ill. 290, 90 N. E. 709), in this case not the slightest evidence has been offered in support of the allegation. On the contrary, it is perfectly clear that the house itself, even in its dilapidated condition, would not have attracted the children, and that they would not, but for the express permission given, have entered thereon. While the doctrine of the turntable cases is not limited in this state to those nuisances which are automatically dangerous to children seeking merely amusement, nevertheless the owner of a dilapidated house cannot be held to a duty to prevent children from coming on the premises to gather wood by tearing it down, especially in the absence of any proof that children, without express permission, were in the habit of indulging in such practices. There is, moreover, no proof which would justify a jury in finding (what is, however, not alleged in the count) that the building constituted a dangerous attraction even to children, to whom permission to enter had been given. If the house ever became a dangerous attraction it was only while and because it was in the process of demolition. This count, however, is based on the claim that the house, because of its dilapidated

condition, not a house in process of demolition, had become a dangerous allurement to the decedent. If the first count, which alleges that decedent with others tore down the building in a negligent manner, can be sustained at all, it must be on the theory that the force of this allegation is counteracted by the further allegation of decedent's age and ignorance that the work was being done negligently, and on the further theory that a special duty was owing to decedent because of his age. Unless defendant's duty to such a minor is different from that to an adult, no cause of action is stated, inasmuch as the decedent was, at the best, a mere licensee who came upon the premises solely for his own profit. Towards licensees, however, whether adults or minors, the owner owes only a negative duty not to set traps, but no positive duty to exercise care either as to keeping his buildings in repair or to carry on any work that may be done thereon in a careful manner. The exception to this rule is the case of a dangerous attraction; the duty in respect thereto is, however, not dependent upon the license. Even an infant trespasser, in case of a dangerous attraction, has rights greater than those of an adult licensee. This first count, however, is not based upon the allurement of a child by a dangerous attraction; and if it were, the evidence, in our judgment, would not sustain the charge. While such a building in process of destruction may be dangerous, the danger is not hidden from a child of decedent's age, while disclosed to an

adult. This lad was not a mere baby. He was at least up to the average of his age. He knew as well as an adult that such a building in such condition and under such handling must fall. There is no evidence to support the allegation of his ignorance. The defendant, therefore, is not liable even if Brown was its agent for the purpose of giving permission to tear down the building."

But in *Osborn v. Atchison, T. & S. F. R. Co.* (1912) 86 Kan. 440, 121 Pac. 364, it was held that an abandoned round-house on which boys were accustomed to play, with the knowledge of the agent of the company, was an attractive nuisance, and the defendant company was liable for damages for the death of a boy lured there for play, and which resulted from the defective and dangerous condition of the place. The court observed: "They played marbles on the roof, catching pigeons, and that it was a fort; and there is testimony that they played there almost every day in the view of the agents and employees of appellant. No guards or fences were placed on or around the building to prevent children from climbing upon the building. The structure was alluring and attractive to children too young to know the danger, and it was dangerous for them. That they resorted there for play was known to the agents of appellant. The case falls clearly within the attractive-nuisance doctrine, which has been adopted and applied in this state in a number of cases." J. D. C.

IOWA SUPREME COURT.

VERNIE SMITH, by Guardian and Next Friend, Appt.,

v.

ILLINOIS CENTRAL RAILROAD COMPANY.

(— Iowa, —, 158 N. W. 546.)

Negligence — attractive nuisance — smoldering fire.

A smoldering fire maintained by a railroad company in a rubbish dump at the bottom of an embankment a few feet from a sidewalk is not an attractive nuisance which will render it liable for injury to a four-year-old boy who is passing along the walk, which is protected by a railing, is attracted by the fire, passes the railing, and, ap-

proaching too near the embankment, falls down into the fire to his injury.

For other cases, see Negligence, I. c, 2, b, in Dig. 1-52 N. S.

(June 29, 1916.)

APPEAL by plaintiff from a judgment of the District Court for Cherokee County in favor of defendant in an action brought to recover damages for injuries alleged to have been caused by plaintiff's being burned in a fire on defendant's dumping ground. Affirmed.

Statement by Preston, J.:

Suit brought by Vernie Smith to recover damages alleged to have been caused by his being burned in a fire on a dump ground in the yards of defendant company at Cherokee, Iowa. There was a trial to a jury. Defendant introduced no evidence. At the con-

Note. — For fire as attractive nuisance, see annotation following this case, post, 1036.

L.R.A.1917F.

clusion of plaintiff's testimony, the trial court directed a verdict for the defendant. Plaintiff appeals.

Mr. C. M. Smith for appellant.

Messrs. Molyneux & Maher, Helsell & Helsell, W. S. Horton, and Blewett Lee, for appellee:

A fire or smoldering ashes 30 to 40 feet from a sidewalk, located in a ravine 12 to 15 feet below the street, where neither children nor any other human beings are accustomed to go or play, is not an attractive nuisance such as to constitute an exception to the general rule that the owner of premises owes no duty to exercise care for the safety of trespassers, except to refrain from wilful or wanton injury to them after discovery upon his property.

Hart v. Mason City Brick & Tile Co. 154 Iowa, 741, 38 L.R.A. (N.S.) 1173, 135 N. W. 423; Brown v. Rockwell City Canning Co. 132 Iowa, 631, 110 N. W. 12; Schmidt v. Kansas City Distilling Co. 90 Mo. 284, 59 Am. Rep. 16, 1 S. W. 865, 2 S. W. 417; Etheredge v. Central R. Co. 122 Ga. 853, 50 S. E. 1003; Smith v. Jacob Dold Packing Co. 82 Mo. App. 9; American Adv. & Bill Posting Co. v. Flannigan, 100 Ill. App. 452; Paolino v. McKendall, 24 R. I. 432, 60 L.R.A. 133, 96 Am. St. Rep. 736, 53 Atl. 268, 12 Am. Neg. Rep. 550; Erickson v. Great Northern R. Co. 82 Minn. 60, 51 L.R.A. 645, 83 Am. St. Rep. 410, 84 N. W. 462; Coleman v. Robert Graves Co. 39 Misc. 85, 78 N. Y. Supp. 893; Twist v. Winona & St. P. R. Co. 39 Minn. 164, 12 Am. St. Rep. 626, 39 N. W. 402; Thompson v. Illinois C. R. Co. 105 Miss. 636, 47 L.R.A. (N.S.) 1101, 63 So. 185; Charvoz v. Salt Lake City, 42 Utah, 455, 45 L.R.A. (N.S.) 662, 131 Pac. 901; Coon v. Kentucky & I. Terminal R. Co. 163 Ky. 223, L.R.A.1915D, 160, 173 S. W. 325; Hageage v. District of Columbia, 42 App. D. C. 109; Kayser v. Lindell, 73 Minn. 123, 75 N. W. 1038, 4 Am. Neg. Rep. 408; Clark v. Richmond, 83 Va. 355, 5 Am. St. Rep. 281, 5 S. E. 369; Chicago, K. & W. R. Co. v. Bockoven, 53 Kan. 279, 36 Pac. 322; Kelly v. Benas, 217 Mo. 1, 20 L.R.A. (N.S.) 903, 116 S. W. 557; Middleton v. Reutler, 141 App. Div. 517, 126 N. Y. Supp. 315; Missouri, K. & T. R. Co. v. Edwards, 90 Tex. 65, 32 L.R.A. 825, 36 S. W. 430; Lynch v. Knoop, 118 La. 611, 8 L.R.A. (N.S.) 480, 118 Am. St. Rep. 391, 43 So. 352, 10 Ann. Cas. 807; Vanderbeck v. Hendry, 34 N. J. L. 467; Thompson v. Cumberland Teleph. & Teleg. Co. 138 Ky. 109, 127 S. W. 531; Simonton v. Citizens Electric Light & P. Co. 28 Tex. Civ. App. 374, 67 S. W. 539; Johnston v. New Omaha Thomson-Houston Electric Light Co. 78 Neb. 24, 17 L.R.A. (N.S.) 435, 110 N. W. 711, 113 N. W. 526; Northwestern L.R.A.1917F.

Elev. R. Co. v. O'Malley, 107 Ill. App. 599; McAllister v. Jung, 112 Ill. App. 138; Hermes v. Hatfield Coal Co. 134 Ky. 300, 23 L.R.A. (N.S.) 724, 120 S. W. 351; Devine v. Armour & Co. 150 Ill. App. 74; Latham v. Johnson [1913] 1 K. B. 308, 82 L. J. K. B. N. S. 258, 108 L. T. N. S. 4, 77 J. P. 137, 57 Sol. Jo. 127, 29 Times L. R. 124; Witte v. Stifel, 126 Mo. 295, 47 Am. St. Rep. 668, 28 S. W. 891; Blum v. Weatherford & C. Bros. 121 La. 298, 46 So. 317; Williamson v. Gulf, C. & S. F. R. Co. 40 Tex. Civ. App. 18, 88 S. W. 279; Fitzmaurice v. Connecticut R. & Lighting Co. 78 Conn. 406, 3 L.R.A. (N.S.) 149, 112 Am. St. Rep. 159, 62 Atl. 620, 19 Am. Neg. Rep. 102; Belt R. Co. v. Charters, 123 Ill. App. 322; Gates v. Northern P. R. Co. 37 Mont. 103, 94 Pac. 751; San Antonio & A. P. R. Co. v. Morgan, 92 Tex. 98, 46 S. W. 28; Driscoll v. Clark, 32 Mont. 172, 80 Pac. 1, 373; Union Stockyard & Transit Co. v. Butler, 92 Ill. App. 166; Kramer v. Southern R. Co. 127 N. C. 330, 52 L.R.A. 359, 37 S. E. 468; Smith v. Hayea, 29 Ont. Rep. 283; Oil City & P. Bridge Co. v. Jackson, 114 Pa. 321, 6 Atl. 128; Curtis v. Tenino Stone Quarries, 37 Wash. 355, 79 Pac. 955; Stendal v. Boyd, 73 Minn. 53, 42 L.R.A. 288, 72 Am. St. Rep. 597, 75 N. W. 735; Klux v. Nieman, 68 Wis. 276, 60 Am. Rep. 854, 32 N. W. 223; Peninsular Trust Co. v. Grand Rapids, 131 Mich. 571, 92 N. W. 38; Salladay v. Old Dominion Copper Min. Co. 12 Ariz. 124, 160 Pac. 441; Savannah, F. & W. R. Co. v. Beavers, 113 Ga. 398, 54 L.R.A. 314, 39 S. E. 82, 10 Am. Neg. Rep. 8; Lineburg v. St. Paul, 71 Minn. 245, 73 N. W. 723, 4 Am. Neg. Rep. 64; Gillespie v. McGowen, 100 Pa. 144, 45 Am. Rep. 365; Meyer v. Union Light, Heat & P. Co. 151 Ky. 332, 43 L.R.A. (N.S.) 136, 151 S. W. 941.

Preston, J., delivered the opinion of the court:

The petition alleges, in substance, that plaintiff is a minor about four years of age; that for some months, and during the summer of 1914, defendant kept and maintained in its railway switch yards at Cherokee, Iowa, and at a point about 15 feet north of the sidewalk on the north side of Cherry street, and between the Sioux Falls and Sioux City branches of its main right of way in said city, a dump upon which the defendant, through its employees, threw and piled the waste paper, straw, hay, and other refuse and accumulations that usually and generally accumulate in a railway terminal station yard, and for two weeks previous to August 15, 1914, caused, permitted, and allowed a fire to be and exist in said pile of refuse matter; that said fire was kept up and maintained and kept burning in said pile of refuse matter as aforesaid on said

15th of August, 1914, on which date the plaintiff, while passing along and over the sidewalk on said Cherry street, in close proximity to said smoldering fire, was attracted by said fire, which fire was an attractive nuisance, and, while so attracted to the edge of the bank overlooking said smoldering fire, the bank beneath the feet of plaintiff gave way and caved in, and the body of plaintiff was caused to roll down said embankment and into and upon said smoldering fire, and that plaintiff was burned. The answer was in general denial.

The case was tried upon the theory that the fire constituted an attractive nuisance. The dump was about 12 feet high. The fire was at the bottom of the dump. The claim is that it had been burning there from eight to ten days, and some of the witnesses put it that it had been burning there more or less the greater part of the summer. The testimony is that there was no blaze and that the space it was burning or smoldering was about 18 inches across; that on or about the 15th of August, plaintiff, in company with an older brother seven years of age, started from their home about a block from the scene of the injury and walked a block to the north side of Cherry street on the sidewalk, going up in another part of the city to play, and at the point of the sidewalk opposite the fire on defendant's premises, plaintiff's claim is that they were attracted to the scene, and plaintiff went too close to the edge of the dump and it caved in with him, and he rolled to the bottom and into the smoldering fire.

We shall set out somewhat fully the testimony of plaintiff's father and the other witnesses, whose description of the premises is illustrative of the other testimony. After stating that there is no permanent disfigurement of the child, plaintiff's father says: "The fire was between the Sioux Falls and Sioux City tracks, north of Cherry street, in the city; it was 15 or 20 feet north of the Cherry street sidewalk, in my judgment. There is a high bank there, perhaps 12 feet high. There are bridges near this track, about 30 feet from the sidewalk. Each bridge crosses that little creek. There is a dump between the two bridges north of the sidewalk from Cherry street and between the two tracks. The bank is made of cinders, I think. The company dumped rubbish there over that bank during August, 1914; it was cobs and rubbish they picked up around the yards, paper, straw, and hay. I saw men whom I thought were section men dumping rubbish there during the summer, but I don't know that they were section men. I do not know where the rubbish came from. There was no walk of any kind out onto the dump; the path just leads

to the bank, and then there is this strip of 12 feet between the bridges, and it is not used by anyone to get anywhere. One branch of the railway goes west of Sioux City, and the other goes northeast to Sioux Falls and forms a triangle there. Down beyond the dump is a low place that the creek crosses by the two railroad bridges, and there are no buildings down there of any kind; it is a low spot used for no other purpose."

Other testimony shows that the sidewalk there runs east and west over the railroad track; and along the sidewalk going west there is a level space up toward the track about 18 or 20 feet wide from the sidewalk up to the approach of the bridge; there is nothing dumped there, and it is all level. A rail along the sidewalk runs up to within a few feet of the track running to Sioux Falls. The level space is near the track running to Sioux City. There is a railing along the sidewalk east and west. That the pile of rubbish extends out 20 or 25 feet from the sidewalk. The railing between the dump and the sidewalk runs up close to the tracks on each side. The rail extends as close to each track as it is practical to put it and still let the cars go by. This dump is a vacant spot not used by anyone, only as they dump stuff over it down to the creek bottom, where the creek overflows once in a while. Witness says: "I should say it was 10 or 12 feet down there. It is much lower than the walk below the sidewalk. It is flat up on top, where they dump it in. It is bushes and weeds and shrubbery down below on the creek bottom. The level space is separated from the sidewalk by a railing and posts made of 4x4's. There is a fence leading down from the right-of-way fence, from the track down. There is no driveway or walk down there in this rough bottom." This witness could not tell the exact distance the fire was from the sidewalk, but stated that it was probably 25 feet across the top of the dump, and then down to the bottom of the slope would be 12 or 15 feet more.

The brother of plaintiff testified that plaintiff was injured about 8 o'clock in the morning; that they were going up some place to play with some boys. They went up the sidewalk. He says: "Vernie stopped to look at the fire, and it kind of caved; he got too close to the side, to the edge of it. There was a fire there that morning down below the bank."

Witness did not go out on the bank, but Vernie walked out on the top of the bank and got on the edge of it, and it caved in and he rolled down the bank. Witness says that the fire was not blazing at all, just a little smoke coming up; that it was down

at the bottom of the hole. Witness continues: "You couldn't see the fire from the sidewalk very good. My mother knew I was going to play with the boys, but she didn't know Vernie was going; she told him not to go, but he went anyway. In going to these boys' house we went across the tracks and along the sidewalk. I saw the rail between me and the fire when I stopped. I went out of my way when I went out on this dump. It wasn't on the way to the boys; it wasn't the way anywhere and we weren't going anywhere there. I told Vernie to keep back from the bank; I told him not to go out there, but he went out anyway. I have gone out on the edge of that bank as far as Vernie did, but it didn't seem to cave in with me. He got over too near the edge. The dirt was soft there and he tumbled down. There was no one near to push him, and nothing to attract his attention; he just got too close to the edge."

It will be seen from the testimony that the place was a natural dumping ground; that it was used for no other purpose; that it was not a playground; that there were no paths across or near it, except the sidewalk along the street, which was guarded and separated from the dump by the railing; the place was a ravine, rough, unoccupied and unused, and that the fire, which plaintiff claims was an attractive nuisance, and which was located on the far side of the smooth top of the dump, which was 20 to 25 feet across, and in addition was at the base of the slope some 12 to 15 feet below, was a small smoldering spot not to exceed 18 inches across; that the premises were guarded by a railing extending as close to the track as it was practical to put it and still let the cars go by. Under the pleadings and evidence, no question arises out of a failure to guard the premises. It is conceded that plaintiff was a trespasser.

The cases relied upon by appellant are some of those referred to in *Edgington v. Burlington, C. R. & N. R. Co.* 116 Iowa, 410, 57 L.R.A. 581, 90 N. W. 95 (*Turntable Cases*). The theory, as we understand it, of the *Turntable Cases*, is that they are dangerous if left unguarded and in a place where children are known, either actually

or constructively, to be in the habit of playing or going. As some of the cases put it, an attractive nuisance is something that has a peculiar attraction, and there is some special or latent danger and an unguarded condition, and that it is located where children are known to frequent. None of these conditions or elements exists in the instant case.

The distinction between the right of owners of property to make use of the same to the best advantage, subject to the rule that they must use and enjoy it in a manner to avoid injury to others, and the doctrine of attractive nuisance is well pointed out in *Hart v. Mason City Brick & Tile Co.* 154 Iowa, 741, 744, 745, 38 L.R.A. (N.S.) 1173, 135 N. W. 423. Appellee cites a large number of cases to sustain their proposition. But, under the facts in this case, plaintiff may not rely upon the claim that the dump and fire constituted an attractive nuisance. We shall not refer to any considerable number of the cases cited. In addition to the *Hart Case*, supra, they cite *Brown v. Rockwell City Canning Co.* 132 Iowa, 631, 110 N. W. 12; *Schmidt v. Kansas City Distilling Co.* 90 Mo. 284, 59 Am. Rep. 16, 1 S. W. 865, 2 S. W. 417; *Etheredge v. Central R. Co.* 122 Ga. 853, 50 S. E. 1003; *American Adv. & Bill Posting Co. v. Flannigan*, 100 Ill. App. 452; *Paolino v. McKendall*, 24 R. I. 432, 60 L.R.A. 133, 96 Am. St. Rep. 736, 53 Atl. 268, 12 Am. Neg. Rep. 550; *Erickson v. Great Northern R. Co.* 82 Minn. 60, 51 L.R.A. 645, 83 Am. St. Rep. 410, 34 N. W. 462; *Coleman v. Robert Graves Co.* 39 Misc. 85, 78 N. Y. Supp. 893; *Twist v. Winona & St. P. R. Co.* 30 Minn. 164, 12 Am. St. Rep. 626, 39 N. W. 402; *Kayser v. Lindell*, 73 Minn. 123, 75 N. W. 1038, 4 Am. Neg. Rep. 408. See also recent case of *Wilmes v. Chicago G. W. R. Co.* 175 Iowa, 101, ante, 1024, 156 N. W. 877.

It is quite clear that plaintiff has not brought his case within the rule contended for by him.

Our conclusion is that the action and judgment of the trial court was right, and it is therefore affirmed.

Evans, Ch. J., and Deemer and Gaynor, JJ., concur.

Annotation—Fire as attractive nuisance.

The general subject of attractive nuisance, or the turntable doctrine, so-called, including the question, What are attractive nuisances within the meaning of that doctrine? is discussed in the note to *Cahill v. E. B. & A. L. Stone & Co.* L.R.A.1917F.

19 L.R.A. (N.S.) 1094; and many concrete aspects of the subject are considered in other notes that may be found by consulting L.R.A. Indexes, under the title, "Negligence." See especially notes in 3 L.R.A. (N.S.) 149, and 19 L.R.A.

(N.S.) 1124, as to the application of the doctrine in the case of injury by hot water or ashes.

As to liability of one turning scalding water into an open ditch, for injury to a child who falls into it, see *Conway v. Kinston*, L.R.A.1916B, 945, and note appended, treating generally of the duty toward children as to obstructions or defects in street.

Generally, as to duty of property owner to trespassing children, see note to *Walsh v. Pittsburg R. Co.* 32 L.R.A. (N.S.) 559.

The cases *Erickson v. Great Northern R. Co.* (1900) 82 Minn. 60, 51 L.R.A. 645, 83 Am. St. Rep. 410, 84 N. W. 462; *Paolino v. McKendall* (1902) 24 R. I. 432, 60 L.R.A. 133, 96 Am. St. Rep. 736, 53 Atl. 268, 12 Am. Neg. Rep. 550; and *Coleman v. Robert Graves Co.* (1902) 39 Misc. 85, 78 N. Y. Supp. 893, affirmed in (1904) 97 App. Div. 411, 89 N. Y. Supp. 1040, discussing the application of the turntable doctrine to injuries by fire, are sufficiently set out in the note to *Madden v. Boston & M. R. Co.* 39 L.R.A. (N.S.) 1058, which treats generally of the duty to guard against injury to trespassing children by fire.

It will be observed that *Paolino v. McKendall* (R. I.) and *Coleman v. Robert Graves Co.* (N. Y.) supra, expressly disapprove of the turntable doctrine.

So, following *Thompson v. Baltimore & O. R. Co.* (1907) 218 Pa. 444, 19 L.R.A. (N.S.) 1162, 120 Am. St. Rep. 897, 67 Atl. 768, 11 Ann. Cas. 894, which declares that the doctrine of the Turntable Cases is not sound in principle, and that it is a sweeping innovation on the settled common-law rule that a landowner is not liable for the condition of his premises to one who enters them without permission, a recovery was denied in *Saar v. American Glass Specialty Co.* (1913) 55 Pa. Super. Ct. 282, where a child six years old was burned in a fire kindled by employees on a lot in the rear of a factory for the purpose of burning rubbish, the court stating that there was no evidence from which a jury should have been permitted to find that the defendant company had done anything from which an invitation to others or to the public to use this property could be inferred, or that the property had been used as a playground or common.

The following cases, however, do not disapprove of the attractive nuisance or turntable doctrine, but determine whether under the facts that doctrine applies: L.R.A.1917F.

Thus, in holding the attractive nuisance doctrine inapplicable to a smoldering fire in a dump, the court in *SMITH v. ILLINOIS C. R. Co.* ante, 1033, states that the theory of the Turntable Cases is that turntables are dangerous if left unguarded and in a place where children are known, either actually or constructively, to be in the habit of playing or going; as some of the cases put it, an attractive nuisance is something that has a peculiar attraction, and there is some special or latent danger and an unguarded condition, and that it is located where children are known to frequent. None of these conditions or elements exist in the *SMITH CASE*.

So a recovery on the theory of attractive nuisance, against the magistrates of a burg for injury to a three-year-old child by fire in a rubbish heap, was denied in *Johnston v. Lochgelly Magistrates* (1913) 50 Scot. L. R. 916, it appearing that the magistrates did not own the field, but were merely permitted to deposit refuse thereon, and there being no averment that they set fire to the rubbish or directed it to be burned or that it was burned by anyone for whom they were responsible. In differentiating a turntable case, Lord Mackenzie said: "There is nothing per se dangerous about putting down waste paper. The danger, on the pursuer's averments, was or may have been caused solely by the act of a third party for whom the defenders were not responsible. There could be no duty on their part to have a watchman constantly on duty to see that all and sundry did not light the paper, or to see that if they did, the fires were extinguished. Nor was there any duty on the defenders' carter, who, it is said, was aware that the fire was burning, if it had been lit by someone else not connected with the defenders."

One owes no duty to a twelve-year-old child to guard it from a fire which he has started out of doors, if the child is of sufficient intelligence and capacity to know that the fire will burn and is dangerous. Consequently, the court in *Arkansas Valley Trust Co. v. McIlroy* (1911) 97 Ark. 160, 31 L.R.A. (N.S.) 1020, 133 S. W. 816, held erroneous an instruction that, "if a person leaves a fire or other instrumentality attractive to children unguarded at a place where children are accustomed to go and play, and a child does go to or near such fire or other dangerous instrumentality attractive to children, and is injured, such child can recover damages from all those concerned in leaving unguarded

such fire or other dangerous instrumentality attractive to children." The leaving upon the premises of a dangerous object attractive to children, said the court, does not alone constitute the act of negligence; the act of negligence consists in leaving such object under such circumstances that one of ordinary prudence might reasonably expect that a child too young to appreciate the danger would be allured to and attracted thereby. What might be an act of negligence in leaving such an object or element resulting in attracting thereto a child of a few years of age, and too young to appreciate the danger therefrom, might not be an act of negligence if it should be reasonably expected that only a child of the age and maturity to fully understand and appreciate the danger from such an object or element should go near thereto; because it would not be reasonably anticipated that a child of sufficient maturity and intelligence to appreciate the danger from fire would go to and play with this dangerous element. The character of the object or element thus left on the premises, and the maturity and intelligence and capacity of the child, must be taken into consideration before it can be said that the leaving of such object or element on the premises unguarded is such an act of negligence that a liability would result therefrom for a consequent injury. In the case at bar the element was fire, known to be dangerous by very young children, and the child was twelve years old and of the average intelligence of a child of that age. If a person of ordinary prudence and foresight would not anticipate that a child of that age and intelligence would not appreciate the danger from fire, and would play with it, then it would not be an act of negligence to leave it where such child might go. So, if the plaintiff was of the intelligence and capacity to know that fire would burn and was dangerous, then it could not be said that the defendants were negligent in not foreseeing that she would be attracted to and would play with fire that was left in the yard.

It was a matter of dispute in *Madden v. Boston & M. R. Co.* (1912) 76 N. H. 379, 39 L.R.A.(N.S.) 1058, 83 Atl. 129, whether a girl of tender years was on a railroad right of way or on her father's premises when she caught fire. The court stated that she was first discovered on the defendant's right of way after her clothing was on fire. How long she had been there is not disclosed by the L.R.A.1917F.

evidence; and it would be the merest conjecture to suppose that the fire came in contact with her while she was upon her father's premises, and that she then escaped over the wall onto the defendant's land. She must be treated as a trespasser. The court further observed that the evidence did not have any legitimate tendency to show that the workmen ought to have known that she or other little children were liable to be there. It does not appear that the defendant's way was frequented by children. It had not been used as a playground, and there was no reason to anticipate that children would trespass upon it when it was being burned over. It is argued that the fire was attractive to children and that the defendant, knowing this fact, ought to have anticipated that they would trespass upon its way to play with the fire. But this assumption is not universally true; for many children are repelled by the sight of a conflagration. It is impossible, without other evidence, to account for the presence of the deceased on the defendant's way. What induced her to go there is problematical; and it cannot be inferred that she was there because the fire attracted her in order to draw the further inference that the railroad men ought, in the exercise of reasonable care, to have known of her presence in time to warn her of her danger. When she screamed nothing could be done to save her. If, therefore, it would have been the defendant's duty to warn her of her danger, or to drive her from its land if its servant had known or ought to have known of her presence, the fact that it cannot be charged with that knowledge prevents the application of that doctrine, and shows that her injury is not attributable to its violation of any duty it owed to her. It had a right to burn the dry grass by the side of its track without keeping watch for casual trespassers who might possibly get into the flames and be injured. Whether, if it had known the deceased was present, it would have been its duty to protect her from being burned by the fire, on the ground that the fire was "active intervention" by the landowner, it is unnecessary to consider.

The attractive nuisance doctrine, however, was held applicable in *Peirce v. Lyden* (1907) 85 C. C. A. 312, 157 Fed. 552, where a boy was burned with oil which he, with other boys, stole out of an unlocked oil shed, the court stating that nothing was more attractive to boys than fire, and as they had been for some six months in the habit of throw-

ing the defendant's oil on fires made by them, and as this fact was actually known to his night watchman, the question of defendant's negligence was properly presented to the jury.

So, in *Roman v. Leavenworth* (1913) 90 Kan. 379, 133 Pac. 551, an action for damages alleged to have been sustained by a boy eleven years old while playing on a city dump, by falling into a smoldering fire, the dump was held to be an attractive nuisance. The court said that, the dump being in charge of a boss employed by the city, it was material whether or not he, with the knowledge and acquiescence of the city, exercised control over the whole dump, rather than whether or not he had express authority so to do. A mere warning to the plaintiff to be careful, uttered by a private person engaged in unloading spoiled fruit at such dump, would not relieve the city from liability even if the plaintiff was sufficiently intelligent to appreciate the danger of going over the embankment which formed a part of the dump, after spoiled fruit, but proceeded and sustained injuries "at a place where a prudent person would not anticipate anyone would go," if the testimony should show that the place where the injury occurred was a smoldering fire of some weeks probable duration, over the embankment, of which fire the plaintiff had no knowledge.

Some of the cases involving injuries to children by fire are decided independently of the application of the attractive nuisance doctrine, but are included here because of the suggestive character of the facts.

Thus, like *SMITH v. ILLINOIS C. R. Co.* ante, 1033, a boy twelve years old in trying to get some wire was, in *Butz v. Cavanaugh* (1896) 137 Mo. 503, 59 Am. St. Rep. 504, 38 S. W. 1104, 1 Am. Neg. Rep. 299, severely burned by stepping into a smoldering fire in a dump on private property, some distance from the street, which the owner of the land had failed to guard as required by ordinance. The owner was held not liable, the court stating that "this ordinance is in derogation of a common right, and a failure to comply with its requirements should not be treated as a license to voluntary trespassers to go upon the property at will. It was evidently intended to protect those only who were lawfully using the public streets, and not those who voluntarily leave the street and go upon the property for their own convenience or pleasure. A fence would be no protection against such persons. L.R.A.1917F.

These last remarks may not apply to persons non sui juris, who may wander upon the property, but we do not regard plaintiff as such a person. He was an intelligent, active lad of twelve years, who had been warned by his father of the danger of going into the excavation. He must be taken as voluntarily assuming the risk of injury in going down the dump. The attraction of a piece of wire does not excuse the trespass."

Where a janitor at a time when a high wind was blowing, contrary to instructions, burned waste paper on an unimproved lot frequented by children, whereby a child of tender years caught fire, it was held in *McDermott v. Consolidated Ice Co.* (1910) 44 Pa. Super. Ct. 445, that the employer was liable. If the evidence, observed the court, showed that the day was windy, that the material ignited was combustible in its character, and so flimsy in structure that it would be easily caught up and carried by the wind whilst in flame; and if, under such conditions, the fire would not have been easily controlled even had the man who lighted it remained to watch it, we cannot say that the court should have declared as a matter of law that the lighting of a fire under such conditions did not exhibit want of reasonable care. Neither plaintiff nor defendant was in this case regarded as trespassers in making use of the lot which was owned by the railroad company.

Where the city authorities allowed to smolder for nearly a week a fire set by an employee in a ditch between a sidewalk and driveway, or on the extreme edge of a street, whereby a child five years old fell into it and was burned, the city was held liable, in *Stone v. Florence* (1913) 94 S. O. 375, 78 S. E. 23, a statutory action for failure to keep street in repair.

Speaking of the duty of protecting children against hidden traps, *Lush, J.*, in *Crane v. South Suburban Gas Co.* [1916] 1 K. B. (Eng.) 33, 85 L. J. K. B. N. S. 172, 32 Times L. R. 74, stated that the question of the creation or non-creation of a trap is irrelevant in a case where a wrongful act is alleged to have been done upon a highway or land adjacent thereto; that question arises only in cases where a person is alleged to have created a trap on land over which he has given the plaintiff a license or invitation to go. This case is not of that kind. The obligation in regard to the user of a highway or land adjacent thereto is not to create a nuisance.

Land adjacent to the highway is on exactly the same footing for this purpose as the highway itself. In this case a gas company, while repairing a main, left on or adjacent to the highway a fire pail containing molten lead, and a passer-by tipped it over, burning an infant standing near. The company was held liable on the ground that, in performing its statutory duty, it had placed a nuisance on or adjacent to the highway without taking proper steps for the protection of plaintiff.

In *Davenport v. McClellan* (1916) 88 N. J. L. 653, 96 Atl. 921, the defendant

negligently omitted to extinguish a fire which he had started in a public street, leaving it burning and unguarded; a child five years of age playing in the street put on the fire additional leaves, and in doing this his clothing caught fire and he was thereby injured. It was held that the act of the child was not an intervening cause which destroyed the causal connection between the defendant's act and the injury, and that defendant's negligent act was the proximate cause. See also *Crane v. South Suburban Gas Co.* (Eng.) supra.

J. D. C.

NEW JERSEY COURT OF ERRORS AND APPEALS.

MAX SWILLER et al., Respts.,

v.

HOME INSURANCE COMPANY OF NEW YORK, Appt.

(— N. J. —, 101 Atl. 516.)

Insurance — consent to change of ownership — effect.

The indorsement by an insurer on a fire insurance policy of consent to change of ownership in the property insured, without more, is not to be construed as an agreement by the company to become liable to the new owner for a loss occurring after the ownership actually changed but before the consent was given.

For other cases, see *Insurance*, III. c, 1, b, in *Dig. 1-52 N. S.*

(The Chancellor, and Bergen, Minturn, Kalisch, White, and Williams, JJ., dissent.)

(July 18, 1917.)

APPEAL by defendant from a judgment of the Supreme Court in favor of plaintiffs in an action brought to recover the amount alleged to be due on a fire insurance policy. Reversed.

The facts are stated in the opinion.

Mr. Russell E. Watson, for appellant:

Plaintiffs' noncompliance with the clauses in the policy which are warranties avoids the policy.

Carson v. Jersey City Ins. Co. 43 N. J. L. 300, 39 Am. Rep. 584, affirmed in 44 N. J. L. 210; *Ordway v. Chace*, 57 N. J. Eq. 478, 42 Atl. 149; *Grunauer v. Westchester F. Ins. Co.* 72 N. J. L. 289, 3 L.R.A. (N.S.)

Headnote by PARKER, J.

Note. — As to effect of consent after loss to assignment of fire insurance policy or to change of ownership, see annotation following this case, post, 1042. L.R.A.1917F.

107, 62 Atl. 418; *Sun Ins. Co. v. Greenville Bldg. & L. Asso.* 58 N. J. L. 367, 33 Atl. 962.

The indorsement worked no waiver because the company had no knowledge of the facts.

Globe Mut. L. Ins. Co. v. Wolff, 95 U. S. 326, 24 L. ed. 387; *Cooley, Briefs on Ins.* pp. 2467, 2468.

If the indorsement constituted a new contract it was not retroactive.

May, Ins. §§ 378, 400; *Mercantile Mut. Ins. Co. v. Folsom*, 18 Wall. 237, 251, 21 L. ed. 827, 833; *Commercial Ins. Co. v. Hallock*, 27 N. J. L. 645, 72 Am. Dec. 379.

Mr. John P. Kirkpatrick for respondents.

Parker, J., delivered the opinion of the court:

The suit is to recover loss by fire which plaintiffs claimed to be covered by a policy issued by the defendant company. The policy was issued in the names of Max Herman and Wolfe Fisher, as their respective interests might appear, for a term of one year from October 8, 1912. On February 14th, about 3 P. M., Fisher and Gottlieb delivered a deed conveying the property to the two Swillers, the present plaintiffs, who also received the written policy, and about 4 P. M. of the same day they gave it to their insurance broker, named Levine, with directions to have the ownership transferred to their names. Levine was not the agent of the company. That agent was a corporation named Neilson T. Parker, Incorporated. Levine did not go to Parker for an indorsement of change of interest until the next morning, when the indorsement was made. In the meantime, the fire had occurred. The stipulation of facts shows that when Levine presented the policy for indorsement of new ownership, neither Parker, Incorporated, nor the company, knew of the fire having taken place, and Levine did not inform Parker of it.

On this state of facts, the trial judge, sitting without jury, held that, although in his estimation the policy was not originally enforceable because Fisher had no interest in the property at the time of its issue or thereafter, yet plaintiffs were entitled to recover, on the theory, as he stated it, that the question was not one of waiver of the invalidity of the original policy, but of practically new insurance; and that instead of writing a new policy for the remaining portion of the policy (term?) the company extended the old insurance to the new owners.

We think that this was error. It may be conceded that by indorsing the new ownership on a policy which the company could have voided for misstatement of original ownership, or for transfer of ownership to the Swillers without such indorsement, the company entered into a fresh contract with said new owners to insure them from the remainder of the term, and that the premium originally paid was a valid consideration therefor. But when did the remainder of the term begin? In order to uphold the decision below, it is necessary to say that it began when the deed to the Swillers was delivered. Doubtless the company could have so agreed, but the question is: What agreement did it actually make by the indorsement? The only reasonable answer, as it appears to us, is that in the absence of some special stipulation the insurer's consent to change of ownership must be construed as operating to protect the new owner from the time it is given, and that time is, ordinarily, when it is affixed by the company or its authorized agent, and that it does not relate back to any prior time when the ownership in fact changed; or, in other words, that the insurer does not, by assenting to the change of ownership, assume the liability for a loss occurring before that consent was given, of which it knew nothing, and for which, as the policy stood without its consent, it was not liable.

The case is not within the rule in *Hallock v. Commercial Ins. Co.* 26 N. J. L. 268, 27 N. J. L. 645, 72 Am. Dec. 379, for in that case the application was made for insurance and premium tendered to the agent before the fire occurred, for a term to begin at the date of the application, and the policy was so written. There was consequently in that case no room for argument as to what the company agreed to, and the main question was whether it was relieved from the agreement because the fire had occurred without its knowledge before it had formally entered into it.

One of the defenses set up in the pleadings, and not contradicted as to the facts, was that the policy contained a provision that, unless otherwise provided by agree-

ment indorsed thereon or added thereto, it should be void if any change, other than by the death of the insured, take place in the interest, title, or possession of the subject of insurance, etc.; and that by the conveyance to the Swillers such change took place, and vitiated the policy. On the trial defendant requested the court to find that the foregoing clause was a warranty, of which there had been a breach by the conveyance to the Swillers, which had not been waived by an indorsement on the policy, or addition thereto; and further, that the indorsement in question, placed on the policy after the fire, did not constitute such waiver, because the company had no knowledge or notice of such fire. These requests were either overruled or confessed and avoided by the decision placing the judgment upon the ground, not of waiver, but of new insurance. As the case stands before us, defendant is entitled to attack both the refusals of the court and its specific findings of law injurious to defendant. It is not necessary to pass upon the question whether, by the language of the policy insuring Herman and Fisher as their respective interests appeared, the policy, though void as to Fisher, would be good as to Herman. It might even be conceded for the sake of argument that they might have recovered for the loss. The simple question before us is: Was the company under a contractual liability to the Swillers for a loss after title vested in them, and before the indorsement of change of ownership?

The trial court held that it had agreed to such liability by its indorsement made after the fire and without knowledge thereof. This we consider erroneous, for reasons already stated; and for this error the judgment must be reversed.

The Chancellor and Bergen, Minturn, Kallsch, White, and Williams, JJ., dissent.

Bergen, J., dissenting:

I am unable to agree with the majority of the court that the refusal of the trial court to find, as requested, that the indorsement entered on the policy on February 15, 1913, which reads as follows: "Interest in this policy is hereby vested in Max and Abe Swiller, trading under the name of Swiller Brothers, as owner instead of as heretofore. Loss if any, first payable as before. Second mortgagees eliminated,"—was not a waiver of previous breaches of warranty as to ownership, called to the attention of the court, because the company had no notice of the facts alleged to avoid the insurance and forfeit the policy, was erroneous.

This request is based upon the assumption

that the policy, before it was assigned to the plaintiffs and the indorsement made thereon, was absolutely void because when it was issued to the previous owners, Max Herman and Wolfe Fisher, the latter had conveyed his undivided one-half interest to Nathan Gottlieb. The policy of insurance is not printed in the record, nor was it submitted to the court; the case being tried and determined upon facts stipulated, so we have no knowledge of the terms of the policy, relating to the character of the interests insured, except as they appear in the stipulations, the first of which is that on October 8, 1912, the defendant issued a Standard fire insurance policy "to Max Herman and Wolfe Fisher, as their respective interests appear, for the term of one year from the 8th day of October, 1912, at noon, to the 8th day of October, 1913, at noon." As I read this policy, it is an insurance against loss of the respective interests of each, and not of their joint interest, and there is no reason why the insurance company could not lawfully contract, as they did, to insure either against loss so far as their respective interests appeared, and if so, each had an undivided interest insured. If Fisher had no interest, all the company insured was the interest of Herman, which interest remained insured until he conveyed it to the plaintiffs, and so long as he retained that interest his mortgagee, Augusta McGinnis, one of the plaintiffs, was protected to the extent of his insurable interest by reason of the indorsement making any loss first payable to her as mortgagee.

None of the conditions contained in the policy upon which the breaches of warranty appearing in the requests to charge or find appear in this record; but, assuming that the policy contained these warranties, there was no breach so far as the interest of Herman is concerned, because his respective interest was always in existence, and continued to be until he conveyed the property and handed over the policy to the new owner; for "respective interests" means such interests as each of the insured had. It is not a case where tenants in common are jointly insured, where conveyance by one

would avoid the policy, but an insurance of the respective interest of each as such interest might appear and therefore there was no breach of warranty, so far as Herman was concerned, which called for a compliance with the sixth request that the indorsement did not constitute a waiver of the breaches of warranties, because one of the parties held a valid insurance to the extent of his interest. The effect of the new contract created by the indorsement on the policy after the conveyance by Herman and after the loss is not raised by any request to charge, and is not to be considered, because all of the requests are based upon the theory that the entire policy was void from its inception because Fisher was not one of the owners when the policy was issued; and therefore the very interesting question, how much of the period of the time stated in the policy it was to cover inures to the assignee when the entire policy is assigned and consented to by the insurance company, is not before us.

If it is a new contract based upon all the terms and conditions of the policy, as seems to be the settled law, it may be that the insurance company, by the substitution of a new owner for the old one, makes the policy good to the new owner for the entire period, which would be nothing more than an agreement to insure the new owner for the entire period covered by the policy, or at least from the time it was assigned to him; and that the company has a right to antedate its policy was settled in *Hallock v. Commercial Ins. Co.* 26 N. J. L. 268. But no such question is raised in this case, for all the requests the refusal to comply with which is the only ground of error alleged are based upon the claim that, the policy being originally void, the indorsement to the new owner was not a waiver of alleged breaches, because the policy itself was void, and if, as I think, the policy was not void because it was an insurance of respective interests, one of which was insurable, then the requests were based upon a false assumption of law, and were properly refused.

The judgment should be affirmed.

Annotation—Effect of consent after loss to assignment of fire insurance policy or to change of ownership.

This note does not cover the question of the necessity or sufficiency of the insurer's consent to the assignment by the insured of his claim for a loss which has occurred. Nor does it cover the effect of the insurer's consent to an assignment or change of ownership as a waiver of prior breaches of warranty or misrepresentations.
L.R.A.1917F.

The holding in *SWILLER v. HOME INS. Co.* ante, 1040, that the insurer did not by an indorsement of a mere consent to a change of ownership of the insured property, made after a loss had occurred, but without knowledge thereof, assume liability for such loss, is undoubtedly sound under a policy like the one involved in that case.

This conclusion is supported by the decision in *Harper v. Michigan Mut. T. C. & W. Ins. Co.* (1912) 173 Mich. 459, 139 N. W. 27. In that case the by-laws of a mutual insurance company provided that the insurance of a member should cease upon the sale of his property, but that he might assign his policy with the approval of the secretary. It was held that the insurance ceased on the date the insured property was sold, and that the grantee could not recover for a loss which occurred after the policy was assigned to him but before the secretary's approval of the assignment was secured, although the latter had knowledge of the loss when he entered his approval. The court said: "On the 18th, when, by virtue of the approval of the assignment, plaintiff for the first time became a member of the defendant organization, liable for its assessments and entitled to its benefits, he had no building to insure. Baldly stated, plaintiff's proposition is this: That, after his building was destroyed, he could effect an insurance upon it through the wrongful act of the secretary. This is not a case of waiver, and is not governed by the rules laid down in the many cases cited by plaintiff. It is a case where, if plaintiff's contention could prevail, defendant's secretary would be permitted to take \$1,500 from the members of this defendant organization and present it to plaintiff. This is not insurance. It is vicarious philanthropy. Section 3 of the by-laws forbids the defendant from insuring buildings not on a solid and secure foundation. At the time the insurance was effected (in plaintiff's interest), the building was in ruins, as shown by the exhibits. But it is unnecessary to have recourse to the policy. Public policy forbids the holding that the agent or officer of an insurance company possesses any such power. As well might it be claimed that, after a building had been destroyed by fire, the owner thereof could, after acquainting the agent with the fact, secure a policy which would cover his loss, upon the theory that the insurance company had waived the existence of the building because the agent knew it was already burned."

And in *Illinois F. Ins. Co. v. Stanton* (1870) 57 Ill. 354, where the policy provided that there could be no valid assignment unless the consent of the directors was certified on the policy, the court stated that it was sufficient if the policy was assigned by the consent of the directors previous to loss, implying L.R.A.1917F.

that assent thereafter would be of no avail.

In *Boynton v. Farmers' Mut. F. Ins. Co.* (1870) 43 Vt. 256, 5 Am. Rep. 276, where a policy insuring a property owner and his heirs and assigns provided that a sale of the property should avoid the policy, but that a grantee having the policy assigned might have it confirmed upon application to the directors and with their consent within thirty days after the sale, it was held that a grantee was entitled to recover in equity, where the property was transferred and the policy assigned to him before a loss occurred, and the insurer was notified of the loss, and was, within thirty days after the sale, although after the loss, requested to ratify and confirm the policy to the grantee, but arbitrarily refused to do so. The court held that the grantee's rights under the policy commenced at the time of assignment, and that he had thirty days after he purchased the property to perform the conditions as to ratification, and that during that time the insurance remained in force for his benefit.

In *Furbush v. Consolidated Patrons* (1908) 140 Iowa, 240, 118 N. W. 371, there was held to be a waiver of the requirement of the by-laws which included an indorsement of an assignment on the books of the company by the secretary, where the secretary in communications with the insured and his grantee gave permission to assign the policy to the latter and stated that it would be all right if the policy was sent in later, and an indorsement of the assignment was made before a fire occurred, but the policy was not taken to the secretary, or his approval indorsed on it, until after the loss. J. T. W.

WEST VIRGINIA SUPREME COURT OF APPEALS.

EDWARD P. MERRILL
v.

MARIETTA TORPEDO COMPANY, Plff.
in Err.

(— W. Va. —, 92 S. E. 112.)

Pleading — amendment — departure.

1. Amendment of a declaration in trespass by adding thereto additional counts,

Note.—The general subject of Workmen's Compensation Acts is discussed in a note in L.R.A.1916A, p. 23, which is supplemented by a note in L.R.A.1917D, p. 80.

As to the rights of an employee who while

Headnotes by WILLIAMS, J.

which aver with greater particularity and precision than was done in the original declaration the duty of defendant and the negligence causing the injury complained of, and increasing the damages, is no departure from the original cause of action.

For other cases, see Pleading, I. n, in Dig. 1-52 N. S.

Evidence — opinion — nonexpert.

2. A party is not prejudiced by the opinion evidence of witnesses, not competent as experts, if their opinions coincide with the opinions of the experts testifying for the opposite party.

For other cases, see Appeal and Error, VII. m, 3, a, (3), in Dig. 1-52 N. S.

Same — photograph — explosion.

3. Photographs of a building and its surroundings, taken after an explosion of nitroglycerin causing its wreck, are admissible to show the effect of the explosion, if identified either by the artist who took them or by some other person familiar with the scene.

For other cases, see Evidence, V. in Dig. 1-52 N. S.

Same — location of wound.

4. Where it is shown that another person working near by was instantly killed by an explosion that injured plaintiff, it is permissible to prove on what part of the body of deceased the fatal wound appeared.

For other cases, see Evidence, XI. j, in Dig. 1-52 N. S.

Trial — instruction.

5. The following instruction, applicable to the facts in this case, is approved: "The jury are further instructed that a person in the possession or control of nitroglycerin designed to be used by him is bound to the highest degree of care to take every reasonable precaution to prevent explosion."

For other cases, see Trial, III. e, 4, in Dig. 1-52 N. S.

Workmen's compensation — suit against stranger.

6. An employee who receives compensation for an injury from the workmen's compensation fund is not thereby estopped to sue a third person, not his employer, whose negligence caused his injury.

For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.

Master and servant — injury to stranger — liability.

7. The negligent performance of an act done within the scope of the servant's employment, causing injury to a stranger, renders the master liable. Private rules and instructions prescribed by the master to

govern his servant in the performance of his duty do not excuse the master.

For other cases, see Master and Servant, III. a, in Dig. 1-52 N. S.

New trial — newly discovered evidence.

8. After-discovered evidence which is only cumulative, and not of such character as will likely produce a different result on a new trial, or which simply tends to impeach the testimony of a witness, does not warrant setting aside a verdict.

For other cases, see New Trial, IV. in Dig. 1-52 N. S.

(February 27, 1917.)

ERROR to the Circuit Court for Roane County to review a judgment in plaintiff's favor in an action brought to recover damages for injuries caused by the explosion of nitroglycerin alleged to have been caused by the negligence of defendant's servant. Affirmed.

The facts are stated in the opinion.

Messrs. Pendleton, Mathews, & Bell for plaintiff in error.

Messrs. Ryan & Boggess and Charles E. Hogg, for defendant in error:

It was no objection to the filing of the amended declaration that it increased the amount of damages claimed in the original declaration.

Bentley v. Standard F. Ins. Co. 40 W. Va. 729, 23 S. E. 584; *Clark v. Ohio River R. Co.* 39 W. Va. 732, 20 S. E. 696; *Hogg, Pl. & Forms*, 3d ed. 153, and note 5.

While the original declaration, consisting of one count, is sufficient, every one of the counts in the declaration as amended is good, and under any of these counts all of the evidence was properly admissible.

Hill v. Norton, 74 W. Va. 428, 82 S. E. 363, 6 N. C. C. A. 455; *Laraway v. Croft Lumber Co.* 75 W. Va. 510, 84 S. E. 333.

The loss or diminution of capacity to follow one's usual business or employment, the rate of his earnings, the extent and nature of the business or employment of plaintiff, and his physical capacity to perform his work at the time of the injury may be shown in fixing the damages.

Alabama G. S. R. Co. v. Yarbrough, 83 Ala. 238, 3 Am. St. Rep. 715, 3 So. 447; *Walker v. Erie R. Co.* 63 Barb. 260; *Grant v. Brooklyn*, 41 Barb. 381; *Nebraska City*

engaged in his employment is injured by the negligence of a third person, see the annotation in L.R.A.1916A, pp. 100 and 225; and the annotation in L.R.A.1917D, at p. 98. The earlier cases upon this point are also reviewed in an annotation to *Peet v. Mills*, L.R.A.1916A, p. 360. An examination of the cases set out in these annotations discloses the fact that West Virginia is the only state in which the recovery of com-

pensation by an injured employee or his dependents will not prevent a recovery, in a common-law action, against a third person whose negligence causes the injury.

The decision in *Mercer v. Ott*, — W. Va. —, 89 S. E. 952, relied upon by the court in *MERRILL v. MARIETTA TORPEDO Co.* as authority for its decision, will be found set out at length in the annotation in L.R.A.1917D, p. 99, note 4.

v. Campbell, 2 Black, 590, 17 L. ed. 271; Chicago & J. Electric R. Co. v. Spence, 213 Ill. 220, 104 Am. St. Rep. 213, 72 N. E. 796; Goodhart v. Pennsylvania R. Co. 177 Pa. 1, 55 Am. St. Rep. 705, 35 Atl. 191; McHugh v. Schlosser, 159 Pa. 480, 23 L.R.A. 574, 39 Am. St. Rep. 699, 28 Atl. 291; Schwartz v. Shull, 45 W. Va. 405, 31 S. E. 914, 5 Am. Neg. Rep. 496; Riley v. West Virginia C. & P. R. Co. 27 W. Va. 145; Wilson v. Wheeling, 19 W. Va. 323, 42 Am. Rep. 780; Baker v. Manhattan R. Co. 118 N. Y. 533, 23 N. E. 885, 5 Am. Neg. Cas. 312; Leeds v. Metropolitan Gaslight Co. 90 N. Y. 26.

Testimony as to the injuries to the body of Clark McClain caused by said explosion and also testimony in rebuttal in connection with photographs referred to in the evidence, were admissible.

Rathbun v. White, 157 Cal. 248, 107 Pac. 309; Norfolk & A. Terminal Co. v. Morris, 101 Va. 422, 44 S. E. 719; Bettman v. Skinner, 113 Va. 24, 73 S. E. 436; Sutherland v. Gent, 116 Va. 783, 82 S. E. 713.

Plaintiff's failure to anticipate the negligence or fault of the defendant acting through its agent does not constitute contributory negligence.

Beach, Contrib. Neg. 2d ed. § 38; Hazard Powder Co. v. Volger, 7 C. C. A. 130, 12 U. S. App. 665, 58 Fed. 152; Marine Ins. Co. v. St. Louis, I. M. & S. R. Co. 41 Fed. 643.

The alleged acts of negligence occurred within the course of the employment of Norris, and therefore his acts are binding upon the corporation regardless of the instructions the defendant company may have given.

Wilton v. Middlesex R. Co. 107 Mass. 108, 9 Am. Rep. 11; Lake Shore & M. S. R. Co. v. Brown, 123 Ill. 162, 5 Am. St. Rep. 510, 14 N. E. 197; Higgins v. Watervliet Turnp. & R. Co. 46 N. Y. 23, 7 Am. Rep. 293; Illinois C. R. Co. v. Reedy, 17 Ill. 582; Toledo, W. & W. R. Co. v. Harmon, 47 Ill. 298, 95 Am. Dec. 489; Shea v. Sixth Ave. R. Co. 62 N. Y. 180, 20 Am. Rep. 480; Bryan v. Adler, 97 Wis. 124, 41 L.R.A. 658, 65 Am. St. Rep. 99, 72 N. W. 368.

The so-called newly discovered evidence presented in this case does not meet the conditions of the law authorizing the court to grant a new trial upon this ground.

Wynne v. Newman, 75 Va. 811; State v. Betsall, 11 W. Va. 703; Halstead v. Horton, 38 W. Va. 727, 18 S. E. 953; Carder v. Bank of West Virginia, 34 W. Va. 38, 11 S. E. 716; Arthur v. Chavis, 6 Rand. (Va.) 142; Smith v. McLain, 11 W. Va. 654; Corey v. Moore, 86 Va. 721, 11 S. E. 114; De Lima v. Glassell, 4 Hen. & M. 369; Strader v. Goff, 6 W. Va. 257; Lucas v. Locke, 11 W. Va. 81; Nadenbousch v. Sharer, 4 W. Va. 203; L.R.A.1917F.

State v. Booker, 98 W. Va. 8, 69 S. E. 295; State v. Stowers, 66 W. Va. 198, 66 S. E. 323; Jacobs v. Williams, 67 W. Va. 377, 67 S. E. 1113; State v. Huffman, 69 W. Va. 770, 73 S. E. 292; Sisler v. Shaffer, 43 W. Va. 771, 28 S. E. 721.

A court should never set aside a verdict and grant a new trial upon the ground of after-discovered evidence, unless the evidence is such that on the granting of a new trial its production ought to produce a different result.

Hall v. Lyons, 29 W. Va. 410, 1 S. E. 582; Field v. Com. 89 Va. 690, 16 S. E. 865; Cody v. Conly, 27 Gratt. 313; Traveler's Ins. Co. v. Harvey, 82 Va. 949, 5 S. E. 553; Lucas v. Locke, 11 W. Va. 81; Halstead v. Horton, 38 W. Va. 727, 18 S. E. 953; Bloss v. Hull, 27 W. Va. 503; Farmers' & S. Leaf Tobacco Warehouse Co. v. Pridemore, 55 W. Va. 451, 47 S. E. 258.

Williams, J., delivered the opinion of the court:

Plaintiff was employed by the Ohio Fuel Oil Company as a well driller, and on the 30th of March, 1914, while preparing to measure the depth of the well, preparatory to having it shot, he was injured by an accidental explosion of nitroglycerin, and in an action for the injury recovered a verdict and judgment against the Marietta Torpedo Company for \$5,000. By this writ of error it seeks reversal of the judgment.

Defendant is a corporation engaged in manufacturing nitroglycerin and shooting oil wells. It undertook for the Ohio Fuel Oil Company to shoot the well in question, known as "Jacob Reynolds well No. 3." It sent William Norris, one of its employees, to do the work. He arrived at the well in the afternoon of March 30th with 40 quarts of nitroglycerin put up in 8-quart cans. The fluid had to be transferred to another vessel, called a torpedo, lowered to the bottom of the well, and exploded. This process is understood among oil men as "shooting" a well. Norris brought the nitroglycerin to the well in a spring wagon, left it about 60 feet from the engine which operated the drill, unhitched his horses from the wagon, and tied them at a point farther away. It was necessary to measure the depth of the well to ascertain how far to lower the torpedo before exploding it, and plaintiff was assisting in making the necessary preparations to take the measurement when he was injured. The nitroglycerin was frozen, and it was necessary to thaw it out before it could be put into the torpedo. It is proven, and not controverted, that the usual method of thawing it is to immerse the cans in water, which has first been heated to a temperature of from 120° to 160°. Plaintiff

and Clark McClain, his fellow servant, got a barrel at the derrick, which stood some distance away from the engine, and took it to the engine shed, removed a board from the side of the shed, and placed the barrel so that the bottom rested partly on the floor of the engine shed and partly on a board walk on the outside, but on the same level with the floor. Norris and McClain then got some pieces of steam pipe and connected the engine with the barrel, by means of a joint or ell extending it down to the bottom of the barrel for the purpose of heating the water. While they were thus engaged plaintiff says he filled the barrel with water and went to the derrick. After the pipe was arranged, Norris says McClain turned the steam into the barrel, and in the meantime he went to his wagon, got two cans of nitroglycerin, and carried them down to the engine and placed them on the ground between the barrel and a large water tank near by, about 3 or 4 feet from the barrel, and about 2 feet from the tank. The cans were about 16 inches long, and he swears he laid them down, so they could not fall over, and then examined the water. Finding it warm enough, he says he told McClain to cut off the steam and remove the pipe from the barrel, and immediately returned to the wagon to get more nitroglycerin, so that he could thaw it all at one time. Just as he got to the wagon and had picked up two more cans, the explosion occurred at the engine shed. McClain was killed instantly, and plaintiff was severely injured by it. The only eyewitnesses to what occurred about the time of the accident are plaintiff and Norris. They differ materially on the vital point as to whether the nitroglycerin exploded on the ground or in the barrel. According to plaintiff's testimony, McClain was at the derrick and returned with him to the engine after two cans had been placed in the barrel of water and while the steam was still escaping into it. He says when he got back to the engine he saw two cans of nitroglycerin suspended in the barrel by strings or pieces of rope, tied to nails driven in the top of the barrel staves, and noticed the water bubbling up in the barrel; that he went to the flywheel of the engine, and was preparing to attach some clamps to it preparatory to unwinding the measuring line to get the depth of the well; that he had sent McClain around to the tool box, on the opposite side of the engine, to get a wrench; that there was a part of the clamp he did not understand, and just as he was about to call to Norris, who was then at the wagon, to ask him how to use it, the explosion occurred. Mr. Norris is equally positive in his testimony that he did not place the cans in the barrel, but laid them carefully on the ground, and returned to

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the wagon to get two more cans, in order to thaw all of the nitroglycerin at once; that after he placed the cans on the ground he examined the water, and finding it of the proper temperature, he told McClain to cut off the steam and take the pipe out of the barrel; that he had attached the joint of pipe that went down in the barrel with his hands; and that McClain was disconnecting it with his hands as he was returning to the wagon. It is proven, and not denied, that Mr. Norris had had an experience in the dangerous work of shooting wells for a period of four years, and in that time had shot about four hundred wells; that before being intrusted with this hazardous work he had had an experience and training in the factory for eight years. His competency is fully proven, and according to his own testimony he was abundantly cautious on this occasion. But there is no evidence to prove what knowledge or experience, if any, McClain had with respect to the degree of care required in working about so dangerous an agency as nitroglycerin.

The plaintiff's theory is that the cans were immersed in the barrel of cold water and the steam then turned into it, and that the action of the steam produced such commotion in the water as to cause the cans to strike against each other or against the sides of the barrel with sufficient force to produce the explosion. On that theory, to prove which there is ample evidence to go to the jury, defendant is liable, for it is clearly proven that such method of thawing nitroglycerin is unusual and dangerous, and therefore a negligent way of handling it.

On the other hand, defendant's theory is that its agent Norris was careful and competent; that he was very careful on this occasion, and placed the two cans of nitroglycerin on the ground, and did not place them in the barrel; that he told McClain to cut off the steam and disconnect the pipes, a work not attended with any danger; that the explosion was caused by his carelessly dropping or throwing something on the cans as they lay upon the ground; and that his act being the act of plaintiff's fellow servant, it is not liable. Plaintiff and McClain were fellow servants, both being employed by the Ohio Fuel Oil Company, and neither of them was a fellow servant with Norris. He was employed by defendant and sent out to do a particularly dangerous work. Although plaintiff admits it was a part of his duty, according to the custom among well drillers, to help take the measurement of the well and prepare the water for thawing the nitroglycerin, it was no part of his duty to assist in handling the nitroglycerin itself; and notwithstanding he says he saw the ni-

troglycerin in the barrel and the water in commotion, he is not chargeable with negligence, because he says he did not know that was a dangerous way to thaw it, although he does say he never saw it thawed in that manner before. Knowledge of the danger is essential to charge a person with assumption of its risk.

There is ample evidence to support either theory of the case, but it is very conflicting. Plaintiff and defendant's agent Norris, while they agree in respect to many unimportant matters, are equally positive in their widely different statements respecting the vital fact which is determinative of the question of negligence; that is, did the explosion occur in the barrel while the steam from the engine was flowing into it, or did it occur on the ground, where Norris says he carefully placed the cans? The jury alone were authorized to determine this vital question from the conflicting testimony, and in view of some of defendant's instructions which the court gave, the effect of which was to tell the jury that if they believed defendant's theory they should find in its favor, it is very clear that they chose to accept plaintiff's theory of the case. According to plaintiff's testimony, McClain could not have been the person who suspended the cans in the barrel; for he swears McClain was with him at the derrick and returned with him to the engine just before the explosion.

The court instructed the jury that if they believed Norris carried the two cans of nitroglycerin to the place where it was to be thawed and carefully laid it on the ground, and while he was away they were exploded by some third person, or by some other agency over which he had no control, the defendant was not liable. It also instructed them if they believed from the evidence the cause of the explosion was wholly a matter of conjecture and doubt they must find for the defendant. So that in reaching their verdict the jury must have believed plaintiff's testimony and disbelieved the testimony of Mr. Norris.

Plaintiff was permitted to amend his declaration, and did so by adding thereto five additional counts, and by enlarging his damages to \$20,000, instead of \$10,000, as in his original declaration: and the overruling of defendant's demurrer to the amended declaration is assigned as error. It is insisted that it in effect alleges a new cause of action. The amended counts simply describe with more particularity the manner in which the injury occurred than was done in the original declaration. It was clearly no departure from the original declaration, either in respect to the averments of defendant's duty in the premises, or the acts

of negligence complained of. The amendment is beneficial rather than prejudicial to the defendant, because it more certainly informs it of the particular acts of negligence which plaintiff expected to prove. Increasing the damages certainly constituted no new cause of action. Courts are very liberal in allowing a plaintiff to amend so long as there is no departure from the original cause of action. There is no departure in this case. Increasing the amount of damages is not a departure. *Bentley v. Standard F. Ins. Co.* 40 W. Va. 729, 23 S. E. 584; *Clarke v. Ohio River R. Co.* 39 W. Va. 732, 20 S. E. 696; and *Hoggs, Pl. & Forms*, § 190, note 5.

Objection was made to the testimony of K. K. McCormick and W. H. Howard, who were examined as experts concerning the constituent elements of nitroglycerin, at what temperature it froze, and what would be regarded as a safe method of thawing it. The former was a school-teacher, and had studied chemistry in a laboratory at college, and the latter was a civil engineer, and had superintended construction work where dynamite and nitroglycerin were used in blasting. But neither had had any actual experience in handling it. We are not called upon to determine whether these witnesses were shown to possess sufficient knowledge to entitle them to give their opinions as experts, for the reason that it is clear their testimony has not prejudiced defendant. Its own witnesses prove that the method which plaintiff says was employed to thaw the nitroglycerin (and which the jury evidently found to be the fact) was dangerous. Mr. Norris himself was examined concerning the danger of turning steam into cold water with cans of nitroglycerin in it, and says it was considered dangerous, and that he never did it on any occasion. Mr. Albert Oppenheim, manager, secretary, and treasurer of the defendant company, testified in its behalf. In the course of his testimony he names the constituent elements of nitroglycerin, explains the method employed by his company in its manufacture, and said the men who were employed to handle it were carefully instructed as to how it should be handled; that when a man is sent out to shoot a well, he is not allowed to have another man to assist him; that a second man could be of no assistance. He also stated that the rule to be observed in thawing nitroglycerin was to immerse it in water first heated to a temperature of 120° to 160°. *John R. Kuhn and J. E. Hines*, both witnesses for defendant and experienced oil well shooters, testified to the same effect. The same vital fact testified to by plaintiff's witnesses, whose competency is questioned, being proven by defendant's expert wit-

nesses, it follows that it could not be prejudiced by the concurring testimony of non-expert witnesses.

Objection was made to the introduction of four or five photographs of the engine and grounds, taken after the explosion had occurred, for the alleged reason they were not properly identified, or proven to be exact pictures of the place. Although Henry Vineyard, who took the photographs, is not as positive as he might have been that they were the same pictures which he took, because he says they had been out of his hands for a while, yet he says they appear to be the same.

He was asked:

What can you say about it? Is it correct or not?

A. It looks like it is correct. I don't see anything wrong with it. There is a little scratched place here.

Q. Does that represent the ground and scene there just as it existed?

A. Yes, sir.

In another place he says: "I have no doubt that this is one of my pictures, although it has been out of my hands."

He identifies in the picture a part of the water tank that was left standing after the explosion. Ross Belt, another witness for plaintiff, identified an oil barrel lying on the ground, shown in one of the pictures, which was not destroyed by the explosion, and which he says he saw just shortly before the explosion. He also pointed out, on one of them, the bottom of the barrel that had been used in thawing the nitroglycerin, and which, he says, had the staves broken off by the explosion to within 6 or 8 inches of the bottom. We think this testimony, viewed in connection with the appearances of the photographs, sufficiently identifies them, and shows that they are true photographs of the place and its surroundings, and that they were taken after the explosion. They were offered simply to show the violence of the explosion and the effect it produced upon the engine house and water tank near by. They furnished no evidence upon the vital question in the case, but were admissible as evidence tending to prove the great force of the explosion.

Ross Belt was at the engine house just before the explosion, and was about 150 yards away at the instant it occurred. He was permitted to testify, over defendant's objection, that the greatest injury to McClain's body was about his head; that the front part of his head was blown off. This was a proper circumstance to go to the jury in support of plaintiff's theory and in refutation of defendant's. If the explosion had taken place on the ground the probability

is the greatest injury would have been done to the lower part of his body.

The court gave six instructions at the request of plaintiff, to the giving of each of which defendant objected. We have carefully considered them, and find they state the law applicable to the case. Plaintiff's No. 3, of which serious complaint is made, reads as follows: "The jury are further instructed that a person in the possession or control of nitroglycerin designed to be used by him is bound to the highest degree of care to take every reasonable precaution to prevent explosion."

The degree of care required in handling a dangerous agency, in order to prevent injury to third persons, must be commensurate with the apparent danger, because no less degree of care would be reasonable. Hence, in handling so dangerous an explosive as nitroglycerin, a very high degree of care, as compared with the caution required in performing a less dangerous work, is only reasonable care. The term "highest degree of care," as used in the instruction, is qualified by the phrase that follows it, "to take every reasonable precaution to prevent explosion." Handling nitroglycerin is an extremely hazardous business, and requires skill and a very high degree of care. *Morrison v. Appalachian Power Co.* 75 W. Va. 608, 84 S. E. 506; *Mattson v. Minnesota & N. W. R. Co.* 95 Minn. 477, 70 L.R.A. 503, 111 Am. St. Rep. 483, 104 N. W. 443, 5 Ann. Cas. 498, 18 Am. Neg. Rep. 511; *Sowers v. McManus*, 214 Pa. 244, 63 Atl. 601; *Pittsburgh, C. & St. L. R. Co. v. Shields*, 47 Ohio St. 387, 8 L.R.A. 464, 21 Am. St. Rep. 840, 24 N. E. 658; *Rush v. Spokane Falls & N. R. Co.* 23 Wash. 501, 63 Pac. 500. In defining what is reasonable care in handling nitroglycerin and dynamite, some of the foregoing authorities use the term "utmost degree of care," and others the "highest degree of care."

The defendant asked for sixteen instructions, all of which were given except three, designated as A, Nos. 7 and 15. A was a peremptory instruction to find for the defendant, and, of course, was properly refused. No. 7 was to the effect that, as it was proven the Ohio Fuel Oil Company had complied with the act of the legislature known as the Workmen's Compensation Act (Code 1913, chap. 15P [§§ 657-711]), and plaintiff, its employee, had applied for and received compensation on account of his injury from the fund provided by that act, he is thereby estopped to recover in this action. We have recently decided the question presented by this instruction adversely to defendant's contention, in *Mercer v. Ott*, — W. Va. —, 89 S. E. 952, and inasmuch as the question here presented is identical with

the one there decided, it is only necessary to refer to that case.

Plaintiff's injury was not due to the negligence of his employer, but, according to the finding of the jury, to the negligence of defendant, an independent contractor to do a particular work. The Compensation Act does not deny right of action to a workman for injury received in the course of his employment, unless the negligence is that of the master, or such for which the master was liable at the common law. If the employee is injured in the course of his employment he is entitled to compensation out of the fund whether his injury was occasioned by the negligence of the master or not; if occasioned by the negligence of a third person his right to compensation out of the fund is not thereby affected, nor is his right of action against such third person causing the injury impaired. The provision of the act is somewhat in the nature of life and accident insurance. That a person may be protected by accident insurance, and at the same time have right of action against the person whose negligence produced the accident resulting in his injury, is well settled.

No. 15 would have told the jury that if they found from the evidence the defendant company had prescribed certain rules to be observed by its agents in handling nitroglycerin, and Norris had disobeyed its rules and instructions, and thereby caused the explosion, it was not liable for such negligent act of its agent. This is not the law. Norris was defendant's agent to perform a certain work, and was acting within the scope of his authority in performing the act which caused plaintiff's injury. Hence his disobedience, if he did fail to observe the rules and instructions prescribed by defendant to govern his conduct in performing that particular work, would not relieve defendant from liability. Those rules were defendant's private instructions to its agent, and there is no evidence that plaintiff knew what they were, and he could not be said to have assumed the risk of their violation. *Wilton v. Middlesex R. Co.* 107 Mass. 108, 9 Am. Rep. 11; *Lake Shore & M. S. R. Co. v. Brown*, 123 Ill. 162, 5 Am. St. Rep. 510, 14 N. E. 197.

"A master is liable in a civil action for injuries occasioned by the unlawful act of his servants, done under a mistake of facts, or a mistake of judgment upon the facts, in the course of the business of the master, although the servant in doing the act departed from the instructions of the master." *Higgins v. Watervliet Turnp. & R. Co.* 46 N. Y. 23, 7 Am. Rep. 293.

The court's refusal to set aside the verdict as being excessive, and on the ground L.R.A.1917F.

of after-discovered evidence, is also assigned as error. Plaintiff was severely injured. The doctor who attended him says there were many injuries on his body, some of them severe. The scalp on one side was loosened from the skull, and his hearing in one ear was entirely destroyed. He was rendered unconscious, and remained in that condition for a long time, was taken to the hospital at Spencer and treated there for about five weeks before he was able to get out. In view of his injuries, we cannot say the jury's assessment is exorbitant.

The after-discovered evidence relates to the presence of a hole in the ground about the point where defendant contends the explosion took place. The affidavit of Bert Bergwyn states that on the 30th of March, a short time after the explosion took place, while working around the place, he stepped in a hole filled with mud and water, and that this point is between the place where the water tank stood and the engine house. This evidence would tend to locate the hole about where witness Norris says he placed the cans of nitroglycerin on the ground. Taken in connection with the fact proven that the bottom portion of the barrel was seen by witness Belt after the explosion, showing it to have been impossible for the explosion to take place in the barrel and produce the hole in the ground, it is insisted that the evidence is very material. In the first place, it is not proven the hole was produced by the explosion. Bergwyn does not say it was not there before; he only says he did not see it before. In the next place, assuming it was not there before the explosion, it is a circumstance in no wise conclusive, and would tend only to corroborate witness Norris and contradict plaintiff, who swears positively he saw the cans in the barrel only a minute or two before the explosion. It is only cumulative in character, and cannot be said to be of sufficient probative value to be likely to produce a different result on another trial. Moreover, affiant was examined as a witness for defendant, and, even assuming the affidavits of Mr. Oppenheim, Mr. Goe, and of the members of the firm of Pendleton, Mathews, & Bell, counsel for defendant, are sufficient to show due diligence in procuring evidence material to the defense, still this after-discovered evidence is not of sufficient importance to warrant setting aside the verdict. A verdict should not be set aside to let in after-discovered evidence which is merely corroborative or contradictory of some witness, and which is not of such character as the court can see ought to produce a different result on a new trial. *Sisler v. Shaffer*, 43 W. Va. 769, 28 S. E. 721, and *Stewart v. Doak Bros* 58 W. Va. 172, 52 S. E. 95.

"A new trial will not be granted on the ground of after-discovered evidence when it does not appear that such evidence could not have been discovered by due diligence before verdict, nor when it is merely cumulative, or tends to contradict or discredit a witness on the former trial, and is not decisive in its character." *Carder v. Bank*

of West Virginia, 34 W. Va. 88, 11 S. E. 716.

Other assignments are governed by the points herein decided.

The judgment is affirmed.

Petition for rehearing denied April 10, 1917.

MINNESOTA SUPREME COURT.

STATE OF MINNESOTA EX REL. SAMUEL LACHTMAN, Appt.,

v.

JAMES G. HOUGHTON, as Inspector of Buildings of Minneapolis, Resp't.

(134 Minn. 226, 158 N. W. 1017.)

Municipal corporations — ordinance — validity.

1. Although an ordinance adopted under legislative authority is presumed to be valid, it must nevertheless be declared invalid if it clearly impairs rights guaranteed by the Constitution.

For other cases, see Evidence, II. a; Municipal Corporations, II. c, 4, a, in Dig. 1-52 N. S.

Constitutional law — restricting use of property.

2. The use which the owner may make of his property is subject to any reasonable restrictions and regulations, imposed by the legislative power, which tends to promote the public welfare or to secure to others the rightful use and enjoyment of their own property; but only such use of property as may produce injurious consequences or infringe the lawful rights of others can be prohibited without violating the constitutional provisions that the owner shall not be deprived of his property without due process of law, nor without compensation first paid or secured.

For other cases, see Constitutional Law, II. b, 2; Eminent Domain, III. c, 1, in Dig. 1-52 N. S.

Same — store in residential district.

3. Prohibiting the owner from erecting a store building upon land within a residential district cannot be sustained as a legitimate exercise of the police power, and is an unlawful invasion of the rights secured to him by the Constitution.

For other cases, see Constitutional Law, II. c, 3, in Dig. 1-52 N. S.

(Hallam and Holt, JJ., dissent.)

(July 28, 1916.)

Headnotes by TAYLOR, C.

Note. — For validity of public restriction as to the location of mercantile business, see annotation following this case, post, 1060.
L.R.A.1917F.

APPPEAL by relator from a judgment of the District Court for Hennepin County denying a writ of mandamus to compel defendant to issue a permit for the installation of electrical appliances in a building erected by relator. Reversed.

The facts are stated in the Commissioner's opinion.

Messrs. George B. Leonard and M. Rose, for appellant:

An ordinance establishing a residential section and prohibiting therein the maintenance of any business whatsoever is induced solely by ornamental and esthetic considerations, and is an act not under the police power, but under the right of eminent domain.

Quintin v. Bay St. Louis, 64 Miss. 483, 60 Am. Rep. 62, 1 So. 625; *Re Chestnut Street*, 118 Pa. 593, 12 Atl. 585; *Bostock v. Sams*, 95 Md. 400, 59 L.R.A. 282, 98 Am. St. Rep. 394, 52 Atl. 665; *St. Louis v. Dorr*, 145 Mo. 466, 42 L.R.A. 686, 68 Am. St. Rep. 575, 41 S. W. 1094, 46 S. W. 976; *Welch v. Swasey*, 193 Mass. 364, 23 L.R.A.(N.S.) 1160, 118 Am. St. Rep. 523, 79 N. E. 745; *Chicago v. Netcher*, 183 Ill. 104, 48 L.R.A. 261, 75 Am. St. Rep. 93, 55 N. E. 707; *Com. v. Boston Adv. Co.* 188 Mass. 348, 69 L.R.A. 817, 108 Am. St. Rep. 404, 74 N. E. 601; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; 2 Dill. Mun. Corp. 1058; *State v. Whitlock*, 149 N. C. 542, 128 Am. St. Rep. 670, 63 S. E. 123, 16 Ann. Cas. 765; *Varney & Green v. Williams*, 155 Cal. 318, 21 L.R.A.(N.S.) 741, 132 Am. St. Rep. 88, 100 Pac. 867; *Curran Bill Posting & Distributing Co. v. Denver*, 47 Colo. 221, 27 L.R.A.(N.S.) 544, 107 Pac. 261; *Haller Sign Works v. Physical Culture Training School*, 249 Ill. 436, 34 L.R.A.(N.S.) 998, 94 N. E. 920; *Chicago v. Gunning System*, 214 Ill. 628, 70 L.R.A. 230, 73 N. E. 1035, 2 Ann. Cas. 892; *People v. Green*, 85 App. Div. 400, 83 N. Y. Supp. 460; *People ex rel. Wineburgh Adv. Co. v. Murphy*, 195 N. Y. 126, 21 L.R.A.(N.S.) 735, 88 N. E. 17; *Passaic v. Paterson Bill Posting, Adv. & Sign Painting Co.* 72 N. J. L. 285, 111 Am. St. Rep. 676, 62 Atl. 267, 5 Ann. Cas. 995; *Bill Posting Sign Co. v. Atlantic City*, 71 N. J. L. 72, 58 Atl. 342; *Crawford v. Topeka*, 51 Kan. 766, 26 L.R.A. 692, 37 Am. St. Rep. 323, 33 Pac. 476; *St. Louis v.*

Hill, 116 Mo. 527, 21 L.R.A. 226, 22 S. W. 861.

The attempted restriction on the use of plaintiff's property was void.

Buffalo v. Chadeayne, 134 N. Y. 163, 31 N. E. 443; Lowell v. Archambault, 189 Mass. 70, 1 L.R.A. (N.S.) 458, 75 N. E. 65; Dainese v. Cooke (Dainese v. Public Works) 91 U. S. 580, 23 L. ed. 251; Barre v. Perry, 82 Vt. 301, 73 Atl. 577; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; Gallagher v. Flury, 99 Md. 181, 57 Atl. 672; Old Colony & F. River R. Co. v. Plymouth County, 14 Gray, 155; Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557; Stockdale v. Rio Grande Western R. Co. 28 Utah, 201, 77 Pac. 849; 1 Lewis, Em. Dom. §§ 56, 65, 141, 226; St. Louis v. Hill, 116 Mo. 527, 21 L.R.A. 226, 22 S. W. 861; State v. Chicago, M. & St. P. R. Co. 36 Minn. 402, 31 N. W. 365; Woodruff v. Glendale, 26 Minn. 78, 1 N. W. 581; State v. Bruggerman, 31 Minn. 493, 18 N. W. 454; Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 132, 144, 53 L. ed. 441, 446, 29 Sup. Ct. Rep. 246; Ash v. Cummings, 50 N. H. 591; Moody v. Jacksonville, T. & K. W. R. Co. 20 Fla. 597; Ex parte Martin, 13 Ark. 198, 58 Am. Dec. 321; Chapman v. Gates, 54 N. Y. 132; Connecticut River R. Co. v. Franklin County, 127 Mass. 50, 34 Am. Rep. 338; Langford v. Ramsey County, 16 Minn. 375, Gil. 333.

Messrs. C. D. Gould and R. S. Wiggin, for respondent:

Express legislative authority to pass the ordinance in question was conferred by statute.

People ex rel. Keller v. Oak Park, 266 Ill. 365, 107 N. E. 636; State, Consolidated Traction Co. Prosecutor v. Elizabeth, 58 N. J. L. 619, 32 L.R.A. 170, 34 Atl. 146; State ex rel. Krittenbrink v. Withnell, 91 Neb. 101, 40 L.R.A. (N.S.) 898, 135 N. W. 376; State v. Barge, 82 Minn. 256, 53 L.R.A. 423, 84 N. W. 911; State v. Taubert, 126 Minn. 371, 148 N. W. 281; Twin City Separator Co. v. Chicago, M. & St. P. R. Co. 118 Minn. 491; 2 Dill. Mun. Corp. § 591; Ex parte Haskell, 112 Cal. 412, 32 L.R.A. 527, 44 Pac. 725; Cronin v. People, 82 N. Y. 318, 37 Am. Rep. 564; Bacon v. Walker, 204 U. S. 317, 51 L. ed. 502, 27 Sup. Ct. Rep. 289; West Conshohocken v. Conshohocken Electric Light & P. Co. 29 Pa. Super. Ct. Rep. 7.

No person can acquire a vested right to enter into or continue in an occupation subject to regulation under the police power, and this business being one which, by express legislative enactment, was subject to regulation under the police power, relator cannot acquire any vested right by the issuance of a permit.

State v. Hovorka, 100 Minn. 249, 8 L.R.A. L.R.A.1917F.

(N.S.) 1272, 110 N. W. 870, 10 Ann. Cas. 398; People v. Schafran, 168 Mich. 324, 134 N. W. 29; Cole v. Culbertson, 86 Neb. 160, 125 N. W. 287; Salem v. Maynes, 123 Mass. 372; Knoxville v. Bird, 12 Lea, 121, 47 Am. Rep. 326; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; L'Hote v. New Orleans, 177 U. S. 598, 44 L. ed. 904, 20 Sup. Ct. Rep. 788; Reinman v. Little Rock, 237 U. S. 171, 59 L. ed. 900, 35 Sup. Ct. Rep. 511.

The police power is gradually being broadened to include everything conducive to the public welfare and public convenience.

State v. Chicago, M. & St. P. R. Co. 114 Minn. 122, 33 L.R.A. (N.S.) 494, 130 N. W. 545, Ann. Cas. 1912B, 1030; Chicago, M. & St. P. R. Co. v. Minneapolis, 115 Minn. 460, 51 L.R.A. (N.S.) 236, 133 N. W. 169, Ann. Cas. 1912D, 1029; Eubank v. Richmond, 226 U. S. 137, 57 L. ed. 156, 42 L.R.A. (N.S.) 1123, 33 Sup. Ct. Rep. 76, Ann. Cas. 1914B, 192; Welch v. Swasey, 214 U. S. 91, 53 L. ed. 923, 29 Sup. Ct. Rep. 567; Hudson County Water Co. v. McCarter, 209 U. S. 349, 52 L. ed. 828, 28 Sup. Ct. Rep. 529, 14 Ann. Cas. 560; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; Bacon v. Walker, 204 U. S. 311, 51 L. ed. 499, 27 Sup. Ct. Rep. 289; Schmidinger v. Chicago, 226 U. S. 578, 57 L. ed. 364, 33 Sup. Ct. Rep. 182, Ann. Cas. 1914B, 284; State ex rel. Krittenbrink v. Withnell, 91 Neb. 101, 40 L.R.A. (N.S.) 898, 135 N. W. 376; Re Montgomery, 163 Cal. 457, 125 Pac. 1070, Ann. Cas. 1914A, 130; Ex parte Hada-check, 165 Cal. 416, L.R.A.1916B, 1248, 132 Pac. 584; Ex parte Quong Wo, 161 Cal. 220, 118 Pac. 714; Cochran v. Preston, 108 Md. 220, 23 L.R.A. (N.S.) 1163, 129 Am. St. Rep. 432, 70 Atl. 113, 15 Ann. Cas. 1048; State v. Gurry, 121 Md. 534, 47 L.R.A. (N.S.) 1087, 88 Atl. 546, Ann. Cas. 1915B, 957; People ex rel. Busching v. Ericsson, 263 Ill. 368, L.R.A. 1915D, 607, 105 N. E. 315, Ann. Cas. 1915C, 183; People ex rel. Keller v. Oak Park, 266 Ill. 365, 107 N. E. 636; State v. Taubert, 126 Minn. 371, 148 N. W. 281.

Ordinances are presumed to be valid, and are not to be set aside by the courts unless the invalidity is clear; and the burden of showing their invalidity is upon the person attacking the ordinance.

State v. Taubert, supra; People ex rel. Keller v. Oak Park, 266 Ill. 365, 107 N. E. 636; State ex rel. Krittenbrink v. Withnell,

91 Neb. 101, 40 L.R.A. (N.S.) 898, 135 N. W. 376.

Taylor, C., filed the following opinion:

The relator owns two lots on Fourteenth avenue south in the city of Minneapolis, and, on August 12, 1915, procured from the building inspector of that city a permit for the erection of a small one-story store building thereon. Immediately thereafter, he contracted with the Hennepin Lumber Company to erect the building, and also executed to Aaron Rudoy a lease of the building so to be erected for a term of two years for use as a store. Pursuant to the contract and before August 20, 1915, the contractor began excavating for the building and delivered some materials therefor upon the premises. On August 20, 1915, the city council passed an ordinance establishing a residential district which provided that "no person shall hereafter erect within said district any building except those used for residence purposes, including duplex and double houses, flats, tenement and apartment houses, and there are hereby prohibited within said district the erection and maintenance of hotels, stores, factories, warehouses, dry cleaning plants, public garages or stables, or any industrial establishment or any business whatsoever."

The relator's property was within the residential district so established, and, at the same meeting at which the ordinance was adopted, the city council, by motion, directed the building inspector to revoke the permit issued to him for the erection of the store building. It does not appear that the building inspector took any action toward revoking the permit, and the relator completed the building ready for the installation of wires and other appliances for lighting it by electricity. The ordinances of the city prohibit the installation of such appliances without a permit therefor from the building inspector, and relator applied to him for such permit. He refused to issue it upon the sole ground that the erection and maintenance of a store building was prohibited by the ordinance above quoted. Thereupon relator sought to compel the issuance of the permit by mandamus. The district court rendered judgment against him and he appealed.

Relator contends that the ordinance infringes the provision of the state Constitution prohibiting the taking or damaging of private property for public use without compensation, and the provision of the United States Constitution prohibiting the state from depriving any person of his property without due process of law; also, that when he obtained his permit and began construction thereunder he acquired a vested right to erect and maintain his

building which could not be impaired by an ordinance adopted thereafter. Respondent contends that the ordinance was enacted under the police power of the state and is a proper exercise of that power.

The city had legislative authority for adopting the ordinance (Gen Stat. 1913, §§ 1581-1585); and the question presented is whether it violates rights secured to property owners by the Constitution, or whether it can be sustained as a legitimate exercise of the police power. It is presumed to be valid and will not be declared invalid unless it clearly transgresses some constitutional inhibition. The legislature has power to regulate and restrict the manner in which the owner may make use of his property so far as may be necessary for the general welfare; but such regulations and restrictions must tend in some degree to prevent harm to the public or to promote the common good, and must not unreasonably impair or abridge his property rights. In *State ex rel. Beck v. Wagener*, 77 Minn. 483, 46 L.R.A. 442, 77 Am. St. Rep. 681, 80 N. W. 633, 778, 1134, in which the validity of the statute regulating the business of persons selling agricultural products on commission was upheld, it is said: "The term 'police power,' as understood in American constitutional law, means simply the power to impose such restrictions upon private rights as are practically necessary for the general welfare of all. *Rippe v. Becker*, 56 Minn. 100, 22 L.R.A. 857, 57 N. W. 331. And it must be confined to such restrictions and burdens as are thus necessary to promote the public welfare; or, in other words, to prevent the infliction of public injury. *State v. Chicago, M. & St. P. R. Co.* 68 Minn. 381, 38 L.R.A. 672, 64 Am. St. Rep. 482, 71 N. W. 400. And in the exercise of its police powers a state is not confined to matters relating strictly to the public health, morals, and peace, but, as has been said, there may be interference whenever the public interests demand it; and in this particular a large discretion is necessarily vested in the legislature, to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests. *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499. If, then, any business becomes of such a character as to be sufficiently affected with public interest, there may be a legislative interference and regulation of it in order to secure the general comfort, health, and prosperity of the state, provided the measures adopted do not conflict with constitutional provisions, and have some relation to, and some tendency to accomplish, the desired end. The subjects which may be legislated upon are, of

necessity, continually arising as business increases and new phases, conditions, and methods appear. The development of the law relating to the proper exercise of the police power of the state clearly demonstrates that it is very broad and comprehensive, and is exercised to promote the general welfare of the state, as well as its health and comfort."

It is well settled that under this power cities may regulate and control the construction of buildings in the interest of health and safety and for the purpose of guarding against fires, and to accomplish this end may prohibit the erection of any building without first obtaining a permit therefor. To promote the general well-being, cities may also prescribe districts within which no business or occupation of a noxious or offensive character, or which tends to interfere with the comfort and prosperity of others may be carried on. The dividing line between restrictions which may be lawfully imposed under the police power and those which invade the rights secured to the property owner by the constitutional provisions that his property shall not be taken or damaged without compensation, nor he be deprived of it without due process of law, has never been distinctly marked out, and probably cannot be. As different cases arise, the courts determine from the facts and circumstances of the particular case whether it falls upon one side or the other of the line. The rule governing the exercise of the police power and defining the duty of the courts in respect thereto is stated in general terms in *State v. Chicago, M. & St. P. R. Co.* supra, as follows: "While the police power of the state is a very extensive one, it is not without limits. A law enacted in the exercise of the police power must be a police regulation in fact. If it will not conduce to any legitimate police purpose, or if it amounts to an arbitrary and unwarranted interference with the right of the citizen to pursue any lawful business, the courts have a right, and it is their duty, to declare the law unconstitutional."

Of the cases cited by the city as supporting its contention that the erection of store buildings in residential districts may be prohibited under the police power, the following are the most nearly in point: In *Re Montgomery*, 163 Cal. 457, 125 Pac. 1070, Ann. Cas. 1914A, 130, *Montgomery* had been convicted of maintaining a lumber yard in a residence district of the city of Los Angeles in violation of an ordinance which enumerated several industrial districts, declared the remainder of the city to be a residence district, and prohibited establishing or maintaining within the residence district, "any stone crusher, rolling

mill, machine shop, planing mill, carpet-beating establishment, hay barn, woodyard, lumber yard, public laundry, or washhouse." The court did not discuss the constitutional question further than to say that the ordinance had been held constitutional in *Ex parte Quong Wo*, 161 Cal. 220, 118 Pac. 714, and that what was there said applied with equal force to this case. Turning to the case cited we find an extended discussion of the question and of the cases in that state and elsewhere bearing thereon; and that the decision was placed upon the ground that the occupations enumerated in the ordinance were proper matters for police regulation in the interest of the health, safety, and comfort of the people of the city. The court said: "The design of the ordinance here involved undoubtedly was to protect such portions of the city of Los Angeles as are devoted principally to residence purposes from the dangers and discomfort attendant upon the operation of certain kinds of business which, while not necessarily nuisances per se, have always been recognized as proper subjects of police regulation. We do not feel warranted in saying that, as to public laundries and washhouses, the conclusion of the city council was clearly unreasonable."

People ex rel. Keller v. Oak Park, 266 Ill. 365, 107 N. E. 636, involved an ordinance prohibiting the erection or maintenance of a public automobile garage within certain districts. The court considered the rule which applied to livery stables and similar kinds of business applicable, and held the ordinance constitutional, saying "that while a garage is not a nuisance per se, it is of such character that it becomes a nuisance when conducted in particular localities and under certain conditions, and that it was lawful for the legislature to confer authority upon cities to direct its location."

In *People ex rel. Friend v. Chicago*, 261 Ill. 16, 49 L.R.A. (N.S.) 438, 103 N. E. 609, Ann. Cas. 1915A, 292 (not cited), the same court had under consideration an ordinance of the city of Chicago prohibiting the erection of a retail store in any block in which all the buildings were used exclusively for residence purposes, and said:

"An act of the legislature which deprives the citizen of his liberty or property rights cannot be sustained under the police power unless the public health, comfort, safety, or welfare demands such enactment (*Ruhrstrat v. People*, 185 Ill. 133, 49 L.R.A. 181, 76 Am. St. Rep. 30, 57 N. E. 41, 12 Am. Crim. Rep. 453; *Bailey v. People*, 190 Ill. 28, 54 L.R.A. 838, 83 Am. St. Rep. 116, 60 N. E. 98; *Bassette v. People*, 193 Ill. 334, 56 L.R.A. 558, 62 N. E. 215), and there must be some logical connection between the object

to be accomplished by such legislation and the means prescribed to accomplish that end. The owner of property has the constitutional right to make any use of it he desires, so long as he does not endanger or threaten the safety, health, and comfort, or general welfare, of the public. This right cannot be wholly taken away or limited by the state except in so far as it may become necessary for individual rights to yield to the higher and greater law of the best interest of the public. *Haller Sign Works v. Physical Culture Training School*, 249 Ill. 436, 34 L.R.A.(N.S.) 998, 94 N. E. 920.

"There is nothing inherently dangerous to the health or safety of the public in conducting a retail store. It may be that in certain exclusively residential districts the owners of residence property would prefer not to have any retail stores in such blocks; but if such be the case, it manifestly arises solely from esthetic considerations, disconnected entirely from any relation to the public health, morals, comfort, or general welfare. Legislation, either by the state or by municipal corporations, which interferes with private property rights or personal liberty, cannot be sustained for purely esthetic purposes."

The court ordered the issuance of a permit for the erection of the store building. *State ex rel. Krittenbrink v. Withnell*, 91 Neb. 101, 40 L.R.A.(N.S.) 898, 135 N. W. 376, involved an ordinance of the city of Omaha forbidding the construction of a brick kiln within the city. The court pointed out that a brick kiln could become so offensive as to be a nuisance, and said: "When the entire record is considered, the evidence does not justify a finding that the ordinance in question has no relation to the public health, safety, or welfare, or that it . . . amounts to an unconstitutional invasion of relator's individual rights."

The city also cites a number of cases which involved regulations as to saloons, slaughter houses, livery stables, fire limits, the height of buildings, etc., and which define the extent of the police power in broad general terms, and announce the well-settled rule that statutes and ordinances are presumed to be valid, but cites no case, and we have found none, holding that the legislature, in the exercise of the police power, may prohibit the erection of an ordinary store building in a residential district. This precise question has seldom arisen, but cases similar in principle are numerous.

In the so-called billboard cases, it has uniformly been held that statutes or ordinances prohibiting the owner from erecting upon his property billboards or other structures for advertising purposes cannot be

sustained under the police power, and are void as an unwarranted invasion of property rights. *Haller Sign Works v. Physical Culture Training School*, 249 Ill. 436, 34 L.R.A.(N.S.) 998, 94 N. E. 920; *Passaic v. Paterson Bill Posting Adv. & Sign Painting Co.* 72 N. J. L. 285, 111 Am. St. Rep. 676, 62 Atl. 267, 5 Ann. Cas. 905; *Varney & Green v. Williams*, 155 Cal. 318, 21 L.R.A.(N.S.) 741, 132 Am. St. Rep. 88, 100 Pac. 867; *People ex rel. Wineburgh Adv. Co. v. Murphy*, 195 N. Y. 126, 21 L.R.A.(N.S.) 735, 88 N. E. 17; *Crawford v. Topeka*, 51 Kan. 756, 20 L.R.A. 692, 37 Am. St. Rep. 323, 33 Pac. 476; *State v. Whitlock*, 149 N. C. 542, 128 Am. St. Rep. 670, 66 S. E. 123, 16 Ann. Cas. 765; *Bryan v. Chester*, 212 Pa. 269, 108 Am. St. Rep. 870, 61 Atl. 894; *Com. v. Boston Adv. Co.* 188 Mass. 348, 69 L.R.A. 817, 108 Am. St. Rep. 494, 74 N. E. 601; *Curran Bill Posting & Distributing Co. v. Denver*, 47 Colo. 221, 27 L.R.A.(N.S.) 544, 107 Pac. 261.

The cases are equally unanimous that restrictions upon the use of property cannot be imposed under the police power for purely esthetic considerations. *Haller Sign Works v. Physical Culture Training School*, 249 Ill. 436, 94 N. E. 920, and note appended to report of that case in 34 L.R.A.(N.S.) 998.

In *St. Louis v. Hill*, 116 Mo. 527, 21 L.R.A. 226, 22 S. W. 861, the city required all buildings fronting upon a boulevard therein to be set back 40 feet from the street line. The law authorizing the ordinance was held void as taking private property without due process of law and without compensation.

In *St. Louis v. Dorr*, 145 Mo. 466, 42 L.R.A. 686, 68 Am. St. Rep. 575, 41 S. W. 1004, 46 S. W. 976, defendants were prosecuted for carrying on a confectionery business in violation of an ordinance of the city of St. Louis which provided that the houses fronting on Washington boulevard "shall be used as residences only, and no business avocations whatever shall be allowed to be followed in same." The ordinance was held void on two grounds,—that it was an unwarranted invasion of private property rights, and that the legislative act authorizing it was an attempt to amend the charter of the city in a manner forbidden by the Constitution.

In *Willison v. Cooke*, 54 Colo. 320, 44 L.R.A.(N.S.) 1030, 130 Pac. 828, an ordinance of the city of Denver prohibited the erection of store buildings, factories, hotels, etc., in any block within a designated district without the written consent of a majority of the owners of the property in the block fronting on the same street, and provided that whenever 50 per cent of such lots

were improved, all buildings thereafter erected should be set back from the street line the average distance of the buildings already built. Plaintiff brought mandamus to compel the issuance of a permit for the erection of a store building within the forbidden territory. The court said: "A store building is in no sense a menace to the health, comfort, safety, or general welfare of the public. . . . These regulations do not, in the slightest degree, have any relation whatever to the health, safety, or general welfare of the public, nor do they tend in any sense to accomplish anything for the benefit of the public in this respect, but merely attempt to limit the petitioner in a use of his property, which does not infringe upon the rights of others. This deprives him of the fundamental right to erect a store building upon his lots covering such portions thereof as he chooses, although, by so doing, he does not imperil or threaten injury to others of which they can lawfully complain. A store building in a residence section of the city is not desirable, from an esthetic point of view; but restrictions for this purpose alone cannot be upheld, as it is only those having for their object the safety and welfare of the public which justifies restricting a use of property by the owner. *Curran Bill Posting & Distributing Co. v. Denver*, 47 Colo. 226, 27 L.R.A. (N.S.) 544, 107 Pac. 261; *State v. Whitlock*, 149 N. C. 543, 128 Am. St. Rep. 670, 63 S. E. 123, 16 Ann. Cas. 765; *Varney & Green v. Williams*, 155 Cal. 318, 21 L.R.A. (N.S.) 741, 132 Am. St. Rep. 88, 100 Pac. 867; *Passaic v. Paterson Bill Posting Adv. & Sign Painting Co.* 72 N. J. L. 285, 111 Am. St. Rep. 676, 62 Atl. 267, 5 Ann. Cas. 995; *Com. v. Boston Adv. Co.* 188 Mass. 348, 69 L.R.A. 817, 108 Am. St. Rep. 494, 74 N. E. 601. We must therefore hold that the restrictions under consideration are invalid, because they have no relation to any object which the municipality, in the exercise of its police power, may legally accomplish, and are unreasonable, arbitrary, and oppressive. . . . Enforcing the provisions of the ordinances in question does not deprive the petitioner of title to his lots. He would not be ousted of possession. He would still have the power to dispose of them; but, although there would be no actual or physical invasion of his possession, he would be deprived of the right to put them to a legitimate use, which does not injure the public, and this, without compensation or any provision therefor. This would clearly deprive him of his property without compensation, and without due process of law, which our Federal and state Constitutions not only inhibit, but which would be repugnant to jus-

tive, independent of constitutional provisions on the subject."

In *Bostock v. Sams*, 95 Md. 400, 59 L.R.A. 282, 93 Am. St. Rep. 394, 62 Atl. 665, involving an ordinance of the city of Baltimore which prohibited the issuance of a building permit unless the building to be erected, "will conform to the general character of the buildings previously erected in the same locality, and will not in any way tend to depreciate the value of surrounding improved or unimproved property," the court said. (95 Md. 412): "Now, undoubtedly the proviso in the ordinance here under consideration attempts to confer powers that affect the citizen in his right of property and his common-law right. It cannot be pretended that the citizen has not the common-law right to acquire title to a lot of land, qualified or absolute, in a city as elsewhere, and to build upon and improve it as his taste, his convenience, or his interest may suggest or as his means may justify, without taking into consideration whether his buildings and improvements will conform in 'size, general character, and appearance' to the 'general character of the buildings previously erected in the same locality;' even though there might be those in whose 'judgment' his so building might in some way 'tend to depreciate the value of surrounding improved or unimproved property.'"

In *Stubbs v. Scott*, 127 Md. 86, 95 Atl. 1060, the court said: "Opening stores in some neighborhoods may be injurious to surrounding properties occupied for residences, but it would be difficult, if not impossible, to prevent an owner from converting his residence into a store building, even in the most exclusive part of the city, if he saw proper to do so. Other considerations than whether they can be prohibited by law generally control the owners in such matters. But it would be going very far to say that the owner of this lot could not erect stores on it, simply because there are now no stores there, and there are valuable properties of other kinds in the immediate neighborhood. Everyone familiar with the city of Baltimore, or any other large city, for some years, knows how neighborhoods have changed in such respects, and, as business grows, properties formerly residences are often converted into stores, and other places of business, as indeed the testimony shows is the case near this locality. If the courts had power to prevent the introduction of stores in such localities as the one now before us, the exercise of that power might result in serious injury to those having vacant lots or desiring to convert their buildings into stores, if there may shortly be a

change of the use of properties in the immediate locality."

In *People ex rel. Corn Hill Realty Co. v. Stroebel*, 209 N. Y. 434, 103 N. E. 735, the city of Utica refused to issue a permit for a building for the business of dealing in vehicles, automobiles, motorcycles, etc., and justified under an ordinance forbidding the maintenance of a public garage. The court said: "There is nothing in the ordinance which purports to limit the right to erect and occupy buildings for the sale of vehicles, automobiles, and motorcycles, and, it may be said in passing, any attempt to exercise any such power would be unconstitutional, for the business of selling such vehicles is as lawful as the sale of groceries or dry goods."

In *Quintini v. Bay St. Louis*, 64 Miss. 483, 60 Am. Rep. 62, 1 So. 625, a shell boulevard lined with summer homes extended along in the city of Bay St. Louis. Under express authority in its charter, the city had prohibited the erection of any buildings except open summer houses between the boulevard and the bay. Plaintiff brought the action to enjoin the city from preventing her from erecting a market within the forbidden ground. The court said: "The law can know no distinction between citizens because of the superior cultivation of the one over the other. It is with common humanity that legislatures and courts must deal, and that use of property which in all common sense and reason is not a nuisance to the average man cannot be prohibited because repugnant to some sentiment of a particular class. That the legislature, in the exercise of the police power, may prohibit in particular localities such use of property as is injurious to public health, is admitted, and what it may do may also be authorized to be done by the local authorities; but it does not follow that it may by a mere declaration convert the harmless, proper, and ordinary use of property into a nuisance. . . . The effect of the ordinance is to deprive the owners of property of its lawful use for a supposed public advantage, and before this can be done there must be just compensation first made."

See also *Philadelphia v. Linnard*, 97 Pa. 242; *Re Chestnut Street*, 118 Pa. 593, 12 Atl. 585; *Passaic v. Paterson Bill Posting Co.* 72 N. J. L. 285, 111 Am. St. Rep. 676, 62 Atl. 267, 5 Ann. Cas. 995.

The police power of the state is very broad, but not without limits. Under it the legislative power may impose any reasonable restrictions and may make any reasonable regulations in respect to the use which the owner may make of his property, which tend to promote the general well-being or to secure to others that use and en-

joyment of their own property to which they are lawfully entitled; but when the legislative power attempts to forbid the owner from making a use of his property which is not harmful to the public, and does not interfere with the rightful use and enjoyment of their own property by others, it invades property rights secured to the owner by both the state and Federal Constitutions. Only such use of property as may produce injurious consequences, or infringe the lawful rights of others, can be prohibited without violating the constitutional provisions that the owner shall not be deprived of his property without due process of law nor without compensation therefor first paid or secured. That the right of a property owner to erect a store building upon his land is within the protection of these constitutional provisions, and cannot be taken away under the guise of a police regulation, is so universally recognized that an extended search has failed to disclose any decision holding otherwise either in fact or in principle. We are forced to the conclusion that the ordinance in question cannot be sustained in so far as it prohibits the erection of ordinary store buildings. This does not mean, however, that it is not valid in so far as it applies to structures or occupations which are within the regulatory domain of the police power. The validity of chapter 128, p. 180, of the Laws of 1915 which provides for establishing residential districts and for making compensation to property owners damaged thereby is not involved in this case and has not been considered or determined herein.

Judgment reversed.

Hallam, J., dissenting:

I dissent. I will not concern myself with the question whether a building permit once issued can be revoked, or whether, under the facts in this case, plaintiff acquired any vested rights by reason of the action or nonaction of the city officials.

I address myself to the main question, whether the state has the constitutional power to regulate the location of grocery stores in a large city. We need not look in the Constitution to find the power. The power exists unless it has been taken away. The contention is that such regulation violates the portion of the 14th Amendment to the Federal Constitution which prohibits the state from depriving any person of his property without due process of law. It may be conceded that the constitutional provision above cited not only prohibits the taking away from a man the title to his property, without compensation, it prohibits the depriving him of the use of his property as well.

I enter upon the discussion of the question realizing that some of the views which I entertain are opposed to the greater number of decisions. This is always a consideration of importance, for decisions of courts are usually arrived at with thoughtful care; yet we should not overlook the fact that precedent is sometimes followed with too much obedience. It should be said, however, that there are some well-considered decisions in harmony with the views here expressed, and also that the preponderance of authority the other way is not so great as would at first appear from the cases cited. Many of these cases involve only common-law rights and the right of the court to impose restrictions; others involve only the construction of statutes or charter provisions and decide no constitutional question at all.

We must take judicial notice of some of the things which everybody knows. In every city and every hamlet there are business districts and residence districts more or less distinct. They are located by certain logical laws of trade and conduct. The business district is central, the residence district suburban. As the city grows the central business district becomes inadequate for all the city's business needs. Accordingly local business districts spring up, and they, too, are, in a general way, separated from the residence districts. Usually these follow lines of traction. No government has planned this separation. Without any definite plan, the intuitive effort of the mass of people of every community has been devoted more or less consciously to maintain this separation. The fact is that people generally recognize that a business district is not the best place for a family home. The man of thrift, whether of large means or small looks forward to a home out from the center of business activities, where he may live upon a plot of ground more or less ample in space, suitable for the bringing up of a family. The consideration is partly esthetic, but it is in far greater measure purely practical. The prompting motives are better light and air, better moral surroundings, and better conditions for recreation. The result is that districts spring up devoted exclusively to the building of homes.

We are not concerned with the question whether such homes are large or small. When a city block has been devoted to the building of homes, with the incidental breathing spaces about them, the property in the district acquires a value by reason of that exclusive use. The effect of the erection of a business structure in a residence block is well known. To an extent it changes the character of the locality from residence to business. It is a matter of common knowledge that the erection of a single grocery

store with its characteristic architecture and mode of construction and operation in a block theretofore devoted exclusively to homes annihilates the value of residences roundabout. The reasons for this depreciation in value are the same as those which in the first instance prompted home owners to locate their homes away from the center of trade.

It is said this relator has a vested right guaranteed him by the Constitution to damage his neighbors' homes by devoting his lot to a use incongruous with the use of property in the vicinity, and that no power can stop him; for to stop this damage would be to take his property without due process of law. If it be said that the owner of a lot in a district of homes has the vested right to use it as he sees fit, notwithstanding the damage to his neighbor, then what of the right of his neighbor whose property value he destroys? Has the one a vested right to destroy and the other no right at all to be protected? In my judgment this slaughter of property value is something the legislature has power to prevent. Courts have exercised the power to abate what they have denominated nuisances at common law. This grocery store was not a nuisance at common law. But it does not follow that the legislature may not regulate the location of business structures that were not nuisances at common law. It may do so. "There are many things that a man might do at common law that the states may forbid. He might embezzle until a statute cut down his liberty." Holmes, J., in *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487.

In my opinion the foregoing facts furnish a justification for restriction by the state of business structures in a residence district. The 14th Amendment has not abrogated the police power of the state. What may be done by the state under the exercise of that power without conflict with the 14th Amendment is a Federal question, upon which the Federal Supreme Court has often spoken.

It is said the police power is "one of the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government." *District of Columbia v. Brooke*, 214 U. S. 138, 149, 53 L. ed. 941, 945, 29 Sup. Ct. Rep. 563.

It is held that "the police power of a state embraces regulations designed to promote the public convenience or the general prosperity as well as those to promote public health, morals, or safety; it is not confined to the suppression of what is offensive, disorderly, or unsanitary, but extends to what is for the greatest welfare of the state." *Bacon v. Walker*, 204 U. S. 311, 51 L. ed.

499, 27 Sup. Ct. Rep. 289; *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 592, 50 L. ed. 596, 609, 26 Sup. Ct. Rep. 349, 4 Ann. Cas. 1175.

It is said that "in a general way . . . the police power extends to all the great public needs. . . . It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." *Noble State Bank v. Haskell*, 219 U. S. 104, 111, 55 L. ed. 112, 116, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 188, Ann. Cas. 1912A, 487.

The police power, it is said, "does not confer power upon the whole people to control rights which are purely and exclusively private, . . . but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. . . . Under these powers the government regulates the conduct of its citizens one towards another and the manner in which each shall use his own property, when such regulation becomes necessary for the public good." *Munn v. Illinois*, 94 U. S. 113, 124, 125, 24 L. ed. 77, 83, 84.

In *Gundling v. Chicago*, 177 U. S. 183, 188, 44 L. ed. 725, 728, 20 Sup. Ct. Rep. 635, it was said: "Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business, or occupation they shall apply are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state; and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for Federal interference."

The power is not confined to regulations of business which is a nuisance per se, "and so long as the regulation in question is not shown to be clearly unreasonable and arbitrary, and operates uniformly upon all persons similarly situated in the particular district, the district itself not appearing to have been arbitrarily selected, it cannot be judicially declared that there is a deprivation of property without due process of law, or a denial of the equal protection of the laws, within the meaning of the 14th Amendment." *Reinman v. Little Rock*, 237 U. S. 171, 177, 59 L. ed. 900, 903, 35 Sup. Ct. Rep. 513.

Such laws are not, it is said, "obnoxious L.R.A.1917F.

to constitutional provisions, . . . merely because they do not provide compensation to the individual whose liberty is restrained. He is presumed to be rewarded by the common benefits secured." *Watertown v. Mayo*, 109 Mass. 315, 318, 12 Am. Rep. 694.

These principles would seem to cover this case. They have been applied to similar cases.

In *Garrett v. Janes*, 65 Md. 260, 267, 3 Atl. 600, the court said: "We see no difficulty in the standing together of a special ordinance adapted to a particular locality, such as Mount Vernon place, and a general one applicable to the streets and alleys of the city at large. The need of such discrimination is apparent. . . . In a city noted for its monuments, municipal legislation peculiar to their neighborhood would seem indispensable; and we regard the ordinance allowing steps, porticos, or any other ornamental structure to extend 9 feet into Mount Vernon place a valid and reasonable exercise of statutory power."

The foregoing case is cited in *Cochran v. Preston*, 108 Md. 220, 229, 23 L.R.A. (N.S.) 1163, 129 Am. St. Rep. 432, 70 Atl. 113, 15 Ann. Cas. 1048, but that case was decided on other grounds. *Bostock v. Sams*, 95 Md. 400, 59 L.R.A. 282, 93 Am. St. Rep. 394, 52 Atl. 665, does not overrule it. That case involved only the common-law right of landowners. Nor does *Stubbs v. Scott*, 127 Md. 86, 95 Atl. 1060. That case involved the power of a city to make restrictions without statutory authority. *State v. Gurry*, 121 Md. 534, 47 L.R.A. (N.S.) 1087, 88 Atl. 546, Ann. Cas. 1915B, 957, sustaining a law limiting the use of property along race lines, goes far toward sustaining restrictive statutes.

The California court has sustained legislation prohibiting the location in residence districts of a laundry (*Ex parte Quong Wo*, 161 Cal. 220, 118 Pac. 714); a lumber yard (*Re Montgomery*, 163 Cal. 457, 125 Pac. 1070, Ann. Cas. 1914A, 130); and a brick yard (*Ex parte Hadacheck*, 165 Cal. 416, L.R.A.1916B, 1248, 132 Pac. 584). The last decision was affirmed in the United States Supreme Court (*Hadacheck v. Sebastian*, 239 U. S. 394, 60 L. ed. 348, 36 Sup. Ct. Rep. 143, Ann. Cas. 1917B, 927). In this case, while there were charges made that the business was a menace to health, the court did not so find, but the basis of the decision is that the surrounding region had become a residence section and that the occupants of the neighboring dwellings are seriously discommoded by the operation of the business, and that the continuance of the business in its present location was so detrimental to the interests of others as to require suppression.

In *Eubank v. Richmond*, 110 Va. 749, 67 S. E. 376, 19 Ann. Cas. 186, the court sustained as a proper exercise of the police power an ordinance which required the committee on streets to establish a building line on a street on request of two thirds of the property owners. This decision was reversed in 226 U. S. 137, 57 L. ed. 156, 42 L.R.A. (N.S.) 1123, 33 Sup. Ct. Rep. 76, Ann. Cas. 1914B, 192, but solely on the ground that the ordinance gave to the owners of other property the arbitrary right to control the property of the plaintiff in error.

In *Rideout v. Knox*, 148 Mass. 368, 2 L.R.A.81, 12 Am. St. Rep. 560, 19 N. E. 390, the court sustained a law prescribing the proverbial "spite fence," and this was cited with approval by the United States Supreme Court in *Camfield v. United States*, 167 U. S. 518, 523, 42 L. ed. 260, 261, 17 Sup. Ct. Rep. 864.

In *Atty. Gen. v. Williams* (*Knowlton v. Williams*) 174 Mass. 476, 47 L.R.A. 314, 55 N. E. 77, the court said, of a law providing for regulation of the character of buildings about Copley square, that it might have been sustained under the police power, but it in fact made provision for condemnation.

In *Welch v. Swasey*, 193 Mass. 364, 23 L.R.A.(N.S.) 1160, 118 Am. St. Rep. 523, 70 N. E. 745, the court sustained a law limiting the height of buildings in residence districts in Boston. The reason assigned was that the law involved elements of safety, but the following language is significant: "The value of land and the demand for space, in those parts of Boston where the greater part of the buildings are used for the purposes of business or commerce, is such as to call for buildings of greater height than are needed in those parts of the city where the greater part of the buildings are used for residential purposes. It was therefore reasonable to provide in the statute that buildings might be erected to a greater height in the former parts of the city than in the latter, even if some of the streets in the former are narrower than those in the latter."

This decision was affirmed in 214 U. S. 91, 53 L. ed. 923, 29 Sup. Ct. Rep. 567.

In *State ex rel. Krittenbrink v. Withnell*, 91 Neb. 101, 40 L.R.A.(N.S.) 898, 135 N. W. 376, an ordinance of the city of Omaha prohibiting the construction of a brick kiln within the city was sustained.

A word as to the contra decisions. There has not been entire uniformity among decisions which construe strictly the power of a state to make restrictions upon structures upon land. Some would hold restrictions upon automobile garages valid. *People ex rel. Busching v. Ericsson*, 263 Ill. 368, L.R.A.1915B, 607, 105 N. E. 315, Ann. Cas. 1915C, 183; *People ex rel. Keller v. Oak* L.R.A.1917F.

Park, 266 Ill. 365, 107 N. E. 636. Others would hold such restrictions void. *People ex rel. Corn Hill Realty Co. v. Stroebel*, 209 N. Y. 434, 103 N. E. 735.

Cases involving the validity of statutes or ordinances forbidding the erection of billboards are numerous. Quite uniformly they have held such legislation invalid. In some cases of ordinances the fact that there existed no statutory authority was a potent consideration. *Curran Bill Posting & Distributing Co. v. Denver*, 47 Colo. 221, 27 L.R.A.(N.S.) 644, 107 Pac. 261; *Crawford v. Topeka*, 51 Kan. 756, 20 L.R.A. 692, 37 Am. St. Rep. 323, 33 Pac. 476. In most of them the controlling consideration was that the purpose of the prohibition was purely esthetic, and that such considerations cannot sustain a restrictive law. *Haller Sign Works v. Physical Culture Training School*, 249 Ill. 436, 34 L.R.A.(N.S.) 998, 94 N. E. 920; *Passaic v. Paterson Bill Posting Adv. & Sign Painting Co.* 72 N. J. L. 285, 111 Am. St. Rep. 676, 62 Atl. 267, 5 Ann. Cas. 995; *People ex rel. Wineburgh Adv. Co. v. Murphy*, 195 N. Y. 126, 21 L.R.A.(N.S.) 735, 88 N. E. 17; *State v. Whitlock*, 149 N. C. 542, 128 Am. St. Rep. 670, 63 S. E. 123, 16 Ann. Cas. 765. I do not think these cases controlling. The California court, though in line with the weight of authority in declaring legislation of this sort void (*Varney & Green v. Williams*, 155 Cal. 318, 21 L.R.A.(N.S.) 741, 132 Am. St. Rep. 88, 100 Pac. 867), found no trouble in sustaining the restrictions as to business structures above referred to.

In *People ex rel. Friend v. Chicago*, 261 Ill. 16, 49 L.R.A.(N.S.) 438, 103 N. E. 609, Ann. Cas. 1915A, 292, and *Willison v. Cooke*, 54 Colo. 320, 44 L.R.A.(N.S.) 1030, 130 Pac. 828, ordinances forbidding stores in certain districts were held void, but there was no statutory authority for the ordinances in either of these cases.

In *State ex rel. Omaha Gas Co. v. Withnell*, 78 Neb. 33, 8 L.R.A.(N.S.) 978, 126 Am. St. Rep. 586, 110 N. W. 680, an ordinance making it unlawful to build except upon a certain line was held void, but there also was the element of control by neighboring property owners, as in the case of *Eubank v. Richmond*, supra.

In *Quintini v. Bay St. Louis*, 64 Miss. 483, 60 Am. Rep. 62, 1 So. 625, the question was as to the validity of a statute making it unlawful to build on the beach side of a shell road any shanty or other building when the same has a tendency to obstruct the view or the sea breeze, and it was held void. The prohibition was against any building whatsoever.

As to decisions holding void legislative acts, or ordinances authorized by legislative

acts, which restrict the construction of business structures in residence districts, or the line on which buildings may be built, I have found only the following: *St. Louis v. Dorr*, 145 Mo. 466, 42 L.R.A. 686, 68 Am. St. Rep. 575, 41 S. W. 1094, 46 S. W. 976, relating to location of such buildings; and *St. Louis v. Hill*, 116 Mo. 527, 21 L.R.A. 226, 22 S. W. 861; *People ex rel. Dilzer v. Calder*, 89 App. Div. 503, 85 N. Y. Supp. 1015; *Fruth v.*

Board of Affairs, 75 W. Va. 456, L.R.A. 1915C, 981, 84 S. E. 105, involving legislation as to building line.

My opinion is that the statute in question, at least as applied to stores, was a valid exercise of legislative power.

Holt, J., concurs in the foregoing dissent.

Petition for rehearing denied.

Annotation—Validity of public restriction as to location of mercantile business.

This note is supplemental to the note to *People ex rel. Friend v. Chicago*, 49 L.R.A.(N.S.) 438, where the earlier cases are collected. Besides the notes on allied subjects, referred to in the earlier note, see the note to *Byrne v. Maryland Realty Co.* L.R.A.1917A, 1220, upon the general subject of the exercise of police power for esthetic purposes.

It will be observed that the decision in *STATE EX REL. LACHTMAN v. HOUGHTON*, ante, 1050, is in line with the principle asserted in the earlier note, that an owner of land is not to be restricted in carrying on business on his premises so long as he does not interfere with the safety and welfare of the public.

STATE EX REL. LACHTMAN v. HOUGHTON was followed and quoted from in *State ex rel. Roerig v. Minneapolis* (1917) — *Minn.* —, 162 N. W. 477, where it was held that prohibiting an owner from erecting a four-family flat building within a residential district, on the ground of unhealthful congestion, added fire risk, and more difficult police supervision, was beyond the police power and void.

A city has no authority to make it unlawful "to establish any sort of business whatever on" a certain street under power to regulate the location and inspection of "all places of business likely to be or (which may) become detrimental to health or comfort," as the city is acting merely from esthetic considerations. *Calvo v. New Orleans* (1915) 136 La. 480, 67 So. 338, where the plaintiff had been arrested for keeping a dry grocery. It was also held in the same case that the power was not embraced in the charter grant of "all powers, privileges and functions which, by or pursuant to the Constitution of this state, have been, or could be, granted to or exercised by any city." The court said: "Defendant has not pointed the court to any city which exercises the power of prohibiting all business from a public

street, and which restricts its use for residential purposes."

In *Stubbs v. Scott* (1915) 127 Md. 86, 95 Atl. 1060, quoted from in *STATE EX REL. LACHTMAN v. HOUGHTON*, a mandamus issued to the building inspector of a city to issue a permit to the petitioner to erect stores on his property, in which stores it appeared that he desired to sell automobiles. The court said: "No authority has been shown to authorize him or the municipality to prevent the appellee from erecting a building on the lot, to be used for stores, and we cannot admit that he could not sell automobiles in his store on said lot."

People ex rel. Corn Hill Realty Co. v. Stroebel (1913) 209 N. Y. 434, 103 N. E. 735, is sufficiently referred to in *STATE EX REL. LACHTMAN v. HOUGHTON*.

In *People ex rel. Lankton v. Roberts* (1915) 155 N. Y. Supp. 1133, affirming (1915) 90 Misc. 439, 153 N. Y. Supp. 143, the court condemned a statute, since repealed, relating to cities of the second class, known as the "Housing Act" (§ 9 of chap. 774, Laws 1913, as amended by chap. 798 of Laws 1913, repealed by chap. 32 of Laws 1915), providing that one side or street frontage of a block should become a "residence district" when a petition of two thirds of the owners to that effect was approved by the common council, and should continue to be such a residence district until a like petition that the district cease to be a residence district should be affirmed by the common council; and that, in general, buildings other than private dwellings should not be erected in residence districts except upon "the written consent of the owners aforesaid." The court granted a mandamus to the city superintendent of buildings, compelling him to issue to the relator a permit to change a residence into an undertaking establishment.

On the other hand, in *Spana v. Dallas* (1916) —*Tex. Civ. App.* —, 189 S. W. 999, a lot owner in the city of Dallas was

unable to get a permit to erect store-houses thereon, the court sustaining an ordinance of the city providing that there should not, without the consent of three fourths of the property owners within 300 feet, be located within any residence portion of the city "any business house or building intended or designed to be used for the barter and sale of goods, wares and merchandise of any description or character, or for the conduct therein of any business," it being provided that a "residence portion of the city" meant any part where there were more dwelling houses than business houses within a radius of 300 feet of the intended location of the business house in question. It was considered that the ordinance was constitutional, and that it was for the welfare, prosperity, and comfort of the citizens.

Reference may be made in this connection to a special term decision in *Re Russell* (1916) 158 N. Y. Supp. 162, where the court declined to issue a mandamus to the authorities of the city of Niagara Falls to grant permission to a lot owner to erect a factory within a prescribed area of the city, within which area the city had by ordinance forbidden the erection or operation of any factory "unless the owners of two thirds of the residences and apartment houses located within 200 feet of the place where such factory building is to be built and operated consent in writing thereto," the lot owner not having obtained the prescribed consents. The court overruled the owner's contention that his property was taken for public use without just compensation, and that he was denied the equal protection of the laws, and said: "The area within which the relator de-

sires to erect his factory building, and which is prescribed by the ordinance, has been used for upwards of one hundred years exclusively for residence purposes, some of the residences being of historic interest. The scenic beauty of this particular section of the city is probably unsurpassed by any other locality in the world. It overlooks the rapids of the upper Niagara river and Niagara Falls and Goat island, and is contiguous to Prospect park and the State Reservation at Niagara. The state of New York has expended millions of dollars in acquiring and maintaining parks and grounds as appropriate surroundings for the famous cataract of Niagara, which is visited annually by many thousands of tourists from all parts of the world. I think there is little room for doubt that the location and operation of a factory in these surroundings would greatly impair the value of property in this section and seriously interfere with its proper enjoyment in the purposes to which it has been heretofore devoted." To the claim that the business was not a nuisance per se the court cited the recent decisions in the Supreme Court of the United States on the regulation of livery stables and brick kilns, both cited in the dissenting opinion in *STATE EX REL. LACHTMAN v. HOUGHTON*, ante, 1050, viz.: *Rainman v. Little Rock* (1915) 237 U. S. 171, 59 L. ed. 900, 35 Sup. Ct. Rep. 511; *Hadacheck v. Sebastian* (1915) 239 U. S. 394, 60 L. ed. 348, 36 Sup. Ct. Rep. 143, Ann. Cas. 1917B, 927.

Ex parte Quong Wo (1911) 161 Cal. 220, 118 Pac. 714, is sufficiently dealt with in *STATE EX REL. LACHTMAN v. HOUGHTON*. B. B. B.

NEBRASKA SUPREME COURT.

MARTIN WHIG

v.

GIRARD FIRE & MARINE INSURANCE
COMPANY OF PHILADELPHIA, Appt.

SAME

v.

AMERICAN INSURANCE COMPANY OF
NEWARK, NEW JERSEY, Appt.

(100 Neb. 271, 159 N. W. 416.)

Insurance — lightning — tornado.

A policy of insurance contained the provi-

Headnote by LETTON, J.

Note. — As to fall of building clause in fire insurance policies, see annotation following this case, post, 1064.
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sions: "*Lighting Clause*.—This policy shall cover any direct loss or damage by lightning, . . . meaning thereby the commonly accepted term 'lightning;' and in no case to include loss or damage by cyclone, tornado, or windstorm." "If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease." The insured frame building had been struck by lightning, and had begun to burn when all of the edifice above the floor of the first story was lifted by a tornado and deposited about 200 feet away, where it continued to burn until wholly destroyed. Held, that the fallen building clause did not apply, and that the insurer was liable.

For other cases, see *Insurance*, VI. b, in *Dig.* 1-52 N. S.

(September 22, 1916.)

APPEAL by defendants from judgments of the District Court for Douglas County in favor of plaintiff in consolidated actions brought to recover the amounts alleged to be due on two fire insurance policies. Affirmed.

The facts are stated in the opinion.

Messrs. Stout, Rose & Wells, for appellants:

A sharp distinction must be made between the fire and lightning risk on the one hand, and the wind risk on the other hand. By the policies in suit, the defendants insured the building as such against loss by fire and lightning on its original site, and not against damage by wind.

Insurance Co. of N. A. v. Bachler, 44 Neb. 550, 62 N. W. 911; Nave v. Home Mut. Ins. Co. 37 Mo. 430, 90 Am. Dec. 394; Huck v. Globe Ins. Co. 127 Mass. 306, 34 Am. Rep. 373; Fred J. Kiesel & Co. v. Sun Ins. Office, 31 C. C. A. 515, 60 U. S. App. 10, 88 Fed. 243, certiorari denied in 171 U. S. 688, 18 Sup. Ct. Rep. 940; Nelson v. Traders' Ins. Co. 86 App. Div. 66, 83 N. Y. Supp. 220, affirmed in 181 N. Y. 472, 74 N. E. 421; Nichols v. Sun Mut. Ins. Co. 71 Miss. 326, 42 Am. St. Rep. 465, 14 So. 263; Home Mut. Ins. Co. v. Tompkins, 30 Tex. Civ. App. 404, 71 S. W. 812, affirmed in 96 Tex. 187, 71 S. W. 814.

If the plaintiff's building was struck by lightning and on fire, and immediately thereafter was totally destroyed by tornado, the defendants' liability under the policies in suit is limited to the damage done by the lightning and fire before the destruction by the tornado.

Beakes v. Phoenix Ins. Co. 143 N. Y. 402, 26 L.R.A. 267, 38 N. E. 453; Warmcastle v. Scottish Union & Nat. Ins. Co. 201 Pa. 302, 50 Atl. 941; Fred J. Kiesel & Co. v. Sun Ins. Office, 31 C. C. A. 515, 60 U. S. App. 10, 88 Fed. 243, certiorari denied in 171 U. S. 688, 18 Sup. Ct. Rep. 940.

The burden was upon the plaintiff to show the amount of damage caused to his building by lightning or fire, or both, before it fell as the result of the wind. He failed to meet this burden.

Warmcastle v. Scottish Union & Nat. Ins. Co. 201 Pa. 302, 50 Atl. 941; Harris v. Lincoln & N. W. R. Co. 91 Neb. 755, 137 N. W. 865; Albers v. Chicago, B. & Q. R. Co. 95 Neb. 506, 145 N. W. 1013; Alt v. Chicago, B. & Q. R. Co. 96 Neb. 714, 148 N. W. 900; Omaha & R. Valley R. Co. v. Brady, 39 Neb. 27, 57 N. W. 767; Watters v. Omaha, 86 Neb. 722, 126 N. W. 308; McEvoy v. Swayze, 34 Neb. 215, 51 N. W. 824; Chamberlain Bkg. House v. Woolsey, 60 Neb. 516, 83 N. W. 729; Harker v. Burbank, 68 Neb. 85, 93 N. W. 949; Wm. Tackaberry Co. v. Sioux City Service Co. 154 L.R.A.1917F.

Iowa, 358, 40 L.R.A.(N.S.) 102, 132 N. W. 945, 134 N. W. 1064, Ann. Cas. 1914A, 1276; Knowlton v. Chicago & N. W. R. Co. 115 Minn. 71, 131 N. W. 858; Western U. Teleg. Co. v. Totten, 72 C. C. A. 591, 141 Fed. 533; Brown v. Chicago, B. & Q. R. Co. 195 Fed. 1007; Treichel v. Great Northern R. Co. 80 Minn. 96, 82 N. W. 1110; Central Coal & Coke Co. v. Hartman, 49 C. C. A. 244, 111 Fed. 96; Macon v. Dannenberg, 113 Ga. 1111, 39 S. E. 446; Starr v. North Side Traction Co. 193 Pa. 536, 44 Atl. 556; McGrath v. Third Ave. R. Co. 9 App. Div. 141, 41 N. Y. Supp. 93; Oakley Mills Mfg. Co. v. Neese, 54 Ga. 459.

Messrs. E. R. Leigh and Byron G. Burbank, for appellee:

There was sufficient competent evidence that the building was destroyed by fire or lightning, or both, to require that fact to be submitted to the jury.

Doyle v. Franek, 82 Neb. 606, 118 N. W. 468; Sheibley v. Nelson, 84 Neb. 393, 121 N. W. 458; Tarnoski v. Cudahy Packing Co. 85 Neb. 147, 122 N. W. 671; Boyd v. Chicago, B. & Q. R. Co. 97 Neb. 238, 149 N. W. 818.

The burden was upon the defendants to prove that the building fell by reason of the tornado alone.

Western Assur. Co. v. J. H. Mohlman Co. 40 L.R.A. 561, 28 C. C. A. 157, 51 U. S. App. 577, 83 Fed. 811, certiorari denied in 168 U. S. 710, 42 L. ed. 1213, 18 Sup. Ct. Rep. 949; Phenix Ins. Co. v. Luce, 60 C. C. A. 655, 123 Fed. 257; Blasingame v. Home Ins. Co. 75 Cal. 633, 17 Pac. 925; Transatlantic Ins. Co. v. Bamberger, 11 Ky. L. Rep. 101, 11 S. W. 595; N. & M. Friedman Co. v. Atlas Assur. Co. 133 Mich. 212, 94 N. W. 757; London & L. F. Ins. Co. v. Crunk, 91 Tenn. 376, 23 S. W. 140; Jordan v. Iowa Mut. Tornado Ins. Co. 151 Iowa, 73, 130 N. W. 177, Ann. Cas. 1913A, 266.

Where the lightning has struck or the fire has begun before the building falls, the policies have been broken and the liability has been incurred, and the fact that some other cause may intervene whereby the building falls does not release the insurance companies from full liability under the policies.

Davis v. Connecticut F. Ins. Co. 158 Cal. 766, 32 L.R.A.(N.S.) 604, 112 Pac. 549; Fred J. Kiesel & Co. v. Sun Ins. Office, 31 C. C. A. 515, 60 U. S. App. 10, 88 Fed. 243; Ermentrout v. Girard F. & M. Ins. Co. 63 Minn. 305, 30 L.R.A. 346, 56 Am. St. Rep. 481, 65 N. W. 635; London & L. F. Ins. Co. v. Crunk, 91 Tenn. 376, 23 S. W. 140; Cummings v. Pennsylvania F. Ins. Co. 153 Iowa, 579, 37 L.R.A.(N.S.) 1169, 134 N. W. 79, Ann. Cas. 1913E, 235; N. & M. Friedman Co. v. Atlas Assur. Co. 133 Mich. 212, 94

N. W. 757; Russell v. German F. Ins. Co. 100 Minn. 528, 10 L.R.A.(N.S.) 326, 111 N. W. 400.

Letton, J., delivered the opinion of the court:

Action on policy of fire insurance. Plaintiff recovered. Defendant appeals. The policy contains the following provisions:

"*Lightning Clause.*—This policy shall cover any direct loss or damage by lightning, . . . meaning thereby the commonly accepted term 'lightning,' and in no case to include loss or damage by cyclone, tornado, or windstorm."

"If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease."

The answer denies that the building was destroyed or damaged by fire or lightning, and alleges that it "was blown down and totally destroyed by tornado and wind on the 23d day of March, 1913, so that the said building fell not as a result of any fire, but solely as a result of said tornado and wind, and there was no loss or damage by fire or lightning to said building prior to the time that the said building was blown down." It is also alleged that the insurance immediately ceased the moment the building fell.

A motion was made at the close of the testimony for a peremptory instruction directing the jury to find for the defendant. This was overruled, and this action is assigned as error. Defendant insists that the evidence shows conclusively that the building did not fall as the result of fire and lightning, but did fall as the result of the tornado; that the defendant's liability under the policy was limited to the damage done by lightning and fire before the building fell; that the plaintiff failed to show the amount of this damage; and that therefore there was no evidence upon which a verdict for any amount could be rendered.

A witness was standing at the south window of the kitchen in a restaurant which she and her husband conducted in the village of Ralston. The insured building stood about 100 feet away in a southwesterly direction. While standing there she saw lightning strike the insured building and saw smoke and flame come from it. She remained at the window scarcely a moment, then went into the dining room, and the next thing of which she was conscious was that she was sitting in a pile of rubbish, a tornado having struck and wrecked the house. She was severely injured, and was unable to tell how long she had been unconscious. Other testimony showed that all the buildings near by were torn down and L.R.A.1917F.

wrecked by a tornado. The superstructure of the insured building was blown away down to the lower floor. It seems that the upper part of the store building was carried by the wind about 200 or 250 feet north and totally consumed by fire. Part of the walls were standing at that place so that one could have gone inside if it had not been on fire. There was no fire at that time at the original site. No other building in the village was burned.

The jury found specially that the building was struck by lightning, and was on fire before its destruction by the tornado; that the fire that consumed the portion on the hill was the same fire; and that the building was wholly destroyed thereby.

It is undisputed that the building was set on fire by lightning, and that this fire continued until it was consumed. If the building had remained upon the original site, and had there burned down, defendant would have been liable. Does the fact that after the fire began the building was removed a short distance by vis major operate to defeat recovery on the policy? If, after a fire begins, a building is wholly consumed by reason of insufficient fire protection or defective appliances, is the insurer liable? There is nothing in the record to show that the fire could have been extinguished with the existing appliances if the building had remained upon the original site. If, while burning, the position of a building is changed by explosion or some other outside force without the intervention of the insured, will this render the fallen building clause operative? We cannot so hold. Had it not been for the fire which was in the building when struck by the tornado, the partially demolished structure would still have been in existence. Under the fallen building clause, if the building had been blown down, or had fallen before fire was communicated to it, there would be no liability on the part of the insurer, but contra if the fire was burning before the building fell. *Transatlantic Ins. Co. v. Bamberger*, 11 Ky. L. Rep. 101, 11 S. W. 595. It is held in *N. & M. Friedman Co. v. Atlas Assur. Co.* 133 Mich. 212, 94 N. W. 757, that the fallen building provision in a fire policy is a condition subsequent, and that the burden is upon the insurer to prove as a defense that the building fell before the fire started. The opinion quotes at great length from *Western Assur. Co. v. Mohlman Co.* 40 L.R.A. 561, 28 C. C. A. 157, 51 U. S. App. 577, 83 Fed 811, which holds to the same effect.

In *London & L. F. Ins. Co. v. Crunk*, 91 Tenn. 376, 23 S. W. 140, the facts were that before the fire destroyed the building it had been partially wrecked by a tornado.

The roof of the two front upper rooms had been blown away, the rafters, ceiling, and part of the walls remaining. There was evidence to show that before this some fire had been blown upon the floor by a current of air passing through a room, which was the probable cause of the burning of the building. The court said: "This was evidence sufficient to justify the verdict that the fire commenced before the fall of any part of the building. Of course, if it commenced before the fall, though the entire building fell subsequently, the insurance company would be liable. 2 May, Ins. 3d ed. § 401."

Defendant insists that it is only liable for such damage as occurred before the building was moved by the tornado, and that, since there is no evidence on this point, there can be no recovery. The contention seems to be well answered in the following quotation: "When the fire begins to burn the property insured, the thing insured against has happened, the liability has begun, some loss has become inevitable. It is true that it might happen that a fall occurring during a fire would prevent it from being put out, and thus cause greater loss than would otherwise have been suffered, and the insurer might wish to contract for exemption in such a contingency. But in such a case it would be practically impossible to make an intelligent division, separating the loss occurring before the fall from that occurring afterward. No person owning goods would be willing to make such a contract and assume the burden of such a division, if he understood its effect. If it was the intention to provide for the case of the falling of a building after a fire had attacked the

goods, and to exempt the insurer from liability for the goods burned after the fall took place, while holding him for that which occurred before, surely more explicit language would have been used." *Davis v. Connecticut F. Ins. Co.* 158 Cal. 766, 772, 32 L.R.A. (N.S.) 604, 112 Pac. 552.

We agree that, if it was the intention to place the burden of proof on the insured to show what proportion of the total loss accrued before a building falls and after a fire has begun therein, the policy provision should have been more explicit. The Nebraska flood cases cited are not applicable, since no contract of indemnity was involved, and the burden was on the claimant to prove the extent of his damage, while under a valued policy law a different rule prevails.

Complaint is made with respect to instructions given by the trial court, but, since there is no dispute as to the facts, the instructions could not have been prejudicial. Error is assigned on the refusal to give defendant's instruction No. 8, which, in substance, states that the jury must confine their verdict to actual damages done by lightning and fire to the building on its original site, and that "you cannot give a verdict for the damage done by the tornado." In instruction No. 6 by the court the jury were told, "You must not allow any damages done by the tornado." The remainder of the instruction was properly refused under the facts and the law.

The evidence justifies the verdict, and the judgment of the District Court is affirmed.

Petition for rehearing denied December 19, 1916.

Annotation—Fall of building clause in fire insurance policies.

This note supplements the annotation accompanying *Davis v. Connecticut F. Ins. Co.* 32 L.R.A. (N.S.) 604.

As to causes of loss covered by cyclone, hurricane, tornado, or windstorm insurance, see annotation to *National Union F. Ins. Co. v. Crutchfield*, L.R.A. 1915B, 1094.

As to liability of insurer for fire caused by earthquake, see annotation to *Williamsburg City F. Ins. Co. v. Willard*, 21 L.R.A. (N.S.) 103.

The question of liability of insurer for loss caused by explosion is covered in the annotations to *Heuer v. Northwestern Nat. Ins. Co.* 19 L.R.A. 594, and *Wheeler v. Phenix Ins. Co.* 38 L.R.A. (N.S.) 474. L.R.A. 1917F.

Operation and construction of standard clause in general.

As stated in the earlier note, the standard fall of building clause provides that "if a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease."

The court in *Wieg v. Girard F. & M. Ins. Co.* ante, 1061, decided that such a clause contained in a policy insuring against loss by lightning did not apply where the building was struck by lightning and had begun to burn at the time all of the building above the first story was lifted by a tornado and carried for some distance.

In *Cummings v. Pennsylvania F. Ins. Co.* (1912) 153 Iowa, 579, 37 L.R.A. (N.S.) 1169, 134 N. W. 79, Ann. Cas. 1913E, 235, the standard clause in a policy insuring against loss or damage to goods by lightning was held to have reference to the falling of the building containing the goods from causes other than those insured against, and was held not to exclude liability for damage to the goods by reason of the throwing down of the building by lightning.

In *Ogburn-Griffin Grocery Co. v. Orient Ins. Co.* (1914) 188 Ala. 218, 66 So. 434, under the standard clause contained in a policy on goods, it was held that no recovery could be had where the building containing the goods fell from a cause other than fire prior to the time the insured goods caught fire, even though the building was on fire before it fell.

What amounts to fall—standard form of policy.

Supplementing note in 32 L.R.A. (N.S.) p. 605.

Following the decision in *Nelson v. Traders' Ins. Co.* (1905) 181 N. Y. 472, 74 N. E. 421 (set out in the prior annotation), it was decided in *Fountain v. Connecticut F. Ins. Co.* (1910) — Cal. App. —, 117 Pac. 630, that the standard clause meant that the insurer was excused from liability by the fall either of a building as a structure, or of such a substantial and important part thereof as impairs its usefulness as such and leaves the remaining part subject to an increased risk of fire. And certain instructions given were held fairly within this rule, and not open to the objection that they were misleading, although

in a part of an instruction it was stated that the clause meant some substantial part of the building, the falling of which "would destroy its distinctive character as such."

And in *Loomis v. Connecticut F. Ins. Co.* (1911) 16 Cal. App. 532, 117 Pac. 642, where the policy contained the standard "fall of building" clause, instructions were sustained which stated in substance that to exonerate the insurer under this clause a material and substantial part of the building containing the insured goods must have fallen from a cause other than fire, and that the falling must have occurred before either the building or the goods had been attacked by fire. And the evidence in the case was held to show that a material and substantial part of the front wall of the building fell by reason of an earthquake before the fire attacked the building or the goods, and a judgment for the plaintiff was reversed.

In *Fountain v. Connecticut F. Ins. Co.* — Cal. —, 117 Pac. 630, the evidence, although conflicting, was held sufficient to justify the jury's finding that the building had not fallen, within the meaning of the standard clause, before the fire attacked the insured property.

Burden of proof.

Supplementing note in 32 L.R.A. (N.S.) p. 608.

In accord with the statement in the earlier note, it has been held that the burden is upon the insurer to prove that it is relieved from liability under the fall of building clause. *Fountain v. Connecticut F. Ins. Co.* (Cal.) supra.

J. T. W.

NEBRASKA SUPREME COURT.

DR. WILLIAM FREW et al.

v.

GEORGE SCOLLAR, Appt.

(— Neb. —, 162 N. W. 496.)

Contribution — by surety — limitation.

1. A surety in whose favor the Statute of Limitations has not run, who has done nothing to suspend its operation, and who

Headnotes by ROSE, J.

Note. — For right of surety to indemnity from principal, or contribution from cosurety, as affected by the fact that an action by the creditor against the principal or cosurety would be barred, see annotation following this case, post, 1074. L.R.A.1917F.

has been compelled to pay the debt of his principal, may exact contribution from a cosurety in another state, though under the laws thereof the creditor's claim against the latter was barred when the principal's debt was paid.

For other cases, see *Principal and Surety*, II. in Dig. 1-52 N. S.

Evidence — relation of parties to contract.

2. In an action by a surety for contribution from an alleged cosurety, parol evidence may be admitted to show the actual relation of the parties to the obligation discharged by plaintiff.

For other cases, see *Evidence*, VI. f, in Dig. 1-52 N. S.

(Hamer, J., dissents in part.)

(April 14, 1917.)

A PPEAL by defendant from a judgment of the District Court for Nuckolls County in favor of plaintiffs in an action brought to compel contribution from defendant as an alleged cosurety. Reversed.

The facts are stated in the opinion.

Messrs. W. G. Hastings and Buck, Brubaker, & Buck, for appellant:

The right to contribution rests wholly upon equitable principles and is not at all founded upon contract, and was formerly enforced only in courts of equity. It is now enforced also in courts of law as an implied right, but when sought in a court of law the right still rests upon purely equitable principles, and the claim is subject to equitable defenses.

10 R. C. L. 1036, 1059; 7 Am. & Eng. Enc. Law, 2d ed. pp. 326, 331, § 11; White v. Banks, 56 Am. Dec. 283, note; Rindge v. Baker, 15 Am. Rep. 475, note; Moore v. Moore, 11 N. C. (4 Hawks) 358, 15 Am. Dec. 523.

Where one party to a contract claims contribution from another as cosurety, he has the burden of establishing that relationship.

10 Enc. Ev. 51; Coleman v. Norman, 10 Heisk. 590; Nurre v. Chittenden, 56 Ind. 462; Sweet v. McAllister, 4 Allen, 353; Thompson v. Sanders, 20 N. C. 539 (4 Dev. & B. L. 404).

In actions for contribution the principle is well established that parol evidence is admissible to show the true relations existing between the several parties bound by a written obligation.

6 R. C. L. 1061; Jones, Ev. 2d ed. § 495 (507); Williams v. Glenn, 92 N. C. 253, 53 Am. Rep. 416; Bulkeley v. House, 62 Conn. 459, 21 L.R.A. 247, 26 Atl. 352; Houck v. Graham, 106 Ind. 195, 55 Am. Rep. 727, 6 N. E. 594; Hichborn v. Fletcher, 66 Me. 209, 22 Am. Rep. 562; Mansfield v. Edwards, 136 Mass. 15, 49 Am. Rep. 1; Sloan v. Gibbs, 56 S. C. 480, 76 Am. St. Rep. 559, 35 S. E. 408; Stockwell v. Mutual L. Ins. Co. 98 Am. St. Rep. 38, note; Porter v. Huie, 28 L.R.A. (N.S.) 1045, note; Chapman v. Garber, 46 Neb. 16, 64 N. W. 362; Stump v. Richardson County Bank, 24 Neb. 522, 39 N. W. 433; Coleman v. Norman, 10 Heisk. 590; Thompson v. Taylor, 12 R. I. 109; Craythorne v. Swinburne, 14 Ves. Jr. 160, 33 Eng. Reprint, 482, 9 Revised Rep. 264, 21 Eng. Rul. Cas. 636; Hunt v. Chambliss, 7 Smedes & M. 532; Rae v. Rae, 6 Ir. Ch. Rep. 490; Barry v. Ransom, 12 N. Y. 462; Robison v. Lyle, 10 Barb. 512; Adams v. Flanagan, 36 Vt. 400; Anderson v. Peareson, 2 Bail. L. 107; Barnett v. Pratt, 37 Neb. 349, 55 N. W. 1050; Norman v. Waite, 30 Neb. 302, 46 N. W. 639; Huffman v. Ellis, 64 Neb. 623, 90 N. W. 552; Musser v. Musser, 92 L.R.A.1917F.

Neb. 387, 138 N. W. 599; Wehnes v. Roberts, 92 Neb. 696, 139 N. W. 212, Ann. Cas. 1914A, 452; Exchange Bank v. Clay Center State Bank, 91 Neb. 835, 137 N. W. 845; Franklin State Bank v. Chaney, 94 Neb. 1, 142 N. W. 537; First Nat. Bank v. Burney, 91 Neb. 269, 136 N. W. 37; Western Wheeled Scraper Co. v. McMillen, 71 Neb. 686, 99 N. W. 512.

The right of contribution may be defeated by any wrong or negligent act on the part of the debtor making payment.

6 R. C. L. 1048; Rollins v. Taber, 25 Me. 144; Stockwell v. Mutual L. Ins. Co. 140 Cal. 198, 98 Am. St. Rep. 35, 73 Pac. 833; 6 Pom. Eq. Jur. § 918, p. 1488; Re Koch, 148 Wis. 548, 134 N. W. 663.

The Statute of Limitations is a statute of repose; and when the time limited by it has expired, then in legal contemplation the debt is extinguished.

Mayberry v. Willoughby, 5 Neb. 368, 25 Am. Rep. 491; Smith v. Nofsinger, 86 Neb. 834, 126 N. W. 659.

The statute is not tolled by promises, nor by payments by any person other than the one sought to be charged, or by one having his authority.

Mayberry v. Willoughby, supra; Mizer v. Emigh, 63 Neb. 245, 88 N. W. 479; Dwire v. Gentry, 95 Neb. 150, 145 N. W. 350.

The original debt having been extinguished by the Statute of Limitations as to the defendant, the plaintiffs could not thereafter by paying the debt make the defendant liable for contribution.

9 Cyc. 795; Screven v. Joyner, 1 Hill, Eq. 252, 26 Am. Dec. 199; Cochran v. Walker, 82 Ky. 220, 56 Am. Rep. 891; Shelton v. Farmer, 9 Bush, 314; Lovell v. Nelson, 11 Allen, 101, 87 Am. Dec. 706; Spelman v. Talbot, 123 Mass. 489; Turner v. Thom, 89 Va. 745, 17 S. E. 323; Stockmeyer v. Oertling, 35 La. Ann. 467; McLin v. Harvey, 8 Ga. App. 360, 60 S. E. 123.

Mr. Charles Battelle, for appellees:

A cosurety's right to contribution arises out of his payment of more than his due proportion of the joint obligation, and dates from such payment, unaffected by the fact that the Statute of Limitations has barred any direct liability of his cosurety to the creditor.

Martin v. Frantz, 127 Pa. 389, 14 Am. St. Rep. 859, 18 Atl. 20; Peaslee v. Breed, 10 N. H. 489, 34 Am. Dec. 178; Boardman v. Paige, 11 N. H. 438; Wood v. Leland, 1 Met. 387; Camp v. Bostwick, 20 Ohio St. 337, 5 Am. Rep. 669; Aldrich v. Aldrich, 56 Vt. 324, 48 Am. Rep. 791; Hard v. Mingle, 206 N. Y. 179, 42 L.R.A. (N.S.) 1131, 99 N. E. 542.

The right of action by a surety against his cosurety for contribution does not ac-

crue until payment of the obligation is made by the surety.

Kelly v. Sproul, 153 Mich. 691, 117 N. W. 327, 15 Ann. Cas. 1029; Wood, Limitations, § 145; Broughton v. Robinson, 11 Ala. 922; Thayer v. Daniels, 110 Mass. 345; Scott v. Nichols, 27 Miss. 94, 61 Am. Dec. 503; Burton v. Rutherford, 49 Mo. 255; Keller v. Rhoades, 39 Pa. 513, 80 Am. Dec. 539.

The period of limitation applied to an action for contribution is that fixed for an implied contract, or a contract not evidenced by a written instrument, though the original contract is in writing. The statute begins to run from the time when the plaintiff paid more than his share of the debt.

7 Am. & Eng. Enc. Law, 2d ed. 340; Wolmershausen v. Gullick [1893] 2 Ch. 514, 62 L. J. Ch. N. S. 773, 3 Reports, 610, 68 L. T. N. S. 753, 12 Eng. Rul. Cas. 823; Stallworth v. Preslar, 34 Ala. 509; Crawford v. Kirksey, 50 Ala. 590; Sherwood v. Dunbar, 6 Cal. 53; May v. Vann, 15 Fla. 553; Sexton v. Sexton, 35 Ind. 88; Wilson v. Crawford, 47 Iowa, 469; Preston v. Gould, 64 Iowa, 44, 19 N. W. 834; Ingalls v. Dennett, 6 Me. 79; Hooper v. Hooper, 81 Md. 155, 48 Am. St. Rep. 496, 31 Atl. 508; Wood v. Leland, 1 Met. 387; Magee v. Leggett, 48 Miss. 139; Pass v. Grenada County, 71 Miss. 426, 14 So. 447; Singleton v. Townsend, 45 Mo. 380; Sherrod v. Woodward, 15 N. C. (4 Dev. L.) 360; Ponder v. Carter, 34 N. C. (12 Ired. L.) 242; Leak v. Covington, 99 N. C. 559, 6 S. E. 241; Williams v. Williams, 5 Ohio, 444; Camp v. Bostwick, 20 Ohio St. 337, 5 Am. Rep. 669; Durbin v. Kuney, 19 Or. 75, 23 Pac. 661; Miller v. Howry, 3 Penr. & W. 380, 24 Am. Dec. 320; Reeves v. Pulliam, 7 Baxt. 119, 9 Baxt. 153; Marshall v. Hudson, 9 Yerg. 57; Maxey v. Carter, 10 Yerg. 521; Beck v. Tarrant, 61 Tex. 402; Glasscock v. Hamilton, 62 Tex. 154; Faïres v. Cockerill, — Tex. Civ. App. —, 29 S. W. 669; Bushnell v. Bushnell, 77 Wis. 435, 9 L.R.A. 411, 46 N. W. 442.

One signing a note as surety is liable for the payment thereof precisely to the same extent as his principal.

Kroncke v. Madsen, 56 Neb. 609, 77 N. W. 202; Mentzer v. Burlingame, 78 Kan. 219, 18 L.R.A.(N.S.) 585, 97 Pac. 371; Leeds Lumber Co. v. Haworth, 60 Am. St. Rep. 201, note; 6 R. C. L. p. 1041; Scott v. Nichols, 61 Am. Dec. 504, note.

Messrs. Cole & Brown also for appellees.

Rose, J., delivered the opinion of the court:

This is an action for contribution between sureties. It is alleged in the petition that April 17, 1894, George Scoular, William Frew, Thomas Donald, and Janet Scoular, as sureties, and Robert and William Scoular, L.R.A.1917F.

as principals, executed a bond for the payment of a loan of £1,500. The bond matured May 15, 1894, and was secured by a mortgage on land in Scotland, where all the parties resided except defendant, a resident of Nebraska. It is also alleged that the principals in the bond became insolvent, that the encumbered land was sold in satisfaction of prior liens, and that in 1912 William Frew and the trustees of the estate of Thomas Donald, plaintiffs herein, were compelled to pay the debt. It is alleged further that the laws of Scotland do not bar an action on the bond before forty years. The suit is brought against George Scoular to compel contribution in the sum of \$2,000, his alleged liability as one of three solvent sureties. Defendant pleaded that he signed the bond in Nebraska, that he was then, and has since been, a resident thereof, and that the action is barred here by the Statute of Limitations,—a five-year period. Rev. Stat. 1913, § 7567. Defendant also pleaded that he was not a surety, but that he signed the bond under an agreement to merely release any inheritable interest he might have in the mortgaged land. The trial court directed a verdict for plaintiffs, and from a judgment in their favor for \$3,018.12, defendant has appealed.

Should defendant's plea of the Statute of Limitations be sustained? The question may be stated thus: May a surety in whose favor the Statute of Limitations has not run, who has done nothing to suspend its operation, and who has been compelled to pay the debt of his principal, exact contribution from a cosurety in another state, though under the laws thereof the creditor's claim against the latter was barred when the principal's debt was paid? While the decisions appear to be in conflict, the better reason and the weight of authority seem to support the rule requiring contribution. Camp v. Bostwick, 20 Ohio St. 337, 5 Am. Rep. 669; Wood v. Leland, 1 Met. 387; May v. Vann, 15 Fla. 553; Crosby v. Wyatt, 23 Me. 156; Crosby v. Wyatt, 10 N. H. 319; Martin v. Frantz, 127 Pa. 389, 14 Am. St. Rep. 859, 18 Atl. 20; Aldrich v. Aldrich, 56 Vt. 324, 48 Am. Rep. 791; Wolmershausen v. Gullick [1893] 2 Ch. 514, 62 L. J. Ch. N. S. 773, 3 Reports, 610, 68 L. T. N. S. 753, 12 Eng. Rul. Cas. 823.

In Camp v. Bostwick, 20 Ohio St. 337, 5 Am. Rep. 669, it was contended, as in the present case, that, since the Statute of Limitations had barred an action by the creditor against the defendant before the plaintiff paid the debt, defendant received no benefit from such payment, and was not liable for contribution. In answer to this argument the court said: "If the right of a cosurety to claim contribution rested upon

the doctrine of subrogation to the rights of the creditor, the proposition might be true. The doctrine of subrogation has its origin in the relation of principal and surety, whereby a surety who pays the debt of his principal is, in equity, substituted in the place of the creditor, and is entitled to all the rights which the creditor may have against his principal. But the doctrine of contribution has its origin in the relation of cosureties or other joint promisors in the same degree of obligation. It is not founded upon the contract of suretyship. *Russell v. Faylor*, 1 Ohio St. 327, 59 Am. Dec. 631, and *Dering v. Winchelsea*, 1 Cox, Ch. Cas. 318, 29 Eng. Reprint, 1184, 2 Bos. & P. 270, 128 Eng. Reprint, 1276, 21 Eng. Rul. Cas. 617. It is an equity which springs up at the time the relation of cosureties is entered into, and ripens into a cause of action when one surety pays more than his proportion of the debt. *Wayland v. Tucker*, 4 Gratt. 268, 50 Am. Dec. 76. From this relation the common law implies a promise to contribute in case of unequal payments by cosureties. But equity resorts to no such fiction. It equalizes burdens and recognizes and enforces the reasonable expectations of cosureties because it is just and right in good morals, and not because of any supposed promise between them. This equity, having once arisen between cosureties, this reasonable expectation that each will bear his share of the burden, is, as it were, a vested right in each, and remains for his protection until he is released from all his liability in excess of his ratable share of the burden. Neither the creditor, the principal, the Statute of Limitations, nor the death of a party, can take it away."

Defendant argues that the Ohio case is based upon *Wood v. Leland*, 1 Met. 387, a suit in equity which must be distinguished, contribution now being a legal remedy to which the Statute of Limitations should be applied. The argument is not conclusive. The question is not whether the Statute of Limitations runs against a surety's claim for contribution, but when does the cause of action for contribution accrue? Ordinarily the Statute of Limitations does not commence to run until the cause of action accrues. The right of a surety to contribution does not arise until he has paid more than his proportion of the debt, or until his liability has been determined by judgment. *May v. Vann*, 15 Fla. 553; *Wolmershausen v. Gullick* [1893] 2 Ch. 514, 62 L. J. Ch. N. S. 773, 3 Reports, 610, 68 L. T. N. S. 753, 12 Eng. Rul. Cas. 823; *Ex parte Snowden*, L. R. 17 Ch. Div. 44, 50 L. J. Ch. N. S. 540, 44 L. T. N. S. 830, 29 Week. Rep. 654. Upon this point most of L.R.A.1917F.

the cases cited by defendant appear to be distinguishable. *Cochran v. Walker*, 82 Ky. 220, 56 Am. Rep. 801, and *Shelton v. Farmer*, 9 Bush, 314, are decisions under local statutes modifying the general rule. *Lovell v. Nelson*, 11 Allen, 101, 87 Am. Dec. 706, and *Spelman v. Talbot*, 123 Mass. 489, rest upon special statutes relating to claims against the estates of deceased persons, but recognize the general rule announced in *Wood v. Leland*, supra. *Stockmeyer v. Oertling*, 35 La. Ann. 467, without discussion follows *Ledoux v. Durrive*, 10 La. Ann. 7, and neither case involves the Statute of Limitations. *Turner v. Thom*, 89 Va. 745, 17 S. E. 323, appears to be a case where payment by the plaintiff was voluntary, the Statute of Limitations having run in favor of both sureties. *Stone v. Hammell*, 83 Cal. 547, 8 L.R.A. 425, 17 Am. St. Rep. 272, 23 Pac. 703, is a case where the plaintiff by absence from the state had suspended the operation of the statute. *McLin v. Harvey*, 8 Ga. App. 360, 69 S. E. 123, without any discussion of the principles underlying contribution, and *Screven v. Joyner*, 1 Hill, Eq. 252, 26 Am. Dec. 199, announce the rule urged by defendant herein, but the reasoning is not convincing. The action for contribution was not barred by the Statute of Limitations.

The trial court excluded testimony tending to show that defendant signed the bond at the request of his brother, one of the principals therein, and that it was agreed between them and the obligee that defendant was merely releasing whatever inheritable interest he might have in the encumbered land, and that plaintiffs knew defendant was not to be held as a surety. This is not an action on the bond, but a suit between sureties to enforce contribution. Evidence was therefore admissible to show the actual relation of the parties to the bond. 4 Wigmore, Ev. §§ 2444, 2445; *Chapman v. Garber*, 46 Neb. 16, 64 N. W. 362; *Cox v. Ellsworth*, 97 Neb. 392, 150 N. W. 197; *Oldham v. Broom*, 28 Ohio St. 41; *Chapeze v. Young*, 87 Ky. 476, 9 S. W. 399; *Leeper v. Paschal*, 70 Mo. App. 117; *Shea v. Vahey*, 215 Mass. 80, 102 N. E. 119; *Enterprise Brewing Co. v. Canning*, 210 Mass. 285, 96 N. E. 673; *Bulkeley v. House*, 62 Conn. 459, 21 L.R.A. 247, 26 Atl. 352. In the case last cited it was said: "In considering the questions involved, it should be borne in mind that this is an action for contribution. Contribution does not rest upon contract, but on the broad equitable principle that equality is equity. Justice and fair dealing demand that where one or more parties sign the same obligation and become equally obligated in precisely the same degree thereby, and stand upon the same footing as to

their liabilities thereunder, one of the number shall not be compelled to assume the whole burden for his associates, but may compel them to share equally with him any loss that may occur as the result of their joint liability. In actions for contribution, therefore, the principle seems now to be well established that parol evidence is admissible to show the true relations existing between the several parties bound by a written obligation. . . . Such evidence is not offered to contradict or vary the contract contained in the writing, but simply to show the actual relations subsisting between the joint makers of the note and the real nature of the contract between them. Such facts are not a part of the contract and do not affect its terms, but are wholly collateral to it. To support his claim for contribution, therefore, the plaintiff clearly had the right to show his true relations to the note, and this without regard to the knowledge of the defendant."

If defendant was not one of the sureties he is not liable for contribution. The trial court therefore erred in excluding evidence on this issue.

It follows that the judgment is reversed, and the cause remanded for further proceedings.

Dean and Cornish, JJ., not sitting.

Hamer, J., concurring in part, and dissenting as to that part of the majority opinion which refuses to dismiss the case:

I concur in so much of the opinion as holds that the judgment of the district court shall not stand and reverses the same. But I would go further, and dismiss the case. To the mind of the writer the majority opinion would import the Scotch Statute of Limitations into Nebraska and determine the liability of the defendant by that statute, and without consulting our own Statute of Limitations. It denies to the resident in Nebraska the protection which the Nebraska Statute of Limitations confers upon him. I would ask my brethren who are responsible for the majority opinion if the Statute of Limitations of this state does not run in favor of a man who was a resident of Nebraska at the time he signed the contract and has never since changed that residence?

It is said in *Bell v. Morrison*, 1 Pet. 351, 7 L. ed. 174, opinion by Justice Story: "It has often been matter of regret in modern times that in the construction of the Statute of Limitations the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that, instead of being viewed in an unfavorable light, as an unjust and discreditable defense, it had received such sup-

port as would have made it, what it was intended to be, emphatically, a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt, from lapse of time, but to afford security against stale demands after the true state of the transaction may have been forgotten, or be incapable of explanation by reason of the death or removal of witnesses. It has a manifest tendency to produce speedy settlements of accounts, and to suppress those prejudices which may rise up at a distance of time and baffle every honest effort to counteract or overcome them."

The majority opinion concedes that "the decisions appear to be in conflict," but then says that the better reason is that there shall be a rule allowing contribution. This decision in effect imports, in a way, the Scotch Statute of Limitations to Nebraska.

It should be remembered that this is not an action on the instrument which the defendant signed. This is an action to enforce contribution. It is based on the claim of the plaintiffs that the defendant was liable with them as a cosurety and that they paid the debt, and therefore that he should pay them his share. Before the defendant can be liable he should stand upon the same footing and be under the same burden with the other sureties when they paid the debt. The right to enforce contribution is based upon the fact that one (or more) of several having a common liability has paid the debt. If the basic fact upon which the right rests, the common liability, is lacking, payment by the cosurety gives no right to contribution.

The majority opinion does not answer the questions: (1) Does the Nebraska statute run in Nebraska? (2) If it does run, could the holders of the instrument showing the indebtedness sue the defendant in Nebraska upon it after the expiration of five years from the time it came due, and maintain an action upon it? (3) If they could not, then was the defendant liable upon the said bond and mortgage at the time the plaintiffs paid and satisfied it, between seventeen and eighteen years after it became due? (4) And if the defendant was not liable upon it, what sort of favor did the plaintiffs confer upon the defendant when they paid it? (5) And if the Scotch Statute of Limitations is forty years, and the plaintiffs were still liable under it for the debt up to the time they paid it, and the defendant, who lived in Nebraska, and not in Scotland, had been released from the payment of it by the Nebraska Statute of Limitations, five years, can you explain how the sureties in Scotland and the alleged surety in Nebraska actually stood upon the same

footing and carried the same burden when the Scotch sureties paid the debt in Scotland: and if you cannot explain it, why should the rule that there can be no contribution enforced between sureties unless at the time of payment the sureties who pay and the surety against whom contribution is sought stand upon the same footing and carry the same burden be disregarded in this case? I have looked and listened in vain for answers to these questions.

When the Scotch sureties paid the original debt due on the mortgage the defendant had already been released from the payment of that debt if the Statute of Limitations runs in Nebraska. But the Scotch sureties were still liable on the original mortgage when they paid the debt, because they were living in Scotland under a Statute of Limitations by which the debt would be continued forty years. But at this time the defendant was not liable, if he had ever been liable, because the Nebraska Statute of Limitations had released him from the payment of that original debt. If the defendant had been released from the payment of the original debt by the Statute of Limitations of the state of Nebraska, then he did not stand on the same footing as the Scotch sureties in Scotland, and there could be no way to make the defendant liable unless he made a new promise, and this he is not shown to have done.

We have only to inquire whether Clark, the creditor in Scotland, or the trustee in charge of his estate, could come to Nebraska and maintain an action against the defendant on the instrument which it is alleged he signed. Of course, no such action might be maintained in Nebraska, because the Nebraska Statute of Limitations rendered the maintenance of such an action impossible; but it is claimed that the cosureties paid the debt, and therefore that they acquired the right to compel the defendant to pay what they allege was his proportion. And now, as the Nebraska Statute of Limitations does run in Nebraska, and the defendant had been released from the payment of the original debt by such statute, he must have been already discharged. Of course, if the sureties in Scotland had chosen to pay the debt before the Statute of Limitations in Nebraska outlawed it they might have done so, and then they could have come to Nebraska and could have successfully sued the defendant for contribution and maintained their suit against him. But they did not come, and when the Nebraska statute released him it became impossible that they should acquire any right unless he made a new promise, and that he did not do.

It is contended by the plaintiffs that the L.R.A.1917F.

Statute of Limitations in Nebraska did not run for the reason that the sureties in Scotland made payments on the debt. But it is proper to remember that the theory upon which a payment prevents the Statute of Limitations from running is that the payment is a new promise by the debtor. In this case there was no new promise, for the reason that the surety in Nebraska, if he was a surety, knew nothing about these payments being made, and therefore they could not be his promise. To illustrate: Suppose that A sues B for contribution as a cosurety with him on the bond of A, B, and C to D, which bond A has paid, and suppose B's execution of the bond was obtained by duress, a good defense to an action by D, in whose favor the bond was given, and equally and surely a good defense in an action for contribution by A; for if B had no liability on the bond, being compelled to execute it by duress, his defense to an action for contribution could not be defeated by A's act in paying the debt. So, likewise, if B's liability is terminated by the Statute of Limitations, A cannot by payment of C's obligation, on which A and B are sureties, compel contribution from B. B's obligation is terminated. A remedy against him cannot be revived otherwise than by his own act.

Did the Statute of Limitations run in Nebraska? In *Pingrey, Suretyship and Guaranty*, 2d ed. § 90, it is said: "The American doctrine is that a part payment by one of several joint debtors is inoperative to prevent the running of the Statute of Limitations as to the others. In order to prevent the running of the statute, payment must be made by the debtor in person, or for him by authority, or for him and in his name without authority, but subsequently ratified by him. The mere fact that he has knowledge of payment being made by his codebtor is not sufficient. Hence a partial payment of a promissory note or debt by the principal debtor will not suspend the Statute of Limitations as to the surety."

Of course, the same thing must be true as to a surety where the payment is by one or more of his cosureties.

In *Cocke v. Hoffman*, 5 Lea, 105, 40 Am. Rep. 23, it was held, as stated in the syllabus: "A surety who pays the debt after the bar of the Statute of Limitations has attached in his favor is not entitled to recover contribution from a cosurety equally protected by the statute."

That was an action for contribution. *Jesse M. Lyons*, the intestate of the plaintiff in error, commenced said action January 20, 1867, against *James Hoffman*, before a justice of the peace, to recover contribution from him as a cosurety for money paid in

discharge of the common debt. Lyons and Hoffman were sureties for James Richards on a note dated December 14, 1862, and payable one day after date to William Lyons for \$100. Jesse M. Lyons paid this note on the 20th of January, 1875, after the bar of the Statute of Limitations had become fixed. In the body of the opinion it was said that "it has never been held that if one of such parties [a cosurety] pays the debt after it has ceased to be legal, subsisting, and compulsory, as where he is himself protected by the Statute of Limitations or by a discharge in bankruptcy, he could recover against a cosurety."

In *Cochran v. Walker*, 82 Ky. 220, 56 Am. Rep. 891, it was held, as stated in the syllabus: "A surety who has paid a judgment cannot enforce contribution against his cosurety if when the debt was paid the Statute of Limitations ran as between the original obligee and the cosurety or his executor."

In the body of the opinion it is said: "It is conceded that if one surety pays the debt to his principal after the running of the statute, he has no right of contribution against his cosurety, so as to defeat the plea of limitation."

In note c, 98 Am. St. Rep. 44 (*Stockwell v. Mutual L. Ins. Co.*) it is said: "The general rule is that, where one joint debtor pays a debt which is barred by limitation, without the consent of his codebtor, he is not entitled to contribution from him,"—citing many authorities.

In *Spelman v. Talbot*, 123 Mass. 489, it is said in the statement of the case: "The prayer of the bill was for judgment for the amount of the defendants' intestate's contributory share in the sums paid by the plaintiffs, and for general relief. The answer contained a demurrer for want of equity."

The court held that there could be no recovery, "inasmuch as it [the claim in the case] did not come into existence until after the period had arrived at which the administrators of the deceased were relieved by law of all liability."

While this is not the usual case for contribution, the nature of it is the same.

In *Turner v. Thom*, 89 Va. 745, 17 S. E. 323, it is held, as stated in the syllabus: "To entitle one joint obligor to recover from his co-obligor money paid by him in excess of his proportion, the payment must have been made upon a debt for which the latter was legally liable at time of the payment, and which the obligor paying was compellable to pay, and not upon a debt that was barred as to the obligor sought to be charged."

It was a suit for contribution. The court L.R.A.1917F.

said in the body of the opinion: "For, whether the doctrine of contribution 'is the result of a general equity which equalizes burdens and benefits,' or originates in a contract which the law implies, that the joint promisors at the time of the giving of the joint obligation mutually promise each other that if one is compelled to pay more than his proportion of the joint debt the other will indemnify the one so paying to the extent of the excess over his just proportion, it is equally clear that the payment must have been made upon a debt for which the defendant was legally liable at the time of the payment, and which the obligor who pays was compellable to pay, and not upon a debt which was barred as to the obligor sought to be charged,"—citing *Wood, Limitations*, 321, 322; *Bell v. Morrisson*, 1 Pet. 351, 7 L. ed. 174; 1 Story, Eq. Jur. 13th ed. § 325, and note; *Fordham v. Wallis*, 10 Hare, 217, 68 Eng. Reprint, 905, 22 L. J. Ch. N. S. 548, 17 Jur. 228, 1 Week. Rep. 118.

In *Stockmeyer v. Oertling*, 35 La. Ann. 467, it was held, as stated in the syllabus: "The party from whom contribution is demanded must have been under a legal obligation to pay at the time payment was made by him who demands the contribution."

In the body of the opinion it was said: "The party from whom contribution is demanded must have been himself under a legal obligation to pay at the time payment was made by him who demands the contribution."

In *McLin v. Harvey*, 8 Ga. App. 360, 69 S. E. 123, it was held, as stated in the syllabus: "As a general rule, one surety cannot recover contribution from another when the debt paid by the surety seeking contribution was not binding either on the principal or on the other surety. . . . The right of contribution does not rest on the original contract, but arises out of the relation created thereby of a common obligation, and the contract implied therefrom of discharging the common obligation equally; and when one surety or indorser on a promissory note is by operation of law discharged from the obligation of payment, the obligation thus discharged cannot without his consent be revived against him by the voluntary act of a cosurety."

In *Ellicott v. Nichols*, 7 Gill, 85, 48 Am. Dec. 546, it was held, as stated in the syllabus: "A plaintiff who seeks to extricate a case from the Act of Limitations must show a new promise, within three years prior to the institution of the suit, either express or implied."

It was also said: "One copromisor who pays a debt barred by the act, against the

consent of his codebtor, cannot maintain an action for contributions against such codebtor."

In *Wheatfield Twp. v. Brush Valley Twp.* 25 Pa. 112, it is held, as stated in the syllabus: "Where a debt is due from several parties, and one of them pays it after it is barred by the Statute of Limitations, he cannot maintain an action for contribution against the other debtors."

In the body of the opinion it is said: "The action for contribution is founded upon the equity arising from the payment by the plaintiff of more than his share of a liability existing at the time against both. Where the plaintiff is not liable for the debt, he has no right to volunteer a payment for the purpose of making the defendant his debtor. And where the defendant is not bound for it, the payment confers no benefit upon him."

In *Williamson v. Rees*, 15 Ohio, 572, it is held, as stated in the syllabus: "The co-signers of a note, joint and several in its terms, which fell due in 1807, and on which a suit was severally instituted in 1814 against another co-obligor and judgment recovered, and afterwards suffered to lie dormant sixteen years, and then revived, and finally paid thirty-eight years after it became payable, cannot be compelled to contribute."

In *Hunter v. Robertson*, 30 Ga. 479, it was held, as stated in the syllabus: "A payment by the principal or maker of a promissory note before barred by the statute does not constitute a new point for the running of the Statute of Limitations as against the indorser or surety, unless such indorser or surety be a party to such payment."

In *McBride v. Hunter*, 64 Ga. 655, it was held: "A payment and entry thereof on a note by the principal does not prevent the bar of the Statute of Limitations from attaching in favor of his security. Nor can the administrator of one who signed a note only as security relieve it from the bar of the statute so far as primary creditors may be affected thereby. Especially is this the case where the note was barred before the death of the security."

In *Rogers v. Burr*, 105 Ga. 432, 447, 70 Am. St. Rep. 50, 31 S. E. 438, 442, the decision of Lord Mansfield in *Whitcomb v. Whiting*, 2 Dougl. K. B. 652, 99 Eng. Reprint, 413 (the beginning of the trouble) is cited, and the court say: "The foundation on which it rests [was] found to be altogether unsatisfactory. In Pennsylvania and some of the other states it has been utterly exploded"—citing *Levy v. Cadet*, 17 Serg. & R. 126, 17 Am. Dec. 650; *Durham v. Lewiston*, 4 Me. 140; also cases collected in L.R.A.1917F.

Hunt v. Bridgham, 2 Pick. 581, 583, note 1, 13 Am. Dec. 458."

In *Ledoux v. Durrive*, 10 La. Ann. 7, it was held that when one of several sureties has paid the debt, he cannot, in an action for contribution against his cosurety, recover, when "at the time of such payment the cosurety himself was under no legal obligation to pay the debt."

This court long ago settled that payment by one surety is no bar to the running of the Statute of Limitations as to another. I would say that the great weight of authority is so strong that it would seem there should be no serious contention about the matter, but for the fact of the existence of this majority opinion. As early as 1877 this court in *Mayberry v. Willoughby*, 5 Neb. 368, 25 Am. Rep. 491, held that "to take a debt out of the statute, there must be an unqualified acknowledgment of the debt as originally due, and a promise to pay it; and if the promise is conditional, the condition must be performed before an action can be maintained on the promise."

It was also said: "A promise by one joint debtor will not take a debt out of the Statute of Limitations as to his co-contractors, unless he is specially and severally authorized by them for that purpose."

The moral right of the statute and the wisdom of its policy were commented upon by Justice Gantt, who said in the body of the opinion: "Hence the law must be regarded as designed to protect persons from ancient claims, whether well or ill founded; and its tendency is to produce speedy settlements, and if such settlements are not made within the time limited by the law its effects are such as to extinguish the legal liability upon the debt, unless it be revived by a new promise; and therefore, if the creditor by his own fault and laches permits the statute to attach, whatever may be the nature or character of his claim, he cannot complain of the operation of the law, since it is by his own negligence that it can be brought to bear against him."

There was nothing to prevent the sureties in Scotland from paying the debt there within five years after it fell due, and then they could have come to Nebraska, and could have sued the defendant here within that time. By so doing they could have recovered a judgment for contribution money from the defendant to the extent of his share of the debt. But they wait seventeen years, until the principals have failed, and until they have gone through bankruptcy. They wait until the property mortgaged in Scotland in which this defendant had an interest has been sold, probably for very much less than its value. They seem to have had possession of this property;

and after the defendant has nothing left in Scotland of his inheritance, then they try to get judgment against him in Nebraska, and to absorb the results of his twenty-five years of labor here.

It is contended that the Scotch sureties by the payment of the debt in Scotland kept alive some sort of living principle in it.

In *Dwire v. Gentry*, 95 Neb. 150, 145 N. W. 350, it is said in the syllabus: "The payment of interest on a note by a principal without the authority, knowledge, or consent of the surety will not stop the running of the Statute of Limitations as to the surety."

In the body of the opinion it is held: "That the Statute of Limitations is one of repose, and that when the time limited by it has expired then in legal contemplation the debt is extinguished, and can only be revived by a new promise by the person sought to be charged, or by some person lawfully authorized by him for that purpose."

If we apply the principle stated in that case to the instant case, it is apparent that the debt in Scotland had been outlawed in Nebraska, and that no suit could be maintained upon it here. It follows, therefore, that the Nebraska surety did not stand upon the same footing and did not bear the same burden borne by the Scotch sureties under their very long-winded Statute of Limitations.

In *Dwire v. Gentry*, supra, the case of *Omaha Sav. Bank v. Simeral*, 61 Neb. 741, 86 N. W. 470, was relied upon. Mr. Justice Letton, referring to the last-named case, quotes from it: "No payments were made on the note by Redick. Simeral, the principal on the note, made several payments, which were without the knowledge or consent of Redick, the surety. The payments so made did not toll the statute as to Redick."

In *Mizer v. Emigh*, 63 Neb. 245, 88 N. W. 479, it is said in the syllabus: "A payment made on an account by a person other than the debtor, without his authority, knowledge, and consent, will not toll the running of the Statute of Limitations."

In that case the Statute of Limitations was interposed as a defense, and was sustained by the court below, which rendered a judgment for the defendant. This court affirmed the judgment.

Along the same line as the cases above cited and quoted from are *Bell v. Morrison*, 1 Pet. 351, 7 L. ed. 174; *Coleman v. Fobes*, 22 Pa. 156, 60 Am. Dec. 75; *Screven v. Joyner*, 1 Hill, Eq. 252, 26 Am. Dec. 199; *Willoughby v. Irish*, 35 Minn. 63, 59 Am. Rep. 297, 27 N. W. 379; *Waughop v. Bartlett*, 165 Ill. 124, 46 N. E. 197; *Bulkeley v. House*, 62 Conn. 459, 21 L.R.A. 247, 26 Atl. L.R.A. 1917F.

352; *Oldham v. Broom*, 28 Ohio St. 41; *Smith v. Coon*, 22 La. Ann. 445; *Pfenninger v. Kokesch*, 68 Minn. 81, 70 N. W. 867; *Harper v. Fairley*, 53 N. Y. 442; *Hance v. Hair*, 25 Ohio St. 349; *Mozingo v. Ross*, 150 Ind. 688, 41 L.R.A. 612, 65 Am. St. Rep. 387, 50 N. E. 867; *Bottles v. Miller*, 112 Ind. 584, 14 N. E. 728; *Littlefield v. Littlefield*, 91 N. Y. 203, 43 Am. Rep. 663; *Kallenbach v. Dickinson*, 100 Ill. 427, 39 Am. Rep. 47; *Myatt v. Bell*, 41 Ala. 222; *Steele v. Souder*, 20 Kan. 39; *Tate v. Clements*, 16 Fla. 339, 26 Am. Rep. 709; *Van Keuren v. Parmelee*, 2 N. Y. 528, 51 Am. Dec. 322; *Angell, Limitations*, 6th ed. § 259; 2 Wood, *Limitations*, 4th ed. § 285. In that section it is said that the doctrine of *Whitcomb v. Whiting*, 2 Dougl. K. B. 652, 99 Eng. Reprint, 413, is repudiated; that "the courts, without any express legislation, have repudiated the doctrine as unsound, predicated upon erroneous reasoning, and opposed to the spirit of these statutes; especially is this the case in New Hampshire, Pennsylvania, Tennessee, Kansas, Florida, Maryland, Illinois, and by the United States Supreme Court;" also that the doctrine in *Whitcomb v. Whiting* "has been nearly obliterated by legislative and judicial action."

I think that I have examined all the cases cited in the majority opinion. Some appear to be overruled. Only one seems to justify the views expressed in the majority opinion. It is *Aldrich v. Aldrich*, 56 Vt. 324, 48 Am. Rep. 791, where the plaintiff and defendant were cosureties on a promissory note, and the principal and sureties were residents of Vermont, and after the Statute of Limitations became a bar in Vermont the plaintiff went down into New Hampshire, where the Statute of Limitations is no defense, and was there sued, and judgment rendered against him, when he paid the debt. It was held that he had an action for contribution against his cosurety.

In *Waughop v. Bartlett*, 165 Ill. 124, 133, 46 N. E. 200, it is said in the syllabus: "One joint maker of a note cannot, by payment thereon, or any other act, stop the running of the Statute of Limitations against another joint maker, except when duly authorized for that purpose."

In the body of the opinion it is said: "The note in this case shows indorsements of interest thereon at regular semiannual periods from its date up to January 1, 1890. These indorsements of interest were all made by the holder of the note, or his representative in the state of Massachusetts. Of themselves they would not constitute a new promise."

Justice Story, in delivering the opinion of the court in *Bell v. Morrison*, 1 Pet. 351, 367, 7 L. ed. 174, 181, quoted Lord Mans-

field's opinion in *Whitcomb v. Whiting*, supra, where he, Mansfield, said: "Payment by one is payment for all, the one acting virtually as agent for the rest; and in the same manner an admission by one is an admission by all; and the law raises the promise to pay when the debt is admitted to be due."

Justice Story said of this very brief exposition of a legal principle: "This is the whole reasoning reported in the case, and is certainly not very satisfactory. It assumes that one party who has authority to discharge has necessarily also authority to charge the others, that a virtual agency exists in each joint debtor to pay for the whole, and that a virtual agency exists by analogy to charge the whole. Now this very position constitutes the matter in controversy. It is true that a payment by one does inure for the benefit of the whole; but this arises not so much from any virtual agency for the whole, as by operation of law; for the payment extinguishes the debt; if such payment were made after a positive refusal or prohibition of the other joint debtors, it would still operate as an extinguishment of the debt, and the creditor could no longer sue them. In truth, he who pays a joint debt pays to discharge himself; and so far from binding the others conclusively by his act, as virtually theirs also, he cannot recover over against them, in contribution, without such payment has been rightfully made, and ought to charge them. When the statute has run against a joint debt, the reasonable presumption is that it is no longer a subsisting debt; and therefore there is no ground on which to raise a virtual agency to pay that which is not admitted to exist."

Eighteen of the courts of last resort in the United States which I have examined, together with the United States Supreme Court decisions, have declared for the doctrine which I have endeavored to express in this dissent. If I am right, there is against them only the highest tribunal of

the state of Vermont. The majority opinion seems to disregard the decisions of the supreme court of our own state.

In note 17, § 287, 2 Wood, Limitations, 4th ed. it is said: "The earlier decisions in New York following *Whitcomb v. Whiting* (see *Johnson v. Beardslee*, 15 Johns. 3; *Patterson v. Choate*, 7 Wend. 441) were overruled in 1849, in *Van Keuren v. Parmelee*, 2 N. Y. 523, 51 Am. Dec. 322."

In the body of the text in § 285 of the same book it is said that "the doctrine of *Whitcomb v. Whiting*, supra, that an acknowledgment, new promise, or payment made by one of two or more joint contractors will remove the statute bar as to all has practically but little force at the present day, as in many of the states the legislature has expressly overridden it by providing that no acknowledgment, promise, or part payment made by one joint debtor shall deprive the others of the benefit of the statute; . . . especially is this the case in New Hampshire, Pennsylvania, Tennessee, Kansas, Florida, Maryland, Illinois, and by the United States Supreme Court; while in Connecticut, New Jersey, Rhode Island, and Delaware the doctrine of *Whitcomb v. Whiting* is still adhered to."

Many authorities are cited against the doctrine.

It is also said in the text that the doctrine of *Whitcomb v. Whiting* "has been nearly obliterated by legislative and judicial action." In addition to the authorities above cited, which are against the doctrine of *Whitcomb v. Whiting*, are the following states, mentioned in note 3, under § 285: Alabama, Iowa, Minnesota, Kansas, South Carolina, Ohio, California, Oregon, Nevada, Nebraska, Texas, Arizona, Dakota, Idaho, Montana, Utah, and Wyoming.

If I have correctly counted the decisions as they are cited, the courts of last resort in twenty-two states have repudiated the doctrine of *Whitcomb v. Whiting* as it was laid down by Lord Mansfield.

Annotation—Right of surety to indemnity from principal, or contribution from cosurety, as affected by the fact that an action by the creditor against the principal or cosurety would be barred.

As to when Statute of Limitations commences to run to bar an action by a surety against a cosurety for contribution, see notes to *Mentzer v. Burlingame*, 18 L.R.A. (N.S.) 585, and *Hard v. Mingle*, 42 L.R.A. (N.S.) 1131.

As stated in *FREW v. SCULAR*, ante, 1065, the decisions appear to be in conflict upon this question, but the great weight of authority seems to support the L.R.A.1917F.

rule that the right of a surety to indemnity from the principal, or contribution from a cosurety, is not defeated by the fact that an action by the creditor against the principal or cosurety would have been barred at the time when the surety was compelled to pay the debt.

Thus, it was held in the following cases that a surety who paid the debt

of the principal when barred as to the latter, but not as to the former, could recover from the latter the amount so paid. *Hooks v. Branch Bank* (1845) 8 Ala. 580; *Reid v. Flippen* (1872) 47 Ga. 273; *Scott v. Nichols* (1854) 27 Miss. 94, 61 Am. Dec. 503; *Rucks v. Taylor* (Miss.) *infra*; *Sibley v. McAllaster* (1836) 8 N. H. 389; *Marshall v. Hudson* (1836) 9 Yerg. (Tenn.) 57; *Willis v. Chowning* (1897) 90 Tex. 617, 59 Am. St. Rep. 842, 40 S. W. 395; *Norton v. Hall* (1868) 41 Vt. 471.

In *Turner v. McCarter* (1871) 42 Ga. 491, however, relief was granted to a surety against a judgment taken against him by default upon the assumption that, the note being barred as against the principal at the time the judgment was taken, the surety could not look to the latter for indemnity.

It appears, however, that the judge who wrote the opinion in the preceding case subsequently wrote the opinion in *Reid v. Flippen* (1872) 47 Ga. 273, and there stated: "There are some remarks by me in the case of *Turner v. McCarter* (Ga.) *supra*, indicating a different opinion from the present decision. That case, however, stands on peculiar ground, and I am myself now satisfied that my reasoning there is not sound."

The rule giving a surety the right to indemnity notwithstanding the debt is barred as to his principal applies to a surety who, because a resident of another state, where the period of limitation is longer than in the state of the principal's residence, is compelled to pay the debt upon the recovery by the creditor of a judgment therefor against him, in an action commenced after the Statute of Limitations would have barred an action against him in the state of the principal's residence. *Rucks v. Taylor* (1873) 49 Miss. 552.

A surety who under legal compulsion pays a judgment against his principal and himself may maintain an action against his principal for reimbursement, although at the time of such payment the judgment could not in any manner have been enforced against the latter, on account of its having been dormant as to him for more than a year. *Reed v. Humphrey* (1904) 69 Kan. 155, 76 Pac. 390.

In the following cases it was held that a surety who has been compelled to pay more than his proportion of the principal's debt may compel a cosurety to contribute the amount he ought to have paid, although an action against the latter by the creditor would have

been barred if instituted at the time of the payment by the surety: *Broughton v. Robinson* (1847) 11 Ala. 922; *Evans v. Evans* (1849) 16 Ala. 465; *Crosby v. Wyatt* (1843) 23 Me. 156; *Wood v. Leland* (1840) 1 Met. (Mass.) 387; *Kelly v. Sproul* (1908) 153 Mich. 691, 117 N. W. 327, 15 Ann. Cas. 1029, *infra*; *FREW v. SCOLAR*; *Crosby v. Wyatt* (N. H.) *infra*; *Hard v. Mingle* (1912) 206 N. Y. 179, 42 L.R.A. (N.S.) 1131, 99 N. E. 542; *Camp v. Bostwick* (1870) 20 Ohio St. 337, 5 Am. Rep. 669; *Martin v. Frantz* (1889) 127 Pa. 389, 14 Am. St. Rep. 859, 18 Atl. 20; *Reeves v. Pulliam* (1874) 7 Baxt. (Tenn.) 119; *Glascock v. Hamilton* (1884) 62 Tex. 143; *Aldrich v. Aldrich* (Vt.) *infra*; *Wolmershausen v. Gullick* [1893] 2 Ch. 514, 62 L. J. Ch. N. S. 773, 3 Reports, 610, 68 L. T. N. S. 753, 12 Eng. Rul. Cas. 823.

The contrary was held in *Shelton v. Farmer* (1872) 9 Bush (Ky.) 314, and *Cochran v. Walker* (1884) 82 Ky. 220, 56 Am. Rep. 891. The reason given for so holding was that there was a statute in Kentucky for the protection of sureties, giving a surety when sued by the creditor power to compel the latter to join his cosurety, and that by the neglect of the surety sued to do so, and thus allowing the Statute of Limitations to run in favor of his cosurety, the former lost his right to contribution from the latter.

There does not appear to be any similar statute involved in any of the cases holding the majority rule, except in the cases of *Broughton v. Robinson* (1847) 11 Ala. 922, and *Reeves v. Pulliam* (1874) 7 Baxt. (Tenn.) 119. In the former case the statute allowed one surety, when sued by the creditor, to notify his cosurety of the pendency of the suit, and made it the duty of the court, on proof at the trial of the giving of such a notice, to enter up judgment in favor of the surety sued, against the cosurety so notified, for the proportion of the debt which such cosurety should pay. In the latter case a right to a judgment by motion was given by the statute to a cosurety against whom judgment had been rendered, or who had paid such judgment, or more than his ratable share thereof, against all the parties to the instrument for their proportion, whether they were included in such original judgment or not. As in both of these cases the surety sued made the statutory motion, there was no ruling as to the effect upon his right to contribution of his failure to take advantage of the statute;

but in both cases it was held that the fact that the motion for judgment against the cosurety was made after the Statute of Limitations had run in favor of the cosurety as against the claim of the common creditor did not defeat the right to contribution.

The reason given for the majority rule would seem to indicate that the existence of a statute giving the surety sued by the creditor power to compel his cosureties to be brought into the action, or to require the court to enter up judgment against them for contribution, and the failure of the surety sued to invoke such remedy, would not alter the decision of the cases upholding the right of a surety to contribution after the Statute of Limitations would bar an action against the cosurety by the creditor. The reason for the majority rule, as given in *FREW v. SCOLAR*, ante, 1065, is that the doctrine of contribution is not founded upon the contract of suretyship, but is based on an equity which springs up at the time the relation of cosureties is entered into, and ripens into a cause of action when one surety pays more than his proportion of the debt. The object of this equity is to equalize burdens among cosureties, and having once arisen, the reasonable expectation of cosureties that each will bear his share of the burden is, as it were, a vested right in each, and remains for his protection until he is released from all his liability in excess of his ratable share of the burden, and neither the creditor, the principal, the Statute of Limitations, nor the death of a party can take it away.

A surety as to whom the Statute of Limitations of his state is no defense to an action by the creditor may exact contribution from a cosurety in another state, although under the laws of the latter state the creditor's claim against the cosurety was barred when the surety

paid the principal's debt. *FREW v. SCOLAR*; *Crosby v. Wyatt* (1839) 10 N. H. 318; *Aldrich v. Aldrich* (1883) 56 Vt. 324, 48 Am. Rep. 791.

It was so held in the last case, although the surety seeking contribution had moved from a state after the Statute of Limitations had run there in favor of all the parties, including himself, to a state where he was compelled to pay the debt because its Statute of Limitations was not available as a defense.

The rule that a surety is not protected against contribution by the failure of his cosurety to pay the debt until after the Statute of Limitations has run against their joint obligation, which has been kept alive as against the latter by a valid judgment in favor of the creditor, is not changed by a statute providing that in actions against joint contractors, if the plaintiff is barred as to some of the defendants, but entitled to recover as to others by virtue of a new acknowledgment or otherwise, judgment will be entered in favor of those defendants as to whom the action is barred, and in favor of the plaintiff against the others. *Kelly v. Sproul* (1908) 153 Mich. 691, 117 N. W. 327, 15 Ann. Cas. 1029.

Cases where an action by the creditor against the surety seeking indemnity or contribution would also be barred when the latter paid the principal's debt, though literally within the scope of this note, are not treated herein because based upon a different principle of law; viz., the principle that a surety who voluntarily pays the principal's debt after the bar of the Statute of Limitations has attached in his favor cannot recover indemnity or contribution, which principal would defeat a surety's action for indemnity or contribution, although an action by the creditor against the principal or cosurety would not be barred. G. V. I.

NORTH DAKOTA SUPREME COURT.

STATE OF NORTH DAKOTA EX REL. F. S. McCURDY, State's Attorney for Burleigh County, Resp't.,
v.

ANNIE BENNETT et al., Appts.

(— N. D. —, 163 N. W. 1063.)

Nuisance — closing bawdyhouse.

1. In the absence of legislative enactment authorizing the destruction of personal

property which is kept and used in connection with the operation and maintenance of a bawdyhouse, the court has no inherent authority to order the destruction of such property, and has no authority to order the destruction of any property connected

Note. — The right to seize or forfeit property found in bawdyhouse is discussed in *State ex rel. Robertson v. Lane*, 52 L.R.A. (N.S.) 932, and see footnote to that case.

Generally as to validity of statutes or ordinances against bawdyhouses, see annotation following *People ex rel. Thrasher v. Smith*, L.R.A.1917B, 1078.

with the operation of a bawdyhouse. The court has the authority, under the present law defining bawdyhouses, prescribing what may be done with such houses and personal property therein, to take possession of, close, and keep closed for the term of one year, any house or building in which such bawdyhouse is conducted; and has authority also to take possession of all personal property found therein or on such premises and place it in the possession, by its order, of a sheriff or some person appointed by the court, to remain in such possession for the term of one year, and has also the right and authority to charge up as costs in such case the expense of caring for all such property during such time the same is in the possession or control of such persons as are authorized by law to take charge of property, such as sheriffs or other persons appointed by the court.

For other cases, see Nuisances, II. c, in Dig. 1-52 N. S.

Same — affidavits in past tense.

2. Where the affidavits in support of an application for injunction refer to the nuisance as having existed, rather than existing, the court is not without jurisdiction, notwithstanding that the affidavits do not allege the present existence of the nuisance at the time of the commencement of the action, where the complaint in the action does allege that the nuisance is existing at the time of the commencement of the action, and the injunctive order is based upon both the complaint and the affidavits.

For other cases, see Nuisances, II. c, in Dig. 1-52 N. S.

(Robinson, J., dissents in part.)

(July 14, 1917.)

APPEAL by defendants from a judgment of the District Court for Burleigh County in plaintiff's favor in an action brought to enjoin the maintenance of a common nuisance. Reversed in part.

The facts are stated in the opinion.

Messrs. Fisk, Murphy, & Linde and Sullivan & Sullivan, for appellants.

The court had no authority under our statute to order the destruction of the personal property found in the place in which the nuisance was alleged to have been maintained.

State ex rel. Robertson v. New England Furniture & Carpet Co. (State ex rel. Robertson v. Lane) 126 Minn. 78, 52 L.R.A. (N.S.) 932, 147 N. W. 951, Ann. Cas. 1915D, 549.

Messrs. F. E. McCurdy and William Langer, Attorney General, for the State.

If a court in its discretion believes it necessary to destroy property in order to prevent that property from being further used in an illegitimate manner, it would seem to be the most effective method of enforcing its orders.

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State ex rel. Robertson v. New England Furniture & Carpet Co. (State ex rel. Robertson v. Lane) 126 Minn. 78, 52 L.R.A. (N.S.) 935, 147 N. W. 951, Ann. Cas. 1915D, 549.

Grace, J., delivered the opinion of the court:

The complaint states a cause of action for the discontinuance of a common nuisance, to wit, a bawdyhouse, alleged to have been maintained at the time of the commencement of the action and prior thereto at the place described in the complaint. As proof of the maintaining of the nuisance, the affidavit of the state's attorney, on information and belief, and the affidavit of F. L. Watkins, upon his own knowledge, were made in support of the injunctive proceedings. The answer was a general denial. The affidavits also constitute the evidence in the case, by stipulation.

The first point raised by the appellants is that the affidavits, which by stipulation constitute the proof in the action, were insufficient as a matter of law to confer upon the court jurisdiction, in that they do not show or furnish any proof, that any nuisance ever existed, or that it was transpiring, existing, and being carried on at the time of the commencement of the action. The main contention of the parties in regard to this assignment of error relates to the proposition that there is no allegation or statement in the affidavits that a nuisance is in existence or was in existence at the time of the commencement of the action. In this case, however, the court, in making its injunctive order, bases its order not only on the affidavit of the state's attorney and F. L. Watkins, but also upon the verified complaint. It will be noticed that the complaint alleges that the nuisance was being maintained at the time of the commencement of the action, and this is nowhere disproved by any competent testimony, although the same is denied in the answer; but, so far as determining the question of jurisdiction is concerned, the allegation in the complaint, taken together with the fact that there was positive proof of the existence of the nuisance, and these, taken together with the presumption of the continuance of the nuisance, it having been shown by competent proof that it did once exist, is sufficient to give the court jurisdiction,—and we hold that the court did have jurisdiction.

As to the other assignment of error, which is that the court had no power as a matter of law under our statute to make an order destroying the personal property found in the building in which the alleged nuisance is charged to have been maintained, it is a

matter of considerable importance and not easy of solution. The statute referring to that matter is found in Comp. Laws 1913, §§ 9644-9651, inclusive. The main section, however, is § 9644. It will be noticed by such section that the existence of such nuisance, when it be established in either a criminal or equitable action, upon the judgment of a jury, court, or judge having jurisdiction, and where it is found in any such proceeding that such a place is a nuisance, the sheriff, his deputy, or any constable of the proper county, or marshal of any city where the same is located, shall be directed to shut up and abate such place by taking possession thereof and closing the same against its use by anyone, and keep the same closed for the period of one year from the date of the judgment decreeing such place to be a common nuisance. Under this statute the court, after having found the place under consideration in this complaint to be a nuisance, ordered the house to be closed up for the period of one year and all of the personal property therein, consisting of the list of personal property included in the judgment of the trial court, and which it is not necessary to fully describe in this opinion, but generally such personal property consisted of pictures, a piano, clock, heating stove, chairs, tables, vases, beds and bedding, dressers, commodes, a victrola the usual dining room furniture, the usual kitchen furniture, and also a trunkful of cut glass (said to be worth about \$500), and other furniture of like nature destroyed. There is no question under the statute but what the court had a right to close the house for the term of one year. The sole question, therefore, remaining, is whether the court had authority, under its inherent equitable powers, to order the destruction of such property, being in the house at the time of the continuance of the nuisance, and at least most of it, to some extent, susceptible of use in the continuance and conduct of such nuisance. All of the personal property is such property as could be used for a good and legitimate use and was such personal property of which a legitimate use could be made. It is different from the dice which are used in a dice game, poker chips and gambling devices or tables or paraphernalia for which no other beneficial use could be generally found, and which would be generally useless excepting in the conduct and operation of gambling games and devices. Our statute does not provide that such property may be destroyed. Has the court, then, the power, in the exercise of its function as a court of equity, on the grounds of public policy, for the public good, the moral welfare, the moral safety of the community, and for the protection of the L.R.A.1917F.

younger members of the community, both male and female, if the court concludes that such property is being used and persistently used to carry on and operate a nuisance, to order its destruction? We are clear that the court has no such inherent power, and the court has such power only where conferred upon it by the legislature. The United States Supreme Court in the case of *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273, has decided with what branch of the government the police power is lodged, and has determined which branch of the government has power to determine questions of police regulation so as to bind all, and has determined that the legislative branch of the government is the division of the government with which is lodged the power to determine what rules, regulations, and laws of police power shall be enacted and be operative. The United States Supreme Court in such case, speaking through Justice Harlan, uses the following language, referring to police powers: "Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety."

In the case of *Balch v. Glenn*, 85 Kan. 735, 43 L.R.A. (N.S.) 1080, 119 Pac. 67, Ann. Cas. 1913A, 406, the following is found in the syllabus: "The legislature of the state may declare that to be a nuisance which is detrimental to the health, morals, peace, or welfare of its citizens, and may confer power upon local boards or tribunals to exercise the police power of the state when, in the judgment of such tribunals, the conditions exist which the legislature has declared constitute such nuisance."

We think it is well settled that the power to declare what is a nuisance and to enact or bring into existence laws, regulations, powers, and remedies to destroy such nuisance rests primarily with the legislative branch of the government. Our legislature has declared, for instance, that places where intoxicating liquors are kept for sale, or a place to which persons resort to drink intoxicating liquors, are a nuisance, and has authorized the abatement of such nuisance, and in connection therewith authorized the destruction of any liquors found upon such

place. It has also declared that the keeping and maintaining of a place where gambling is carried on is a nuisance, and has authorized the discontinuance of such nuisance and the destruction of all gambling apparatus connected with such place. Our legislature has also enacted a law, being § 9644, Comp. Laws 1913, which defines bawdyhouses and declares them to be a nuisance, and authorizes any place or house of ill fame, assignation, or prostitution, maintained as a place to which persons may resort or visit for unlawful sexual intercourse, to be abated and closed up for a period of one year, and also authorized the officer to take possession of all personal property found on such premises and hold the possession of such premises and keep the same closed until final judgment is entered, or until the possession of the same shall be disposed of by an order of the court or judge upon a hearing had before it for such purpose. This is the expression of the legislature upon this subject, and confers the only power relative to such subject which the courts may exercise. In the law enacted by the legislature relating to bawdyhouses it does not authorize the destruction of the property, and until the Legislature enacts such a law the courts are without the inherent power to order the destruction of property used in the maintenance of a bawdyhouse. The court can order that all such property shall be taken possession of by a sheriff or other public officer, whether the same is real or personal property, and retained in the possession of such public officer or other person appointed by the court by its order, for the full term of one year, and may also order that the expenses for holding and caring for such property during the year be taxed as a part of the costs in the action. This is as far as the legislature has gone, and the court is not authorized to go any farther, in view of the fact that the power to enact laws upon such subject and to make regulations concerning the abatement of such nuisance and the disposition of the property connected with such nuisance and what may be done to abate such nuisance is lodged wholly and entirely with the legislature.

The case of *State ex rel. Robertson v. New England Furniture & Carpet Co.* (State ex rel. *Robertson v. Lane*) 126 Minn. 78, 52 L.R.A.(N.S.) 932, 147 N. W. 951, Ann. Cas. 1915D, 549, holds that the court may order the destruction of property used in the maintenance of a bawdyhouse. The legislature of Minnesota, however, has enacted a statute directly upon this subject, authorizing the destruction of this property when so used. They do, however, in such case, say that equity could have dealt with the property in any way reasonably necessary. L.R.A.1917F.

to suppress the nuisance, meaning thereby that the court of equity could have assumed any powers it saw fit to destroy the nuisance, even in the absence of a statute. We do not believe such holding is sound as applied to nuisances and property of the character here involved, in view of the fact that the power to deal with common nuisances and to enact laws defining them and for their discontinuance and the disposition of property connected therewith and its destruction, if necessary to abate such nuisance, is lodged wholly and entirely in the legislative branch of government, as is clearly shown from the conclusion reached by the United States Supreme Court in the case referred to; and there are many other cases to the same point and of like import.

The judgment of the District Court is reversed in so far as it orders the destruction of the property mentioned and set forth in its findings of fact and decree.

Robinson, J., dissenting in part:

This is an appeal from a judgment or order which is to the effect that the defendants have kept in Bismarck a bawdyhouse, and that the sheriff take possession of the house and keep it securely locked for one year and destroy all the stoves, beds, furniture, and furnishings of the house, amounting to the value of \$2,000 or \$3,000. The proceeding was commenced by warrant or order signed by the judge, directing any sheriff, constable, or policeman to take possession of the house and to lock and hold the same with all the personal property therein.

If the judgment is valid, then the most innocent party in Bismarck may be charged with the keeping of a bawdyhouse and at any moment of the day or night he may be thrown out of his house and home and have it locked up and his property destroyed. Such a procedure is unknown to the common law, and it is unknown to common sense and common reason. It leads to the destruction of civil liberty, the burning of Salem witches, and the persecution of those who do not think as we do.

In Blackstone we read that a man's house is his castle wherein he may defy even the monarch, but, under the spell of modern reform, if some irresponsible detective, working for his dirty fee, makes affidavit, whether true or false, charging a person with the keeping of a bawdyhouse, then a party may be thrown out of his house and the house and all the property destroyed, and, as in this case, it may all be done in a summary manner and without a trial by jury.

And still the Constitution provides: The right of trial by jury shall be secured to all and shall remain inviolate. Under constitu-

tional law, before the courts may hang a man or send him to state's prison or throw him out of his house or destroy his property, they must give him a trial by jury. The right of trial by jury is a thousand times more sacred than the right to abate forbidden houses and to destroy property. Indeed, the Constitution contains nothing to warrant the destruction of property, and it does protect property to the same extent that it protects life and liberty. It reads: All men are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property and reputation, and pursuing and obtaining safety and happiness. The right of trial by jury shall be secured to all and shall remain inviolate. No person shall be compelled in any criminal case to be a witness against himself, or be deprived of life, liberty, or property without due process of law. Excessive bail shall not be required nor excessive fines imposed, nor shall cruel or unusual punishment be inflicted. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated. All courts shall be open, and every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due process of law and right and justice administered without sale, denial, or delay. These are among the most sacred provisions of the Constitution. They cannot be too often repeated. It were well to commit them to memory and to repeat them morning and evening as we do the Lord's Prayer and the Ten Commandments. The action is under chapter 59, Laws of 1911, which was house bill No. 130. At the close of the session the bill was rushed through and passed without reading or discussion, contrary to the Constitution. The act declared every bawdyhouse to be a common nuisance, to abate which an action may

be commenced by any person in the name of the state, and that, at the commencement of such action, on an affidavit stating the offense, the judge must grant an injunction and issue a warrant commanding the officer to take possession of the house and to securely lock and hold the same to abide the final judgment. Then it is provided that a final judgment against the accused shall direct the officer to shut up and abate the place and to keep the same securely closed for one year.

The statute contains nothing to warrant the destruction of personal property, and, if it did, it would be clearly void, and it is void in declaring a house to be a public nuisance when in fact it may not be a nuisance. A house may be a public nuisance when it overhangs the street or when it becomes a worthless firetrap and a menace to the city, but shall we say that the McKenzie Hotel is a common nuisance, and that it should be closed for one year by reason of the fact that to some extent it is or may be used, as all hotels are used, for gambling, drinking, and forbidden love? Shall we say that the grass and parks are nuisances to be destroyed because of use in that way? Shall we say that on mere affidavits and without trial by jury any party may be turned out of his house and deprived of his liberty and property? Even Shylock disdained to beg for life without his property. He said: "You take my life when you do take the means whereby I live."

There is nothing in the record to show that the house in question is a nuisance. For aught that appears from the affidavits, it may be one of the nicest and best and most secluded houses in the town. When a party offends against the law he may be punished by the law and as provided by the law, but not by destroying his property or dispossessing him of lands or houses or home. The act in question is void. The judgment is void, and it should be reversed.

OREGON SUPREME COURT. (In Banc.)

BAGGAGE & OMNIBUS TRANSFER COMPANY, Resp't.,

v.
CITY OF PORTLAND et al., Appts.

(84 Or. 343, 164 Pac. 570.)

Carrier — exclusive privilege for baggage transfer — validity.

1. A contract by a railroad company giv-

Note. — For right of carrier to grant exclusive train privilege to baggage or passenger transfer companies, see annotation following this case, post, 1085.
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ing a baggage company the exclusive right to solicit on its trains and to occupy space in its station is not void as against public policy.

For other cases, see Carriers, IV. b, in Dig.
1-52 N. S.

Same — statutory prohibition of preferences.

2. Contracting to give a particular baggage company exclusive rights on its trains and in its station is not forbidden by a statute making it unlawful for any railroad company to make or give any undue or unreasonable privilege or advantage to any particular person, firm, or corporation, if the statute where such provision is found

was intended to prohibit preferences among passengers or shippers.

For other cases, see Carriers, IV. b, in Dig. 1-52 N. S.

Municipal corporation — authority to forbid baggage monopoly.

3. A charter conferring upon a municipal corporation police power and the authority to regulate all public utilities does not empower it to forbid a carrier to grant a baggage company the exclusive privilege to solicit patronage on its trains and in its station.

For other cases, see Municipal Corporations, II. c, 4, d, in Dig. 1-52 N. S.

(April 17, 1917.)

APPEAL by defendants from a decree of the Circuit Court for Multnomah County in favor of plaintiff in a suit to enjoin the threatened enforcement of a city ordinance prohibiting the granting of exclusive privileges to transfer companies. **Affirmed.**

Statement by Moore, J.:

This is a suit by the Baggage & Omnibus Transfer Company, a corporation, against the city of Portland, a municipal corporation, and its directing executive officers, to enjoin the threatened enforcement of a city ordinance. The complaint alleges in effect that the Northern Pacific Terminal Company, a corporation, owns in that city a union depot and railroad tracks connecting with similar lines of other railway companies; that on January 1, 1914, the terminal company entered into a written contract with the plaintiff granting to the latter the exclusive privilege of requesting from passengers on incoming trains the right to transfer their baggage to such places in Portland, Oregon, as might be directed, and also to maintain within the station grounds a representative to solicit from travelers as they left sleeping cars after occupying them all or a part of the night the same right; that the plaintiff was also granted the advantage of occupying at the depot a part of the baggage room and was furnished by the terminal company with telephone connections; that the council of the city of Portland adopted, and its mayor approved, Ordinance No. 29773, § 3 of which undertakes to make it unlawful for any railway company to give to the owner of any vehicle a right or privilege which would not be extended upon equal terms to the proprietor of all carriages in that municipality, and provides a penalty for a violation of the enactment; and that the defendants threaten to enforce the provisions of such ordinance and to subject the plaintiff and its agents to a multiplicity of suits and criminal actions, thereby depriving it of a valuable property right, to its irreparable L.R.A.1917F.

injury and damage, to redress which wrong no adequate remedy exists at law. Copies of the contract and of the ordinance were made parts of the complaint, the prayer of which is that the enactment may be decreed oppressive and void, and the defendants enjoined from putting their menace into execution. The answer admits some of the averments of the complaint, denies others, and alleges generally that the contract referred to is void, in that it violates public policy by denying to all others than the plaintiff equal rights and privileges; that it is impossible for any other person engaged in the transfer business to obtain possession of baggage at the depot until several hours after the arrival of a train, thereby making it necessary for all passengers who desire the immediate delivery of their trunks, etc., to patronize the plaintiff, whose contract creates a monopoly. A demurrer to the answer on the ground that it did not state facts sufficient to constitute a defense was sustained, and the relief prayed for in the complaint was granted, from which decree the defendants appeal.

Messrs. L. E. Latourette and W. P. La Roche, for appellants:

An arrangement whereby exclusive or preferential privileges are given in the matter of handling baggage or passengers at a depot is against public policy, in violation of the common law and of the statutes, and is void.

Montana Union R. Co. v. Langlois, 9 Mont. 419, 8 L.R.A. 753, 18 Am. St. Rep. 745, 24 Pac. 209; Kalamazoo Hack & Bus Co. v. Sootsma, 84 Mich. 194, 10 L.R.A. 819, 22 Am. St. Rep. 693, 47 N. W. 667; Palmer Transfer Co. v. Anderson, 131 Ky. 219, 19 L.R.A. (N.S.) 756, 133 Am. St. Rep. 237, 115 S. W. 182; Cravens v. Rodgers, 101 Mo. 247, 14 S. W. 106; State v. Reed, 76 Miss. 211, 43 L.R.A. 134, 71 Am. St. Rep. 528, 24 So. 308, 11 Am. Crim. Rep. 651; Re Marriott, 1 C. B. N. S. 499, 140 Eng. Reprint, 205, 26 L. J. C. P. N. S. 154, 3 Jur. N. S. 493, 5 Week. Rep. 312; Re Palmer, L. R. 6 C. P. 194, 40 L. J. C. P. N. S. 133, 24 L. T. N. S. 135, 19 Week. Rep. 627; Parkinson v. Great Western R. Co. L. R. 6 C. P. 554, 40 L. J. C. P. N. S. 222, 24 L. T. N. S. 830, 19 Week. Rep. 1063; Pennsylvania Co. v. United States, 236 U. S. 351, 59 L. ed. 616, P. U. R. 1915B, 261, 35 Sup. Ct. Rep. 370; Indian River S. B. Co. v. East Coast Transp. Co. 28 Fla. 387, 29 Am. St. Rep. 258, 10 So. 480.

An arrangement whereby exclusive soliciting privileges are granted at depots or depot yards is also void.

Indianapolis Union R. Co. v. Dohn, 153 Ind. 10, 45 L.R.A. 427, 74 Am. St. Rep.

274, 53 N. E. 937; *Hedding v. Gallagher*, 69 N. H. 650, 76 Am. St. Rep. 204, 45 Atl. 96; *Markham v. Brown*, 8 N. H. 523, 31 Am. Dec. 209; *Camblos v. Philadelphia & R. R. Co.* 9 Phila. 411, Fed. Cas. No. 2,331; *Pennsylvania Co. v. Chicago*, 181 Ill. 289, 53 L.R.A. 223, 54 N. E. 825.

Whether the contract in question is valid or void, it is subject to an exercise by the city of its police power, and the ordinance in question is a proper exercise of such power.

Lindsay v. Anniston, 104 Ala. 257, 27 L.R.A. 436, 53 Am. St. Rep. 44, 16 So. 545; *Chillicothe v. Brown*, 38 Mo. App. 609; *Colorado Springs v. Smith*, 19 Colo. 554, 36 Pac. 540; *City Cab, Carriage & Transfer Co. v. Hayden*, 73 Wash. 24, L.R.A.1915F, 726, 131 Pac. 472, Ann. Cas. 1914D, 731.

Messrs. Stapleton & Conley and M. E. Crumpacker, for respondent:

The terminal company owns its property, the Union Station, baggage room, and terminal grounds, and so long as it performs its proper functions with the traveling and shipping public, it may make any other and further use of its property that it sees fit, and in doing so may give exclusive privileges to others to use the same or any portion thereof to the same extent as a private individual could do.

Old Colony R. Co. v. Tripp, 147 Mass. 35, 9 Am. St. Rep. 661, 17 N. E. 89; *Oregon Short Line R. Co. v. Davidson*, 33 Utah, 370, 16 L.R.A.(N.S.) 777, 94 Pac. 10, 14 Ann. Cas. 489; *Union Depot & R. Co. v. Meeking*, 42 Colo. 89, 126 Am. St. Rep. 145, 94 Pac. 16.

The contract with the terminal company is not against public policy and does not create a monopoly.

Donovan v. Pennsylvania Co. 199 U. S. 279, 50 L. ed. 192, 26 Sup. Ct. Rep. 91; *Hedding v. Gallagher*, 72 N. H. 377, 64 L.R.A. 811, 57 Atl. 225; *Oregon Short Line R. Co. v. Davidson*, *supra*.

The ordinance involved in this case is one that must be taken as an attempt to regulate the private affairs of the terminal company and plaintiff, and it cannot in any just sense be deemed one for the government of the city or for the better regulation of the police of the city, and is therefore not a reasonable exercise of the power conferred.

Wice v. Chicago & N. W. R. Co. 193 Ill. 351, 56 L.R.A. 268, 61 N. E. 1084.

The ordinance is not only unnecessary as a police regulation, and therefore beyond the legislative authority of the city to pass, but it is also unreasonable and oppressive and therefore void.

Ibid.; *Hawes v. Chicago*, 158 Ill. 653, 30 L.R.A. 225, 42 N. E. 375.
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Under the general welfare clause of the city charter, the city may pass reasonable ordinances for the regulation of lawful trades and occupations within its limits, but is not authorized, under such power, to make it unlawful to carry on a lawful business or trade in a lawful manner.

Coegrove v. Augusta, 103 Ga. 835, 42 L.R.A. 711, 68 Am. St. Rep. 149, 31 S. E. 445.

The contract of the plaintiff with the terminal company is one having relation entirely to the use of the private premises of the terminal company, over which the city has no general control, and this contract, being not unlawful in itself, is exempt from municipal interference, and the ordinance so far as it may attempt such interference is invalid.

Napman v. People, 19 Mich. 354.

Moore, J., delivered the opinion of the court:

It is contended that the contract in question is void for the reason stated, and, this being so, an error was committed in granting the relief awarded. As to the validity of such agreements, the decisions of courts of last resort are not harmonious. Most of such final determinations relate to the analogous question of the granting by a railway company to a hack driver of a privilege to occupy some favored part of depot grounds, so that an advantage is secured in the solicitation of passengers and baggage. In *Old Colony R. Co. v. Tripp*, 147 Mass. 35, 9 Am. St. Rep. 661, 17 N. E. 89, which is a leading case on the subject, it was held that a railroad company might contract with a firm to furnish the means to carry incoming passengers and their baggage from its station, and thereby grant the exclusive right to conduct such business, which agreement was not violative of a statute providing that such a corporation "shall give to all persons or companies reasonable and equal terms, facilities, and accommodations . . . for the use of its depot and other buildings and grounds." In that case three of the justices dissented, but cited in support of their argument only one American case, that of *New England Exp. Co. v. Maine C. R. Co.* 57 Me. 188, 2 Am. Rep. 31, wherein a different conclusion was reached. In *St. Louis, I. M. & S. R. Co. v. Southern Exp. Co.* 117 U. S. 1, 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628, it was ruled that railroad companies were not required by usage or the principles of the common law to transport the goods of independent express companies over their lines in the manner in which such commerce was usually carried, nor were they, in the absence of a statute commanding it, required to furnish to all

independent express companies equal facilities for doing an express business on their passenger trains. It will thus be seen that by a decision of the highest court in the land the principles of the common law and the rules of general usage have been eliminated from the duty of a common carrier, which is not obliged to transport goods of or to furnish equal facilities to express companies unless so demanded by statute. 6 Cyc. 374; 4 R. C. L. 593.

Since the decision was rendered in *Old Colony R. Co. v. Tripp*, supra, a diversity of judicial utterance is to be found in the opinions of American courts as to the application of the rule so adopted by the majority of the court and the doctrine thus asserted by the minority. In *Oregon Short Line R. Co. v. Davidson*, 33 Utah, 370, 16 L.R.A.(N.S.) 777, 94 Pac. 10, 14 Ann. Cas. 490, many of the cases are cited which support and those which deny the principle that a railway company may grant an exclusive privilege to one and refuse it to another who goes upon a common carrier's premises for the sole purpose of soliciting custom or of obtaining business. In that case, in construing a section of the Constitution of Utah which provided that "all railroad and other transportation companies are declared to be common carriers, and subject to legislative control, and such companies shall receive and transport each other's passengers and freight without discrimination or unnecessary delay," it was held that the clause of the organic law referred to required only that transportation companies should not show favoritism to their own passengers or shippers over the passengers and freight coming from other lines, and did not prohibit a carrier from protecting its passengers from annoyance and interference by others who might desire to solicit the business and patronage of such travelers, or prevent the carrier from providing means by which a passenger might make arrangements for the transportation of himself or his property beyond the end of the carrier's railroad. In deciding that case, it was determined that the doctrine announced in *New England Exp. Co. v. Maine C. R. Co.* 57 Me. 188, 2 Am. Rep. 31, which it will be borne in mind was cited by the minority of the court in *Old Colony R. Co. v. Tripp*, supra, as sustaining their theory, had been exploded by the Supreme Court of the United States in the *Express Cases*, 117 U. S. 1, 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628, where the true distinction was pointed out with regard to persons who wished to be carried as passengers or shippers of freight, and such as desired to be transported for the purpose of carrying on an independent business with the public upon the property or L.R.A.1917F.

trains of a common carrier. To the same effect, see the case of *Union Depot & R. Co. v. Meeking*, 42 Colo. 95, 126 Am. St. Rep. 145, 94 Pac. 16. In addition to the cases cited in *Oregon Short Line R. Co. v. Davidson*, supra, in support of the conclusion there reached, see also *New York, N. H. & H. R. Co. v. Scovill*, 71 Conn. 136, 42 L.R.A. 157, 71 Am. St. Rep. 159, 41 Atl. 246; *Godbout v. St. Paul Union Depot Co.* 79 Minn. 188, 47 L.R.A. 532, 81 N. W. 835; *State ex rel. Sheets v. Union Depot Co.* 71 Ohio St. 379, 68 L.R.A. 792, 73 N. E. 633, 2 Ann. Cas. 186; *Lewis v. Weatherford*, M. W. & N. R. Co. 36 Tex. Civ. App. 48, 81 S. W. 111. In reaching a like determination in *Donovan v. Pennsylvania Co.* 199 U. S. 279, 299, 50 L. ed. 192, 201, 26 Sup. Ct. Rep. 91, 96, Mr. Justice Harlan says: "There are cases to the contrary, but in our opinion the better view, the one sustained by the clear weight of authority and by sound reason and public policy, is that which we have expressed."

The decision in *Hedding v. Gallagher*, 69 N. H. 650, 76 Am. St. Rep. 204, 45 Atl. 96, cited and relied upon by defendants' counsel as sustaining a contrary conclusion, was expressly overruled upon rehearing. *Id.* 72 N. H. 377, 64 L.R.A. 811, 57 Atl. 225. We are satisfied that the contract made by the Northern Pacific Terminal Company with the plaintiff is valid unless the agreement has been rendered nugatory by proper enactment. The organic law of the state, which defendants' counsel assert establishes such fact, contains a provision as follows: "No law shall be passed granting to any citizen or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." Or. Const. art. 1, § 20. As this clause inhibits only the enactment of a law, it does not prohibit or regulate the right to contract in respect to any subject.

It is also maintained by defendants' counsel that the following provision of the statute is controlling: "If any railroad shall make or give any undue or unreasonable preference or advantage to any particular person, firm, or corporation, or shall subject any particular person, firm, or corporation, or particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, such railroad shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared unlawful; provided, this section shall not prohibit any railroad from giving necessary preference to live stock and perishable freight over other freight." L. O. L. § 6927.

This clause is § 49 of the Act of February 18, 1907, creating a railroad commis-

sion. Laws Or. 1907, chap. 53. A careful reading of the entire statute will disclose the legislative intent was to prohibit a railroad company from showing preference to any of its passengers or shippers. If the act inhibited railway companies from making contracts with hackmen for the transportation of such baggage as they could secure by interviewing passengers on incoming trains, where equal privileges are offered to all that seek to engage such services, the statute would necessarily apply to any other servant whom a common carrier might desire to employ. Passenger trains are usually operated so as safely to afford rapid transportation, and as they carry baggage it is essential that the trunks, valises, etc., should be segregated from the pile in the car used for that purpose before it arrives at the station where such personal effects are to be put off, so that no unreasonable delay may result. Railway companies are held responsible as common carriers for the loss of or damage to baggage while being transported, and this liability continues for a reasonable time after such trunks, etc., have been placed in their depots for delivery. In order to protect railway companies, it is essential that their employees, and the persons with whom they make indemnity contracts for that purpose should alone be permitted to enter their baggage cars and rooms kept for storing such personal effects. It is to the advantage of railroad companies, and also to the benefit of the traveling public, that baggage when thus stored should be delivered as soon as possible, so that liability therefor might cease, the room kept as empty as practicable, and that the owner might speedily secure possession of his personal effects. Such companies ought therefore to be allowed freely to contract with any responsible person, firm, or corporation for the performance of that service, and there is nothing in the statute prohibiting it. For that purpose it is competent for railways to make reasonable by-laws regulating the use of its stations and other matters concerning the despatch of its business. 2 Redf. Railways, § 200.

The validity of § 3 of Ordinance No. 29773, of which mention has been made, must therefore depend upon the power which the council of the city of Portland can legally exercise. Subdivision 1 of § 73 of article 4 of the charter of that municipality, enacted January 23, 1903, and now remaining in force, reads: "The council has power and authority, subject to the provisions, limitations, and restrictions in this charter contained, to exercise within the limits of the city of Portland all the powers commonly known as the police power, to the same extent as the state of Oregon has or L.R.A.1917F.

could exercise said power within said limits." Special Laws Or. 1903, p. 26.

Clauses of the organic law of that municipality amended May 3, 1913, by an exercise of the initiative power, provide as follows: "The term 'public utility,' as used in this charter, shall be deemed to include every plant, property, or system engaged in the public service within the city, or operated as a public utility, as such terms are commonly understood."

Section 153, chap. 7: "The council shall have general supervision and power of regulation of all public utilities within the city of Portland, and of all persons and corporations engaged in the operation thereof." Id. § 154.

It is maintained by defendants' counsel that, founded upon the provisions last quoted, § 3 of Ordinance No. 29773 is a valid exercise of the police power, delegated to the council of the city of Portland, thereby making the municipal enactment referred to equivalent to a statute regulating the business in which the plaintiff is engaged, and, this being so, an error was committed in sustaining the demurrer to the answer. The cases relied upon as sustaining the legal principle contended for will be reviewed. Thus, in *Lindsay v. Anniston*, 104 Ala. 257, 27 L.R.A. 436, 53 Am. St. Rep. 44, 16 So. 545, it was held that, though a hackman might, under a contract with a railroad company owning a city depot, have the right and privilege to enter the premises to solicit patronage, an ordinance subsequently enacted prohibiting hackmen from going within such depot to solicit patronage was not unconstitutional and void as impairing the obligation of a contract, because the agreement should be deemed to have been entered into subject to the power of the city to regulate hacks. In *Chillicothe v. Brown*, 38 Mo. App. 609, it was ruled that an ordinance regulating the conduct of hackmen, porters, etc., in the pursuit of their business, and forbidding the solicitation of custom at the depot or platform of any railroad within the corporate limits of the city, was reasonable and valid, and that it constituted no defense to an action by the city for a violation of the ordinance, that the superintendent of the railway at whose depot the offense was committed had drawn a line on the platforms thereof, and told the defendant and others they might stand on the walk up to such mark and solicit travelers for their hotels, etc., as the railroad company had no authority to suspend at its depot the operation of the municipal enactment. In *City Cab, Carriage & Transfer Co. v. Hayden*, 73 Wash. 24, L.R.A.1915F, 726, 131 Pac. 472, Ann. Cas. 1914D, 731, it was determined that an ordinance prescribing

rules for the regulation of hackmen at a depot stand was not unreasonable in that certain vehicles were assigned to specified positions, some of which were of much more value than others, if such spaces were reasonable so far as the rights of the public were concerned. In *Colorado Springs v. Smith*, 19 Colo. 554, 36 Pac. 540, an ordinance providing that hotel runners, hackmen, etc., plying their respective vocations at any railway passenger depot, on the arrival and departure of trains, should occupy no part of the depot grounds or premises except that portion allotted to them by the station agent, and it was decided that such enactment should not be construed as giving a railroad company the right to exclude from the depot grounds any person lawfully engaged in serving the travelling public, either with or without vehicles, nor to confer upon such company the power to grant exclusive rights and privileges to persons engaged in such occupations, but that the ordinance, being authorized by statute, was to be upheld as a reasonable regulation to promote the convenience of the traveling public and to prevent disorder at railway stations.

A careful examination of these cases will disclose that the several ordinances referred to were enacted under express delegation of legislative authority to regulate at railway stations the business and conduct of hackmen; that, though one of them may have entered into a contract with a railroad company for the exclusive privilege of soliciting patronage at its depot, the advantage thus obtained was held subject to the paramount right of a reasonable exercise of the police power, which authority to enact wholesome ordinances might be employed not for the benefit of the railway company or its favorite hackman, but in the interest of the trav-

eling public. The legal principle thus declared is acknowledged as controlling, but it has no application to the facts involved in the case at bar, for here § 3 of the ordinance in question does not attempt to regulate the conduct or business of hackmen, or to legislate in the interest or for the benefit of the traveling public, but the municipal enactment is designed to inhibit the making of valid contracts by railway companies, so that the benefits derived from a grant of the exclusive privilege to solicit a transfer of baggage, which the plaintiff enjoys under its agreement, may be divided among the owners of vehicles who are engaged in the same business and are able to secure a share of the patronage. Such Utopian state of society is occasionally brought into existence by the acknowledgment, voluntary or otherwise, of the interested parties; but legislation designed to effectuate such felicitous conditions savors of paternalism, and would seem to be premillennial. Whether under a state Constitution, which is a limitation, and not a grant of power, a statute can be validly enacted and legally enforced, whereby equality of burden and remuneration may be secured, is not now involved. In a municipal charter, however, which is a grant, and not a limitation, of power, the authority to enact such a provision as § 3 of Ordinance No. 29773 must be found in the charter in express language, or arise by necessary implication. The organic law of the city of Portland, to which reference has been made, does not explicitly or inferentially contain such a grant of power, and for that reason the section of the enactment mentioned is void.

It follows that the decree should be affirmed, and it is so ordered.

Petition for rehearing denied.

Annotation—Right of carrier to grant exclusive train privilege to baggage or passenger transfer companies.

The above question is covered in the annotation to *Dingman v. Duluth*, S. S. & A. R. Co. 32 L.R.A.(N.S.) 1181, to which this note is supplementary.

The analogous question of the right to discriminate between hackmen and other solicitors of patronage at depots, wharves, etc., is covered in the notes to *Oregon Short Line R. Co. v. Davidson*, 16 L.R.A.(N.S.) 777, and *Rose v. Public Service Commission*, L.R.A.1915B, 358.

As to right of a railroad to give exclusive or preferential facilities to an express company for express business, see annotation to *State v. Missouri*, K. & T. R. Co. 5 L.R.A.(N.S.) 783. L.R.A.1917F.

For right to exclude undesirable hackmen, draymen, etc., from depot, see annotation to *Chicago, R. I. & P. R. Co. v. Armstrong*, 39 L.R.A.(N.S.) 126.

As to effect of discrimination by municipality in designating standing places for cabs and other similar vehicles, see annotation to *City Cab, Carriage & Transfer Co. v. Hayden*, L.R.A.1915F, 726.

As to remedy by injunction for unlawful discrimination by railroad against hack driver, see annotation to *Cooper v. Devall*, 8 L.R.A.(N.S.) 1027.

The decision in *BAGGAGE & OMNIBUS TRANSFER CO. v. PORTLAND*, ante, 1080,

sustaining the validity of a contract between a terminal company and a transfer company, which granted to the latter the exclusive privilege of soliciting from passengers on incoming trains the right to transfer their baggage, is supported by other cases set out in the prior annotation, upholding the right of common carriers to grant the exclusive train privilege to baggage or passenger transfer companies.

The decision in *Lewis v. Weatherford, M. W. & N. W. R. Co.* (1904) 36 *Tex. Civ. App.* 48, 81 S. W. 111 (set out in the earlier note), was relied upon in the later case of *Denton v. Texas & P. R. Co.* (1913) — *Tex. Civ. App.* —, 160 S. W. 113, where the evidence showed that a carrier had given a transfer company the exclusive right to solicit upon trains, it being held in that case that under the circumstances the carrier was entitled to an injunction restraining others from soliciting business as transfer agents about the station and trains.

And in *Union Transfer v. Arizona Eastern R. Co.* (*Ariz.*) P.U.R.1915D, 734, it was held that the delegation by contract to one company of the right to solicit baggage on trains and check from residences and hotels, and the denial of such rights or privileges to other companies, did not constitute undue discrimination, but that the privileges in and about depots, station grounds, or buildings should be equal to all transfer companies. The commission said: "In the matter of solicitation of baggage on the trains for delivery to hotels and residences, and in the matter of checking baggage from hotels and residences to destination of passengers, it is obvious that this practice is one in the interest of the traveling public; that the railroad companies may profit to the extent of a

fixed charge for such privilege, or a percentage of the earnings accruing on such business, does not change this obvious fact. It is a decided convenience for passengers on trains to be able to make arrangements for delivery of their baggage without the annoyance and loss of time that would result from completing such arrangements after their arrival at the stations; and it is likewise apparent that it is a material convenience to the traveling public to be able to check from their residences and hotels, their baggage through to destination. This feature of transportation has been presented to many commissions and courts, and there appears to be some diversity of opinion and ruling as to the propriety and lawfulness of such practice. It is clear that railroad companies could not allow indiscriminately all transfer companies the right to check baggage from hotels and residences, or to place solicitors upon trains. Railroads necessarily must exact bonds for the faithful performance of these duties. The checking of baggage and observance of tariffs and regulations as to weight, excess charges, etc., would make it impracticable, if not impossible, to permit the general checking of baggage by all transfer companies and agents, and insure observance of state and interstate charges and rules. The delegation of the right by contract to solicit baggage on trains and check from residences and hotels to one company, and the denial of such rights or privileges to other companies, cannot be viewed as undue discrimination. The contracting parties to such arrangement must use care to protect the public against imposition and the exaction of discriminatory charges for services rendered by the transfer company." J. T. W.

CONNECTICUT SUPREME COURT OF ERRORS.

VITAL F. AINS

v.

EDWARD D. HAYES, Appt.

(— Conn. —, 101 Atl. 579.)

Landlord and tenant — agreement for moving expenses — compulsion to vacate — raising rent.
The raising by the vendee of real estate

occupied by a tenant, of the rent beyond the means of the tenant, so that he is compelled to move, is not within an agreement by the lessor that, in case the tenant is compelled to vacate the property through sale of the place, he shall receive a specified sum and moving expenses.

For other cases, see Landlord and Tenant, II. d, in Dig. 1-52 N. S.

(August 2, 1917.)

A PPEAL by defendant from a judgment of the Court of Common Pleas for Fair-

Note.—A search has disclosed no other cases on the question involved in *AINS v. HAYES*, as to when a tenant is "compelled" to vacate the property within the meaning L.R.A.1917F.

of an agreement to reimburse him in that event. See, however, the note to *Diepenbrock v. Luiz*, L.R.A.1915C, 234, on "Construction of provision in lease as to termina-

field County in plaintiff's favor in an action brought to recover damages for compelling plaintiff to move through sale of a house. Judgment set aside.

Statement by Roraback, J.:

This action is for damages for compelling the plaintiff to move, occasioned, as alleged, by the sale of a house formerly owned by the defendant. A memorandum of agreement relating to this transaction was in the following words:

Bridgeport, Conn., August 15, 1914.

I hereby agree, if Mr. Ains is compelled to vacate my cottage on Ezra street through my selling said cottage, he is to receive the sum of fifty (50) dollars and moving expenses, which are not to exceed the sum of \$14.

Edward D. Hayes.

The controlling question in issue was whether or not the plaintiff was compelled under the terms of the contract to move through the defendant's selling the cottage. The finding shows that the defendant was the owner of a house consisting of five rooms and a bathroom, but with no water. This building was situated on the corner of Ezra street and Fairfield avenue, in Bridgeport, Connecticut. Ezra street was a new street, and Fairfield avenue had just been laid out through a newly opened tract of land in the northern part of the city of Bridgeport. The place is now a residential neighborhood, and this house was the first one erected on this street. The cottage on this property was lacking in modern improvements, and consisted of a small five-room house upon a city lot. Prior to July 15, 1915, the wife of the plaintiff called at the house of the defendant and inquired if he had any rents. The defendant stated that he had a house which was not complete, as the water and gas had not been connected, but that water could be drawn from a spring a few hundred feet away until the city water supply was connected, which would be in a few months. The defendant showed the plaintiff the building and offered to rent the same for \$14 per month, to commence on August 1, 1915. The plaintiff was willing to take the house on these terms, providing the defendant would give him assurance that he would not sell it to anybody who would compel the plaintiff to vacate the premises. The defendant accepted these terms, and on August 15, 1915, executed the written agreement hereinbefore set forth. The defendant re-

ceived no consideration for this writing. The plaintiff occupied these premises and paid the rent therefor until October 1, 1916. On July 15, 1916, the defendant sold this house to one Koehler, who knew about this agreement between the plaintiff and the defendant. Koehler installed gas in the house between July 15 and September 9, 1916, and then notified the plaintiff that, beginning October 1, 1916, the rent for the house would be \$25 a month. This sum was more than the plaintiff could afford to pay for the house rent and was entirely beyond his means, and in consequence of the increase of rent the plaintiff was obliged, on October 1, 1916, to find another rent. The cost of the plaintiff's moving was \$7.50. The court rendered judgment for the plaintiff, to recover the sum of \$50 and \$7.50 costs of moving, with double costs.

Messrs. John A. Cornell and Bowers & Williamson, for appellant:

The document sued upon is void for uncertainty.

Baurman v. Binzen, 47 N. Y. S. R. 67, 16 N. Y. Supp. 342; Garnett v. Kirkman, 33 Miss. 389; Eldred v. Hazlett, 38 Pa. 16; Fowler v. Hoffman, 31 Mich. 215; Davie v. Lumberman's Min. Co. 93 Mich. 491, 24 L.R.A. 357, 53 N. W. 625; Faulkner v. Des Moines Drug Co. 117 Iowa, 120, 90 N. W. 585; Durkin v. New York, 49 Misc. 114, 96 N. Y. Supp. 1059; Smith v. Dotterweich, 132 App. Div. 489, 116 N. Y. Supp. 896; Arundel Realty Co. v. American Electric R. Co. 116 Md. 257, 38 L.R.A.(N.S.) 157, 81 Atl. 787; Prior v. Hilton & D. Lumber Co. 141 Ga. 117, 80 S. E. 559; Carr v. Louisville & N. R. Co. 141 Ga. 219, 80 S. E. 716; Briggs v. Morris, 244 Pa. 139, 90 Atl. 532; Ashley, D. & N. R. Co. v. Baggott, 125 Ark. 1, 187 S. W. 649; Ryan v. Hanna, 89 Wash. 379, 154 Pac. 436; 9 Cyc. 248, note 42; Hampton v. Buchanan, 51 Wash. 155, 98 Pac. 374; Spokane Canal Co. v. Coffman, 61 Wash. 357, 112 Pac. 383; Solomon v. Wilmington Sewerage Co. 6 L.R.A.(N.S.) 391, note.

Messrs. Henry E. Shannon and Frank L. Wilder for appellee.

Roraback, J., delivered the opinion of the court:

There is nothing disclosed in the finding of facts which shows that the plaintiff was subjected to such a degree of compulsion as to warrant the rendition of a judgment in his favor. The contract states that it was agreed that, if the plaintiff was com-

tion of leasehold in case of sale of premises." It will be observed that in the cases in that note there was an existing lease for a period that had not expired at the time L.R.A.1917F.

of the sale, whereas in the AINS CASE the tenants seem to have had no lease for a definite time, or at least for any period beyond a month.

pelled to vacate the defendant's premises because of the sale of them, he was to receive the sum of \$50 and moving expenses. The word "compelled" may in some cases refer to compulsion exercised through the process of the courts, or through laws acting directly upon the parties. Such certainly is not the present case. The word "compel" in its ordinary sense means: "To drive or urge with force; . . . to constrain; oblige; necessitate, whether by physical or moral force." Webster's New Int. Dict.

As applied to the agreement of Mr. Hayes, the meaning of the language, "if Mr. Ains is compelled to vacate my cottage on Ezra street through my selling said cottage," is this: Mr. Ains may be compelled to leave through the terms of the sale, by which the purchaser is to take immediate possession; or Mr. Ains may be compelled to leave by the action of the purchaser, immediately upon his purchase, notifying him to leave; or Mr. Ains may be compelled to leave by the action of the purchaser in, immediately upon his purchase, making it unreasonable to expect him to continue in possession, as, for example, by raising the rent to a prohibitive rental.

The record is also barren of facts which aliunde tend to sustain the plaintiff's claim that he was compelled to vacate these prem-

ises because they had been sold. It does not here appear that either the defendant or the party purchasing his property did anything which the law condemns. There was no actual or threatened exercise of power possessed, or supposed to be possessed, over the person or property which the plaintiff occupied. It is not even claimed that the plaintiff was ever notified or requested to surrender possession of the property which had been leased to him by the defendant. There is nothing to suggest that this increase in the rental was arbitrary or unreasonable. Upon the other hand, it is fair to infer, from the facts found, that the owner of the property might have been justified in making an alteration in the charge for the use of his premises. The property had been improved, and the facts were not the same when the plaintiff vacated these premises as when he leased them. The only compulsion shown came from the plaintiff's inability to pay the rental of the property. This fact cannot be resorted to for the purpose of fastening liability upon the defendant.

There is error, the judgment for the plaintiff is set aside, and the cause remanded for the rendition of judgment in favor of the defendant.

The other Judges concur.

IOWA SUPREME COURT.

H. L. HUGHES, Appt.,
v.

E. E. SAMUELS et al.

(— Iowa, —, 159 N. W. 589.)

Libel — false advertisement.

The mailing by a business rival to a person whose wife is critically ill, of a card calling attention to the undertaking business of a resident of the same town, signed by his name, may be found to be libelous. *For other cases, see Libel and Slander, II. c, in Dig. 1-52 N. S.*

(October 17, 1916.)

APPPEAL by plaintiff from a judgment of the District Court for Buena Vista County dismissing a petition filed to recover damages for an alleged libel. Reversed.

Statement by Gaynor, J.:

Action to recover damages for an alleged libel. Opinion states the case. Demurrer

Note.—As to libel by falsely ascribing matter to another, see annotation following this case, post, 1093.
L.R.A.1917F.

to petition sustained. Plaintiff elected to stand upon his petition. Thereupon his petition was dismissed, and judgment entered against the plaintiff for costs.

Messrs. Baillie & Edson, for appellant:

Any publication within the terms of the statute defining libel is libelous per se, although it does not charge a crime; and no special damage need be alleged or proved.

Children v. Shinn, 168 Iowa, 531, 150 N. W. 864; *Vial v. Larson*, 132 Iowa, 208, 109 N. W. 1007; 25 Cyc. 337; *Mengel v. Reading Eagle Co.* 241 Pa. 367, 88 Atl. 660; *Maldonado v. Yglesias*, 154 App. Div. 520, 139 N. Y. Supp. 102; *Downer v. Tubbs*, 152 Wis. 177, 139 N. W. 820; *Burns v. Republican Pub. Co.* 54 Colo. 100, 128 Pac. 1122; *Black v. State Co.* 93 S. C. 467, 77 S. E. 51, Ann. Cas. 1914C, 989; *Hinrichs v. Butts*, 149 App. Div. 236, 133 N. Y. Supp. 769; *Nicholson v. Dillard*, 137 Ga. 225, 73 S. E. 382; *International Text Book Co. v. Leader Printing Co.* 189 Fed. 86; *Dobbin v. Chicago, R. I. & P. R. Co.* 157 Mo. App. 689, 138 S. W. 682; *Mayo v. Goldman*, 57 Tex. Civ. App. 475, 122 S. W. 449; *Washington Times Co. v. Downey*, 28 App. D. C.

258, 6 Ann. Cas. 765; *Butler v. Howes*, 7 Cal. 87; *Newell, Slander & Libel*, § 1019.

Whether words are spoken of another in connection with his business or profession or otherwise, they are actionable if they come within the terms of the statute.

Call v. Larabee, 60 Iowa, 212, 14 N. W. 237; *Halley v. Gregg*, 74 Iowa, 565, 38 N. W. 416; *Vial v. Larsen*, 132 Iowa, 208, 100 N. W. 1007; *Newell, Slander & Libel*, 2d ed. 168, 182-393; 25 Cyc. 326; *Wisner v. Nichols*, 165 Iowa, 15, 143 N. W. 1020; *Williams v. Hicks Printing Co.* 159 Wis. 90, 150 N. W. 183; *Quinn v. Prudential Ins. Co.* 116 Iowa, 525, 90 N. W. 349; *Knox v. Meehan*, 64 Minn. 290, 66 N. W. 1149; *Morasse v. Brochu*, 151 Mass. 567, 8 L.R.A. 524, 21 Am. St. Rep. 474, 25 N. E. 74; *Walker v. Cronin*, 107 Mass. 555; *Divens v. Meredith*, 147 Ind. 693, 47 N. E. 143; *Sharpe v. Larson*, 67 Minn. 428, 70 N. W. 1, 554; *Dudley v. Briggs*, 141 Mass. 582, 55 Am. Rep. 494, 6 N. E. 717; *Lovejoy v. Whitcomb*, 174 Mass. 586, 55 N. E. 322; *Schaefer v. Schoenborn*, 101 Minn. 67, 111 N. W. 843; *Van Heusen v. Argenteau*, 194 N. Y. 309, 87 N. E. 437; *Mauk v. Brundage*, 68 Ohio St. 89, 62 L.R.A. 477, 67 N. E. 152; *Davis v. Brown*, 27 Ohio St. 326; *Hubbard v. Allyn*, 200 Mass. 166, 86 N. E. 356; *Williams v. Davenport*, 42 Minn. 393, 18 Am. St. Rep. 519, 44 N. W. 311; *Beek v. Nelson*, 126 Minn. 10, 147 N. W. 668; *Gross Coal Co. v. Rose*, 126 Wis. 24, 2 L.R.A.(N.S.) 741, 110 Am. St. Rep. 894, 105 N. W. 225, 5 Ann. Cas. 549; *Mosnat v. Snyder*, 105 Iowa, 505, 75 N. W. 356; 18 Am. & Eng. Enc. Law, 954; *Dallavo v. Snider*, 143 Mich. 542, 4 L.R.A.(N.S.) 973, 114 Am. St. Rep. 684, 107 N. W. 272, 8 Ann. Cas. 212; *Demos v. New York Evening Journal Pub. Co.* 210 N. Y. 13, 103 N. E. 771; *Nichols v. Daily Reporter Co.* 30 Utah, 74, 3 L.R.A.(N.S.) 339, 116 Am. St. Rep. 796, 83 Pac. 573, 8 Ann. Cas. 841.

Whether words constitute libel as defined by the statute or not, if their publication would naturally tend to and in fact did injure the plaintiff in his business, they give rise to a cause of action for damages.

Call v. Larabee, 60 Iowa, 212, 14 N. W. 237; *Walker v. Cronin*, 107 Mass. 555; *Lucke v. Clothing Cutters' & T. Assembly*, 77 Md. 396, 19 L.R.A. 408, 39 Am. St. Rep. 421, 26 Atl. 505; *Hollenbeck v. Ristine*, 105 Iowa, 488, 67 Am. St. Rep. 306, 75 N. W. 355; *Williams v. Riddle*, 145 Ky. 459, 36 L.R.A.(N.S.) 974, 140 S. W. 661, Ann. Cas. 1913B, 1151; *Ott v. Murphy*, 160 Iowa, 730, 141 N. W. 463; *Buckstaff v. Viall*, 84 Wis. 129, 54 N. W. 111; *Cooper v. Rochester Ice Cream Co.* 212 N. Y. 341, 106 N. E. 117; *Snyder v. Tribune Co.* 161 Iowa, 671, L.R.A.1917F.

143 N. W. 519; *Morrison v. Smith*, 177 N. Y. 366, 69 N. E. 725.

Messrs. Faville & Whitney and James Deland, for appellees:

The publication of the words "bear in mind our undertaking department—satisfaction guaranteed" is not a malicious defamation and is not libel per se.

Gundram v. Daily News Pub. Co. 175 Iowa, 60, 156 N. W. 840; *Hollenbeck v. Hall*, 103 Iowa, 214, 39 L.R.A. 734, 64 Am. St. Rep. 175, 72 N. W. 518; *Wallace v. Homestead Co.* 117 Iowa, 363, 90 N. W. 835.

If the words are not in any proper sense ambiguous or doubtful, and in their ordinary and proper signification convey no defamatory meaning, such meaning can neither be enlarged nor restricted by innuendo.

Quinn v. Prudential Ins. Co. 116 Iowa, 526, 90 N. W. 349; *McLaughlin v. Fisher*, 136 Ill. 111, 24 N. E. 60; *Wallace v. Homestead Co.* 117 Iowa, 363, 90 N. W. 835; *Hollenbeck v. Hall*, 103 Iowa, 214, 39 L.R.A. 734, 64 Am. St. Rep. 175, 72 N. W. 518.

Unless the publication is libelous per se special damages must be pleaded, and it is not enough to allege generally that plaintiff has suffered special damages, but the particular contracts, sales, employments, customers, patients, or clients which it is claimed have been lost must be set out in the petition or it will be demurrable.

Gundram v. Daily News Pub. Co. 175 Iowa, 60, 156 N. W. 840; *Wallace v. Homestead Co.* 117 Iowa, 363, 90 N. W. 835; *Achorn v. Piper*, 66 Iowa, 694, 24 N. W. 513; *Sheibley v. Ashton*, 130 Iowa, 195, 106 N. W. 618; *Pollard v. Lyon*, 91 U. S. 225, 23 L. ed. 308; *Denney v. Northwestern Credit Assn.* 55 Wash. 331, 25 L.R.A.(N.S.) 1021, 104 Pac. 769; *Cruikshank v. Bennett*, 30 Misc. 232, 62 N. Y. Supp. 118; *Hirshfeld v. Ft. Worth Nat. Bank*, 83 Tex. 452, 15 L.R.A. 639, 29 Am. St. Rep. 660, 18 S. W. 743; *Callfas v. World Pub. Co.* 93 Neb. 108, 139 N. W. 830; *Velikanje v. Millichamp*, 67 Wash. 138, 120 Pac. 876; *N. S. Sherman Mach. Co. v. Dun*, 28 Okla. 447, 114 Pac. 617; *Hopkins Chemical Co. v. Read Drug & Chemical Co.* 124 Md. 210, 92 Atl. 478; *Woodruff v. Bradstreet Co.* 116 N. Y. 217, 5 L.R.A. 555, 22 N. E. 354; *Kansas City, M. & B. R. Co. v. Delaney*, 102 Tenn. 289, 45 L.R.A. 600, 52 S. W. 151; *Newbold v. J. M. Bradstreet & Son*, 57 Md. 38, 40 Am. Rep. 426; *Urban v. Helmick*, 15 Wash. 155, 45 Pac. 747; *Keller v. Loyless*, 123 C. C. A. 578, 205 Fed. 510; 25 Cyc. 455.

There can be no libel per se unless the words themselves or by innuendo convey a libelous meaning.

Hollenbeck v. Hall, 103 Iowa, 214, 39

L.R.A. 734, 64 Am. St. Rep. 175, 72 N. W. 518; *Urban v. Helmick*, 15 Wash. 155, 45 Pac. 747; *Cole v. Neustadter*, 22 Or. 191, 29 Pac. 550; *Hofflund v. Journal Co.* 88 Wis. 369, 60 N. W. 263; *Crashley v. Press Pub. Co.* 179 N. Y. 27, 71 N. E. 258, 1 Ann. Cas. 196; *Brown v. Tribune Asso.* 74 App. Div. 359, 77 N. Y. Supp. 461; *Wabash R. Co. v. Young*, 162 Ind. 102, 4 L.R.A. (N.S.) 1091, 69 N. E. 1003; *Watters v. Retail Clerks Union*, 120 Ga. 424, 47 S. E. 911; *Ulery v. Chicago Live Stock Exch.* 54 Ill. App. 233; *Field v. Colson*, 93 Ky. 347, 20 S. W. 264; *Labouisse v. Evening Post Pub. Co.* 10 App. Div. 30, 41 N. Y. Supp. 688; *Crawford v. Barnes*, 118 N. C. 912, 24 S. E. 670; *Dawson v. Baxter*, 131 N. C. 65, 42 S. E. 456; *Fry v. McCord Bros.* 95 Tenn. 678, 33 S. W. 568.

Gaynor, J., delivered the opinion of the court:

Plaintiff and defendant both reside in the city of Storm Lake, and each is and was engaged in the retail furniture business, and, as an incident thereto, carried on a business of undertaking. Defendants are a copartnership.

The plaintiff claims: That on the 6th day of October, 1914, the defendants falsely and maliciously composed and published of and concerning the plaintiff the following:

Bear in mind our Undertaking Department. Satisfaction guaranteed.

[Signed] H. L. Hughes.

That the defendants caused the same to be printed upon a card and mailed to the address of one Albert Cattermole, a citizen and resident of Storm Lake. That at the time the card was mailed, the wife of the said Cattermole was lying critically ill in a hospital in Storm Lake. That of this fact the defendants had full knowledge at the time they composed and published said statement. That they composed and published it for the malicious purpose of injuring the plaintiff in his reputation and business as aforesaid. That the same as so published tended to provoke plaintiff to wrath, and expose him to public hatred, contempt, and ridicule, and to deprive him of public confidence and esteem and social intercourse. That the same was further published for the malicious and wicked purpose of causing the said Albert Cattermole and members of his family, and others to whom the said card or letter might become known, to believe that plaintiff sent the card, and for the further purpose of inducing the said Cattermole to refrain from patronizing the business of the plaintiff. That the publication was further made for L.R.A.1917F.

the purpose of inciting indignation and hatred in the minds of said Cattermole and the members of his family towards the plaintiff and his business as an undertaker, and that it did this. That similar cards were sent to other persons under similar circumstances, and for the purposes aforesaid.

To this petition, defendants filed a demurrer, the substance of which is, that the plaintiff's petition stated no cause of action; that the words published were not libelous per se, and no special damages are alleged to have been suffered by the plaintiff on account of its publication. This demurrer was sustained by the court. Plaintiff elected to stand on his pleading and not to plead further, and his petition was thereupon dismissed, and from the action of the court in the premises, plaintiff has appealed to this court.

This case presents but one question: Is the publication charged to have been made by the defendants libelous per se? If the publication, as applied to the situation of the parties, is libelous per se, then the demurrer was not well taken.

Our statute (Code 1897, § 5086) provides: "A libel is the malicious defamation of a person, made public by any printing, writing," etc., "tending to provoke him to wrath or expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence and social intercourse."

To be libelous, therefore, the publication must be malicious. It must be defamatory, and tend to provoke the person concerning whom it is published to wrath, or expose him to public hatred, contempt, or ridicule. When this card is read, the mind naturally searches for the meaning to be gathered from it, and the impression which its publication would make on the mind, and the purpose of its publication. What is said and what is done always has its proper relation to time, place, conditions, and circumstances.

It appears that Cattermole's wife was sick unto death at the time this card was composed by defendants and sent to him. The defendants knew this fact at the time they composed and mailed the card. We take judicial notice of the fact that the city in which the parties resided was not so populous that the active business men of the city were not known to each other and to the general public. The card was so framed and mailed by the defendants as to lead the receiver to believe that the plaintiff had composed and mailed it, and this was their purpose in mailing it. What possible reason could they have in preparing and publishing this card? Was it to

help a rival? Was it to exploit the business of a rival? Was it intended as a letter of credit, to the public, by and through which he would be better installed in its confidence and esteem? Is this the usual and ordinary course of procedure on the part of rival business firms? With the largest charity, we cannot think this was the purpose of the publication. What, then, was the purpose in the minds of these defendants when they composed and sent these cards to the sick and dying in that community? Was it not rather, as the petition says, to deprive him of public confidence and esteem? Was it not rather to expose him to public contempt and ridicule? Was it not rather to divert business through this means, from the plaintiff, and to injure him by such diversion?

Cattermole's wife was sick unto death at the time he received this card; confined in the hospital. What impression would this card make upon his mind? Would it not bring before him the spectacle of a vulture waiting to prey upon the dead? A man without sympathy for the living because he found more revenue in the dead? What is it these defendants meant by this thing that they have done? What end had they in view? We think, surely, that which the petition charges, to wit, to injure the plaintiff in his reputation and business, to expose him to public contempt or ridicule, to deprive him of public confidence and esteem. What, then, would be the natural and ordinary effect of such a card upon the mind of one to whom it was sent, under the conditions attending Cattermole? Surely, it would bring the sender of such a card, under the conditions then existing, into contempt and hatred, and deprive him of public confidence and esteem. Can the thought be entertained for a moment, that, after the receipt of a card like this, under those circumstances, the receiver would patronize the sender in the event the stricken wife had died? Was it to secure this for the plaintiff that the card was sent?

Published words which directly tend to the prejudice or injury of a person in his office, profession, or business are actionable. *Williams v. Davenport*, 42 Minn. 393, 118 Am. St. Rep. 519, 44 N. W. 311.

Any publication calculated to expose one to public hatred, contempt, or ridicule is libelous per se. *Dressel v. Shipman*, 57 Minn. 23, 58 N. W. 684.

The general rule is, that when language is published concerning a person or his affairs, which, from its nature, necessarily must or presumably will, as its natural and proximate consequence, occasion him pecuniary loss, its publication is libelous per se. See *Townsend, Slander & Libel*, 4th ed. L.R.A.1917F.

§§ 146 and 147; *Fry v. McCord Bros.* 95 Tenn. 680, 33 S. W. 568.

Peculiar damages are required to be alleged only when the publication, with its attending facts and circumstances, is such that damages do not naturally arise from the publication. If the publication, with its attending facts and circumstances, is such that the court can legally presume that injury followed as a natural and inevitable consequence of the act complained of, then there is no occasion, in order to maintain an action, that the plaintiff allege or prove peculiar damages. If the nature and character of the publication, with its attending facts and circumstances, are such as injuriously affect or detract from the reputation and standing of another, and, as a natural and proximate result, tend to bring him into public contempt, hatred, or ridicule, then it is libelous per se. If such injury can be said to be a natural, proximate result or consequence of its publication, then the plaintiff is presumed to have been damaged, and there is no need of any allegation of peculiar damages. The extent of the damages is for the jury.

It is the venom of poisoned speech that constitutes the libel. In tracing the wrong that flows from the publication, we come first to the mind of the reader, and inquire what effect it would naturally have upon the ordinary thinking mind. We first consider the facts published, and the circumstances under which they were published, and the persons to whom a knowledge of the publication was brought. An inquiry arises, would such a publication, under such circumstances naturally tend to poison the mind against the person concerning whom the matter was published? If the matter published can be said, in its natural effect upon the mind, to produce hurt to the good name, fame, and reputation of the person about whom the publication is made, then we say the matter is defamatory, and the person necessarily has suffered not only wrong, but damages as a proximate result of the wrong,—damage to his good name, fame, and reputation in the community. If the words in and of themselves, when published, do not tend to this effect naturally and of their own force and vitality the mind naturally inquires into the circumstances under which they were published, the manner of their publication, and the persons to whom a knowledge of the publication was brought. This inquiry is pursued to ascertain the effect which the publication, under the circumstances, would naturally have upon the mind of the person to whom a knowledge of the publication was brought. If the words and the circumstances attending their publication would not naturally

affect the mind prejudicially against the person concerning whom the publication is made, it must be alleged and shown, not only that they were used in a defamatory sense, but that they were so understood by the hearers. When words, innocent in themselves, are charged to have been intended and used in a defamatory sense, it must be alleged and proven that they were intended in a defamatory sense and were so understood by the persons to whom they were addressed. If they do not themselves convey a defamatory meaning, or an imputation that is defamatory, something must be alleged which shows, or tends to show, that the user of the words intended them in a defamatory sense, and that the persons to whom a knowledge of the publication came were affected in their mental attitude towards the person, to the injury of his good name, fame, and reputation. The publication may be so worded that this could not be gathered from the publication itself. It may be innocent and even commendatory in itself, yet the facts and circumstances attending the publication, the relationship of the parties—the defamer and the defamed—to the public, may be such, considered in the light of the subject-matter concerning which the publication is made, that it is apparent that there was not only an intent to defame, but that a defamatory imputation was so exposed that the ordinary mind easily grasped the purpose of the publication and its injurious consequences to the good name, fame, and reputation of the defamed.

Men receive impressions of and concerning others from what they hear others say about them. Libel is a tort. It consists in a wrong done to the good name, fame, and reputation of another. It is in the nature of an assault upon the good name, fame, and reputation of another. The law protects a man in the possession of his good name, and denies to others the right wrongfully and wickedly, to make an assault upon it. It is often the only asset a man has. Rob him of this, and you rob him of all that he has in life that makes life worth living.

A physical assault is clearly understood and easily defined. One may be punished criminally or mulcted in damages civilly for physical assault. Libel is an assault upon that invisible and intangible thing known as reputation. Though invisible and intangible, it exists among men and is prized, and the law protects it. As has been said by this court, libel rests upon the thought that a public wrong has been committed; an act has been done in violation of the statute, to the hurt of the complaining citizen. A citizen's right to remain secure in his good name and reputation among his fellows, and to enjoy their confidence and

esteem, has been violated. A libel is that which tends to take from him one of his most valuable rights,—his right to the confidence, esteem, and respect of his fellow men. One who, by right living and right conduct, has built up for himself an enviable name among his fellows, and has drawn to him their confidence and esteem, is entitled to retain and enjoy the same; and one who wrongfully and maliciously, and without just cause, makes an assault thereon, and impairs or injures the same, does a grievous wrong for which he is answerable in damages.

It is true that the wrong must be found in the publication, not merely in the wording of the thing published. The injury must flow from the publication. The damage must be the natural and proximate result of the publication,—a result that usually, naturally, and ordinarily follows as a result of the wrong done.

Though the article itself conveys no wrong impression concerning the complainant, and in and of itself could do no harm, it may become most injurious, most hurtful; it may become a direct assault upon the good name, fame, and reputation, because of the manner and the circumstances under which it was published. The publication must be libelous, not necessarily that the article, in and of itself, is libelous.

"A libel is the malicious defamation of a person made public by any writing," etc. It is the malicious defamation against which the inhibition of the statute is raised,—malicious defamation made public by writing. A writing made public which is intended to and does, because of its publication, tend to provoke to wrath, to expose to public hatred, contempt, or ridicule, or which deprives one of the benefits of public confidence and social intercourse, is libelous per se.

Every written publication, maliciously made, defamatory of another, which tends to any of the consequences set out in the statute, is a violation of the inhibitions of the statute. It is therefore a wrong done to a citizen in violation of the statute. It is therefore actionable per se. The fact that it is a violation of the inhibition of the statute makes it actionable per se.

In contemplation of law, reputation is a delicate plant, withered by the breath of scandal. Any publication which imputes to another conduct which right-thinking men condemn, whether the conduct involve a crime, moral turpitude, or any conduct in life, purpose, or manner of living which the common sense of right-thinking men condemns, is presumed in law to have injuriously affected the reputation of the person

so assailed, and, by such injury, to have caused him some damage.

It follows, therefore, that libel is an assault upon character resulting in some injury to the reputation. The injury must be traceable to the assault, and the damage must be the proximate result of the injury. Everyone recognizes the blighting effect of scandalous utterances directed against the character, conduct, or reputation of men. Everyone recognizes that such assaults, publicly made, tend injuriously to affect the reputation and standing of the one so assailed among his fellows. It is from the recognition of this that the law implies damages, without allegation or proof of special damages.

Defamation consists in maliciously poisoning the minds of others, against the party assaulted, by printing, writing, etc., thereby bringing on them some of the consequences provided against in the statute. The statute is intended to, and does, prohibit the malicious poisoning of the minds of others against a citizen, under the protection of the law, by the use of public printing, etc., and this inhibition attaches whether done directly, by the wording of the thing complained of, or indirectly, by insinuation, imputation, or suggestion. The statute is intended to protect one in a right, and to deny to others the liberty to invade that right.

With no explanation from the defendants, we may rightly assume that they prepared and mailed this card for the purpose heretofore indicated, and that the consequences charged in the petition were the consequences that naturally flowed from the thing done. We think the pleading was sufficient to present the question to the jury. As supporting what we have said, see *Call v. Larabee*, 60 Iowa, 212, 14 N. W. 237; *Hollenbeck v. Ristine*, 105 Iowa, 488, 67 Am. St. Rep. 306, 75 N. W. 355; *Halley v. Gregg*, 74 Iowa, 564, 38 N. W. 416. In the latter case it is said, in substance, that if

the act charged constitutes a libel, as defined by the statute, it is actionable per se. See *Zier v. Hoffin*, 33 Minn. 66, 53 Am. Rep. 9, 21 N. W. 862, in which it is said: "Words which may be innocent of themselves may be rendered libelous by the place and circumstances of their publication, for such place and circumstances may impress on them a meaning and suggestion which, standing alone, they do not have. Thus, though the words here do not of themselves impute wrong, they might be published in such a place or under such circumstances as to make them capable of naturally conveying the impression that plaintiff had been guilty of dishonest practices, either in contracting the debt or in withholding payment of it. . . . What meaning they would naturally convey was for the jury to determine in view of the circumstances of their publication." *State v. Armstrong*, 106 Mo. 395, 16 S. W. 604, reported in 13 L.R.A. 419, 27 Am. St. Rep. 361, together with citations and annotations; *Nichols v. Daily Reporter Co.* 30 Utah, 74, 3 L.R.A. (N.S.) 339, 116 Am. St. Rep. 296, 83 Pac. 573, 8 Ann. Cas. 841.

We find no case directly in point on the questions here considered. We think, however, the plaintiff presented a fair question for the jury, and the court erred in sustaining the demurrer, and the cause is there reversed.

Evans, Ch. J., and Ladd, J., concur.

Sallinger, J., concurring:

There is language in the opinion which indicates there may be libel which is not libel per se. I do not wish to be bound by it. I think it is settled by our cases that whatever is libelous is libelous per se; that the action for libel rests on the fact that a "crime has been committed;" and that, therefore, the law presumes damage if a libel is established.

Petition for rehearing denied.

Annotation—Libel by falsely ascribing matter to another.

This note does not cover such cases as *Piper v. Woolman* (1895) 43 Neb. 280, 61 N. W. 588, where the matter alleged to have been libelous did not involve any specific matter attributed to the plaintiff, but merely involved general charges against him of uttering false statements, etc.

For the right of action for unauthorized use of photograph or name for advertising purposes, see annotations to *Henry v. Cherry*, 24 L.R.A. (N.S.) 991; *Foster-Milburn Co. v. Chinn*, 34 L.R.A. (N.S.) 1137; and *Binns v. Vitagraph* L.R.A.1917F.

Co. L.R.A.1915C, 839. In some of the cases in those notes it appears that the photographs were accompanied by testimonials which were attributed to the person complaining.

A situation out of the ordinary is presented in *HUGHES v. SAMUELS*, ante, 1088, in which the court decides that the mailing by one undertaker to a person whose wife was critically ill, of an advertising card purporting to be sent by another undertaker in the same town, and calling attention to the latter's undertaking business, and signed with

the latter's name, might be found to be libelous under a statute providing that "a libel is the malicious defamation of a person, made public by any" writing "tending to provoke him to wrath or expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence and social intercourse." This decision appears correct. The question of libel by falsely ascribing matter published to another has arisen in comparatively few cases.

In another Iowa case it was held that a person was not exposed to public hatred, contempt, or ridicule to the degree required by the statute involved in *HUGHES v. SAMUELS* by a publication in a newspaper of an article headed, "Sick o' chickens; Live on cherries. Gundrams have chicken, chicken everywhere but not a bite to eat. The farm is mixed up," and purporting in part to be an account by the plaintiff and his wife of the giving of a mortgage on their chicken farm, and a statement by them that they were living on cherries, but otherwise starving because they had failed in the chicken farm business, although the plaintiff testified that he had never made such statements to anyone. *Gundram v. Daily News Pub. Co.* (1916) 175 Iowa, 60, 156 N. W. 840.

A publication in a newspaper has been held libelous, as calculated to hold the plaintiff up to ridicule and contempt, and to destroy his influence as a writer and lecturer, where it appeared that he was a member of the Italian nobility and of numerous geographical societies, and a noted newspaper correspondent, traveler, writer, and lecturer, and that an article, preceded by a short biography of his life, and written in the first person, was falsely published, purporting to have been written by him, and representing him as describing himself in an absurd and improbable adventure in rescuing a person from cannibals in Africa. *D'Altomonte v. New York Herald Co.* (1913) 154 App. Div. 453, 139 N. Y. Supp. 200. Scott, J., dissented from the decision, but in the course of his opinion said that doubtless it would be libelous to falsely attribute to an author an obscene or profane article, or one which expressed sentiments abhorrent to right-thinking people, as such articles would hold the putative author up to scorn and contumely; but stated that he was of the opinion that the article in question was complimentary rather than derogatory.

And a publication in a newspaper, concerning a candidate for Congress, of

a false and malicious article in a coarse and blotted imitation of his handwriting and signature, with misspelled words, representing him as saying, "I don't propose to go into debate on the tariff differences on wool, quinine and all the things, because I aint built that way," has been held libelous, and not privileged, the court stating that until courts are prepared to hold that ignorance constitutes no unfitness for office, such a publication must be held libelous; that if such a letter was actually written by the plaintiff it would show him to be ignorant, illiterate, and incapable of intelligently performing his duties as a Congressman. *Belknap v. Ball* (1890) 83 Mich. 583, 11 L.R.A. 72, 21 Am. St. Rep. 622, 47 N. W. 674.

And it has been decided that a daughter was held up to public hatred and contempt and was entitled to recover for libel where a medicine company caused an article to be published in a newspaper which falsely represented her as having voluntarily stated to a reporter that her mother had been bitten by a cat, and that she purred and mewed and assumed the attitude of a cat in an effort to catch rats; that she dreaded the approach of water, and was finally cured by the defendant's medicine. *Steuart v. Swift Specific Co.* (1886) 76 Ga. 280, 2 Am. St. Rep. 40.

And it has been held libelous per se to publish a false statement under a headline reading, "Minister curses in court," that a minister at a certain trial said "You're a ——— skunk, says the Rev. Dr. Potter to Lawyer Clinch," and that during a recess he said: "I'd like to punch that damned skunk in the head," it being held that such statements touched the plaintiff in his office, and tended to represent him as unfit to fill his office. *Potter v. New York Evening Journal Pub. Co.* (1902) 68 App. Div. 95, 74 N. Y. Supp. 317. J. T. W.

MINNESOTA SUPREME COURT.

STATE OF MINNESOTA EX REL. ADRIATIC MINING COMPANY
v.
DISTRICT COURT OF ST. LOUIS COUNTY et al.

(— Minn. —, 163 N. W. 755.)

Workmen's compensation — infection of eye — accident.

1. A workman received an injury to his

Headnotes by BROWN, Ch. J.

eye, caused by a flying particle of iron ore; the particle of ore was removed from the eye by a fellow workman by means of a match and handkerchief, which handkerchief had been in use for several days; the eye was then washed with water from a trough used in common by numerous other miners; gonorrheal infection soon set in, causing the total loss of the sight of the eye; the workman was not afflicted with the disease.

It is held that the injury so received was accidental, within the meaning of the Workmen's Compensation Statute, and that the findings of the trial court are sustained by the evidence.

For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.

Same — review — conclusiveness of findings.

2. In certiorari to review an award of compensation under the Workmen's Compensation Act, the findings of the trial court will not be disturbed, unless manifestly against the preponderance of the evidence.

For other cases, see Certiorari, II. in Dig. 1-52 N. S.

(July 13, 1917.)

CERTIORARI to the District Court for St. Louis County et al. to review a judgment awarding compensation under the Workmen's Compensation Act. Affirmed.

The facts are stated in the opinion.

Messrs. Washburn, Bailey, & Mitchell for relator.

Messrs. Victor L. Power and Victor H. Johnson, for respondents:

The fact that the person injured had a predisposition to disease, or a latent weakness, cannot avail the defendant to relieve him from liability from damages which ensue when his negligence brings the dormant disease into activity or aggravates the latent weakness.

Miller v. St. Paul City R. Co. 66 Minn. 192, 68 N. W. 862; Jones v. Caldwell, 20 Idaho, 5, 48 L.R.A.(N.S.) 119, 116 Pac. 110; Maroney v. Minneapolis & St. L. R. Co. 123 Minn. 480, 49 L.R.A.(N.S.) 756, 144 N. W. 149; Larson v. Boston Elev. R. Co. 212 Mass. 262, 98 N. E. 1048; Herdon v. Springfield, 137 Mo. App. 513, 119 S. W. 467; Memphis, D. & G. R. Co. v. Steel, 108 Ark. 14, 156 S. W. 182, Ann. Cas. 1915B, 198;

Note. — The general subject, "Workmen's Compensation Acts," is treated in an exhaustive annotation in L.R.A.1916A, 23, which is supplemented by annotation in L.R.A.1917D, 80.

As to recovery of compensation for loss of an eye through inspection, see McCoy v. Michigan Screw Co. 1916A, 323, and the annotation attached to that case on page 326, where will be found several cases in which compensation was sought for injuries similar to those set out in STATE EX REL. ADRIATIC MIN. CO. v. DISTRICT CT. L.R.A.1917F.

Heilman Brewing Co. v. Industrial Commission, 161 Wis. 46, 152 N. W. 446; Eagle Chemical Co. v. Nowak, 161 Wis. 446, 154 N. W. 636; McCoy v. Michigan Screw Co. 180 Mich. 454, L.R.A.1916A, 323, 147 N. W. 572, 5 N. C. C. A. 455; Cline v. Studebaker Corp. 189 Mich. 514, L.R.A.1916C, 1139, 155 N. W. 519; Hills v. Oval Wood Dish Co. 191 Mich. 411, 158 N. W. 215; Adams v. Acme White Lead & Color Works, L.R.A. 1916A, 289-293, note.

The employee was entitled to compensation.

Cline v. Studebaker Corp. 189 Mich. 514, L.R.A.1916C, 1139, 155 N. W. 519; McCoy v. Michigan Screw Co. 180 Mich. 454, L.R.A. 1916A, 323, 147 N. W. 572, 5 N. C. C. A. 455.

Mr. M. H. Crocker also for respondents.

Brown, Ch. J., delivered the opinion of the court:

Certiorari to review the judgment of the court below awarding compensation to an injured employee in proceedings under the Workmen's Compensation Act.

The facts as disclosed by the findings of the trial court are substantially as follows: Relator owns and operates an iron mine at or near Biwabic, St. Louis county, this state, and at the time here in question, March 4, 1915, the workman to whom compensation was awarded was in its employ as a miner in and about the mine. While engaged in the discharge of his duties and in breaking up a large chunk of iron ore with a hammer, a particle of the ore flew into his left eye, cutting through the cornea thereof, embedding itself in the eyeball. A fellow workman removed the particle from the eye at the time, using in his efforts in that respect a match and handkerchief. The eye was immediately thereafter washed in water from a trough which was used daily by other miners for the purpose of washing their hands and faces. When the particle had been removed from the eye, blood and watery matter was discharged from the wound, the eye became inflamed, and thereafter a gonorrheal infection set in, and resulted finally in the loss of the sight of the eye. Prior to the injury the eye was normal and the workman experienced no trouble or pain therefrom. The court found that the "said gonorrheal infection was introduced into the said eye . . . either at the time said particle of ore was being removed, . . . or while said eye was being washed by the employee, or the same resulted from latent gonococci germs in said eye, which by reason of the injury to the eye, . . . caused subsequent inflammation and ulcer and resulting sore tissue."

The court further found that the injury arose out of and in the course of the em-

ployment, and other necessary facts, and ordered judgment for the compensation provided for by the statute in such cases.

The only question presented by the assignments of error is whether the findings of the trial court are sustained by the evidence. We answer the question in the affirmative.

The evidence is clear that the workman received some sort of an injury to his eye, in the manner stated by him, the precise character of which is in dispute. There is no dispute, however, about the fact that gonorrheal infection set in soon after the time of the injury, and thereafter progressed to such an extent that the sight of the eye was totally destroyed. And there can be no serious doubt that the facts, as claimed by the workman, disclose an accidental injury within the meaning of the compensation statute. And this, whether the gonorrheal infection resulted from the use of a soiled handkerchief in removing the particle from the eye, or from washing the eye with water from the trough which was used indiscriminately by the miners, or from a latent germ within the eye, set in motion and made active by the violence of the injury to the eyeball. *Miller v. St. Paul City R. Co.* 66 Minn. 192, 68 N. W. 862; *Gardner v. United Surety Co.* 110 Minn. 291, 26 L.R.A.(N.S.) 1004, 125 N. W. 264; 4 Dunnell's Dig. 4871a; *Cline v. Studebaker Corp.* 189 Mich. 514, L.R.A.1916C, 1139, 155 N. W. 519; *Sullivan v. Modern Brotherhood*, 167 Mich. 524, 42 L.R.A.(N.S.) 140, 133 N. W. 486, Ann. Cas. 1913A, 1116, and authorities there cited. In disposing of the question, in proceedings of this kind, whether the findings of the trial court are sustained by the evidence, we apply the rule applicable generally to civil actions, to the effect that the findings of a trial court will not be disturbed unless manifestly against the clear preponderance of the evidence. Our examination of the record will not justify that conclusion, and we therefore sustain the findings of the trial court.

It is contended by relator with some earnestness that the weight of the testimony conclusively shows that there was in fact no injury to the workman's eye of a character to permit extraneous infection of that organ in the manner claimed by him or otherwise, and, further, that at the time of the alleged injury there was present in the eye an active gonorrheal infection, not latent, but alive and in motion, which ultimately destroyed the eye, a condition for which the injury, whatever it may have been, was in no way responsible. We do not concur in the contention that the evidence is conclusive upon the point, though there is some evidence tending to establish the same. But L.R.A.1917F.

taken as a whole the evidence resolved the question into one of fact. In this connection much stress is laid upon the testimony of one of the medical experts who treated the eye about two hours after the injury, and who testified that there was then a pus discharge which could not have formed from an infection occurring only two hours before. The premise may be conceded, for it seems entirely impossible that a pus formation could appear in so short a time. But the doctor may have been mistaken as to the character of the discharge. He testified that he did not examine it carefully, and this, together with other testimony tending to show that there was a discharge from the wound, of a bloody and watery character, leads us to the conclusion that the trial court properly solved the point on the theory that the character of the pus discovered by the doctor was not clearly shown to be such as might come from a gonorrheal ulcer. It was further shown, and in this respect there was no dispute, that the workman was not at the time afflicted with the disease. Nor was there any showing that he had been so afflicted at any prior time.

In this view of the evidence the cause of the infection is not left to conjecture or speculation, any further than a doubt as to which of three possible causes was responsible therefor; namely, the removal of the particle from the eye with the match and handkerchief, or bathing the eye in the common water trough, or the theory of a latent gonococci germ. The latter may be rejected as improbable. But as to the other hypotheses the evidence made the question one of fact.

This disposes of the case, and covers all that need be said. A further discussion of the evidence would serve no useful purpose. It is sufficient to say that we have examined it with care, with the result stated.

Judgment affirmed.

NEBRASKA SUPREME COURT.

SWENSON BROTHERS COMPANY

v.

COMMERCIAL STATE BANK, Appt.

(98 Neb. 702, 154 N. W. 233.)

Appeal — new action.

1. The same cause of action must be pre-

Headnotes by SEDGWICK, J.

Note. — As to effect of certification of postdated check, see annotation following this case, post, 1099.

As to liability of bank on contract of acceptance external to check, see note to *First Nat. Bank v. Commercial Sav. Bank*, 8 L.R.A.(N.S.) 1148.

sented and tried upon appeal that was tried in the court below, but "to plead an issuable fact in the appellate court that was not pleaded in the lower court is not necessarily pleading a new cause of action." *For other cases, see Appeal and Error, VII. j, 3, in Dig. 1-52 N. S.*

Definition — check.

2. "A 'check' is a bill of exchange drawn on a bank, payable on demand." *For other cases, see Checks, I. in Dig. 1-52 N. S.*

Bills and notes — acceptance.

3. "The holder of a bill, presenting the same for acceptance, may require that the acceptance be written on the bill." *For other cases, see Bills and Notes, II. in Dig. 1-52 N. S.*

Same — on separate paper.

4. "Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor, except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value." *For other cases, see Bills and Notes, II. in Dig. 1-52 N. S.*

Bank — certification of check — want of funds.

5. If a postdated check is, before the day of its date, delivered to the bank upon which it is drawn, and there is no money of the maker of the check on deposit in the bank at the time, the president of the bank has no authority by virtue of his office to bind the bank to pay to the payee the amount of the check on the day of its date. *For other cases, see Banks, III. b, in Dig. 1-52 N. S.*

Same — authority of president.

6. The president of a bank will not be presumed to be authorized by virtue of his office to bind the bank to make good the default of another. *For other cases, see Evidence, II. c, 4, in Dig. 1-52 N. S.*

(September 20, 1915.)

APPEAL by defendant from a judgment of the District Court for Cedar County in plaintiff's favor in an action brought to recover the amount alleged to be due on an alleged written acceptance of a check. Reversed.

The facts are stated in the opinion.

Mr. J. C. Robinson, for appellant:

A bank has no authority to guarantee the payment of paper except in the regular course of its banking business. It has no authority to execute such a guaranty merely for the accommodation of others.

City Nat. Bank v. Thomas, 46 Neb. 861, 65 N. W. 895.

No officer of a bank can bind it by a promise to pay debts which the corporation does not owe, and was not liable to pay, unless the bank authorized or has ratified the act.

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Rich v. State Nat. Bank, 7 Neb. 201, 29 Am. Rep. 382; Robertson v. Buffalo County Nat. Bank, 40 Neb. 235, 58 N. W. 716; Thomas v. City Nat. Bank, 40 Neb. 501, 24 L.R.A. 263, 58 N. W. 943.

It is not within the powers of an incorporated state bank to pledge its credit as a mere matter of accommodation.

Sturdevant Bros. & Co. v. Farmers' & M. Bank, 62 Neb. 472, 87 N. W. 156; Bank of Commerce v. Hart, 37 Neb. 197, 20 L.R.A. 780, 40 Am. St. Rep. 479, 55 N. W. 631.

A bank is incompetent to act, or to agree to bind itself to act, in any business, for any purpose or in any manner not authorized by the law of its corporate existence.

Morse, Banks & Bkg. 2d ed. pp. 11, 121.

The president of a bank has no more power of management or disposal over the property of the corporation than any other single member of the board.

Morse, Banks & Bkg. 2d ed. p. 146.

Mr. H. E. Burkett, for appellee:

The acceptance of a check by a bank is just as valid and binding as though accepted by an individual drawee.

Farmers & M. Bank v. Dunbier, 32 Neb. 487, 49 N. W. 376; Henrietta Nat. Bank v. State Nat. Bank, 80 Tex. 648, 26 Am. St. Rep. 773, 16 S. W. 321; First Nat. Bank v. Commercial Sav. Bank, 11 Ann. Cas. 281, and note, 284, 74 Kan. 606, 8 L.R.A.(N.S.) 1148, 118 Am. St. Rep. 340, 87 Pac. 746; Gruenther v. Bank of Monroe, 90 Neb. 280, 133 N. W. 402; Selover, Neg. Inst. 2d ed. p. 191.

If a legal relation be established, it imposes upon the bank a liability to a party to whom it was not before bound at all, and it converts the privilege of the bank to pay if in funds into an absolute and unconditional duty to pay, no matter what may be the state of the depositor's account.

First Nat. Bank v. Commercial Sav. Bank, 74 Kan. 606, 8 L.R.A.(N.S.) 1148, 118 Am. St. Rep. 340, 87 Pac. 746, 11 Ann. Cas. 282.

As between the payee and the acceptor, the acceptor cannot set up a want of consideration or defeat a recovery by showing that its acceptance was for accommodation.

Selover, Neg. Inst. 2d ed. p. 140.

It is no defense in an action on a bill of exchange by the payee against the acceptor, that the bill was accepted without consideration, or in other words, was an accommodation acceptance, and that fact known to the payee.

Grant v. Ellicott, 7 Wend. 227.

The acceptor cannot show that his acceptance, absolute on its face, was in fact conditional.

Selover, Neg. Inst. 2d ed. 193; Flournoy

v. First Nat. Bank, 79 Ga. 810, 2 S. E. 457; 7 Cyc. 778, 779, note 39.

A check may, however, be payable at a future day without ceasing to be a check.

7 Cyc. 531, note 86.

Sedgwick, J., delivered the opinion of the court:

This plaintiff held a claim for adjustment against the Shilton Trading Company, amounting to \$150, and on the 23th day of June, 1910, that company executed and delivered to the plaintiff two checks upon the defendant, Commercial State Bank of Coleridge. One check for \$100 was dated June 30, 1910, and the other check for \$50 was dated July 2, 1910. H. F. Swenson represented the plaintiff in the transaction, and he testified upon the trial that the checks were given him with the understanding "that we could arrange with the bank that these checks should be taken care of by the bank on certain dates." Mr. Swenson and A. E. Severence, who was the manager of the Shilton Trading Company, went to the defendant bank and presented the checks to George A. Gray, the president of the bank. These three men discussed the situation together, and the result was that the checks were left with the bank, and the president of the bank executed and delivered to Mr. Swenson the following writing:

We will send draft for \$100 on Friday, 30th June, 1910, and draft for \$50 on Tuesday, July 2, 1910, as per checks of Shilton Trading Company, of Coleridge, Nebraska, left in Com'l State Bank, Coleridge, by Mr. Swenson June 28, 1910.

George A. Gray, Pt.

Afterwards the bank sent to Mr. Swenson a draft for \$100 as stated in the writing. The bank failed to remit for the \$50, and the plaintiff brought this action against the bank in the county court of Cedar county to recover the \$50 and interest. The plaintiff appealed to the district court for that county, where he recovered a judgment for the \$50 and interest, from which the defendant has appealed to this court.

In the county court the plaintiff filed a bill of particulars alleging, among other things, the execution of the checks and the execution and delivery of the writing by the president of the bank; but the bill of particulars did not contain the allegation that "the acceptance was written by the defendant on a slip of paper other and different from that upon which the aforesaid checks were written, and said acceptance was by the defendant shown and delivered to the plaintiff, and the plaintiff on the L.R.A.1917F.

faith of said acceptance received the aforesaid checks for value."

In the district court this allegation was added to the petition, and the defendant moved to strike this allegation from the petition on the ground that it "constitutes and is a material variance and departure from any issue presented to or pleaded in the lower court."

The court overruled this motion, and the defendant now strenuously insists that the court erred in this ruling. There is no ground for this contention.

"To plead an issuable fact in the appellate court that was not pleaded in the lower court is not necessarily pleading a new cause of action." *North v. Angelo*, 75 Neb. 384, 110 N. W. 571.

The rule is that the same cause of action must be presented and tried upon an appeal that was tried in the court below. The cause of action in this case was the checks and the writing executed by the president of the bank, and adding an issuable fact in the appellate court was not pleading a new cause of action.

The alleged agreement of the defendant bank was in writing, and a large amount of evidence was admitted by the court bearing upon the question whether the plaintiff knew that there were no funds of the maker of the check on deposit in the bank at the time the checks were made and the writing executed by the president of the bank. There are authorities that hold that the acceptance of a check by a bank when there are no funds of the maker in the bank is void, the president of the bank having no authority to make such acceptance. These authorities make exception to the rule when the payee of the check parts with property on the faith of the acceptance, and is without notice that the maker of the check has no money on deposit in the bank subject to check at the time.

"Where a postdated check is certified by the cashier of the bank on which it is drawn to be 'good,' by indorsement thereon, before the day of its date, the instrument, upon its very face, communicates facts and information to persons receiving the same that the cashier, in making such certification was not acting within the known limits of his power, and that he was clearly exceeding them." *Clarke Nat. Bank v. Bank of Albion*, 52 Barb. 592.

This case is cited with approval in 1 *Morse, Banks & Bkg.* 4th ed. § 413, and the author says: "When a postdated check is certified before maturity, it carries notice to all that the certification was beyond the officer's authority." 3 R. C. L. p. 446.

This principle is decisive of this case.

This transaction was not ordinary banking business.

"A 'check' is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this chapter applicable to a bill of exchange payable on demand apply to a check." Rev. Stat. 1913, § 5502.

"The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and, if such request is refused, may treat the bill as dishonored." Rev. Stat. 1913, § 5450.

"Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value." Rev. Stat. 1913, § 5451.

These checks were not presented for certification and retained by the payee. They

were delivered to the bank. The acceptance, therefore, does not bind the acceptor in favor of this plaintiff, who did not receive the checks for value on the faith of the acceptance. The president of the bank undertook to guarantee that the checks would be made good by the maker thereof, and that the bank would pay the amount to the payee of the checks. The payee not only had notice of this, but participated in this arrangement, and was bound to know that such a transaction was beyond the power and authority of the president of the bank. The district court should have directed a verdict for the defendant. The judgment of the District Court is reversed, and the case dismissed.

Hamer, J., not sitting.

Petition for rehearing denied.

Annotation—Effect of certification of postdated check.

It is here assumed that a bank, on certifying a check drawn upon it, becomes liable for the amount of the check to any bona fide holder thereof, whether the drawer has or has not any funds in the bank. On this point see note in L.R.A.1916C, 172. It may also be assumed, for the purposes of the present note at least, that if the holder had, at the time he received the check for value, actual knowledge of the fact that the certification was false, he is not a bona fide holder, and cannot maintain his action against the bank; the fact that he is not a bona fide holder being a defense available to the bank. See same note page 176.

Upon the foregoing assumptions, the question here annotated resolves itself into one of notice to a purchaser, so as to prevent his becoming a bona fide holder, by the mere fact that the date of certification is earlier than the date of the check. By the weight of authority, in number of decisions, a check certified before the date for payment is in itself notice to the purchaser that the bank officer had no authority to certify the check. *Clarke Nat. Bank v. Bank of Albion* (1868) 52 Barb. (N. Y.) 592 (but holder had taken check for a pre-existing debt. See same case, *infra*); *Pope v. Bank of Albion* (1874) 57 N. Y. 126 (but check showed, independently of date, that officer had no authority); *SWENSON BROS. CO. v. COMMERCIAL STATE BANK*, ante, 1096. And there is but one incidental decision to the contrary. See *Smith v. Field* (Idaho) *infra*. L.R.A.1917F.

On reason it would seem that a bank official should have the same authority to certify a postdated check that he has to certify a check that is not postdated, not having authority in either case to certify if the drawer does not, at the time of the certification, have sufficient funds on deposit to pay the check. The opinions to the contrary appear to be based upon the assumption that the sole reason for postdating a check is that the drawer does not have the funds in bank but expects to have by the time the check is payable. This may be the reason in many cases, but it is certainly not the reason in every case; and the certification should be proof that it is not the reason in the individual case.

The mere fact that a check (without reference to certification) is postdated and negotiated before due, does not put the purchaser upon inquiry regarding equities of others or the purchaser's right to recover. (See cases cited in notes in 29 L.R.A.(N.S.) 375, and 44 L.R.A.(N.S.) 405.) So, it is difficult to see why it should relieve a bank from the ordinary consequences of a wrongful certification of a check by one of its officials.

In *Clarke Nat. Bank v. Bank of Albion* (N. Y.) *supra*, the proposition that the holder of a postdated, certified check is put upon inquiry regarding the truth of the certification, is supported. (See quotation from this decision by the court in *SWENSON BROS CO. v. COMMERCIAL STATE BANK*.) It was also said: "First. This check was certified by the cashier before it was payable by

its terms, and before any legal demand of payment was or could be made. Second. It was certified, when the presumption is that the drawer had no funds in the bank to meet it. Third. Ward & Bro. were not bona fide holders of this check without notice of the facts, which vitiates the certification." But the plaintiff in the case had taken the check for a pre-existing debt, and this gave an independent ground upon which the decision is based.

And the fact that a check had been certified before it was due was, in *Pope v. Bank of Albion (N. Y.) supra*, held to be one reason why the holder was put upon inquiry as to the authority of the officer who made the certification; the main reason being that, upon the face of the check, it appeared that the certification was made by a subordinate officer who could not, in the absence of special authority, certify checks.

And see *SWENSON BROS. CO. v. COMMERCIAL STATE BANK*, holding that a purchaser of a check that has been certified before its date has no right to

presume that the president of the bank had authority to certify the check, because no such authority exists.

But there was an incidental holding in *Smith v. Field (1911) 19 Idaho, 558, 114 Pac. 668*, that a check bearing date September 10 and certified on July 15 of the same year constitutes a valid claim against the bank. There is a statute involved, making the certification of a check without sufficient funds a felony on the part of the bank officer, and some other statutory provisions which seem to be declaratory of the common law. The court did not discuss the question of putting the holder upon inquiry as to the officer's authority to certify, and it may be that the statute making the officer criminally responsible for an improper certification has the effect of relieving the holder of the duty to inquire; but in the absence of such statutes it would seem that the public ought to be permitted to assume that the officer has performed his duty honestly. J. W. M.

VIRGINIA SUPREME COURT OF APPEALS.

UNITED CIGARETTE MACHINE COMPANY, LIMITED, Appt.,

v.

W. T. BROWN.

(119 Va. 813, 89 S. E. 850.)

Corporation — lien on stock — damages for tort.

1. The charter lien of a corporation upon its stock and dividends for debts of stockholders extends to claims for damages for breach of contract by another corporation of which a holder of stock in the corporation asserting the lien was president and which was instigated by him to his own profit.

For other cases, see Corporations, V. c. 3, in Dig. 1-52 N. S.

Limitation of actions — enforcement in equity of lien for barred claim.

2. Equity may enforce the lien of a corporation upon stock and dividends of one seeking its aid to compel payment of his dividends for damages for instigating a breach of contract with the corporation which can be readily ascertained, the claim for which could not be enforced at law be-

Note. — For lien of corporation upon stock as affected by the bar of the Statute of Limitations against an action on debt of stockholder, see annotation following this case, post, 1106.

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cause of the expiration of the limitation period.

For other cases, see Equity, III. a, in Dig. 1-52 N. S.

Corporation — lien on stock — expiration of limitation period — effect.

3. The expiration of the limitation period for the enforcement by a corporation against one of its stockholders of a claim does not destroy its charter lien on his stock for the claim, so that he can compel a transfer of the stock by the corporation on the corporate books without paying the debt.

For other cases, see Corporations, V. c. 3, in Dig. 1-52 N. S.

(September 11, 1916.)

A PPEAL by defendant from a judgment of the Corporation Court of Lynchburg sustaining a demurrer to its answer and cross bill in a suit to recover dividends Reversed.

The facts are stated in the opinion.

Messrs. Coleman, Easley, & Coleman for appellant.

Messrs. Harrison & Long, for appellee:

The right to the enforcement of the lien can only arise after complainant has successfully maintained its claim to a right to damages.

United Cigarette Mach. Co. v. Winston Cigarette Mach. Co. 114 C. C. A. 583, 194 Fed. 957.

If the cross bill asks relief of an equitable nature, it is open to demurrer if it does not contain all of the proper allegations which confer an equitable title to such relief.

Barton, Ch. Pr. § 101; Story, Eq. Pl. § 398; Scott v. Rowland, 82 Va. 484; Rosenberger v. Keller, 33 Gratt. 489; Hays v. Heatherly, 36 W. Va. 613, 15 S. E. 223.

The lien given is not only conditioned on the existence of liability, but, being a mere incident of the liability secured, it is barred when the liability is barred.

Menzel v. Hinton, 95 Am. St. Rep. 656, note.

As to merely legal demands, such as these claims are, equity follows the law in giving effect to the Statute of Limitations.

Rowe v. Bentley, 29 Gratt. 756; Coles v. Ballard, 78 Va. 139.

Cardwell, P., delivered the opinion of the court:

The bill in this cause was filed by appellee, W. T. Brown, against appellant, the United Cigarette Machine Company, Limited, in which it is averred that in pursuance of a contract theretofore entered into between the Winston Cigarette Machine Company and the defendant company (spoken of hereafter in this opinion as the Winston company and the United company, respectively) the Winston company sold to the United company certain patents and rights relating to cigarette machines and inventions in cigarette machinery, including especially a machine known as the "Briggs" cigarette machine, in which agreement the Winston company retained the right to sell Briggs machines in the United States and Canada, but granted to the United company the sole and exclusive right to sell the same in other parts of the world; that the consideration to the Winston company under this agreement was £25,000, to be paid and satisfied by the allotment to the Winston company, or as it might direct, of 25,000 shares of £1 each of the capital stock of the United company, and that, the Winston company having directed that the entire amount of the said stock be issued to its stockholders, the same was so issued by the United company, in which distribution of the said shares 3,577 were issued to the complainant, Brown, of which he still owned 2,577 shares, with the incidental right to receive dividends thereon as the same were earned and declared, but that the United company, since 1905, had failed and refused to pay such dividends to the complainant until compelled to do so, and at the last meeting of its stockholders on the 6th of May, 1913, in a resolution declaring dividends on the shares of its stock for L.R.A.1917F.

the year ending December 31, 1912, the shares held by the complainant were excepted and no dividends declared thereon. The bill further averred that the refusal of the United company to pay or declare dividends on complainant's stock was based on the claim that he was responsible for having, as president of the Winston company, instigated, for his own advantage and profit, certain breaches of the contract between the United company and the Winston company under which the shares of stock were issued to the stockholders of the Winston company, and that the United company asserted a lien on complainant's shares of stock and all dividends accruing thereon under § 24 of its charter, or articles of association, for complainant's alleged liability to it in the premises. It is further averred that the breaches of the contract charged were certain alleged sales of Briggs machines to be used outside of the United States and Canada, and, moreover, that the United company also made claim against complainant for the failure of the Winston company properly to fill an order by the United company for a Briggs machine; that the alleged sales of Briggs machines in violation of the contract were two in the year 1900, to be used in Porto Rico, two in the year 1903, for use in Lima, Peru, one in the spring or summer of 1904 to the Imperial Tobacco Company, Limited, of St. Johns, Newfoundland, to be used in its factory there, three in 1904 for use in Valparaiso, Chile; for the sale of each of which said machines the United company claimed from \$1,000 to \$1,500; and that the order for the Briggs machine alleged to have been improperly filled was said to have been given on or about January 16, 1906, the complaint being that an old-style Briggs machine was shipped, instead of the latest improved model, resulting in an alleged loss to the United company of \$618.13.

Complainant further averred that in June, 1912, he sold 1,500 shares of his stock, but lost the sale because the United company refused to transfer the stock to the purchaser until he (complainant) settled his obligations to the company. It is charged in the bill that complainant did not believe the United company, defendant, intended to attempt to establish the alleged obligations of the complainant, because, in addition to the fact that the obligations were wholly without foundation (but on this point complainant expressly declined to tender issue), the alleged claims were barred both in Virginia and in North Carolina by the Statute of Limitations, in consequence whereof the lien therefor had become inoperative and of no effect, his contention being that the United company's

demand was "unliquidated," and could be liquidated only in a court of law, and, as the Statute of Limitations barred any action at law on its demands, the United company could not avail itself of its lien on complainant's shares of stock anywhere.

To this bill the defendant, the United company, filed an answer, which it was prayed might be treated as a cross bill, asking relief against the complainant, Brown, the answer of the United company admitting:

(1) That of the 25,000 shares of its capital, which under the agreement between it and the Winston company were to be allotted to the latter, or as it might direct, 2,577 of the said shares issued to complainant, Brown, still stood registered in his name on the transfer books of the United company; and (2) that § 24 of the articles of association of the United company was correctly set forth in complainant's bill; but the United company in its answer, set forth in totidem verbis §§ 30 and 119 of its articles of association, to which no reference was made in the bill, and filed with its answer a certified copy of said articles of association. The answer further averred that, when the agreement between the Winston company and the United company was executed, the complainant had become president of the Winston company, and that the agreement was signed and executed on behalf of that company by him; that he, as president, managing director, and chief, if not the sole, business representative, as well as a large stockholder of the Winston company, had for years dominated and directed its affairs, acting in the name of the company, but in his own interest and for his own benefit as well; that he had sold, in violation and disregard of the agreement, numerous Briggs cigarette machines, to be used, as he well knew and intended, outside of the United States and Canada, including two sold in the year 1900, to be used in Porto Rico, one in 1903, to be used in Lima, Peru, one in 1904, to be used at St. Johns, Newfoundland, and three in 1904, to be used in Valparaiso, Chile; that each of these machines was sold at a price largely in excess of the price (\$500) at which the Winston company agreed to manufacture and furnish Briggs machines to the United company, and that all of them had been paid for by the respective purchasers, which payments the complainant, individually and personally, got the benefit of, in whole or in part, although ostensibly they may have been made to the Winston company; and the answer distinctly charged that the complainant knowingly sold or supplied, either in his own name or in the name of the Winston company, the aforesaid eight Briggs machines to purchasers outside of the

United States and Canada, thereby depriving the United company of its just rights and profits in the premises, and of a material part of the consideration for the very shares of its capital stock that now stand in complainant's name, upon which shares, as well as upon all dividends thereon, a lien was explicitly given the United company by its articles of association for any liability of the complainant to said company; and the answer further distinctly charged that the complainant, for his own enrichment, procured, directed, instigated, and accomplished, by and through his official and representative relations with the Winston company, the violation of the aforesaid agreement between the United company and the Winston company, thereby realizing for himself and the Winston company \$2,000 on each machine, which the United company was entitled to and otherwise could and would have made and enjoyed.

It was further averred in its answer that the United company, under the agreement between it and the Winston company, was to pay for the manufacture and delivery on board cars of the latest improved model of Briggs machines the sum of \$500 each, and that on or about January 16, 1908, the United company placed with the Winston company an order for a Briggs machine of the latest improved model, to be shipped to W. R. Grace & Company of New York city, and to be forwarded by them to Lima, Peru, in response to which order complainant, Brown, shipped a machine to Grace & Company, with sight draft for \$500 attached to the bill of lading therefor; that the draft was paid and the machine forwarded without being unpacked or delivered, but that upon its arrival at its ultimate destination it was discovered that the machine was not the latest improved model, but an old-style machine, and probably secondhand at that; that the machine was, of course, rejected by the purchaser and thrown back on the United company's hands, and that complainant, Brown, refused to furnish a new machine of the type and style ordered, in place of the old machine, with the result that the United company had to construct and manufacture a new machine at its own shops in Lynchburg with which to replace the old machine foisted upon it by Brown, and for which he had collected the price of a new machine; but the United company was out of pocket \$500 paid for the machine, besides \$118.13 paid for its transportation to Lima and back, and still had on its hands the old machine, which was worthless; and that the Winston company at the instigation of Brown, its sole business representative, declined and refused to take back the old machine or refund the price

thereof. The said answer and crossbill further charged that of Brown's dishonest conduct in the premises he was the beneficiary, and insisted that Brown was therefore liable to the United company to the extent of the profits realized upon the sales of the eight Briggs machines in violation of the contract, and also for the \$618.13 out of which Brown had cheated the United company by palming off on it an old machine in place of the new one ordered; and, further, that the United company had a lien upon the shares of its capital stock standing in Brown's name, and had the right to withhold and retain the dividends thereon and apply the same in or towards satisfaction of the liability of Brown in the premises.

The provisions of its articles of association upon which the United company based its claim to a lien on Brown's stock are as follows:

"24. The company shall have a first and paramount lien upon all the shares registered in the name of each member (whether solely or jointly with others) for his debts, liabilities, and engagements, solely or jointly with any other person to or with the company, whether the period for the payment, fulfilment, or discharge thereof shall have actually arrived or not. And such lien shall extend to all dividends from time to time declared in respect of such shares."

"30. The directors may refuse to register a transfer of any shares upon which the company has a lien, and in the case of shares not fully paid up may refuse to register a transfer to a transferee of whom they do not approve."

"119. The directors may retain any dividends on which the company has a lien, and may apply the same in or towards satisfaction of the debts, liabilities, or engagements in respect of which the lien exists."

With respect to the bill brought by the United company against Brown in the Lynchburg corporation court in November, 1908, the answer and cross bill of the United company in this suit avers that, while it is true that its bill filed in November, 1908, was dismissed, the dismissal was upon the sole ground that Brown was a nonresident of the state of Virginia, and, therefore, the court did not have jurisdiction of the cause; and, with reference to the suit in equity subsequently instituted by the United company in the United States court for the western district of North Carolina, its answer and cross bill here avers that the bill in the United States court of North Carolina was likewise dismissed, but the dismissal was without prejudice, and upon the sole ground that the Federal court of

equity was without jurisdiction; and the United company, in its answer and cross bill in this cause, calls attention, in this connection, to the fact that in the opinion of the circuit court of appeals, affirming the last-mentioned dismissal, it was distinctly held that the liability of Brown to the United company, under the allegations of the bill, had not been questioned, and that the United company's demand was supported "by an array of authority,"—citing a number of decisions and text-writers. The United company's answer and cross bill also calls attention, in this connection, to the further fact that the United States circuit court of appeals also held (citing authorities) that the lien reserved by the United company's articles of association on the shares of its members embraced the demand asserted by the United company against Brown, so that the United company insisted in its answer and cross bill in the instant cause that the only question determined by the dismissal of its first bill, brought in the corporation court of Lynchburg, was that the court did not have jurisdiction of Brown, and that the only question determined by the second suit instituted by the United company against Brown was that the Federal equity court did not have jurisdiction of a suit brought by the United company, *as plaintiff and actor*, to enforce its lien upon Brown's shares of stock. The United company's answer and cross bill also points out that its right, under § 119 of its articles of association, to *retain the dividends on Brown's stock was not involved or dealt with in either of the prior suits*, and insisted that Brown had hitherto succeeded, by technical and evasive tactics, in defeating the jurisdiction of the court in each case and avoiding a decision on its merits; *that, he himself having now invoked the aid of a court of equity, it no longer lay in his mouth to call in question that court's jurisdiction in the premises*,—this under the maxim of equity that he who seeks equity must do equity.

In other words, the United company's answer and cross bill makes the contention, in the alternative, that, Brown now having brought himself into a court of equity and impleaded the United company, the court could and should, regardless of any question whether the United company *as plaintiff and actor* could itself maintain an independent suit in equity, proceed to adjudicate, fix, and determine the amount of Brown's liability to the United company, and enforce its lien therefor on Brown's stock and dividends; and, accordingly, the United company prayed that, if need be, and so far as might be necessary to the United company's protection in the prem-

ises, its answer might be treated as a cross bill for that purpose.

Brown demurred to the United company's answer and cross bill, which demurrer the court sustained, and by its decree then entered, from which this appeal is taken, adjudged: (1) That the United company pay to Brown the sum of \$1,255, with interest thereon from May 6, 1913, together with his costs; (2) that the claims asserted by the United company against Brown were unliquidated and barred by the Statute of Limitations; (3) that the United company's asserted lien on Brown's shares of stock is only "potential," and would have to be "established" at law; and (4) that the United company be enjoined and restrained from withholding further dividends on Brown's stock, or refusing to transfer his stock, or otherwise denying to him "his right as a stockholder."

In the petition for this appeal there are five assignments of error in said decree, but we deem it unnecessary to consider these assignments seriatim. It seems perfectly clear to us that the contention of the appellant, the United company, that it has, by virtue of the provisions of its articles of association (§§ 24, 30, and 119, supra), a lien upon appellee's shares of stock here in question and the dividends accrued and accruing thereon, for the liabilities of appellee to the appellant set forth in its answer, treated as a cross bill, if these alleged liabilities should be sustained. Appellee has nowhere denied his liability for the demands made upon him by the appellant, but has, according to the averments of the answer and cross bill, studiously, artfully, and successfully avoided, up to the time of the institution of this suit by him, taking issue with appellant upon its alleged demands and its right to enforce them as a lien upon his shares of stock and dividends thereon, as provided by appellant's articles of association, which are binding upon appellee as upon every other holder of the association's stock.

In the case of *United Cigarette Mach. Co. v. Winston Cigarette Mach. Co.* above mentioned, reported in 114 C. C. A. 583, 194 Fed. 960, the opinion of the court says: "The liability of Brown to the complainant, if the allegations of the bill be sustained, has not been questioned, and is supported by an array of authority,"—citing a number of textbooks and decided cases.

Speaking of such a lien as appellant is asserting against and upon the stock of appellee in this cause, and the right of a corporation to create a lien upon its shares of stock for the debts and liabilities of the stockholders to the company, Cook on Corporations, 6th ed. vol. 2, § 522, says: "Such a

lien as this in favor of the corporation may be created by statute or by charter, and the weight of authority holds that it may be created by by-law."

This court held in *Bohmer v. City Bank*, 77 Va. 445, that where the charter of a bank provides that the bank shall have a prior lien upon any stock held by a stockholder for any debt of the stockholder to the bank, the lien of the bank upon the stock is a paramount one, and the bank has the right to be first satisfied before transferring the stock; that persons dealing with a corporation must take notice of and are affected by the provisions contained in its charter.

We are further of opinion that the lien upon the stock of appellee and dividends thereon asserted by appellant in this cause is not affected by the Statute of Limitations, even assuming that appellee, Brown, could have made that defense by demurrer.

"The lien will continue for the benefit of the corporation, although the debt be barred by the Statute of Limitations." Cook on Corp. § 527, citing, among other decided cases, *Brent v. Bank of Washington*, 10 Pet. 596, 617, 9 L. ed. 547, 555, which case is as follows:

Brent died the owner of 650 shares of the stock of the bank. He was an indorser on certain promissory notes held by the bank, and the charter of the bank provided that its stock was transferable only on the books of the bank by the holder of the stock. When Brent died he was largely indebted to the United States. His executors applied to the bank to transfer the stock, which the bank refused to do unless the notes held by it and indorsed by Brent were paid. Meanwhile the bank had sued the executors of Brent on the notes, and upon a plea of the Statute of Limitations, a verdict and judgment had been rendered against it. The executors afterwards brought a bill in equity for the use of the United States to compel the bank to transfer the stock to pay the debt due to the government, the contention being that the debt due to it was a preferred one, and the bank filed an answer in which it asserted a lien upon the stock to pay its debt. The lower court decreed a sale of the stock and the application of the proceeds first to the payment of the debt of the bank; and, second, to the payment of the debt to the United States. Counsel for the United States insisted that all right of the bank was barred by the Statute of Limitations and by the verdict and judgment against it on the plea of that statute, but the Supreme Court said: "But they allege that the debt is extinguished by the verdict in their favor, rendered on a plea of the Statute of Limitations. We cannot take this case out of the established rule; the

legal remedy is barred, but the debt remains as an unextinguished right, and the bank, when called into a court of equity, may hold to any equitable lien, or other means in their hands, till it is discharged."

That case, along with a large number of text-books and decided cases, is cited in *Farmers' Loan & T. Co. v. Denver L. & G. R. Co.* 60 C. C. A. 588, 126 Fed. 46, where the United States circuit court of appeals, in an able and convincing opinion, held that a court of equity may, in a case in which the rules and principles of equity demand it, condition its grant of relief sought by a complainant with the enforcement of a claim or equity held by a defendant which, by reason of the Statute of Limitations or otherwise, the latter could not enforce in any other way.

A court of equity may always require him who seeks equity to do equity, and in a case in which the rules and principles of equity demand it, as they do in the case at bar, it may condition the grant of relief sought from it by a complainant with the enforcement of the claim or equity held by the defendant, which, by reason of the Statute of Limitations or a former judgment, the latter could not enforce affirmatively or in any other way. *Central Improv. Co. v. Cambria Steel Co.* 120 C. C. A. 121, 201 Fed. 824, and authorities there cited. See also 1 Pom. Eq. Jur. §§ 386, 393.

There is a very marked distinction between an action at law to recover judgment for a legal demand and a proceeding in equity to enforce an equitable lien for the same demand. The remedy at law may be barred by the Statute of Limitations, but the Statute of Limitations does not extinguish the debt, and a lien therefor may be enforced in equity although the debt be barred. This is nowhere better settled than in Virginia. *Bowie v. Poor School*, 75 Va. 300; *Wolf v. Violet*, 78 Va. 57; *Paxton v. Rich*, 85 Va. 382, 1 L.R.A. 639, 7 S. E. 531; *Hamilton v. Glenn*, 85 Va. 906, 9 S. E. 129; *Tunstall v. Withers*, 86 Va. 896, 11 S. E. 565.

In *Bowie v. Poor School*, supra, it is held that, there being no undertaking to pay the debt in the deed securing its payment, though the remedy at law may be barred by the Statute of Limitations, the debt is not thereby extinguished, but the lien therefor continues unaffected by any lapse of time short of a period sufficient to raise a presumption of payment.

Another distinction, equally as well established by the line of authorities to which the cases cited belong, is tersely stated in 16 Cyc. 141, as follows: "Since the doing of equity is imposed as a condition of obtaining equitable relief, many things may be required which defendant could not com-

pel if driven to an independent action,"—citing in a note a number of decided cases, among them *De Walsh v. Braman*, 160 Ill. 415, 43 N. E. 597, which is directly in point here, and in which there is an able and elaborate opinion, discussing and upholding the equitable principle which we have just quoted above.

In the case at bar, it is, as we view the authorities, immaterial whether appellant could or could not have maintained an affirmative suit in equity to enforce its lien on appellee's stock; the latter having sought the aid of the corporation court of Lynchburg, sitting as a court of equity, and brought himself and the appellant before the bar of that court, it was manifestly within the powers of the court, and was its duty, to condition any relief afforded appellee upon his doing equity; in other words, before granting the prayer of appellee's bill, the court should have required him to discharge his liabilities to appellant, in accordance with the terms and conditions of its articles of association under which appellee holds his stock, which is the subject of litigation in this suit.

We are further of opinion that the lower court erred in its view that the claims asserted by appellant against appellee are unliquidated, and that appellant's lien therefore is only "potential" and would have to be "established" at law. Appellants articles of association are a contract between it and its shareholders, and by the terms of that contract (§ 24) it is expressly provided that the company shall have a first and paramount lien on all the shares registered in the name of each member for his *debts, liabilities, and engagements*, solely or jointly with any other person, to or with the company, and that such lien shall extend to all dividends from time to time declared in respect to such shares; and it is further provided (§ 119) that the directors may retain the dividends on which the company has a lien, and may apply the same in or towards satisfaction of the *debts, liabilities, or engagements* in respect of which the lien exists.

This court held in *Tidewater Quarry Co. v. Scott*, 105 Va. 160, 115 Am. St. Rep. 864, 52 S. E. 835, 8 Ann. Cas. 736, that unliquidated damages are such as rest in opinion only, and must be ascertained by a jury, wherein the amount to be settled rests in the discretion, judgment, or opinion of a jury, and there are no data for computation, and the damages cannot be ascertained by any mode of calculation; but it is otherwise when the damages can be readily ascertained. The opinion of the court in that case illustrates what are and what are not unliquidated damages, and holds that if the dam-

ages, do not lie in mere opinion, but can be readily ascertained by calculation or computation, they may be set off against a liquidated demand.

In this case appellant's claim asserted against appellee is for the difference between the price at which Briggs machines were to have been furnished to appellant under the contract and the price at which appellee, Brown, sold certain of these machines in violation of the contract. The contract fixes the prices at which the machines were to have been manufactured and delivered to appellant, and it provided that appellant should have the exclusive right to supply the demand for the machines except in the United States and Canada. In violation of this contract, as averred by appellant in its answer to appellee's bill, a certain number of said machines were sold by appellee outside of the United States and Canada, and the amount to which appellant thereby became entitled is simply a matter of subtraction from the price at which the machines were sold, the price which appellant was to have paid for them.

In *De Walsh v. Braman*, supra, which involved a discussion of the principles and doctrines of equity which the appellant in the instant case invokes, the court held that before Braman, who had impleaded *De Walsh*, seeking equitable relief, could get from the court the relief asked for by him, he must secure to the defendant, *De Walsh*, that to which he was justly entitled by the principles and doctrines of equity. "If there is a distinctly equitable right to which the defendant is entitled, even though not at common law, the court will make it a condition precedent to the relief of the complainant that he shall grant to the defendant such equitable rights. More especially is this true where the rights of the parties grow out of the same subject-matter or transaction."

We are further of opinion that the decree of the lower court here complained of is erroneous, in that it enjoins appellant from refusing to transfer the stock of appellee in

question. As we have seen, § 30 of appellant's articles of association provides that the directors of the company may refuse to register a transfer of any shares of its stock upon which the company has a lien. The authorities cited, to which a great number of others might be added, show clearly and conclusively that the Statute of Limitations does not extinguish a right, but merely bars the remedy.

"If there is an actual pledge, and the debt becomes barred, this does not give to the debtor a right to reclaim his pledged property. The debt is not extinguished; the statute only takes away the remedy." *Hulbert v. Clark*, 128 N. Y. 295, 14 L.R.A. 59, 28 N. E. 638, quoting from the opinion of the court in *Shaw v. Silloway*, 145 Mass 503, 14 N. E. 783. See also *Spears v. Hartly*, 3 Esp. 81; *Virginia Hot Springs Co. v. McCray*, 106 Va. 474, 10 L.R.A. (N.S.) 465, 56 S. E. 216, 10 Ann. Cas. 179, and *Cook on Corporations*, vol. 2, § 530, where that learned author says: "When a corporation has a lien upon the stock of those of its stockholders who are indebted to it, it may refuse to allow the transfer of the stock until the debt is paid or secured to its satisfaction,"—citing numerous cases.

In the case at bar, as we have seen, appellee, Brown, in his bill expressly declined to tender issue upon his liability to appellant, and, by his demurrer to the answer of appellant prayed to be treated as a cross bill, he concedes the truth of all the averments thereof.

For the foregoing reasons we are of opinion that the decree complained of has to be reversed, and this court will enter the decree which the lower court should have entered, overruling appellee's demurrer to appellant's answer and cross bill, and remand the cause to that court, to be further proceeded with in accordance with the views expressed in this opinion.

Keith, J., absent.

Petition for rehearing denied.

Annotation—Lien of corporation upon stock as affected by bar of limitations against action on debt of stockholder.

As to priority as between the lien of a corporation and a pledgee or bona fide purchaser of corporate stock, see *Ardmore State Bank v. Mason*, 39 L.R.A. (N.S.) 292, and note.

While there are but few cases passing upon the point, they are all in accord with *UNITED CIGARETTE MACH. CO. v. BROWN*, ante, 1100, in holding that the bar of the Statute of Limitations as to L.R.A.1917F.

the debt of the stockholder does not affect the corporation's lien, and it may refuse to transfer the stock to another until the debt is paid. *Farmers' Bank v. Iglehart* (1847) 6 Gill. (Md.) 50; *Reading F. Ins. & T. Co. v. Reading Iron Works* (1890) 137 Pa. 282, 21 Atl. 170; *Sproul v. Standard Plate Glass Co.* (1902) 201 Pa. 103, 50 Atl. 1003.

So, a corporation whose charter and

by-laws prohibited a stockholder who was in any way indebted to it or liable for the indebtedness of another, from assigning and transferring his stock except by permission of the directors, was entitled to refuse to transfer the stock of a member of a partnership which was indebted to it, although the debt was barred by the Statute of Limitations. *Geyer v. Western Ins. Co.* (1867) 3 Pittsb. (Pa.) 41.

And, although a judgment is rendered against a corporation on claims against a stockholder, on the ground that the

debts are barred by the Statute of Limitations, its lien upon the stockholder's shares is not extinguished, and it will not be compelled to transfer the stock until the debts are paid. *Brent v. Bank of Washington* (1836) 10 Pet. (U. S.) 596, 9 L. ed. 547; *Johnson v. Albany & S. R. Co.* (1873) 54 N. Y. 416, 13 Am. Rep. 607.

Some analogous questions are discussed in notes cited in L.R.A. Indexes under the title, "Limitation of actions," subtitle, "Effect of bar; other remedies."

R. L. S.

NORTH DAKOTA SUPREME COURT.

PETER SCOTT, Appt.,
v.

STATE OF NORTH DAKOTA, Resp.

(37 N. D. —, 163 N. W. 813.)

Appeal — refusal to advise verdict — waiver.

1. Error cannot be predicated upon a refusal to advise a verdict of not guilty at the close of plaintiff's case, when testimony is thereafter introduced by defendant, unless the motion is renewed at the close of all the testimony.

For other cases, see *Appeal and Error*, VII. k, in *Dig. 1-52 N. S.*

Intoxicating liquor — nuisance — single sale.

2. A single sale will warrant a conviction under an information for keeping and maintaining a common nuisance by keeping a place where intoxicating liquors are sold as a beverage in violation of the Prohibition Law of this state.

For other cases, see *Intoxicating Liquors*, III. in *Dig. 1-52 N. S.*

(Robinson, J., dissents.)

(June 7, 1917.)

APPEAL by defendant from a judgment of the County Court for Ward County convicting him of keeping and maintaining a common nuisance in violation of the State Prohibition Law. Affirmed.

The facts are stated in the opinion.

Messrs. E. T. Burke and J. E. Burke, for appellant.

Messrs. O. B. Herigstad and R. A. Nestos, for the State:

The materiality of testimony assigned as

Headnotes by CHRISTIANSON, J.

Note. — As to conviction of keeping a common liquor nuisance upon proof of a single sale, see annotation following this case, post, 1110.
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false is as a general rule a question of law for the court.

30 Cyc. 1456; *State v. Caywood*, 96 Iowa, 367, 65 N. W. 385; *State v. Brown*, 128 Iowa, 24, 102 N. W. 799; *State v. Swafford*, 98 Iowa, 362, 67 N. W. 284.

Where, in the indictment for perjury, there are several distinct assignments, proof of any one of them is sufficient to support the indictment.

30 Cyc. 1452.

Messrs. William Langer, Attorney General, D. V. Brennan, and G. K. Foster, Assistant Attorneys General, also for the State.

Christianson, J., delivered the opinion of the court:

The defendant was tried and convicted of the crime of keeping and maintaining a common nuisance, in violation of the provisions of the prohibitory law of this state, and appeals from the judgment of conviction.

The first error assigned is predicated upon the denial of defendant's motion for an advised verdict of not guilty. The record shows that this motion was made at the close of plaintiff's case in chief; that after the denial of the motion, defendant introduced evidence, and that the motion was not renewed at the close of all the evidence. Hence, under numerous decisions of this court, the error, if any, in the denial of defendant's motion for an advised verdict of not guilty was waived. See *Buchanan v. Occident Elevator Co.* 33 N. D. 346, 157 N. W. 122; *Halverson v. Lasell*, 33 N. D. 613, 157 N. W. 682.

An examination of the evidence, however, also, discloses that the trial court very properly denied the motion. The testimony clearly showed that the house involved herein was occupied by and under the control of the defendant. One David Franzen testified that during the months of January, February, and March, 1915, he frequented the house occupied by the defendant, about

once a week, sometimes alone and sometimes in company with friends, and that during these visits he purchased beer from the defendant, paying him therefor 35 cents per bottle or \$1 for three bottles; that he purchased this beer both from the defendant and others in his presence, and that he and his friends drank the same upon the premises in the presence of the defendant, and that at times the defendant himself drank with them. Another witness, Henry Solberg, testified that he obtained beer from the defendant at the house in question, for which he (Solberg) paid 35 cents per bottle, or \$1 for three bottles; that he drank such beer on the premises. He further testified that he did not know where defendant obtained the beer, but that it was nice and cool "and suited him all right."

It is virtually conceded that this testimony, if true, is sufficient to establish the crime alleged. But it is asserted that the witness Franzen was not worthy of belief, and that his testimony should be disregarded. The credibility of this witness and the weight of his testimony was manifestly a question for the jury, and there is nothing in the record to justify a court in adjudging the same incredible as a matter of law.

The court instructed the jury as follows: "The information in this case charges the maintaining of a common nuisance. Under our laws all places are common nuisances: (1) Where intoxicating liquors are sold, bartered, or given away in violation of law; or (2) where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage; or (3) where intoxicating liquors are kept for sale, barter, or delivery in violation of the law. It is the maintaining of a place where these things, or one or more of them, are done that constitutes the crime. The selling of intoxicating liquors contrary to law does not constitute the offense, nor does the keeping of intoxicating liquors for sale contrary to law constitute the offense. Neither is the offense committed by permitting persons to resort to the place for the purpose of drinking intoxicating liquors as a beverage. They are evidences of the offense. It is keeping the place where these things are done that constitutes the offense. Proof of keeping by the defendant, and that any of the prohibited acts was done by the defendant in such place during such keeping, would make the offense complete. So if you find from the evidence beyond a reasonable doubt that the defendant kept the place as charged in the information or at any time between the dates set out in the information, and that any of the prohibited acts mentioned above were done by him at such place during such time, you should

find him guilty as charged in the information. Should you fail to find that the defendant kept the place during said time, or fail to find that any of the acts above set out were done as charged in the information, you should find the defendant not guilty. *In this connection, I charge you that it is a violation of law to sell or keep for sale intoxicating liquors as a beverage.*"

The defendant assigns error upon that portion of the instruction which is italicized. No exceptions were taken to the instructions, and under the rule announced by the court in *State v. Reilly*, 25 N. D. 339, 141 N. W. 720, no error can be assigned on the instructions in absence of proper exceptions filed in the court below. As this point has not been raised by respondent's counsel, however, we shall not rest our decision upon this point, but will consider the reasons presented by appellant in support of his contention that the instruction is erroneous.

Appellant concedes that the instruction assailed is abstractly correct, but he says: "The effect of this charge was to tell the jury that they might convict Scott of a single sale of liquor, whereas the law is well settled that a single sale does not constitute keeping a nuisance."

Appellant's entire argument is predicated upon the proposition just stated. In our opinion appellant's argument is predicated upon an erroneous legal premise. Section 10,117, Compiled Laws 1913, provides: "All places where intoxicating liquors are sold, bartered or given away, in violation of any of the provisions of this chapter, or where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage, or where intoxicating liquors are kept for sale, barter or delivery in violation of this chapter, are hereby declared to be common nuisances."

Under the express terms of this statute a place where intoxicating liquors are sold is a common nuisance, and the person who keeps and maintains such place keeps and maintains a common nuisance. It is not essential that the place shall be kept and maintained for any particular or designated length of time, or that any particular number of prohibited acts take place. A person who keeps and maintains a place where intoxicating liquors are sold as a beverage, becomes guilty of keeping and maintaining such place when the first sale is made, and the place thereby utilized for the prohibited purpose. The authorities seem to be in accord on the proposition that a single sale is evidence of keeping and maintaining a common nuisance within the purview of the statute. *State v. Reyelts*, 74 Iowa, 499, 38 N. W. 377; *State v. Benson*, 154 Iowa, 313, 134 N. W. 851; *Bepley v. State*, 4 Ind. 264,

58 Am. Dec. 628; *Shideler v. Tribe of Sioux*, 158 Iowa, 417, 139 N. W. 897, 900. See also *Com. v. Kerrissey*, 141 Mass. 110, 4 N. E. 820; *State v. Cooster*, 10 Iowa, 453, 457. We have found no authorities to the contrary, and appellant's counsel have cited none in their brief.

It will be observed that the instruction assailed is merely one sentence of an instruction. No rule is better settled than that the instructions must be construed as a whole. The first words of the sentence assailed refers to what had been said immediately before, and states that what follows must be considered, "in connection" with the language preceding.

We are agreed that no prejudicial error was committed by the use of the sentence assailed. This disposes of the only errors assigned on this appeal. It follows from what has been said that the judgment of conviction must be affirmed. It is so ordered.

Robinson, J., dissenting:

In a crusade against wrong good people have often done wrongs that would shame the Devil. A long conducted and zealous crusade for a special object becomes a hobby which narrows the mind and dulls the mental and moral vision of the crusaders until they at length do evil that good may come. Such has been the grave fault for which the overzealous Jesuits have been banished from many countries. Thus in the crusade against liquor, charity and human kindness have been thrown to the wind and replaced by cruelty. The most drastic and cruel laws have been enacted; jury trials have been denied; personal liberty has been disregarded; witnesses, prosecuting attorneys, and even judges, have been bribed by love or fear or filthy lucre. Detective witnesses are employed and given pay in excess of regular witness fees, and are in the business for their dirty fee. In some cases prosecuting attorneys are allowed a bribe of \$10 for each count on which a party may be convicted, and the judges—they have reason to fear and tremble for their offices if they fail to join the crusade and to manifest their zeal.

In this case the complaint is under a statute declaring all places to be a common nuisance where intoxicating liquors are sold or kept for sale or gift as a beverage, and where persons resort for the purpose of drinking intoxicating liquors as a beverage. The punishment of the first offense is a fine of not less than \$200, nor more than \$1,000, and by imprisonment of not less than ninety days nor more than one year; and for the second and every successive offense the punishment is imprisonment in the penitentiary not less than one nor more than two years. This drastic statute is under this section of the Constitution:

"Sec. 217: No person . . . shall . . . manufacture for sale or gift any intoxicating liquors, and no person . . . shall import any of the same for sale or gift, or keep or sell or offer the same for sale, or gift . . . as a beverage."

The prohibition of the statute and the Constitution is only against a sale or gift as a beverage. In this case the complaint charges defendant with keeping and maintaining a common nuisance by keeping a certain building in which intoxicating liquors were sold and bartered and given away as a beverage. The case was tried before the county judge, and he granted a stay of proceedings pending the appeal. In his order granting the stay he certified that, in his opinion, the substantial rights of the defendant as to the merits of the case had been violated. Of course, that being true, it was the duty of the judge to suspend sentence or to order a new trial.

The evidence fails to show that any intoxicating liquors were sold or given away to be drunk as a beverage. The witnesses do not mention the word *beverage* or any similar word. As the testimony shows, defendant was a widower of sixty-three years. He was a regular drayman. He lived in a small house with three small children and a housekeeper. The star witness had been rooming in the house of the defendant, and the housekeeper fired him because of his misconduct. Then, instead of paying his room rent and wash bill, he went and made the complaint. He testified that during three months he had roomed in the house of defendant, and that about once a week he had bought and drank some beer. The testimony does fairly show an occasional drinking of beer in the house of defendant, but there is nothing to show that the house was a resort for beer drinking, or that it was in any way a disorderly house, or a common nuisance. Defendant swore to his innocence. Then he was arrested on a charge of perjury. He again swore to his innocence and was again arrested. Thus he was put out of business; his dray outfit was confiscated; his home was broken up; his children made wards of charity; and he himself confined and kept in idleness at the expense of the taxpayers. Oh cruelty, thou art a wickedness. One swallow does not make a summer; one love affair does not make a bawdyhouse. The house must be kept as a resort for illegal and immoral purposes; the wrong must be common or it is not a common nuisance and the legislature cannot make it otherwise. It is perfectly absurd to say that the keeping of a

house wherein one, two, or three drinks are sold or given away is the keeping of a common nuisance.

In Cana of Galilee there was a wedding feast, and the mother of Jesus was there, and both Jesus and his disciples were called to the marriage, and when they wanted wine the mother of Jesus said unto him: "They have no wine." Jesus said unto the servants: "Fill the water pots with water." And they filled them up to the brim. Then he said unto them: "Draw out now and bear unto the governor of the feast." And they bear it. When the ruler of the feast had tasted the water that was made wine, and knew not whence it was, the governor of the feast said to the bridegroom: "Every man at the beginning doth set forth good wine, and when men have well drunk then that which is worse, but thou hast kept the good wine until now." This beginning of miracles did Jesus in Cana of Galilee and manifested forth his glory.

It cannot be truly said that any person at that feast was guilty of keeping or maintaining a common nuisance, or that in North Dakota the recurrence of such a marriage feast would constitute the keeping or maintaining of a common nuisance. In Scripture drunkenness is everywhere denounced, but on occasions the drinking of wine and even strong drink is commended. Thus we did read: "Give strong drink to him that is ready to perish and wine to those that be heavy of heart. Let him drink and forget his poverty and remember his misery no more." "Go thy way, eat thy bread with joy, and drink thy wine with a merry heart, for God now accepteth thy works." He brought forth food out of the earth and wine that maketh glad the heart of man.

And the Apostle Paul writes to the Apostle Timothy: "Drink no longer water, but use a little wine for thy stomach's sake and thine often infirmities."

It is right to forbid the sale of drinks to Indians, minors, to some persons of Celtic blood, and to any person who does not know enough to care for himself and his family; but to forbid a taste of wine, beer, ale, or

Dublin stout to an anglo-Saxon or a Teuton, why that is cruelty. And cruelty, thou art a wickedness.

The majority opinion says it is virtually conceded that if the testimony as stated be true, it is sufficient to establish the crime alleged. That is a grave mistake. There is no such foolish and false concession, and if there were, it would in no way justify the court in sustaining the conviction. The testimony wholly fails to show that the defendant kept a disorderly house or a common nuisance, or a house in any way given to the sale or drinking of intoxicating liquors, or that he did an injury to any person. Under the rulings of the court, were Christ to come to this state and to keep a house and to repeat the miracle of the marriage feast, he might be convicted and sentenced to the state's prison. That is neither law nor gospel.

It is a matter of regret that in some cases judges are too ready to give a narrow and cold-blooded construction to drastic statutes and to impose on others burdens grievous to be borne, which they themselves touch not with one of their fingers.

At the Grand Pacific I have a nice, exclusive bachelor apartment (\$45 a month). Now, if the governor, the bishop, or one of the justices call on me and I open a bottle of foamy Dublin stout,—my elixir of life,—and for his stomach's sake or for good fellowship give him a glass and join him in a drink with a thousand earnest wishes for his health and happiness, does that make my nice exclusive apartment a common nuisance? If I call on the good bishop, and he treat me to a glass or a bottle of wine, does that turn his palace into a common nuisance? If not, then is there one law for the palace and another law for the cottage? In administering the law we should never forget that the primary purpose of law and government is to build up, and not to pull down; to assure the right of all to enjoy and defend life and liberty, to acquire, possess, and protect property, and to pursue and obtain safety and happiness.

The judgment should be reversed.

Annotation—Conviction of keeping a common liquor nuisance upon proof of a single sale.

As the title indicates, this note is not concerned with cases where a particular sale is charged as a substantive offense, but is confined to cases where the charge is keeping a nuisance or carrying on the business or keeping for unlawful sale. The answer to the question under annotation depends very largely upon the form of the statutory provision. L.R.A.1917F.

sions, which are not in all cases set out in the reports.

It is quite well established that a single sale is not, as a matter of law, sufficient to constitute a nuisance. Thus, in *State v. McIntosh* (1903) 98 Me. 397, 57 Atl. 83, an indictment under a statute charging the defendant with keeping and maintaining a liquor nuis-

ance, it is held that "one or more unlawful sales of intoxicating liquor in a place does not necessarily, and as a matter of law, make that place a common nuisance. The place must be habitually, commonly used for the purpose before it becomes a common nuisance." The statute involved in this case provided that "all places used . . . for the illegal sale or keeping of intoxicating liquors, all houses, shops or places where intoxicating liquors are sold for tippling purposes, all places of resort where intoxicating liquors are kept, sold, given away, drank or dispensed, in any manner not provided for by law, are common nuisances." It had been held previous to the decision in *State v. McIntosh (Me.) supra*, that two sales would not as a matter of law constitute a house a nuisance, the court stating that "the evidence of such sales would be competent for the jury to consider upon the issue whether or not the house was habitually employed by the defendant for the purpose of selling contrary to law. And if it satisfied them beyond reasonable doubt that the defendant was in the habit of so selling therein, they might so find. The weight or value of such testimony was within their exclusive province, and it was erroneous for the court to fix the weight or value which they should give it." *State v. Stanley (1892) 84 Me. 555, 24 Atl. 983. In Com. v. Patterson (1885) 138 Mass. 498, 5 Am. Crim. Rep. 329*, a complaint "for keeping and maintaining a common nuisance, to wit, a certain tenement . . . used for the illegal sale and illegal keeping of intoxicating liquors," the defendant, who had a license to sell liquors to be drunk on the premises, was shown to have made two sales, on two separate occasions, of liquor which was carried away from the premises. The jury were instructed "that, if the defendant was proprietor of the saloon, and made either of the two illegal sales that were testified to, they must return a verdict of guilty." The supreme court, in commenting upon this instruction, states: "This went too far; for, even if a single sale was sufficient evidence to warrant a conviction on this complaint, it certainly did not of itself constitute the offense set forth, or amount to more than evidence for the jury on which they might convict. A building cannot be said to be 'used' for the illegal sale of intoxicating liquors, within the meaning of the Public Statutes, chap. 101, § 6, which makes it a nuisance, nor can the proprietor be

said to 'keep or maintain such common nuisance' within § 7 on the strength of a single casual sale, made without premeditation in the course of a lawful business. Not only do the words 'used' and 'keep or maintain' import a certain degree of permanence, but the same idea is usually a part of the conception of a nuisance." *In Com. v. McNeff (1888) 145 Mass. 406, 14 N. E. 616*, a complaint for keeping and maintaining a common nuisance, to wit, a tenement used for the illegal sale and illegal keeping of intoxicating liquors, where evidence of two illegal sales on two different days were shown, the defendant asked for an instruction in the language used in *Com. v. Patterson (Mass.) supra*, to the effect that a building cannot be said to be used for the illegal sale of intoxicating liquors within the meaning of the statute which makes it a nuisance, nor can the proprietor be said to keep or maintain such common nuisance within the meaning of the statute, on the strength of casual sales made without premeditation in the course of a lawful business; and that not only do the words, "keep or maintain," import a certain degree of permanence, but the same idea is usually a part of the conception of a nuisance. The judge refused so to rule, and instructed the jury that "evidence of more than one sale of intoxicating liquors by the defendant, contrary to the terms of his license, would be evidence for the jury to consider upon the question whether he kept a nuisance, and that evidence of one sale would not be sufficient to convict the defendant." In commenting upon this instruction the supreme court refers to *Com. v. Patterson (Mass.) supra*, and states that that case did not decide that even a single illegal sale might not be evidence of maintaining a liquor nuisance, but simply that a single sale made, it might be casually and without premeditation, could not be said necessarily and as a matter of law to make the seller guilty of maintaining such a nuisance. Continuing, the court states that "if illegal sales on two different days were proved, the element of the continuing use of the building for that purpose, which would not necessarily follow from one sale, would be inferred more easily, and might be inferred by the jury." The court then states that the ruling of the trial court on this point was sufficiently favorable to the defendant, who was convicted. It thus appears that the instruction of

the trial court, to the effect that evidence of one sale would not be sufficient to convict the defendant, was not approved by the supreme court.

In *State ex rel. Vance v. Crawford* (1882) 28 Kan. 726, 42 Am. Rep. 182, an action to perpetually enjoin the further continuance of a liquor saloon in which intoxicating liquors were illegally, continuously, and persistently sold, the court states that "a single offense, or several isolated offenses, may not constitute a nuisance, and may not, for any reason, be enjoined or enjoined; but when the offense is repeated continuously and persistently, without any immediate prospect of a final termination, the aggregate of such offenses will finally become, and will constitute, a public nuisance, which may be enjoined by the public unless some other adequate remedy is given for its complete oppression and extirpation."

It seems to follow, logically, from the proposition that a single sale is not sufficient as a matter of law to constitute a nuisance, that mere proof of a single sale apart from the circumstances under which it was made would not warrant a conviction for keeping a nuisance. That is, if it is admitted that the defendant was guilty of nothing else tending to prove a nuisance but a single sale, he could not be convicted. As a practical matter, however, it is very infrequent for proof of a single sale of liquor to appear without proof of the circumstances under which it was made. These circumstances may furnish the most convincing corroborative evidence, if not of other past violations, at least of an intent to violate the law in the future by making other sales. For example, a single sale by one who had a considerable stock of liquors usually found in retail establishments, together with equipment for making sales, would be more convincing, than would a sale in the home of one who had only a small amount, of a keeping of liquors for sale or keeping a place where liquors are sold, which by the statutes is made to constitute the nuisance. These circumstances may be such as to justify the jury in convicting of a nuisance upon proof thereof, together with proof of the single sale. Convictions upon such proof have been sustained. In fact such convictions have been sustained in some cases, without reference to the circumstances, the rule being stated abstractly that a conviction is authorized upon proof of a single sale. Thus, a single unlawful sale is held in *State v. Reyelts* L.R.A.1917F.

(1888) 74 Iowa, 499, 38 N. W. 377, to warrant a conviction for a nuisance under a statute which apparently made the keeping of places for the unlawful sale of intoxicating liquors nuisances. The statute is not set out in the opinion, but the court states that "the keeping of intoxicating liquors, with the intent to sell them contrary to law, is the act of defendant, creating the nuisance. One sale will disclose the unlawful intent, as well as the keeping. Hence, upon one unlawful sale a conviction may be had for nuisance." This case is cited with approval in *State v. Benson* (1912) 154 Iowa, 313, 134 N. W. 851, an indictment for maintaining a liquor nuisance, the court there stating that "if a single sale of intoxicating liquors was made therein within the period described in the indictment, this was enough to establish the unlawful intent in selling or keeping for sale." The holding in *State v. Reyelts* (Iowa) supra, is again approved in an obiter statement in *Shideler v. Tribe of Sioux* (1913) 158 Iowa, 417, 139 N. W. 897.

See *SCOTT v. STATE*, ante, 1107.

In a majority of cases in which convictions have been sustained upon proof of a single sale, the circumstances under which the sale was made have appeared. In fact the defendants in the Iowa cases, supra, were charged, at least, with acts beyond the single sale. The indictment in *State v. Reyelts* (Iowa) supra, charged the defendant with having made sales on divers days between specified dates, while in *State v. Benson* (Iowa) supra, the defendant was accused of having maintained a place where intoxicating liquors were kept for sale, and sold contrary to law between specified dates. The place alleged to have been a nuisance in *State v. Benson* was a drug store. The defendant had, prior to the time fixed in the indictment, surrendered a permit to sell intoxicating liquors for medicinal purposes, so that, to use the language of the court, "the issue of good faith was in no manner involved."

Most cases emphasize the circumstances under which the sale is made.

It is generally held under the statutes that proof of a single sale, in connection with the circumstances under which it is made, is sufficient to sustain a verdict finding an accused guilty of maintaining a liquor nuisance. The fact that it is admitted or proved that the accused had possession of a stock of liquors seems to have been regarded an impor-

tant element in sustaining a conviction upon proof of a single sale in some cases. In *Bepley v. State* (1853) 4 Ind. 264, 58 Am. Dec. 628, evidence tending to prove that the accused, who was shown to have had bottles of different kinds of liquor, usually found in retail establishments, had on a single occasion sold liquor by a less quantity than a gallon and suffered it to be drunk in his house, was held sufficient to sustain a verdict of guilty in a prosecution for maintaining a nuisance. The statute is not set out in this case. In *Com. v. Kerrissey* (1886) 141 Mass. 110, 4 N. E. 820, a complaint under a statute for "keeping and maintaining a common nuisance, to wit, a certain tenement . . . used for the illegal sale and illegal keeping of intoxicating liquors," it was shown that the saloon of the defendant was searched by the authorities, and a bottle of rum found in a cupboard back of his bar. The defendant asked the court to rule that if this rum "was kept for sale in the saloon by the defendant, it was not sufficient to convict the defendant, unless the jury should find that the saloon was used at other times for the illegal keeping and illegal sale of intoxicating liquor by the defendant." The supreme court states that the trial court could not properly give this instruction, "for, if the defendant kept and used the premises for the illegal sale or keeping of intoxicating liquors, at any period of time or on a single occasion covered by the complaint, he is guilty of the offense charged, and it is not necessary to prove that he used it for the illegal purpose on other days or at other times."

The necessity that the sale be made in the course of a business of unlawful selling has been emphasized. In *Com. v. McArty* (1858) 11 Gray (Mass.) 456, an indictment under a statute "for a nuisance by keeping 'a certain tenement' used for the illegal sale and illegal keeping of intoxicating liquors," where it was shown that the defendant kept a grocer shop, and that there were jugs and decanters on the shelf in a room behind the shop and opening into it, and that the defendant twice sold gin in that room, the defendant requested the judge to instruct the jury that the evidence of two sales of gin, and of the situation and contents of the back room, was not sufficient to authorize the jury in finding that the alleged tenement was a common nuisance by reason of being used for the sale of intoxicating liquor. The judge refused this, but ruled "that

neither two nor even a larger number of illegal sales would of themselves constitute a using for the illegal sales of intoxicating liquors; that using for that purpose implied habitual, continuous action, and that the jury must be satisfied that the defendant constantly kept intoxicating liquors in that place and made a business of selling them there, contrary to law; and it was for the jury to say, upon the evidence, whether the place was used by the defendant for the illegal sales of intoxicating liquors." The defendant upon conviction alleged exception, but the supreme court stated that the instructions to the jury were right in principle and accurate in statement. In *Com. v. Coolidge* (1884) 138 Mass. 193, a defendant was convicted under a complaint for keeping and maintaining a common nuisance, to wit, a tenement used for the illegal sale and illegal keeping of intoxicating liquors, upon evidence tending to show that on one occasion two persons went into an apothecary shop kept by the defendant, and asked the defendant for a soda; that the defendant asked them what syrup they would have, and one of the persons said whisky; and that the defendant then delivered to them two drinks of soda and whisky for which one of the persons paid. Upon appeal from a conviction by the defendant, the court states that "it cannot be held, as matter of law, that there was not sufficient evidence in this case to justify the verdict of the jury. While a single sale of intoxicating liquor might not be sufficient evidence to prove that the defendant kept a nuisance under the statute, yet the sale may be made under such circumstances as to indicate that it was made in the course of the defendant's usual business. In this case, it was proved that the defendant kept an apothecary shop, and sold whisky therein to one Delano; it was for the jury to say whether, from the circumstances of the sale, from the manner in which Delano and his companion called for the whisky, and from the readiness with which the defendant supplied it, without any hesitation or question, it was fairly to be inferred that he was in the habit of selling intoxicating liquor in his shop."

The trial court in *Com. v. McNeff* (1888) 145 Mass. 406, 14 N. E. 616, gave an instruction to the effect that "evidence of one sale would not be sufficient to convict the defendant" of maintaining a nuisance. Under this instruction

the defendant was convicted and was appealing. The supreme court, without approving this instruction, merely states that the ruling of the court on this point was sufficiently favorable to the defendant. See further as to this case, *supra*.

See *Com. v. Patterson* (1885) 138 *Mass.* 498, 5 *Am. Crim. Rep.* 329, *supra*.

A contrary conclusion seems to have been reached in *Miller v. State* (1854) 3 *Ohio St.* 475, although it is not altogether clear but that the court is talking about the effect of a single sale as a matter of law, instead of its sufficiency to sustain a verdict. It is held in this case that to convict the defendant in a prosecution under a statute providing "that all places where intoxicating liquors are sold in violation of this act, shall be taken, held and declared to be common nuisances," etc., it is necessary to aver in the information and prove on the trial that the place where the liquor was sold was a place of public resort; and the proof must also show that it was a place where liquors were habitually sold in violation of the act;—that "a single sale does not make the place a nuisance, or the seller a 'keeper' within the meaning of the act. A series of sales is necessary." The court of common pleas of this state in *Belle Centre v. Welsh* (1890) 24 *Ohio L. J.* 176, says of this case that the court, by the language above used, "simply means that he [the defendant] is not the 'keeper' of a place of public resort; and that a place where only a single sale is made does not thereby become a nuisance so as to authorize its abatement under the 8th section of the Act of 1854," the statute above quoted.

In *Nicholson v. People* (1887) 29 *Ill. App.* 57, it was held that there could be no conviction under an information for keeping a place alleged to be a common nuisance under a statute making "all places where intoxicating liquors are sold in violation of this act . . . common nuisances," where intoxicating liquors were sold only in a single instance and without the actual permission or consent of the keeper; but this case turned upon the fact that the sale was without the actual permission or consent of the keeper; the court concluding that "we hold that to warrant a conviction under this section it must be shown that the keeper of the place, or his agent to keep it, intended there to make unlawful sales of intoxicating liquors, as well as that they were so made."

L.R.A. 1917F.

In *Com. v. Hagan* (1891) 152 *Mass.* 565, 26 *N. E.* 95, evidence of a single sale made on a Sunday in the absence of the defendants, by a young woman who was washing the floor, was held not sufficient to sustain a conviction under an indictment for keeping and maintaining a common nuisance, to wit, a tenement used for the illegal sale and keeping of intoxicating liquors, where there was nothing to show that the woman was employed by the defendants in their business.

A charge to the jury in a prosecution under an indictment charging the accused with the offense of keeping a disorderly house, that "if the proof shows that in any single instance the defendant has sold beer in less quantities than a quart, either on week days or on Sunday, he is guilty of keeping a disorderly house," under a statute declaring any person violating the provisions of the statute respecting the sale of liquor liable to indictment as a keeper of a disorderly house, was held erroneous in *Gulick v. State* (1888) 50 *N. J. L.* 468, 14 *Atl.* 751, not for the reason that a single sale would not be sufficient, but for the reason that the offense was not complete unless the liquor sold was drunk on or about the premises where sold, the court stating that the instruction complained of permitted the jury to find the statutory offense committed upon proof of only one of the ingredients prescribed by the statute.

In *Com. v. Hayes* (1890) 150 *Mass.* 506, 23 *N. E.* 216, it is held that a conviction cannot be had under a complaint for keeping and maintaining a common nuisance, to wit, a tenement used for the illegal sale and illegal keeping for sale of intoxicating liquors, by proof of a single sale to a minor accompanied by two adult persons on the occasion when the sale was made. The defendant in this case was a licensed liquor dealer. The court states that "the evidence of the single sale testified to, made under the circumstances stated, was not, we think, sufficient to warrant the jury in finding that the defendant kept or maintained his tenement for the illegal keeping or sale of intoxicating liquors. It was not sufficient to prove a habit on the part of the defendant of selling such liquors to minors in his tenement, or an intention of keeping a tenement which should be used for the purpose of selling such liquors to minors."

A question similar to that under the statutes involved in the above cases,

arises under statutes making the "keeping of a place" where liquors are unlawfully sold, an offense, but not making it a nuisance. It has been held that a conviction for "keeping a place" where liquors are sold contrary to law is sustained by proof of a single unlawful sale. Thus, in *Volk v. Westerville* (1901) 17 Ohio Dec. 776, proof of a single sale is held sufficient, without proving a series of sales, to constitute the offense of unlawfully keeping a place where intoxicating liquors were sold at retail. The court refers to the case of *Miller v. State* (1854) 3 Ohio St. 475, and states that that case has no application as an authority to the case at bar. No further statement appears. In *Lynch v. State* (1908) 31 Ohio C. C. 352, 12 Ohio C. C. N. S. 332, affirmed without opinion in (1909) 81 Ohio St. 489, 91 N. E. 1133, proof of one unlawful sale is held to warrant a conviction for keeping a place where intoxicating liquors are sold in violation of law. A similar decision appears in *Sanders v. State* (1913) 24 Ohio C. C. 226, 1 Ohio App. 306. In the *Sanders* Case the court, in answer to the argument that proof of a single sale on a single day does not dignify the offense as one of keeping a place, states that "strictly speaking, that is true. Under the law a single sale is of itself an offense punishable as such. Where, however, a single sale is accompanied by proof evidencing the indicia of a place where liquors are kept, showing the connection wherewith a room furnished with fixtures, bartender, or other evidence connecting such sale with the place, such proof in connection with a single sale may be sufficient to justify [a conviction] of 'keeping a place etc.'"

In *Belle Centre v. Welsh* (1890) 24 Ohio L. J. 176, it seems to be held as a matter of law that a single sale otherwise than as permitted by statute is a violation of a municipal ordinance prohibiting ale, beer, and porter houses, and other places where intoxicating liquors are sold at retail.

On the contrary, where the defendant is entitled to sell liquor for certain purposes, it has been held that proof of a single unlawful sale does not warrant a conviction. Thus, in *Maynard v. Eaton* Circuit Judge (1896) 108 Mich. 201, 65 N. W. 760, it is held that proof of a single unlawful sale will not warrant the conviction of a druggist of unlawfully keeping a place for the illegal sale of liquor, where the druggist has complied with the statute to enable

him to sell liquor for certain purposes. This case was followed in *People v. Remus* (1904) 135 Mich. 629, 98 N. W. 397, 100 N. W. 403, an information charging the respondent with keeping a drug store for the unlawful sale of liquor.

Other statutes are directed at the engaging in or carrying on of the liquor business. A single act does not as a matter of law amount to engaging in or carrying on business. Thus, in *Harris v. State* (1874) 50 Ala. 127, upon the trial of an indictment for engaging in and carrying on the business of retailing intoxicating liquors without a license, the court, in discussing generally what amounts to an engagement in or carrying on of the business, states: "It is true, the doing of a single act, pertaining to a particular business will not be considered engaging in or carrying on the business; yet a series of such acts would be so considered." A similar decision appears in *Weil v. State* (1875) 52 Ala. 19, where it is stated that "a mere selling of spiritous liquors, in a single instance, or the doing any single act pertaining to any of the enumerated pursuits or occupations, does not require license." A court cannot therefore instruct the jury upon an indictment for engaging in or carrying on the business of retailing liquors, where the only evidence is of a single sale, that if they believe the evidence they must convict. *Lawson v. State* (1876) 55 Ala. 118. But this does not mean that, where there is evidence of the circumstances under which the sale was made, the jury is not entitled to consider the single sale. In *Abel v. State* (1891) 90 Ala. 631, 8 So. 760, upon an indictment charging the accused with engaging in or carrying on the business of a wholesale dealer in liquors without a license and contrary to law, the defendant asked for an instruction that the sale of 1 or even 2 quarts of whisky at two different times is not sufficient to authorize the jury to convict the defendant of engaging in or carrying on the business of selling liquor. This instruction was refused, and the defendant excepted. Upon appeal it is stated that "one act may be sufficient to constitute an 'engaging in, or carrying on the business,' according to the intent with which the act is done, and other proof in the case. If a party makes all necessary preparations to carry on the business, holds himself out as a wholesale liquor dealer, and solicits trade as such, and makes one sale in

violation of the law intending to continue the business, he is engaged in, or carrying on, the business, within the meaning of the law."

In *State v. Hays* (1917) — **S. D.** —, 162 N. W. 311, a prosecution for engaging in the business of selling intoxicating liquors at retail without a license, a single sale was held to be "engaging in business" by virtue of a statute providing that "retail dealers of spiritous or intoxicating liquors . . . shall be held and deemed to include all persons who sell any such liquors by the drink or by the bottle or in any manner in quantities of less than 5 gallons at any one time to any person or persons," and that "if any person or persons shall engage or be engaged in any business requiring the payment of license . . . each violation of any of the provisions of this article shall be construed to constitute a separate and complete offense, and for each violation on the same day or on different days, the person or persons offending shall be liable . . . ;" the court stating: "We think it entirely clear under the foregoing statutory provisions that it was the legislative intent to make a single sale constitute 'engaging in business.'" That it was the intent of the legislature, as evidenced by this statute, to make proof of a single sale in wilful violation of the act sufficient to justify a jury in finding the accused guilty of the offense of engaging in the business unlawfully, is the opinion of the court in the case of *State v. Irwin* (1903) 17 **S. D.** 380, 97 N. W. 7.

Some statutes, in defining the offense of engaging in the business of selling intoxicating liquor in violation of law, require at least two sales. This was true of the statute involved in *Thomas v. State* (1912) 66 **Tex. Crim. Rep.** 374, 147 S. W. 262; *Floyd v. State* (1912) 66 **Tex. Crim. Rep.** 407, 147 S. W. 264; *Whitehead v. State* (1912) 66 **Tex. Crim. Rep.** 482, 147 S. W. 583; *Hightower v. State* (1914) 73 **Tex. Crim. Rep.** 258, 165 S. W. 184; *Brice v. State* (1915) — **Tex. Crim. Rep.** —, 179 S. W. 1178 (no reference to statute); *Barnes v. State* (1916) — **Tex. Crim. Rep.** —, 185 S. W. 2 (no reference to statute); *Blackburn v. State* (1916) — **Tex. Crim. Rep.** —, 185 S. W. 581. Under such a statute proof of one sale is, of course, insufficient. *Floyd v. State*; *Brice v. State*; and *Barnes v. State* (**Tex.**) *supra*. Whether proof of two sales is sufficient under such a statute to convict of following the business is beyond the scope of this note. It has been held that proof of two sales is not

alone sufficient. *Thomas v. State* (**Tex.**) *supra*; *Molthrop v. State* (1912) 66 **Tex. Crim. Rep.** 543, 147 S. W. 1159.

That the violation of an ordinance prohibiting the keeping or storing of intoxicating liquor for sale or for unlawful sale may be shown by a proof of a single sale has been held in a number of cases: *Rooney v. Augusta* (1903) 117 **Ga.** 709, 45 S. E. 72; *Reese v. Newman* (1904) 120 **Ga.** 198, 47 S. E. 560; *Robinson v. Americus* (1904) 121 **Ga.** 180, 48 S. E. 924; (there was no evidence of other sales in this case) *Sawyer v. Blakeley* (1907) 2 **Ga. App.** 159, 58 S. E. 399; *Coggins v. Griffin* (1908) 5 **Ga. App.** 1, 62 S. E. 659; *Cooper v. Ft. Valley* (1913) 13 **Ga. App.** 169, 78 S. E. 1097; *Everett v. Vidalia* (1914) 14 **Ga. App.** 664, 82 S. E. 50; *Rice v. Eatonton* (1914) 15 **Ga. App.** 505, 83 S. E. 868; *Singleton v. Quitman* (1915) 17 **Ga. App.** 328, 86 S. E. 741; *Seabrooks v. Macon* (1915) 17 **Ga. App.** 348, 86 S. E. 781; *Shepherd v. Jackson* (1916) 18 **Ga. App.** 216, 89 S. E. 161; *Porter v. Athens* (1916) 18 **Ga. App.** 232, 89 S. E. 173; *Jefferson v. Perry* (1916) 18 **Ga. App.** 689, 90 S. E. 365; *Jefferson v. Perry* (1916) 18 **Ga. App.** 690, 90 S. E. 366.

In *Porter v. Athens* (1916) 18 **Ga. App.** 232, 89 S. E. 173, it is stated that "the violation of a municipal ordinance penalizing the keeping of intoxicants for the purpose of unlawful sale may be shown by proof of a single sale. The sale raises such a presumption that the liquor sold was kept for the purpose of illegal sale, and furnishes conclusive evidence of the defendant's guilt under the ordinance, unless rebutted by evidence which satisfactorily establishes that the liquor was kept for some different purpose."

That the single sale must be made under circumstances indicating an intent to violate the law has been emphasized in other cases. It is held in *Everett v. Vidalia* (1914) 14 **Ga. App.** 664, 82 S. E. 50, that evidence of a single illegal sale of intoxicating liquor without further proof may be sufficient to authorize the inference that intoxicants were kept for the purposes of illegal sale, in violation of a municipal ordinance forbidding the keeping and storing of whisky or other intoxicating liquors for the purpose of sale, provided the evidence is sufficient to satisfy the mind that this purpose existed at or before the time of the alleged sale; but such a conviction cannot be supported when it does not appear that a sale was intended by the owner before the liquor was con-

sumed, although there is evidence that money was afterwards paid to the owner, and though, if the accused were charged with the sale in violation of the State Prohibition Law, the evidence would warrant a conviction. In *Shepherd v. Jackson* (1916) 18 Ga. App. 216, 89 S. E. 161, it is stated that "proof of a single sale, if made under such circumstances as to show either a continuing purpose on the part of the vendor to sell a stock of liquor, or to indicate that the particular liquor sold was kept for that purpose . . . will suffice to authorize a conviction under a municipal ordinance forbidding the keeping of intoxicants for the purpose of unlawful sale."

In *Jennings v. Quitman* (1915) 17 Ga.

App. 313, 86 S. E. 739, it is stated that "the undisputed proof of a single sale of intoxicating liquors within the confines of the municipality was sufficient to establish the unlawful purpose for which the defendant kept liquors."

An injunction against the keeping of intoxicating liquors on certain premises for sale, and from selling such liquors there, was held to be violated upon proof that large quantities of intoxicating liquors were subsequently purchased by the defendant, and some kept at the place where he made a single sale of a pint to a purchaser. In *State v. Meyer* (1912) 86 Kan. 793, 40 L.R.A. (N.S.) 90, 122 Pac. 101, Ann. Cas. 1913C, 278.

W. A. E.

NEW MEXICO SUPREME COURT.

SOUTHWESTERN SAVINGS LOAN & BUILDING ASSOCIATION v.

ARTHUR A. AWALT, Appt.

BOARD OF COUNTY COMMISSIONERS et al., Garnishees.

(— N. M. —, 166 Pac. 1181.)

Garnishment — public officials.

1. Under the provisions of chapter 26, Laws 1915, district courts are authorized to summon public officials as garnishees.

For other cases, see *Garnishment, I. b, in Dig. 1-52 N. S.*

Same — salary of officer.

2. Where the term of office of a county officer has expired, salary due him by the county may be subjected to garnishment, where the creditor has reduced his demand to judgment.

For other cases, see *Garnishment, I. a, 1, in Dig. 1-52 N. S.*

(June 28, 1917.)

APPEAL by defendant from a judgment of the District Court for Curry County in favor of plaintiff in an action on a deficiency judgment in which garnishment of money due defendant as salary was sought. Affirmed.

The facts are stated in the opinion.

Mr. W. A. Gillenwater for appellant.

Mr. Henry G. Coors, Jr., for appellee:

The judgment in this case is a judgment by confession, as is clearly shown on its face.

Headnotes by ROBERTS, J.

Note. — For right to garnish fees or salary of public officer after expiration of term of office, see annotation following this case, post, 1119
L.R.A.1917F.

8 Cyc. 564; 23 Cyc. 699; *Skinner v. Dameron*, 5 Rob. (La.) 447; 3 C. J. 674; *Lewis v. Barber*, 21 Ill. App. 638; *Keith v. Kellogg*, 97 Ill. 147; *Burton v. Lawrence*, 4 Tex. 373.

A judgment by confession constitutes a waiver or release of all errors, and an appeal therefrom should be dismissed.

2 R. C. L. §§ 40, 41; 3 C. J. 603, 604; *Sorrell v. Stone*, 60 Tex. Civ. App. 51, 127 S. W. 300; 23 Cyc. 720; *Pacific R. Co. v. Ketchum*, 101 U. S. 289, 25 L. ed. 932; *United States v. Babbitt*, 104 U. S. 767, 26 L. ed. 921; *Francisco v. Chicago & A. R. Co.* 79 C. C. A. 292, 149 Fed. 359, 9 Ann. Cas. 628.

Mr. H. S. Bowman also for appellee.

Roberts, J., delivered the opinion of the court:

This action was instituted in the district court of Curry county by the appellee against the appellant, Arthur L. Awalt, on a deficiency judgment rendered in one of the district courts of this state in favor of the appellee and against the appellant. Concurrently with the filing of the complaint, appellee filed its application for a writ of garnishment, stating that the garnishees, the board of county commissioners of Curry county and R. E. Brown, tax collector of said county, were jointly indebted to the defendant, Awalt, and had in their hands and possession effects and moneys belonging to him. Writ was issued and served upon the garnishees, directing them to answer in what sum, if any, they were indebted to the said Awalt, and what effects belonging to him they had in their possession when the writ was served. The board of county commissioners answered that at the time of filing their answer and at the time the said writ of garnishment was served

upon them they were indebted to the defendant Awalt in the sum of \$2,262.15. Appellant answered the complaint and application for the writ of garnishment, admitted the rendition of the judgment, and denied the right of the plaintiff to garnish the funds in the hands of the garnishees "and due unto the defendant by reason of the salary due the defendant from said Curry county." The answer also denied the right of the appellant to maintain garnishment proceedings after admitting that there was due him from Curry county an unknown sum "as his current wages for salary as county clerk." Appellee filed a reply to the answer. The plaintiff moved to strike paragraph 2 of defendant's answer, on the ground that the same was not the allegation of or averment of a fact, but was merely a conclusion of law, and that the same was irrelevant and redundant. The court sustained the motion, and thereafter rendered judgment on the pleadings against appellant and the board of county commissioners. Prior to the rendition of the judgment it appears that W. A. Gillenwater, an attorney at law answering for Mr. James A. Hall, attorney for appellant, stated: "The defendant, A. L. Awalt, did not have any defense to the cause of action of plaintiff, and did not intend nor desire to make any defense thereto, nor oppose the claim of plaintiff."

Judgment was apparently rendered upon the pleadings and in view of this statement of counsel. To review the action of the lower court this appeal is prosecuted.

Appellee filed a motion to dismiss the appeal, on the ground that the judgment from which it was taken was entered by the trial court by the consent of appellant, and therefore all errors were waived. Appellant meets this proposition by first contending that the appeal could not be dismissed, because an appeal is allowed by statute from all final judgments; and further, assuming the statement, quoted *supra*, constituted a consent of the appellant to the entry of the judgment, it is unavailing here, because the trial court was without jurisdiction of the subject-matter. We will dispose of the case on the merits, however, because our conclusion in that regard will likewise dispose of the contentions urged under the motion.

Appellant contends that, because the money due him was salary owing him by the county for services as county clerk, under the holding of this court in case of *Owen v. Terrell*, — N. M. —, 162 Pac. 171, the court was without jurisdiction to entertain the garnishment proceedings to subject such salary to the payment of the judgment sued upon. In that case we held that it was well settled at common law that salaries, fees, or other compensation due public officers or

employees could not be reached and subjected by their creditors to the payment of their debts in attachment or garnishment proceedings. There is one very important distinction, however, between that case and the one now under consideration. Here the pleadings in no wise disclose that appellant was acting as county clerk and still in office at the time the suit was instituted. It is asserted in the brief of counsel for appellee, and not denied by appellant, that at the time this suit was instituted appellant was not county clerk of Curry county, but that he had been removed by proceedings instituted in the district court of Curry county. However that may be, the answer of the appellant alleged that the money sought to be reached by garnishment was earned as salary as county clerk, but fails to allege that he was still in office at the time of the institution of the suit. Hence the question presented is whether or not the court had jurisdiction to entertain proceedings in garnishment for the purpose of reaching moneys due the appellant from Curry county, earned by him as salary as a public official, where his term had expired, or he had ceased to be a public official, at the time of the institution of the suit. In determining this question two propositions are involved: First, whether or not the court had jurisdiction to entertain a proceeding to reach, by garnishment, funds in the hands of the county owing by it to the defendant; second, Was the salary earned by Awalt, as county clerk, subject to garnishment when he was no longer in office? As to the first proposition, this court said, in the case of *Dow v. Irwin*, 21 N. M. 576, L.R.A.1916E, 1153, 157 Pac. 490, that "public policy forbids that officers of a county should be required to litigate such questions with private parties, with whom they have no concern, and prosecute appeals at the expense of the county to the court of last resort, in order to definitely settle the question of the liability of the county, or incur liability upon their official bonds for the wrongful diversion of county funds."

In other words, it was held in that case that, in the absence of legislative authorization, public policy forbade the garnishment of money due the creditors of the county, whether the remedy by which it was sought to reach such funds was denominated legal or equitable. Since that case arose, however, the legislature of the state, by chapter 26, Laws of 1915, amended the garnishment statute and provided: "In all cases where the plaintiff has a judgment in some court of the state against the defendant any public officer may be summoned as garnishee."

This section of the statute disposes of the

contention based upon the Dow-Irwin Case, for express authority is given to summon a public official as garnishee. The legislature having declared that public officers may be summoned as garnishees in their official capacity, and thereby having fixed the public policy of the state in that regard, the court had jurisdiction to summon the garnishees in this case.

A more serious question is presented, however, by the second proposition. In the case of *Owen v. Terrell*, as stated, this court held that salaries, fees, or other compensation due public officers or employees could not be reached by their creditors in attachment or garnishment, upon the ground that to allow attachment or garnishment in such cases was against public policy, as tending to injure the public service, and that, while the statute above quoted permitted the summoning of the public officials as garnishees in their official capacity, it did not expressly or impliedly authorize the garnishment of current salary due a public official. This case is distinguishable from the *Owen-Terrell* Case, because there *Owen* was still in office when the suit was instituted. Hence the question here is, *Awalt* not being in office at the time suit was filed, does he come within the rule of the *Owen-Terrell* Case? In 18 Cyc. 1435, in discussing the question, it is said: "A person who has ceased to be an officer or an employee of the government cannot insist upon this exemption given to a public officer, for in such case public policy no longer requires it."

The reason for the rule which exempts the salary of the public official from garnishment advanced by the better reasoned cases is: "That the salary of a public officer is a provision made by law for his maintenance and support during his term, to the end that, without anxiety concerning his means of subsistence, he may be able to devote himself entirely to the duties of his office, and the public thus have full benefit

of his knowledge and ability in the services he is selected to render; and that, if he could be deprived of his means of support by the garnishment of his salary, presumptively his efficiency as an officer would be impaired, if not destroyed, and the public interest would suffer serious detriment." 12 R. C. L. 803.

In the case of *Baird v. Rogers*, 95 Tenn. 492, 32 S. W. 630, the court, after giving adherence to the rule that the salary of a public official was not subject to garnishment, on the ground of public policy, because of the reason above stated herein, upheld the right to garnish the salary of a municipal officer where his term had expired, saying: "But the defendant, *Rogers*, is no longer an employee of the town of *Jellico*. His official connection with it had been determined long prior to the filing of complainant's bill. The efficiency of corporate service no longer depends upon the security of fees or emoluments from the reach of his creditors."

The reason for the rule being as above stated in the quotation from R. C. L., certainly the appellant is not within the rule, for, not being in office at the time the proceedings were instituted, no detriment to the public would be occasioned by subjecting the money due him by the county to garnishment. He stands on the same footing as any ordinary creditor, and the only obstacle in the way to the garnishment of the money due him having been removed by legislative enactment, above quoted, the court had jurisdiction to entertain the proceedings, and properly entered the judgment against the county.

For the reasons stated, the judgment will be affirmed; and it is so ordered.

Hanna, Ch. J., and Parker, J., concur.

Petition for rehearing denied August 4, 1917.

Annotation—Right to garnish fees or salary of public officer after expiration of term of office.

The question as raised assumes the general rule that the salaries of public officers are exempt from garnishment or attachment proceedings, and goes to the point whether or not the fact that the term of office has expired affects this rule. In this regard it is to be remembered that where the question is not affected by statutory provisions the rule exempting the salaries or fees of a public officer from garnishment or attachment is generally based on the ground

that it is against public policy to permit interference of this character with the duties of a man serving the public, and also that public agencies such as municipalities, counties, and townships should not be subjected to possible embarrassment or interference with their functions by actions of this character.

The first reason for exempting the fees or salary of a public officer would not apply after the expiration of his term of office, and it has been held that the

municipality may waive objection to the proceedings and submit itself to the jurisdiction of the court. For example, it has been held that a judgment against a municipality in favor of a former officer for the fees and emoluments of his office may be garnished by a creditor of such officer, at least where the municipality waives its privilege of exemption and submits itself to the garnishee proceedings. *Baird v. Rogers* (1895) 95 Tenn. 492, 32 S. W. 630.

Conceding that it is contrary to public policy for a public officer's salary to be garnished, it has been held that the reason for the rule does not apply when the officer's services have been performed and the salary or fees earned, or were due. *Thompson v. Cullers* (1896) — *Tex. Civ. App.* —, 35 S. W. 412.

And see *SOUTHWESTERN SAV. L. & BLDG. ASSO. v. AWALT*, ante, 1117, holding that after the expiration of the term of office of a county officer a judgment creditor may resort to garnishment process to reach the balance of salary due such officer.

It has been held that money due the register of a county for fees is subject to garnishment after his term of office has expired, since there is nothing detrimental to public policy in an attachment under these circumstances. *Robertson v. Beall* (1856) 10 Md. 125.

In *Jones v. Nicoll* (1911) 72 Misc. 483, 131 N. Y. Supp. 341, the question was presented as to whether or not a sum

allowed a commissioner in condemnation proceedings for services was wages, salary, or earnings within the meaning of a statute in effect authorizing proceedings to reach and apply wages, salary, or earnings, and it was held that the statute did not authorize proceedings to reach a debt of this character, although the amount due was earnings, since the statute referred only to current earnings as they matured from time to time.

Fees awarded by a court to be paid a jurymen for past jury service are not "goods, effects, and credits" within the statutory provision making corporations subject to garnishment proceedings to reach the "goods, effects, or credits" of the debtor under the possession and control of such corporation. *Clark v. Clark* (1874) 62 Me. 255.

The pay of a retired officer of the government is not liable to be taken by creditors by attachment or garnishment, for it is intended as a means of subsistence, and it will not be permitted to be diverted. *Elwyn's Appeal* (1871) 67 Pa. 367.

And it has been held that an allowance to a retired officer is a mere credit, and does not constitute a debt which is subject to attachment. *Innes v. East India Co.* (1856) 2 Jur. N. S. 189, 25 L. J. C. P. N. S. 154, 17 C. B. 351, 139 Eng. Reprint, 1108, 4 Week. Rep. 245.

A. G. S.

KANSAS SUPREME COURT.

H. S. IRETON, Appt.,
v.

ATCHISON, TOPEKA, & SANTA FE RAIL-
WAY COMPANY.

W. F. SCHWANTES
v.

SAME, Appt.

(96 Kan. 480, 152 Pac. 625.)

Master and servant — fire set out by servant — liability.

The rule that an employer is not liable

Headnote by BURCH, J.

Note. — The liability of a master for damages by fire started by servant for his own purposes, but incidental to the work, is discussed in the note to *McLaughlin v. Cloquet Tie & Post Co.* 49 L.R.A. (N.S.) 544.

The liability of a master for the act of a servant in setting out fire while clearing

land is treated in the note to *Marlowe v. Bland*, 47 L.R.A. (N.S.) 1116.

For other cases, see Master and Servant, III. a, 2, in Dig. 1-52 N. S.

(November 6, 1915.)

A PPEAL by plaintiff Ireton, from a judgment of the District Court for Cowley County in defendant's favor in an action brought to recover damages for the alleged

land is treated in the note to *Marlowe v. Bland*, 47 L.R.A. (N.S.) 1116.

The liability of an employer for the act of an independent contractor in setting out fire is discussed in the notes to *St. Louis & S. F. R. Co. v. Madden*, 17 L.R.A. (N.S.) 788, and *Carlton County Farmers' Mut. F. Ins. Co. v. Foley Bros.* 38 L.R.A. (N.S.) 175.

negligent destruction of plaintiff's building by fire. Affirmed.

APPREAL by defendant from a judgment of the District Court for Cowley County in favor of plaintiff Schwantes, in an action brought to recover damages for the alleged destruction of his property by fire. Reversed.

The facts are stated in the opinion.

Mr. J. A. McDermott for appellant Ireton.

Messrs. William R. Smith, Owen J. Wood, Alfred A. Scott, and Harlow Hurley, for appellee railway:

The question as to whether a person owning land adjacent to a railroad company's right of way is guilty of such contributory negligence in failing to remove combustibles therefrom, as will bar a recovery for damage caused by a railroad, is a question of fact for the jury.

Kansas P. R. Co. v. Brady, 17 Kan. 380; St. Joseph & D. C. R. Co. v. Chase, 11 Kan. 47; Missouri P. R. Co. v. Kincaid, 29 Kan. 654; Missouri P. R. Co. v. Cornell, 30 Kan. 35, 1 Pac. 312; Atchison, T. & S. F. R. Co. v. Ayers, 56 Kan. 176, 42 Pac. 722; Atchison, T. & S. F. R. Co. v. Ireton, 63 Kan. 888, 66 Pac. 987; Union P. R. Co. v. Holmes, 68 Kan. 810, 74 Pac. 606; Chicago, R. I. & P. R. Co. v. Lost Springs Lodge, 74 Kan. 847, 85 Pac. 803.

Messrs. William R. Smith, Owen J. Wood, Alfred A. Scott, and Harlow Hurley, for appellant railway:

Plaintiff was not entitled to recover on any charge of negligence pleaded in the amended petition.

Manning v. John Hancock Mut. L. Ins. Co. 100 U. S. 693, 698, 699, 25 L. ed. 761, 763; Duncan v. Atchison, T. & S. F. R. Co. 86 Kan. 112, 51 L.R.A.(N.S.) 565, 119 Pac. 356.

The defendant is not liable for fire set out by its employees in furtherance of their own personal business.

26 Cyc. 1536; 20 Am. & Eng. Enc. Law, 165; 1 Thomp. Neg. § 526; Morier v. St. Paul, M. & M. R. Co. 31 Minn. 351, 47 Am. Rep. 793, 17 N. W. 952; Southern R. Co. v. Power Fuel Co. 12 L.R.A.(N.S.) 472, 82 C. C. A. 65, 152 Fed. 917; Pittsburgh, C. & St. L. R. Co. v. Shields, 49 Ohio St. 387, 8 L.R.A. 464, 21 Am. St. Rep. 840, 24 N. E. 658; Slater v. Advance Thresher Co. 97 Minn. 305, 5 L.R.A.(N.S.) 598, 107 N. W. 133; St. Louis Southwestern R. Co. v. Harvey, 75 C. C. A. 536, 144 Fed. 806.

Mr. J. A. McDermott for appellee Schwantes.
L.R.A.1917F.

Burch, J., delivered the opinion of the court:

The defendant employed a large number of Mexican laborers to perform work on its track and roadbed. These laborers, with their families, were allowed to live on the defendant's right of way. Some of them maintained open fires. From one of these fires, fire was communicated to a near-by building owned by Ireton and occupied by Schwantes for a store. The building and its contents were destroyed, and separate suits for damages were brought by the respective owners. Ireton was defeated, and appeals. Schwantes recovered, and the railway company appeals.

In the Schwantes Case the jury returned the following special findings of fact:

Q. 3. If you find that plaintiff's property was destroyed by fire communicated from fires on defendant's right of way, state what officers, agents, or employees set out such fires.

A. 3. Mexican laborers.

Q. 4. If you find that such fires were set out by any of defendant's employees, state for what purposes such fires were built or maintained.

A. 4. Cooking and other purposes.

Q. 5. If you find that plaintiff's property was destroyed from fires on defendant's right of way, state for whose benefit such fires were maintained.

A. 5. Mexican laborers.

The evidence upon these material and determining facts was substantially the same in both cases. There was no evidence in either case that anyone but the laborers set out the fires, or that the fires were maintained for other than cooking, washing, and similar purposes, or that the fires were maintained for the benefit of anyone but the laborers themselves.

The theory of the trial court was that the defendant was liable for the consequences of the negligent escape of fire maintained on its right of way with its knowledge and consent. This could be true only in the event that the fire was maintained for the benefit of the defendant in the conduct of the work which the laborers were hired to do, or perhaps in the event that the railway company permitted the creation of a common nuisance on its premises by its licensees, from which the damages sued for resulted. The petitions were drawn and the cases were tried and submitted on the theory of negligence, and liability for nuisance need not be considered. Liability for negligence

rests on the doctrine of respondeat superior, the limits of which have just been stated. The defendant's laborers were employed to lay steel, distribute ballast, and surface track. When they were not doing this, they were not working for the defendant, and the defendant was not their superior. Their camp fires were no more factors of this work than they would have been if they had been maintained for domestic purposes of the laborers elsewhere than upon ground owned by the defendant, and the defendant can be called upon to respond for a negligent act of an employee only when the act was committed in the prosecution of work which the employee was hired to do for the defendant.

The case of *Morier v. St. Paul, M. & M. R. Co.* 31 Minn. 351, 47 Am. Rep. 793, 17 N. W. 952, is a leading one on the subject under discussion. Railroad section men in charge of a section foreman, engaged in repairing track, built a fire on the railroad right of way to warm their coffee for dinner. After dinner they resumed work without extinguishing the fire, which spread to adjoining premises and burned the plaintiff's hay. In holding that the railroad company was not liable, the court said: "Beyond the scope of his employment the servant is as much a stranger to his master as any third person. The master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment. A master is not responsible for any act or omission of his servant which is not connected with the business in which he serves him, and does not happen in the course of his employment. And in determining whether a particular act is done in the course of the servant's employment, it is proper first to inquire whether the servant was at the time engaged in serving his master. If the act be done while the servant is at liberty from the service, and pursuing his own ends exclusively, the master is not responsible. If the servant was, at the time when the injury was inflicted, acting for himself, and as his own master pro tempore, the master is not liable. If the servant step aside from his master's business, for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended. Such, variously expressed, is the uniform doctrine laid down by all authorities. . . . It would seem to follow, as an inevitable conclusion, from this, that on the facts of this case the L.R.A.1917F.

act of these section men in building a fire to warm their own dinner was in no sense an act done in the course of and within the scope of their employment, or in the execution of defendant's business. For the time being they had stepped aside from that business, and in building this fire they were engaged exclusively in their own business, as much as they were when eating their dinner, and were for the time being their own masters, as much as when they ate their breakfast that morning, or went to bed the night before." pp. 352, 353.

The Minnesota court cites (p. 353) among other authorities, the English case of *Williams v. Jones*, 3 Hurlst. & C. 258, 33 L. J. Exch. N. S. 297. There the plaintiff let to the defendant a shed in which to make a signboard. The defendant employed a carpenter to do the work. The carpenter lighted his pipe with a burning shaving ignited by a match, and then dropped the shaving in the midst of others, with the result that the shed was burned. It was held that the defendant might be responsible for the negligence of the carpenter in the course of his employment, but not for his negligence in the personal matter of lighting his pipe. The laborers in these cases were not hired to cook or to do washing, or to supply other of their personal needs, through the agency of fire, any more than the carpenter in the English case was hired to smoke his pipe, and the fact that they were "blanket Mexicans," that the defendant furnished them with tents and stoves when the weather grew cold, that they used old ties for fuel, or that the defendant's foreman required the fires to be removed from close proximity to the depot, does not bring the maintenance of the fires within the service which the Mexicans were employed to perform for the defendant.

It is not necessary to discuss the assignments of error in the Ireton case. None of them relate to the fundamental subject which has just been discussed, and judgment should have been rendered for the defendant on the defendant's demurrer to the evidence, for the reason that no cause of action against the defendant was proved. Therefore the judgment in the Ireton Case is affirmed. The judgment in the Schwantes Case is reversed, and the cause is remanded, with direction to render judgment for the defendant on the findings of fact.

Petition for rehearing denied December 15, 1915.

NEW YORK COURT OF APPEALS.

EDISON ELECTRIC ILLUMINATING
COMPANY OF BROOKLYN
v.PEOPLE'S NATIONAL BANK OF LEBA-
NON, Impleaded, etc., Appt.,
and
NATIONAL BRIDGE WORKS, Impleaded,
etc., Respts.

(221 N. Y. 1, 116 N. E. 369.)

**Assignment — of funds due building
contractor — failure to record — ef-
fect.**

The provision of the Mechanics' Lien Law that no assignment by a building contractor of funds due under the contract shall be valid unless recorded does not apply in favor of an attaching creditor of the contractor or one having a judgment against him for personal injuries.

For other cases, see *Records and Recording Laws, III. c, in Dig. 1-52 N. S.*

(McLaughlin, J., dissents.)

(May 8, 1917.)

APPEAL by the defendant bank from a judgment of the Appellate Division of the Supreme Court, Second Department, modifying and affirming a judgment entered in the office of the clerk of the Supreme Court for Kings County upon the report of a referee in favor of the National Bridge Works in an action brought to determine who is entitled to a fund due from the plaintiff to the defendant contractor under a contract for the construction of certain improvements. Reversed.

The facts sufficiently appear in the opinion.

Messrs. Bond & Babson, for appellant:

The unrecorded assignments of the Horace E. Frick Company to the People's National Bank, of moneys due and to become due, are valid as against everyone other than lienors under and by virtue of the Lien Law; a fortiori as to respondents the National Bridge Works, and John V. Lindberg who contributed nothing to the fund in controversy, and whose attachment and judgment were obtained long after the giving of the said assignments and the advancing of money thereon.

Williams v. Ingersoll, 89 N. Y. 508; McCorkle v. Herrman, 117 N. Y. 297, 22 N. E. 948; Bates v. Salt Springs Nat. Bank, 157 N. Y. 322, 51 N. E. 1033; Niles v. Mathusa, 162 N. Y. 546, 57 N. E. 184; Colum-

Note. — As to who may take advantage of failure to file assignment of a building contract or of the money due thereunder, see annotation following this case, post, 1127.

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bia Bank v. Equitable Life Assur. Soc. 61 App. Div. 594, 70 N. Y. Supp. 767; Van Kannel Revolving Door Co. v. Astor, 119 App. Div. 214, 104 N. Y. Supp. 653; White v. Livingston, 69 App. Div. 369, 75 N. Y. Supp. 466; Young v. Upson, 115 Fed. 192; MacDonald v. Kneeland, 5 Minn. 352, Gil. 283; Copeland v. Manton, 22 Ohio St. 398; Endlich, Interpretation of Statutes, §§ 113-127; Davis v. Davis, 75 N. Y. 221; Dean v. Metropolitan Elev. R. Co. 119 N. Y. 540, 23 N. E. 1054; Henavie v. New York C. & H. R. R. Co. 154 N. Y. 278, 48 N. E. 525; People ex rel. Collins v. Spicer, 99 N. Y. 225, 1 N. E. 680; People ex rel. Earl v. England, 16 App. Div. 97, 45 N. Y. Supp. 12; Drake v. State, 144 N. Y. 416, 39 N. E. 342; Spencer v. Myers, 73 Hun, 278, 26 N. Y. Supp. 371; Porter v. Parmley, 52 N. Y. 186; Woolcott v. Shubert, 217 N. Y. 212, L.R.A.1916E, 248, 111 N. E. 829, Ann. Cas. 1916B, 726; Harvey v. Brewer, 178 N. Y. 5, 70 N. E. 73; John P. Kane Co. v. Kinney, 35 Misc. 1, 71 N. Y. Supp. 8, affirmed in 174 N. Y. 60, 66 N. E. 619; Brace v. Gloversville, 167 N. Y. 452, 60 N. E. 770; Armstrong v. Chisolm, 99 App. Div. 465, 91 N. Y. Supp. 299; Re Meyer, 209 N. Y. 386, L.R.A.1915C, 615, 103 N. E. 713, Ann. Cas. 1915A, 263; Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 516; Jackson ex dem Scofield v. Collins, 3 Cow. 89; Philippotts v. Philippotts, 10 C. B. 85, 20 L. J. C. P. N. S. 11; Henry v. Morgan, 2 Binn. 497; Russell v. Farquhar, 55 Tex. 355; Ayers v. Lawrence, 59 N. Y. 196; Lake Shore & M. S. R. Co. v. Roach, 80 N. Y. 339; Tolkow v. Metropolitan L. Ins. Co. 73 Misc. 393, 133 N. Y. Supp. 367; John A. Philbrick & Bro. v. Ignatz Florio Co-op. Asso. 200 N. Y. 526, 93 N. E. 1123, affirming 137 App. Div. 613, 122 N. Y. Supp. 341; Tubridy v. Wright, 144 N. Y. 519, 43 Am. St. Rep. 776, 39 N. E. 640; Troy Public Works Co. v. Yonkers, 68 Misc. 372, 124 N. Y. Supp. 307; Mack v. Colleran, 136 N. Y. 617, 32 N. E. 604; Tisdale Lumber Co. v. Read Realty Co. 154 App. Div. 270, 138 N. Y. Supp. 829; Riverside Contracting Co. v. New York, 148 N. Y. Supp. 281, affirmed in 165 App. Div. 972, 150 N. Y. Supp. 1109.

The liens of a judgment tort creditor and of an attaching creditor are not contemplated by the Lien Law, and the claims of the respective parties to the fund in question should be adjudicated by the principles of the common law.

McCorkle v. Herrman, 117 N. Y. 297, 22 N. E. 948; John Mulstein Co. v. New York, 213 N. Y. 308, 107 N. E. 653; Riverside Contracting Co. v. New York, 218 N. Y. 596, 113 N. E. 564; Van Kannel Revolving Door Co. v. Astor, 119 App. Div. 214, 104

N. Y. Supp. 653; *Tolkow v. Metropolitan L. Ins. Co.* 73 Misc. 393, 133 N. Y. Supp. 367; *Bates v. Salt Springs Nat. Bank*, 157 N. Y. 323, 51 N. E. 1033; *Smith v. Texas & P. R. Co.* — Tex. Civ. App. —, 39 S. W. 969.

Messrs. **Thompson & Fuller**, for respondent **National Bridge Works**:

The assignments from the Frick Company to the bank, not having been filed in accordance with § 15 of the Mechanic's Lien Law, are invalid and unenforceable, at least as against **National Bridge Works**, an attaching creditor.

McCorkle v. Herrman, 117 N. Y. 297, 22 N. E. 948; *Herrmann v. New York*, 136 App. Div. 28, 120 N. Y. Supp. 146; *Uvalde Asphalt Paving Co. v. New York*, 191 N. Y. 244, 84 N. E. 83; *John Mulstein Co. v. New York*, 213 N. Y. 308, 107 N. E. 651; *Barrett v. John V. Schaefer, Jr. & Co.* 162 App. Div. 52, 146 N. Y. Supp. 1056, affirmed in 217 N. Y. 722, 112 N. E. 1054.

Messrs. **Low, Miller, & Low**, for respondent **Lindberg**:

The alleged assignments are invalid as against the defendant **Lindberg** because not filed pursuant to § 15 of the Lien Law.

Harvey v. Brewer, 178 N. Y. 7, 70 N. E. 73; *John P. Kane Co. v. Kinney*, 174 N. Y. 69, 66 N. E. 619; *Barrett v. John V. Schaefer, Jr. & Co.* 162 App. Div. 52, 146 N. Y. Supp. 1056, affirmed without opinion in 217 N. Y. 722, 112 N. E. 1054; *Kelsey Smith & Co. v. Douglas*, 165 App. Div. 707, 151 N. Y. Supp. 549; *Asphalt Paving & Contracting Co. v. New York*, 218 N. Y. 686, 113 N. E. 1050; *Van Kannel Revolving Door Co. v. Astor*, 119 App. Div. 214, 104 N. Y. Supp. 653; *Kenyon v. Walsh*, 31 Misc. 634, 66 N. Y. Supp. 35; *Tooker v. Arnoux*, 76 N. Y. 397; *Weeks v. O'Brien*, 141 N. Y. 199, 36 N. E. 185; *Reining v. Buffalo*, 102 N. Y. 308, 6 N. E. 792.

Hiscock, Ch. J., delivered the opinion of the court:

This action was brought by plaintiff for the purpose of procuring a determination of opposing claims to a fund produced under a building contract. While various other issues between the parties to this appeal were litigated upon the trial and are discussed upon this appeal, we are all agreed that, after the reversal by the appellate division of various findings made by the trial court and upon the new findings made by the former court, there only remains for our consideration one question. That question is the one whether § 15 of the law relating to mechanics' liens (Consol. Laws, chap. 33), in effect providing that an assignment by a contractor of sums of money due or to grow due upon his contract shall

be invalid unless filed in the office of the clerk of the county where the real property is situated, can be invoked for the benefit of one having a judgment against the contractor for damages for personal injuries, or an attaching creditor of such contractor. The courts below have held that it may be so invoked. We reach a different conclusion.

The decisive facts, in addition to merely formal ones, which present this question, are as follows:

The defendant Frick company made a contract with the plaintiff for the construction of certain improvements. Before completion of this contract it became insolvent and defaulted, but after completion of the contract at its expense there remained due to it from the plaintiff on account of said contract the sum of about \$6,000, and which is the fund in dispute. Before any default, this company made an agreement with the appellant bank, providing for the advancement to it by the latter of moneys with which to carry on its business, and agreed that from time to time it would assign to the bank moneys due to it upon contracts, as security for the payment and satisfaction of said loans. The bank advanced moneys, which were wholly or largely used in carrying on the contract here involved, and subsequently, and in accordance with its agreement, the Frick company executed to the bank assignments of moneys due under said contract sufficient to exhaust the entire fund now on hand. These assignments were never filed in the office of the county clerk.

The respondent **Lindberg** was an employee of the Frick company, and subsequent to the execution of the assignments above referred to he recovered a judgment against it for damages for personal injuries caused by its negligence, on which, after return of execution unsatisfied, supplementary proceedings were instituted.

The respondent **National Bridge Works** furnished supplies to the Frick company, which were used to some extent in carrying on the contract already referred to, but it took notes for its indebtedness, and after the execution of the assignments to appellant it brought action upon these notes and obtained attachments under which it attempted to secure a levy and lien upon the fund already referred to.

The section under which respondents urge that appellant's assignments, because not filed in the clerk's office, were invalid as to them, is § 15 of the Lien Law (Consol. Laws, chap. 33), which reads as follows: "No assignment of a contract . . . or of the money or any part thereof due or to become due therefor, . . . shall be valid, until . . . such assignment . . . be filed in the office of the county clerk of the county

wherein the real property . . . is situated.

Indisputably the assignments to appellant gave rights to the fund in question which were superior to any acquired by respondents, unless such result was prevented by the statute which has been quoted.

Neither of the respondents occupies the position of a laborer or materialman having furnished labor or materials toward the improvement producing the fund for which any lien on said fund exists under the Lien Law. Lindberg's claim could never have served as the basis for such a lien, and while apparently the bridge works furnished material for which it might have had a lien, that right has been lost, and it occupies the position of an ordinary contract creditor with an attachment. Nevertheless, if the language of the provision in question were to be construed and interpreted simply by itself, it is broad enough to sustain respondents' claim that it protects them; for there is therein no specification or limitation of the persons who may take advantage of it and defeat an assignment as invalid because it has not been filed. But clearly we ought not to thus interpret this clause by itself and wholly detached from the statute of which it is a portion. We ought to consider the origin and purpose of the entire statute; and especially we ought to consider (if they are known and open to our consideration) the origin and purpose of the particular provision which we are interpreting. *People ex rel. Collins v. Spicer*, 99 N. Y. 225, 233, 1 N. E. 680; *People ex rel. Earl v. England*, 16 App. Div. 97, 100, 45 N. Y. Supp. 12; *Church of the Holy Trinity v. United States*, 143 U. S. 457, 463, 36 L. ed. 226, 220, 12 Sup. Ct. Rep. 511.

There is no doubt about the origin and general purpose of the statute as an entirety. We know from its provisions, from what has been said of its objects in many opinions, and from the title of the comprehensive statute predecessor of the present one, adopted in 1885 (Laws 1885, chap. 342), that the act was passed for the protection of laborers and materialmen who had contributed their labor and materials toward the construction of some improvement, and to give them a lien for their pay upon funds which were the fruits of their contributions. Not even these persons acquired liens unless they complied with certain rules in perfecting and enforcing the same, and certainly the general purpose of the statute was not to protect persons who became possessed of claims in tort against the contractor, or of persons who occupied the position of ordinary contract creditors, no matter how meritorious these classes of claims might be, and no matter how much the latter might

have contributed to the improvement. And we may go even further in this line of consideration. Although the statute was thus intended to and did afford certain protection to a creditor of the classes specified, by giving a lien upon moneys due under the contract, it was entirely possible that he might be, and in fact it often happened that he was, defeated in his attempts to pursue this relief through prior and secret assignments by the contractor of moneys due or to grow due on the contract; and the legislature set out to guard against this particular danger. Commencing as far back as 1896 (Laws 1896, chap. 915, § 5), there was a provision which finally developed into the present § 15, which has been quoted, intended to prevent this defeat of the meritorious claims generally provided for in the act by a requirement that assignments of moneys due on the contract should be made public by filing them and punishing the failure thus to make them public by a declaration of invalidity. In *Harvey v. Brewer*, 178 N. Y. 5, 7, 70 N. E. 74, it was said in respect of this section: "This section is supposed to be due to a decision of this court in *Bates v. Salt Springs Nat. Bank*, 157 N. Y. 322, 51 N. E. 1033, holding that, in the absence of anything to the contrary in the contract, and before any notice of mechanic's lien is filed, the contractor may assign to his creditor in payment of his debt the whole or any portion of the moneys due or to become due under the contract, and the assignee acquires a preference over a subsequent lienor. . . . That section indicates that the legislature was of the opinion that the protection of the laborers and materialmen made it necessary that notice of an assignment of the contract or the moneys due thereunder or some part thereof, or an order drawn by a contractor upon the owner, ought to be given to those interested, and so it provided that such an assignment or order should not be valid 'until the contract or a statement containing the substance thereof, and such assignment or a copy of each or a copy of such order, be filed' in the proper county clerk's office."

John P. Kane Co. v. Kinney, 35 Misc. 1, 5, 71 N. Y. Supp. 8, affirmed in 174 N. Y. 69, 66 N. E. 619; *Brace v. Gloversville*, 167 N. Y. 452, 456, 60 N. E. 779; *Armstrong v. Chisolm*, 99 App. Div. 465, 469, 91 N. Y. Supp. 299; *Van Kannel Revolving Door Co. v. Astor*, 119 App. Div. 214, 104 N. Y. Supp. 653.

It thus appears that the legislature adopted a statute for the protection of certain classes of creditors, which do not include the respondents, and that they inserted therein the special provision under consideration for the purpose of filling a gap in the stat-

ute and for the purpose of preventing the defeat of the beneficial purposes secured by other provisions of the statute through certain definite evils. It recognized that it was useless to give to a laborer or materialman the right to file a lien upon a fund if the contractor could defeat all practical benefits of this right by making a secret assignment of the fund, and hence the requirement that such assignments should be filed. During all of this process it is beyond dispute that the general purpose of the legislative mind was to protect certain classes, and that this particular clause was passed to make such protection more perfect. Keeping this in mind, and construing the language of § 15 in the light of the general purpose of the statute, it seems to us evident that the language rendering assignments invalid is to be limited by the purpose for which the provision was adopted, and that it should be held to relate simply to the people contemplated by the statute, and should not be held to apply for the benefit of those, like the present respondents, who were not in the mind of the legislature at all.

We think that this view is sustained by the following authorities: *Re Meyer*, 209 N. Y. 386, L.R.A.1915C, 615, 103 N. E. 713, Ann. Cas. 1915A, 263; *Church of the Holy Trinity v. United States*, supra; *Lake Shore & M. S. R. Co. v. Roach*, 80 N. Y. 330, 344; *Delafield v. Brady*, 108 N. Y. 524, 529, 15 N. E. 428; *Riggs v. Palmer*, 115 N. Y. 506, 509, 510, 5 L.R.A. 340, 12 Am. St. Rep. 819, 22 N. E. 188.

In the *Church of the Holy Trinity Case* it was contended that a statute made a certain act a misdemeanor, and it was said: "The construction invoked cannot be accepted as correct. It is a case where there was presented a definite evil, in view of which the legislature used general terms for the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention, of the legislature, and therefore cannot be within the statute."

The judgments of the Special Term and Appellate Division should be reversed in so far as the same dismiss appellant's claim against the fund herein and direct payment therefrom of the respective claims of the respondents, and also in so far as they award judgment in favor of said respondents respectively and against appellant for the sum of \$79.06 and \$289.36 for expenses of the reference.

Judgment is further granted that appellant's claims herein be paid from the balance of said fund now on hand in priority to respondents' claims, and that appellant have costs in this court against said respondents, which in addition shall include the taxation against each respondent of one third of the disbursements incurred in printing the record on appeal in the appellate division.

Collin, Cardozo, Pound, Crane, and Andrews, JJ., concur with Hiscock, Ch. J.

McLaughlin, J., dissenting:

I had occasion to consider the effect of § 15 of article 2 of chapter 38, Laws of 1909, in *Williams Engineering & Contracting Co. v. New York*, 175 App. Div. 571, 162 N. Y. Supp. 381. Subsequent investigation has led me to the conclusion that the construction there put upon the section is the correct one. Chapter 38 of the Laws of 1909 is entitled "An act in Relation to Liens, Constituting Chapter 33 of the Consolidated Laws." The act contains all the provisions of the laws then existing relating to liens on personal property, except those relating to conditional sales of goods which were transferred to the Personal Property Law (Consol. Laws, chap. 41). The first article is devoted to definitions, the second to mechanics' liens, and the remaining articles to other liens and the enforcement of the same.

Section 15 comes in article 2, relating to mechanics' liens. It provides that "no assignment of a contract . . . or of the money or any part thereof due, or to become due therefor . . . shall be valid, until . . . such assignment . . . be filed in the office of the county clerk of the county wherein the real property . . . is situated . . . and such contract, assignment or order shall have effect and be enforceable from the time of such filing."

From the language thus used it is difficult to imagine how the purpose of the legislature, in enacting the section, can be misunderstood. The words, "no assignment," are so comprehensive and so clear and unambiguous as to include every assignment unless words not expressed in the statute are read into it. But it is suggested that, notwithstanding the fact that the language used, if taken literally, includes all assignments, nevertheless that is not what the legislature intended; that its intent was to protect a certain class of creditors to the exclusion of others.

In ascertaining what the legislature intended by the enactment, the words used must be taken in their ordinary and usual

meaning; and if a doubt arises as to the sense in which they are used, then such doubt must be solved, if possible, by a reference to the context (*Bristor v. Smith*, 158 N. Y. 157, 53 N. E. 42); and it is only in case the intent cannot be ascertained in this way that resort may be had to the occasion of the enactment and to the policy which prompted it (*Palmer v. Van Santvoord*, 153 N. Y. 612, 38 L.R.A. 402, 47 N. E. 915). This statute, if the ordinary meaning be accorded to the words used, is plain, and there is no necessity to resort either to the general context of the whole article or to the occasion or policy which prompted the enactment. The evident purpose was to provide against secret transfers of an interest in a contract, or the money due or to grow due under it, and a method to carry out and make effective this purpose is provided.

Every assignment, no matter for what purpose given, in order to be valid must be filed in a public office, to the end that anyone may ascertain just what the interests are and by whom held. The protection of a particular class of lienors was not, in my opinion, the main purpose of the enactment. It was only incidental. The main purpose was publicity, and no one, no matter who, could be injured if it be enforced according to its letter and spirit. Anyone who takes an assignment, if he complies with the section, is fully protected. If he does not comply with it, then he takes no interest, because the assignment cannot be enforced. Title to the subject-matter of the assignment remains in the assignor, and as such may be reached by a diligent creditor.

It may be that in some cases this would work a hardship. That is the case with the enforcement of nearly every statute, but in the long run a nearer approach to justice will be reached by giving to the words used their ordinary, normal, and natural meaning, rather than by inserting or substituting others in order to carry out what one may conjecture the legislature intended.

The construction for which I contend does not require reading anything into the statute, and for the obvious reason that it is perfectly plain upon its face. If a change

be desired, then it should be done by legislative enactment, and not by judicial fiat. The legislature can change the section if it sees fit to do so; but until it does the court will have performed its full duty by enforcing it according to the language used, instead of giving a different effect by reading into the statute words not there to be found.

The view for which I contend is sustained by *Snyder*, *Lien Law of New York*, 6th ed. p. 234; *Jensen*, *Mechanic's Lien Law of New York*, p. 101; *Barrett v. John V. Schaefer, Jr. & Co.* 162 App. Div. 52, 146 N. Y. Supp. 1056, affirmed in 217 N. Y. 722, 112 N. E. 1054; *Van Kannel Revolving Door Co. v. Astor*, 119 App. Div. 214, 217, 104 N. Y. Supp. 653; and *Harvey v. Brewer*, 178 N. Y. 5, 7, 70 N. E. 74. In the latter case this court said: "So if what was done here was in effect either an absolute or equitable assignment of so much of the fund as the order named, it would come within the condemnation of § 15 of the Lien Law, *supra*. That section indicates that the legislature was of the opinion that the protection of the laborers and materialmen made it necessary that notice of an assignment of a contract or the money due thereunder or some part thereof, or an order drawn by a contractor upon the owner, ought to be given to those interested, and so it provided that such an assignment or order should not be valid 'until the contract or a statement containing the substance thereof, and such assignment or a copy of each or a copy of such order, be filed' in the proper county clerk's office."

The assignments in the present case from the Frick company to the appellant bank never were filed in the office of the county clerk where the real property which was being improved was situate, and for that reason, as I read the statute, the same are invalid and unenforceable.

I am therefore unable to concur in the prevailing opinion in so far as it holds that such assignments are valid, and to that extent I dissent from the decision about to be made.

Annotation—Who may take advantage of failure to file assignment of a building contract or of the money due thereunder.

EDISON ELECTRIC ILLUMINATING CO. v. PEOPLE'S NAT. BANK, ante, 1123, seems to be a case of first impression. In *Van Kannel Revolving Door Co. v. Astor* (1907) 119 App. Div. 214, 104 N. Y. Supp. 653, however, the court, in holding a mechanics' lien superior to a prior un-

filed assignment, said: "These equitable assignments, as against everyone other than lienors, would be valid. But when we concede that there was an equitable assignment 'of the money or any part thereof due or to become due therefor,' we bring the case within the letter and

spirit of the section of the statute above quoted, and which was intended to protect the rights of subcontractors and materialmen in the funds in the hands of the owner or contractor at the time of filing the lien, unless record notice of the existence of such assignment was given."

It was held in *Armstrong v. Chisolm* (1904) 99 App. Div. 465, 91 N. Y. Supp. 299, that an equitable assignment by a

contractor to his subcontractor would be superior to a subsequent assignment by the contractor for the benefit of creditors, filed before the equitable assignment was filed.

For garnishment of money due or to become due on a contract the proceeds of which have been assigned by the debtor prior to the garnishment, see the note to *Hall v. Kansas City Terra Cotta Co.* L.R.A.1916D, 365. B. B. B.

UNITED STATES SUPREME COURT.

NORFOLK SOUTHERN RAILROAD COMPANY, Plff. in Err.,

v.

W. C. CHATMAN.

(244 U. S. 276, 61 L. ed. 1131, 37 Sup. Ct. Rep. 490.)

Carrier — caretaker as passenger — liability.

1. A person in charge of an interstate shipment of live stock, traveling on a freight train upon a pass issued pursuant to the terms of the contract of shipment, as permitted by the Act of June 29, 1906, which excepts necessary caretakers of live stock from the prohibition against the issuance of any "interstate free pass," must be regarded as a passenger for hire, to whom the carrier must respond in damages in case of his injury through the carrier's negligence, notwithstanding a stipulation in the contract purporting to release the carrier from all liability for any personal injury which he may sustain.

For other cases, see Carriers, II. c, 2; II. c, m, 6, in Dig. 1-52 N. S.

Estoppel — urging inconsistent defenses.

2. A connecting carrier defending a personal-injury action under a release from liability contained in a contract of carriage issued as required by the Act of June 29, 1906, pursuant to the published tariffs of the initial carrier, will not be heard in the courts to urge the inconsistent defense that its own tariff made unlawful this contract on which it relies.

For other cases, see Estoppel, III. j, 1, in Dig. 1-52 N. S.

Carriers — free transportation — caretakers.

3. A notice to shippers that return passes to caretakers of live stock will not be allowed is all that can be claimed for a provision in a carrier's published tariff that "free or reduced transportation shall not

be issued for shippers or caretakers in charge of live-stock shipments, whether carloads or less, and such shippers or caretakers shall pay full fare returning." Such provision implies that passes will be issued by the carrier to the destination of the shipment.

For other cases, see Carriers, II. m, 3, in Dig. 1-52 N. S.

Same — published rates — separate rate for carriage of caretaker.

4. The failure of the published tariffs of a carrier to make a separate rate, payable in money, for the carriage of a caretaker of an interstate shipment of live stock, or to state separately how much of the published rate for which the carrier is to transport the live stock and their caretaker to destination is to be treated as payment for the transportation of the stock and how much for the carriage of the caretaker, does not make the latter's presence on a freight train in charge of the shipment unlawful, so as to defeat his right to recover damages in case of injury through the carrier's negligence, since, by the Act of February 4, 1887, as amended by the Acts of June 29, 1906, June 18, 1910, and August 24, 1912, the determining and prescribing of the form in which tariff schedules shall be prepared and arranged is committed to the Interstate Commerce Commission, this obviously being an administrative function with which the courts will not interfere in advance of a prior application to the Commission.

For other cases, see Carriers, IV. c, 1, in Dig. 1-52 N. S.

(May 21, 1917.)

ERROR to the United States Circuit Court of Appeals for the Fourth Circuit to review a judgment affirming a judgment of the District Court for the Eastern District of North Carolina in favor of plaintiff in an action brought to recover damages for personal injuries. Affirmed.

The facts are stated in the opinion.

Note.—The general question as to the right of a carrier to limit its liability to a drover or caretaker accompanying a shipment is discussed in the note to *Buckley v. Bangor & A. R. Co.* L.R.A.1916A, 623. L.R.A.1917F.

Generally as to the duty of a carrier to a caretaker accompanying shipment of live stock, see notes to *Muldoon v. Seattle City R. Co.* 22 L.R.A. 794, and *Otto v. Chicago, B. & Q. R. Co.* 31 L.R.A.(N.S.) 632.

Messrs. C. M. Bain, John H. Small, W. B. Rodman, and J. Kenyon Wilson, for plaintiff in error:

All passes under the Hepburn Act are free passes.

Charleston & W. C. R. Co. v. Thompson, 234 U. S. 576, 58 L. ed. 1476, 34 Sup. Ct. Rep. 964.

If the pass was free under the statute, there is no question of the validity of its stipulations.

Northern P. R. Co. v. Adams, 192 U. S. 440, 48 L. ed. 513, 24 Sup. Ct. Rep. 408; Boering v. Chesapeake Beach R. Co. 193 U. S. 442, 48 L. ed. 742, 24 Sup. Ct. Rep. 515; Baltimore & O. S. W. R. Co. v. Voigt, 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385; Robinson v. Baltimore & O. R. Co. 237 U. S. 84, 59 L. ed. 849, 35 Sup. Ct. Rep. 491, 8 N. C. C. A. 1.

A carrier engaged in the transportation of passengers and property in interstate commerce is forbidden to receive as payment for an interstate journey anything other than money.

Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265; Chicago, I. & L. R. Co. v. United States, 219 U. S. 486, 55 L. ed. 305, 31 Sup. Ct. Rep. 272; American Exp. Co. v. United States, 212 U. S. 522, 53 L. ed. 635, 29 Sup. Ct. Rep. 315; United States v. Hocking Valley R. Co. 194 Fed. 234; State v. Union P. R. Co. 87 Neb. 29, 31 L.R.A.(N.S.) 657, 126 N. W. 859.

The carrier must give notice in the tariff of free cartage, lighterage, ferriage, or any other accessorial service that will be furnished, as well as of any allowance that will be made to shippers who furnish transportation facilities or service.

United States v. Chicago & A. R. Co. 148 Fed. 646, 26 L.R.A.(N.S.) 551, 84 C. C. A. 324, 156 Fed. 558, 212 U. S. 563, 53 L. ed. 653, 29 Sup. Ct. Rep. 689; Victor Fuel Co. v. Atchison, T. & S. F. R. Co. 14 Inters. Com. Rep. 120; Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 260, 57 L. ed. 1472, 1478, 33 Sup. Ct. Rep. 916.

In this case Chatman obtained an advantage other than that afforded others, and also obtained a privilege that was not specified in the tariff, but, to the contrary, such privilege was absolutely prohibited.

Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 162, 56 L. ed. 1033, 1037, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501.

Conditions in tariff are conclusive against all.

Atchison, T. & S. F. R. Co. v. Robinson, 233 U. S. 173, 58 L. ed. 901, 34 Sup. Ct. Rep. 558.

Chatman is not entitled to recover for L.R.A.1917F.

injuries sustained while riding on the train in violation of law.

Southern R. Co. v. Wilcox, 99 Va. 394, 39 S. E. 144; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 483, 55 L. ed. 297, 304, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265; Mayes v. Cherokee Strip Live Stock Assn. 58 Kan. 712, 51 Pac. 215; Melody v. Great Northern R. Co. 25 S. D. 606, 30 L.R.A.(N.S.) 568, 127 N. W. 543, Ann. Cas. 1912C, 727; Duncan v. Maine C. R. Co. 113 Fed. 508; Illinois C. R. Co. v. Messina, 240 U. S. 395, 60 L. ed. 709, 36 Sup. Ct. Rep. 368; Vassor v. Atlantic Coast Line R. Co. 142 N. C. 68, 7 L.R.A.(N.S.) 950, 54 S. E. 849, 9 Ann. Cas. 535; Baltimore & O. R. Co. v. Hamberger, 155 Fed. 849; Miller v. Ammon, 145 U. S. 421, 36 L. ed. 759, 12 Sup. Ct. Rep. 884; Pullman's Palace Car Co. v. Central Transp. Co. 171 U. S. 148, 43 L. ed. 108, 18 Sup. Ct. Rep. 808; Oscanyan v. Winchester Repeating Arms Co. 103 U. S. 261, 26 L. ed. 539.

Messrs. Charles Whedbee and P. W. McMullan, for defendant in error:

One who is traveling upon what is known as a drovers' pass is a passenger for hire.

Buckley v. Bangor & A. R. Co. 113 Me. 164, L.R.A.1916A, 617, 93 Atl. 65; Willcox v. Erie R. Co. 162 App. Div. 64, 147 N. Y. Supp. 360; New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627, 10 Am. Neg. Cas. 624; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148.

Mr. Justice Clarke delivered the opinion of the court:

The judgment obtained in this case by the plaintiff, W. C. Chatman, in the district court, and affirmed by the circuit court of appeals for the fourth circuit, is here for review on writ of error.

On December 1, 1911, the plaintiff below (hereinafter designated as the plaintiff) delivered to the Pennsylvania Railroad Company at Jersey City a carload of horses to be carried to Hertford, North Carolina, and was tendered by an agent of the company for his signature the customary "uniform live-stock contract" of the Pennsylvania Company, the essential provisions of which are printed in the margin.¹

This contract was retained by the company, but from it was detached a "coupon"

¹ The provisions of the contract essential to be considered are, in substance, that the company had received from Chatman a carload of horses for transportation to Port Norfolk for Hertford, North Carolina, "with W. C. Chatman in charge;" and that it was received by the Pennsylvania Company "for

which was given to Chatman, containing in substance an acknowledgment that he had delivered live stock of the kind and nature therein described, consigned to W. C. Chatman, destination Port Norfolk, Virginia, for Hertford, North Carolina, "W. C. Chatman, man in charge." Without other pass or ticket than this "coupon," and without other payment than the published tariff on the carload of stock, the Pennsylvania Railroad Company carried the plaintiff, with his carload of horses, on a freight train to Norfolk, Virginia, where the car was delivered to and accepted by the defendant company for transportation to its destination.

The plaintiff testifies that defendant's conductor saw him and knew he was on the car up to the time the accident complained of occurred.

The car in which the horses and the plaintiff were being carried was derailed on defendant's line, and the plaintiff, being injured, sued for damages and secured the judgment which we have before us.

The negligence of the defendant is not disputed.

On this record the defendant claims two defenses, the first of which is:

That the plaintiff is not entitled to recover, because when injured, he was traveling on a free pass issued pursuant to the terms of the live-stock contract in which he had released the carriers from all liability for any personal injury which he might sustain, thus bringing his claim within the authority of *Northern P. R. Co. v. Adams*, 192 U. S. 440, 48 L. ed. 513, 24 Sup. Ct. Rep. 408.

itself and on behalf of connecting carriers for transportation subject to the official tariffs, classifications and rules of said company;" and "that the said shipper is at his own sole risk and expense to load and take care of and feed and water said stock whilst being transported . . . and neither said carrier nor any connecting carrier is to be under any liability or duty with reference thereto, except in the actual transportation of the same . . . and that the shipper shall see that all doors and openings in said car or cars are at all times so closed and fastened as to prevent the escape therefrom of any of the said stock." It further provided that, in consideration of the premises and of the carriage of a person or persons in charge of said stock upon a freight train of said carrier or its connecting carriers without charge, other than the sum paid or to be paid for the transportation of the live stock in his or her charge, that the said shipper shall and will indemnify and save harmless said carrier and every connecting carrier from all claims and liabilities of every kind, by reason of personal injury sustained by the person in charge of said stock, whether

In *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 384, 21 L. ed. 627, 641, it was decided that a person traveling on a "drover's pass," issued upon a live-stock contract precisely similar in its terms to that which we have in this case, was a passenger for hire, and that a release from liability for injuries caused by the carrier's negligence was void because a common carrier cannot lawfully stipulate for such exemption.

This decision was rendered in 1873, and has been frequently approved: *Grand Trunk R. Co. v. Stevens*, 95 U. S. 655, 24 L. ed. 535, 10 Am. Neg. Cas. 638; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* (The Montana), 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; *Baltimore & O. S. W. R. Co. v. Voigt*, 176 U. S. 498, 505, 44 L. ed. 560, 564, 20 Sup. Ct. Rep. 385; *Santa Fe, P. & P. R. Co. v. Grant Bros. Constr. Co.* 228 U. S. 177, 184, 57 L. ed. 787, 791, 33 Sup. Ct. Rep. 474; *George N. Pierce Co. v. Wells, F. & Co.* 236 U. S. 278, 283, 59 L. ed. 576, 581, 35 Sup. Ct. Rep. 351. This court continues of the opinion expressed by it in 1899, in *Baltimore & O. S. W. R. Co. v. Voigt*, 176 U. S. 498, 505, 44 L. ed. 560, 564, 20 Sup. Ct. Rep. 385, that the *Lockwood* Case "must be regarded as establishing a settled rule of policy."

But the plaintiff in error claims that this rule is no longer applicable to such a case as this we are considering, for the reason that, while the plaintiff, as the shipper of the stock, was within the exception of § 1 of the amendment to the Act "to Regulate Commerce" of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1916, §

the same be caused by the negligence of said carrier or any connecting carrier, or otherwise.

There was printed upon this contract, as a part of it, the following:

"Release for Man or Men in Charge.

"In consideration of the carriage of the undersigned upon a freight train of the carrier or carriers named in the within contract without charge, other than the sum paid or to be paid for the carriage upon said freight train of the live stock mentioned in said contract, of which live stock . . . in charge, the undersigned does hereby voluntarily assume all risks of accidents or damage to his person or property, and does hereby release and discharge the said carrier or carriers from every and all claims, liabilities and demands of every kind, nature and description for or on account of any personal injury or damage of any kind sustained by the undersigned so in charge of said stock, whether the same be caused by the negligence of the said carrier or carriers or any of its or their employees, or otherwise.

"(Signature of man in charge)

"W. C. Chatman."

8563), prohibiting the issuance of any "interstate . . . free pass . . . except . . . to necessary caretakers of live stock, poultry, and fruit," yet this exception permitted him to travel free of charge upon a "free pass or free transportation," and not as a passenger for hire on a free pass, which would be a contradiction in terms.

The Lockwood Case shows that live-stock contracts such as we have here, providing for the transportation of caretakers of stock on free passes, were in use by carriers as early as 1859 (17 Wall. 357, 365), and that they have continued in use up to this time is apparent from the decisions hereinbefore cited, from the case at bar, and from many recently reported cases. *Tripp v. Michigan C. R. Co.* L.R.A.—, —, 151 C. C. A. 385, 238 Fed. 449. Notwithstanding the fact, as we have seen, that such transportation has been declared by a long line of decisions not to be "free" in the popular sense, but to be transportation for hire, with all of the legal incidents of paid transportation, the carriers of the country have continued to issue it and to designate it as "free."

With this legal and commercial history before us we must conclude that the designation "free pass," as applied to transportation issued or given by railroad companies to shippers and caretakers of stock, had acquired a definite and well-known meaning, sanctioned by the decisions of this court and widely by the decisions of the courts of the various states, long prior to the enactment of June 29, 1906, and that, therefore, Congress must be presumed to have used the designation "free pass" in the sense given to it by this judicial determination when, in § 1 of that act, by specific exception, it permitted the continuance of the then long established custom of issuing free transportation or passes to shippers or caretakers of live stock. *Kepner v. United States*, 195 U. S. 100, 49 L. ed. 114, 24 Sup. Ct. Rep. 797, 1 Ann. Cas. 655; *Lawder v. Stone*, 187 U. S. 281, 293, 47 L. ed. 178, 183, 23 Sup. Ct. Rep. 79; *Sutherland, Stat. Constr.* § 333.

It results that the "settled rule of policy" established by the Lockwood Case, and the decisions following it, must be considered unmodified by the Act to Regulate Commerce; that the plaintiff in charge of his stock, traveling upon a pass permitted to be issued by that act, was a passenger for hire, and that defendant's first claim must therefore be denied.

The claim of the defendant that the plaintiff was unlawfully upon its train because its published tariff did not allow the issuing of such a pass as that which the plaintiff was using when injured is without merit.

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The extract from the defendant's tariff, relied upon to sustain this claim, reads:

"Free or reduced transportation shall not be issued for shippers or caretakers in charge of live-stock shipments, whether carloads or less, and such shippers or caretakers shall pay full fare *returning*."

It is sufficient answer to this claim to say that the railroad company is here defending under the release from liability contained in a contract of carriage issued as required by law (§ 7 of the Act of June 29, 1906, 34 Stat. at L. 595, chap. 3501), pursuant to the published tariffs of its connecting, the initial, carrier, the Pennsylvania Railroad Company, and it will not be heard in the courts to urge the inconsistent defense that its own tariff made unlawful this contract on which, in the alternative, it relies.

To this we add that passes for caretakers, not only to destination, but returning to point of shipment, were formerly general (*Cleveland, P. & A. R. Co. v. Curran*, 19 Ohio St. 1, 2 Am. Rep. 362), and in some parts of the country are still issued (*Kirkendall v. Union P. R. Co.* 118 C. C. A. 383, 200 Fed. 197, 200), and that, in our opinion, the language of the notice quoted, while obscurely worded, implies that such passes will be issued by the defendant to destination of the shipment, and was intended as notice to shippers that return passes would not be allowed. The meaning now claimed for this notice would have been unmistakably expressed without the final clause, "and such shippers or caretakers shall pay full fare *returning*." Why "*returning*" if full fare were also to be paid "*going*?" Tariffs must not be made cunningly devised nets in which to entangle unsuspecting or inexperienced shippers.

The second defense of the railroad company is in the alternative, and must be considered because its first defense has failed.

This claim is that, under the Interstate Commerce Law, payment for the transportation of passengers for hire could be made only in money, and at a rate stated in a tariff filed and published in the manner required by law; that no separate payment for plaintiff's transportation was made in money, and the consideration for it must be found, if at all, incorporated in the rate charged for the stock, or in the service which he was to render in caring for it in transit; and that, as neither of these was separately stated in any filed and published tariff, the plaintiff's presence upon the car was unlawful and he should not recover for injuries sustained.

In the consideration of this second claim of the defendant these facts, appearing of record, are decisive: The defendant relies

for its defense upon the terms of the live-stock contract entered into between its connecting carrier, the Pennsylvania Company, and the plaintiff; and, averring in its answer that it received the shipment of horses "in accordance with the terms of said contract," it claims immunity from liability for damages to the plaintiff under the declaration of that contract that: "In consideration of the carriage of the undersigned (plaintiff) upon a freight train of the carrier or carriers named in the contract without charge other than the sum paid or to be paid for the carriage . . . of the live stock . . . the plaintiff assumed the risk of accident and released said carrier or carriers from all liability to him for any injury which he might sustain."

While the record is not as clear as could be wished, the excerpts which it contains from the filed tariffs of the Pennsylvania Company and the live-stock contract, both introduced in evidence by the defendant, justify the conclusion, certainly as against the defendant, that the contract was a part of the tariffs of the Pennsylvania Company, filed and published according to law, and that the defendant is bound by its terms.

Treating this live-stock contract as a part of the lawfully published tariffs of the Pennsylvania Company, under which the contract for the carriage of the plaintiff was made, and by which the defendant confesses itself bound, it is clear that such tariffs show the two carriers declaring that, for the published rate, payable in money, the plaintiff's carload of stock and the plaintiff himself, as a caretaker, would be carried on freight trains from Jersey City to the North Carolina destination; and, as we have seen, the law declares that a caretaker so carried is a passenger for hire, against whom the release of liability on which the defendant relies must be treated as unreasonable and void.

The objection that the published tariff of the Pennsylvania Company did not specify how much of the stipulated payment by the plaintiff should be treated as payment for the transportation of the stock, and how much for the transportation of the caretaker, and that the payment for the carriage of the plaintiff was not separately stated in a passenger tariff, cannot be considered in this case, for the reason that the Act to Regulate Commerce (§ 6, as amended June 29, 1906, June 18, 1910 [36 Stat. at L. 548, chap. 309, § 9], and August 24, 1912 [37 Stat. at L. 568, chap. 390, § 11, Comp. Stat. 1916, § 8569]) commits to the Interstate Commerce Commission the determining and prescribing of the form in which tariff schedules shall be prepared and arranged, and this is an obviously administrative function with which the courts will

not interfere in advance of a prior application to the Interstate Commerce Commission. *Atchison, T. & S. F. R. Co. v. United States*, 232 U. S. 199, 221, 58 L. ed. 568, 577, 34 Sup. Ct. Rep. 291; *Texas & P. R. Co. v. American Tie & Timber Co.* 234 U. S. 138, 58 L. ed. 1255, 34 Sup. Ct. Rep. 885.

It results that the second claim of the defendant must be rejected because the fare of the plaintiff was paid in money, pursuant to published tariffs, which clearly showed the terms of the shipment of the stock, with transportation for the plaintiff included, in a form which, in the state of this record, must be considered as having been satisfactory to the Interstate Commerce Commission, to which the determination of such form was committed by law.

The claim that *Charleston & W. C. R. Co. v. Thompson*, 234 U. S. 576, 58 L. ed. 1476, 34 Sup. Ct. Rep. 964, rules this case, cannot be allowed, for the sufficient reason that the plaintiff in that case was found to be traveling upon a gratuitous pass, issued without consideration, to a member of the family of an employee. Behind such a pass there lay no such background of court decision and of railroad practice as we have here, giving definite interpretation to the statute as applied to "caretakers' passes," and therefore that case fell without the scope of the *Lockwood* decision and within the principle of *Northern P. R. Co. v. Adams*, 192 U. S. 440, 48 L. ed. 513, 24 Sup. Ct. Rep. 408, and *Boering v. Chesapeake Beach R. Co.* 193 U. S. 442, 48 L. ed. 742, 24 Sup. Ct. Rep. 515.

The judgment of the Circuit Court of Appeals is affirmed.

WASHINGTON SUPREME COURT. (Department No. 1.)

YOUNG MEN'S CHRISTIAN ASSOCIATION OF WENATCHEE, Resp.,
v.

OLDS COMPANY, Impleaded, etc., Appt.

(84 Wash. 630, 147 Pac. 406.)

Subscription — increasing amount of funds — effect.

1. A subscription to a building fund of a specified total for a charitable object is not released by the increase of such total to a much larger amount if the addition is

Note. — The validity and enforceability of subscriptions to charities are discussed in the note to *Y. M. C. A. v. Estill*, 48 L.R.A. (N.S.) 783; and see later cases, *Brokaw v. McElroy*, 50 L.R.A. (N.S.) 835, and *Hurley v. Y. M. C. A.* 52 L.R.A. (N.S.) 220.

covered by further subscriptions so that the enterprise will not fail.

For other cases, see *Subscription*, in *Dig.* 1-52 N. S.

Same — permitting work — estoppel.

2. A subscriber to a fund for a charitable object who permits work to progress in carrying on the enterprise for a length of time without objection cannot secure release from his subscription because the plans have been changed.

For other cases, see *Estoppel*, III. g, 1, in *Dig.* 1-52 N. S.

(April 5, 1915.)

APPPEAL by the defendant corporation from a judgment of the Superior Court for Chelan County in plaintiff's favor in an action brought to recover the amount of a subscription to a building fund. Affirmed.

The facts are stated in the opinion.

Messrs. Reeves, Crollard, & Reeves, for appellant:

The contract is ambiguous.

Causten v. Barnette, 49 Wash. 659, 96 Pac. 225; Chicago, R. I. & P. R. Co. v. Denver & R. G. R. Co. 143 U. S. 596, 36 L. ed. 277, 12 Sup. Ct. Rep. 479; Reed v. Merchants' Mut. Ins. Co. 95 U. S. 23, 24 L. ed. 348; Page, Contr. § 1126; Strong v. Eldridge, 8 Wash. 595, 36 Pac. 969; Dyer v. Middle Kittitas Irrig. Dist. 25 Wash. 80, 64 Pac. 1009.

Messrs. Cade & Barrows, for respondent:

The contract is simple, plain, and complete, and it being a complete agreement, the law presumes that the parties set out in the writing all of their contract.

Gordon v. Parke & L. Mach. Co. 10 Wash. 18, 38 Pac. 755; Tobin v. McArthur, 56 Wash. 523, 106 Pac. 180; Michels v. Rustemeyer, 20 Wash. 597, 56 Pac. 380; Allen v. Farmers' & M. Bank, 76 Wash. 51, 135 Pac. 621.

Before parol evidence can be considered for the purpose of explaining the language of a written instrument, it must first appear that the language employed in the instrument is ambiguous, or leaves it indefinite and uncertain as to what the parties intended.

Mooney v. Mooney Co. 71 Wash. 258, 128 Pac. 225; Babcock, C. & Co. v. Urquhart, 53 Wash. 168, 101 Pac. 713; Gilbert Co. v. Husted, 50 Wash. 61, 96 Pac. 835; Marsh v. Wade, 1 Wash. 538, 20 Pac. 578; Gurney v. Morrison, 12 Wash. 456, 41 Pac. 192.

Holcomb, J., delivered the opinion of the court:

Defendants, for and on behalf of appellant, the Olds Company, a corporation, signed and delivered to a solicitor raising L.R.A.1917F.

a fund for the construction of a Young Men's Christian Association building in Wenatchee a subscription agreement in writing, as follows:

\$35,000 Y. M. C. A. Building Fund.

\$250. Wenatchee, Washington, 5-27, 1910.

For the purpose of purchasing a site and erecting a building for the proposed Wenatchee Young Men's Christian Association, and in consideration of the gift of others, I hereby agree to give the sum of \$250 on condition that at least \$25,000 is raised before May 29, 1910. Payable in two equal consecutive instalments: \$125 December 31, 1910. \$125 December 31, 1911.

The Olds Company, by A. J. Olds, A. W. Olds, and J. T. Olds.

Two Hundred and Fifty Dollars Club, 25 needed. (Obtained by Collier of Company I, Collier, Captain.)

The agreement was accepted by the respondent, and subscriptions aggregating the specified sum of \$25,000 were obtained prior to May 29, 1910. The building cost a large sum in excess of the \$35,000 originally contemplated, and other subscriptions were solicited and received to meet the total cost, amounting to \$66,295. Defendants refused to pay the amount of their subscription agreement at the times therein specified, or at all, and this action was begun to recover the amount thereof; and judgment was granted in favor of respondent and against the appellant the Olds Company, a corporation, alone, for the amount of the subscription agreement, with interest. From the judgment the Olds Company appeals.

The appellant first lays great stress upon the clause at the head of the subscription agreement, reading, "\$35,000 Y. M. C. A. Building Fund," the same having been printed in red ink, and insists that this was a guaranty to the subscriber that the building should cost not to exceed \$35,000. Appellant insists that the erection of a building greatly exceeding in cost the original contemplation of \$35,000 was a violation of the subscription agreement, and invalidated it, upon the principle that "any material change in the plan or purpose for which the subscription was made cannot be effected without the consent of the subscriber. He is thereby released unless there has been a waiver, or unless he has estopped himself to deny his consent to the change." 37 Cyc. 498.

The reason underlying that principle is that there is a failure of consideration. Presbyterian Church v. Cooper (First Presby. Church v. Cooper) 112 N. Y. 517, 3 L.R.A. 468, 8 Am. St. Rep. 767, 20 N. E. 352.

It is undoubtedly true that a diversion of the funds from one avowed purpose to another purpose would release a subscriber. Thus, if a subscription were obtained to build a church and it was used to build a business block, the subscriber would be released unless he consented thereto, and so, manifestly, if the funds subscribed were not used at all, but retained and appropriated by the promisee to his own use. But here the funds were not diverted nor misappropriated. They were used to construct the building contemplated. The single condition specified in the agreement was that it was to be effective only upon \$25,000 being subscribed by May 29, 1910. This condition was met. The purpose and plan of the beneficiary were strictly pursued. The fact that the scope and purpose of the beneficiary were enlarged and the subscription fund increased constituted no detriment to appellant, and, in the light of the circumstances, will not release it. Even though representations were positively and expressly made to a subscriber that the building to be constructed should cost no more than \$35,000, "where a representation which induced the subscription is promissory in its nature, and not a statement of existing fact, it has been held that the con-

tract cannot be avoided by the subscriber because of such misrepresentation." 37 Cyc. 494; Paddock v. Bartlett, 68 Iowa, 16, 25 N. W. 906; Perkins v. Bakrow, 45 Mo. App. 248.

It is generally held that if work has been done or expenditure has been made upon the faith of and in reliance upon a subscription, a consideration is thus furnished to support the promise. 37 Cyc. 486; Strong v. Eldridge, 8 Wash. 595, 36 Pac. 696.

Moreover, where the subscriber permits the work to be carried on for a length of time without objection, as was the case here, he will be regarded as acquiescing in the acts done, and will not be relieved from payment of the subscription on the ground that the plan has been changed and the work is of no benefit. *Ex parte Booker*, 18 Ark. 338.

The conditions attached to appellant's subscription promise were fully met. The judgment appealed from is right, and is affirmed.

Morris, Ch. J., and Mount and Parker, JJ., concur.

Petition for rehearing denied.

WASHINGTON SUPREME COURT. (Department No. 1.)

A. W. GREENIUS and Wife, Appts.,
v.
AMERICAN SURETY COMPANY OF NEW
YORK, Impleaded, etc., Respts.
(92 Wash. 401, 159 Pac. 384.)

Sheriff — wrongful arrest — liability on bond.

A constable is liable on his official bond conditioned faithfully to discharge the duties of his office if for the commission of a felony he without warrant assaults and arrests an innocent person without reasonable grounds for believing that he committed the act.

For other cases, see Bonds, II. o, 1, in Dig. 1-52 N. S.

(August 4, 1916.)

A PPEAL by plaintiffs from a judgment of the Superior Court for Snohomish County sustaining a demurrer to the complaint in an action on an official bond. Reversed.

The facts are stated in the opinion.

Note.—The liability of the sureties on the bond of an officer for an illegal arrest is treated in the notes to *Leger v. Warren*, 51 L.R.A. 193, 222, and *Lee v. Charmley*, 33 L.R.A.(N.S.) 275.
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Messrs. Cooley & Horan and R. Mulvihill, for appellants:

Defendants were liable on the official bond.

Paul v. Tierney, 89 Minn. 407, 95 N. W. 219; *Murfree*, Official Bonds, § 211; *Lee v. Charmley*, 20 N. D. 570, 33 L.R.A.(N.S.) 275, 129 N. W. 448; *Martin v. Smith*, 136 Ky. 804, 29 L.R.A.(N.S.) 463, 125 S. W. 249; *Greenberg v. People*, 8 L.R.A.(N.S.) 1223, and note, 225 Ill. 174, 116 Am. St. Rep. 127, 80 N. E. 100; *Kopplekom v. Huffman*, 12 Neb. 95, 10 N. W. 577; *Growbarger v. United States Fidelity & G. Co.* 126 Ky. 118, 11 L.R.A.(N.S.) 759, 128 Am. St. Rep. 274, 102 S. W. 873; *Johnson v. Williams*, 111 Ky. 289, 54 L.R.A. 220, 98 Am. St. Rep. 416, 63 S. W. 759; *Gomez v. Scanlan*, 155 Cal. 528, 102 Pac. 12; *Weber v. Doust*, 81 Wash. 673, 143 Pac. 148; *White v. Jansen*, 81 Wash. 435, 142 Pac. 1140; *Skagit County v. American Bonding Co.* 59 Wash. 1, 109 Pac. 197.

Messrs. Sherwood & Mansfield, for respondent Surety Company:

The surety on the bond of a peace officer

Generally as to the liability of an officer for making an arrest, see notes to *Leger v. Warren*, 51 L.R.A. 193; *Lawton v. Harkins*, 42 L.R.A.(N.S.) 69; and *Brown v. Hadwin*, L.R.A.1915B, 505.

is not liable for acts of such officer performed while acting under color of office.

Marquis v. Willard, 12 Wash. 528, 50 Am. St. Rep. 906, 41 Pac. 889; Felonicher v. Stingley, 142 Cal. 630, 76 Pac. 504; Hawkins v. Thomas, 3 Ind. App. 399, 29 N. E. 157.

Chadwick, J., delivered the opinion of the court:

Defendant Moore is the duly elected, qualified, and acting constable of Monroe precinct in Snohomish county. Respondent American Surety Company is surety upon his official bond. The condition of the bond is: "Now, therefore, if the said Samuel B. Moore will execute all process to him directed and delivered and pay over all moneys received by him by virtue of his office, and in every respect discharge all duties of a constable according to law during the term for which he was elected and until his successor is duly elected and qualified and while he shall act as such constable, and shall faithfully discharge all duties which may be required of him by any law enacted subsequent to the execution of this bond, then this obligation shall be void, otherwise to remain in full force and effect."

A felony had been committed, and Moore, whom we shall refer to as the defendant, was directed to apprehend the guilty parties. The right of a constable to arrest without warrant has not been defined by statute. Authority to do so is to be found in the common law. At common law, a peace officer could arrest without a warrant when he had reasonable grounds for believing that the party arrested had committed a felony. 4 Bl. Com. 292; 3 Cyc. 878; Murfree, Sheriffs, § 1161.

The material parts of the complaint are:

"(3) That on or about the 19th day of July, 1915, a felony was committed at Duvall in the county of King, state of Washington, by some person or persons unknown to these plaintiffs, and the defendant S. B. Moore, as such constable was informed of the commission of said felony and directed to arrest and apprehend the guilty parties. That the said S. B. Moore as such constable, acting upon said information and in pursuance to said directions and by virtue of his authority as constable of said Monroe precinct, but without any warrant or other written process, did arrest these plaintiffs, and in making said arrest the said S. B. Moore did commit an assault upon each of said plaintiffs in said Monroe precinct, and at the same time and place, by then and there shooting the said Minnie Greenius, plaintiff, and as a result of said shooting the said Minnie Greenius was struck by a bullet in the hip joint and a portion of

said bullet passing on down through the leg and lodged in the flesh about 6 inches below the hip joint; that the said Minnie Greenius has suffered great pain and anguish as the result of said injury and shooting. That said injury is permanent and said Minnie Greenius will continue to suffer great pain and anguish in the future. That said constable in shooting at these plaintiffs mistook them for the persons who committed a felony."

"(5) That immediately after said assault upon these plaintiffs by the said shooting the said constable took both of said plaintiffs into his custody, claiming that said plaintiffs were the persons who committed the felony aforesaid at Duvall, and said constable held these plaintiffs in custody by virtue of his authority as constable, for the period of six hours, in Monroe precinct. That as a result of said holding in custody the plaintiffs and each of them suffered great mental anguish, pain, and humiliation."

"(6) That said plaintiffs did not commit any felony at any time, and the said constable did not have any reasonable grounds for believing that these plaintiffs committed any felony at any time or place."

It is insisted by counsel for respondent, and the court below so held, that the complaint sets forth a naked trespass, an act done colore officii, for which the surety is not liable. Much mental energy has been expended in drawing distinctions between acts of public officers done colore officii, and acts done virtute officii, and we shall not undertake to assemble definitions. Our understanding is that when an officer acts in the performance of his duty, and, so acting, acts to the hurt or annoyance of a third party or an innocent party, he is nevertheless acting in virtue of his office. That is to say, if his office gives him authority to act, he is acting in virtue of his office, although in the performance of a specific duty he improperly exercises his authority. For instance, if an officer have a warrant for A, and, without reasonable ground for believing him to be the guilty person, takes B, he is still acting in virtue of his office. If it were not so, he would never be liable upon his bond. Nor would his surety ever be liable except for his lawful acts, which is reductio ad absurdum, for it follows that there could be no liability if there had been no breach of duty.

An official bond is a promise to the state and to all third parties that, in the execution of legal duty, the officer will do it well, and without hurt to strangers to his process. The best argument against attempting to fix an arbitrary line of demarcation between acts done colore officii and those

done in virtue of office is that the cases, after a hundred years of exposition, are in hopeless and interminable confusion. The later authorities preponderate, however, in favor of the doctrine that if an officer have process against A, and, without reasonable ground for believing him to be the guilty person, execute it upon the person or property of B, his sureties are liable where the bond is conditioned for the faithful performance of the duties of his office. Throop, Pub. Off. § 240; Murfree, Sheriffs, §§ 46a, 47a; Brandt, Suretyship & Guaranty, 2d ed. § 566.

A complaint, in legal effect not unlike the one before us, was held good as against a motion in arrest of judgment based upon the ground that the complaint did not state a cause of action in that it showed that defendant was a trespasser, in *Clancy v. Kenworthy*, 74 Iowa, 740, 7 Am. St. Rep. 508, 35 N. W. 427. In *Hall v. Tierney*, 89 Minn. 407, 95 N. W. 219, the court says: "And this attempted distinction led to very much refinement and fanciful reasoning by the courts, as will be seen upon examining the authorities. . . . But of later years, and certainly in this court, this refined and fanciful distinction has been disregarded, and it has been held, in effect, that for improper acts performed by an officer under color of his office the sureties upon his bond can be held liable. . . . 'The object of an official bond is to obtain indemnity against the misuse of an official position for wrong purposes; and that which is done under color of office, and which would obtain no credit except for its appearing to be a regular official act, is within the protection of the bond, and must be made good by those who signed it.' Murfree, Official Bonds, § 211."

The claimed distinctions between acts done *colore officii* and acts done *virtute officii* are pointed out and rejected in *Lee v. Charmley*, 20 N. D. 570, 33 L.R.A. (N.S.) 275, 129 N. W. 448: "The distinction made between the official acts that serve as the basis of these conflicting lines of authority is that 'acts done *virtute officii* are where they are within the authority of the officer, but in doing them he exercises that authority improperly or abuses the confidence which the law reposes in him; while acts done *colore officii* are where they are of such a nature that his office gives him no authority to do them.' . . . The almost uniform current of the later cases, however, regards wrongful acts of a public officer *colore officii* as official acts, for which the sureties upon his bond are liable."

See also *Lammon v. Feusier*, 111 U. S. 17-21, 28 L. ed. 337, 338, 4 Sup. Ct. Rep. 286, where the authorities are collected. L.R.A.1917F.

We think, too, that this court is committed to the later and better rule, and is in line with the preponderating authority.

We held the surety of an officer liable for a wrongful arrest in *Weber v. Doust*, 81 Wash. 668, 143 Pac. 148. This holding was not questioned on rehearing (a. c. 84 Wash. 330, 146 Pac. 623). In *White v. Jansen*, 81 Wash. 435, 142 Pac. 1140, although holding that a reasonable ground for believing that the plaintiff had committed a felony was a defense, the liability of the officer, in the absence of such probable cause, was not questioned. Nor do we attach the meaning to paragraph 6 of the complaint that is given to it by respondents. It is a proper allegation of the ultimate fact, the affirmation and denial of which make up the ultimate issue.

It may well be questioned whether the complaint would be good under the doctrine of *White v. Jansen*, *supra*, where it is said: "We think it was therefore a question for the jury whether the sheriff had reasonable grounds for supposing or believing that the respondent was the person charged with the crime,"—or, to meet the facts in this case, the persons who had committed a felony.

We are told that the judgment was based upon *Marquis v. Willard*, 12 Wash. 528, 531, 532, 50 Am. St. Rep. 906, 41 Pac. 890. Granting that the holding of the court in that case—that the chief of police and ex officio city jailer had no authority in law to incarcerate the plaintiff or any other person—was correct as applied to the facts involved, it can have no application in a case of this kind, for here defendant had authority to make arrests. If the jailer, having authority to confine a prisoner in the city jail, had, in breach of his duty, put the prisoner to hard labor, or otherwise mistreated or maltreated him, the cases would be parallel. This distinction is noted in the opinion:

"The most of the cases which have held that the sureties were liable even though the action of the officer was but a naked trespass, have been those in which the officer, having process in his hands which authorized his acts as against the person or property therein named, had wrongfully enforced the same against other property or a different person. It is clear that in such a case the process furnishes no justification to the officer, and he is as such a trespasser when by virtue thereof he levies upon the property of a person not named therein as he would have been without process. . . .

"For an officer to serve process placed in his hands for that purpose is a strictly official act, and while such process would only justify him in a proper service of it, yet an improper service might be in an attempt

to obey its command. It was as an officer that he received the process, and his acts under it, whether rightful or not, may well be held to have been by virtue of the office. But for the office he would not have had the process. Without it his acts would have been impossible. Hence such acts might well be said to be official. And since under all the authorities the sureties are liable for acts done by virtue of the office, there is reason for holding them liable for the wrongful acts of the officer in the execution of process, even though in doing them he so departs from its command as to be a trespasser. But, when an officer without process does an act which under the law he has no right to do, he cannot in any proper sense be said to be acting by virtue of his office, and it is going far enough to hold that in so doing he is acting under color of office. Such is the reasonable rule."

We think the use of the words, "when an officer without process does an act which under the law he has no right to do," was ill advised. The court should have said, rather, that when one who is an officer is engaged outside of the performance of any duty imposed by law, his surety is not liable. For, as we have said, and there can be no doubt as to the present state of the law, a felony having been committed, an officer,

having authority to arrest without warrant or process, subject only to proof of reasonable cause, as explained in the White Case, is engaged in the performance of official duty when he goes in search of the offender. It makes no difference whether he is with or without process or warrant. He is an officer just the same, and his acts, whether right or wrong, are in virtute officii. It is only necessary to read the cases to understand that no other rule is either practical or tolerable. If an officer engaged in a search for either goods or persons can run amuck, saying, "This I did in excess and in violation of my duty, and my bondsmen are not, therefore, liable," we can imagine no case where a surety might be held. The primary purpose of a bond is to insure third parties against the mistakes and trespasses of officers when officially engaged. Defendant was guilty of a breach of official duty, and it follows that his surety must answer to the merit of the complaint.

Reversed and remanded, with directions to overrule the demurrer of the respondent.

Morris, Ch. J., and Mount, Fullerton, and Ellis, JJ., concur.

Petition for rehearing denied.

LOUISIANA SUPREME COURT.

SUCCESSION OF ADONIS LE BLANC.

(— La. —, 76 So. 223.)

Executors and administrators — status of life insurance.

1. Life insurance made payable to the executors, administrators, or assigns of the assured forms a part of his estate at his death; and the proceeds or avails of such insurance are either community property or the separate property of the estate of the assured, depending upon whether the assured was married or single when the insurance contract was made, not upon his marital status at the time of his death.

For other cases, see *Insurance*, VI. d, 2, in Dig. 1-52 N. S.

Same — exemption — extent.

2. The object of the Act No. 189 of 1914, to exempt the proceeds of avails of all life insurance from all liability for any debt, ex-

cept a debt secured by a pledge or an assignment of the policy, or an advance payment made on the policy, is expressed in the title, "An Act to Exempt the Proceeds of Life Insurance from liability for debt." For other cases, see *Statutes*, I. c, 2, in Dig. 1-52 N. S.

Constitutional law — exemption of insurance — obligation of contracts.

3. A statute exempting the proceeds or avails of life insurance from liability for debt does not impair the obligation of a contract of insurance made before the passage of the act.

For other cases, see *Constitutional Law*, II g, in Dig. 1-52 N. S.

Executors and administrators — exemption of life insurance.

4. The exemption of the proceeds or avails of all life insurance from liability for any debt, except a debt secured by a pledge or an assignment of the policy, or an advance payment made on the policy, by the Act No. 189 of 1914, is not merely a personal exemption in favor of the person insured, but inures to the benefit of his heirs at law, and exempts the proceeds or avails of life insurance made payable to the executors or administrators or assigns of the assured from liability for his debts, or the debts of his succession, at his death.

For other cases, see *Insurance*, VI. d, 2, d, in Dig. 1-52 N. S.

Headnotes by O'NEILL, J.

Note. — As to whether the exemption of proceeds or avails of life insurance inures to the benefit of the estate where the policy is payable to executors or administrators, or estate, see annotation following this case, post, 1143.

L.R.A.1917F.

Same — expense of administration — what bears.

5. If the assets of an estate, including the half interest of the deceased in the community property other than the proceeds or avails of the insurance on his life, are sufficient to pay the law charges, costs of administration, expenses of last illnesses, and funeral expenses, there is no reason for requiring the half interest of the heirs of the predeceased wife in the community property to bear any part of the costs of administering the estate of the deceased husband.

For other cases, see Executors and Administrators, IV. c, in Dig. 1-52 N. S.

(June 11, 1917.)

APPEAL by opponents and creditors from a judgment of the Judicial District Court for the Parish of Vermilion, confirming for the most part the account of the administrators of Adonis Le Blanc, deceased, indicating a method for settlement of the estate. Modified and affirmed.

The facts are stated in the opinion.

Messrs. Smith & Carmouche, for appellants Crowley Bank et al.:

The act exempts the proceeds of these policies.

Holden v. Stratton, 198 U. S. 202, 49 L. ed. 1018, 25 Sup. Ct. Rep. 656; Flood v. Libby, 38 Wash. 366, 104 Am. St. Rep. 851, 80 Pac. 533; Holmes v. Marshall, 145 Cal. 777, 69 L.R.A. 67, 104 Am. St. Rep. 90, 79 Pac. 534, 2 Ann. Cas. 88.

Messrs. Mouton & Debaillon, for appellees:

The exemption established by Act 189 of 1914, when the life insurance policy is payable to the insured, is for the benefit of the insured; said exemption being extended to all policies of life insurance, including those payable to the insured or his estate.

Flood v. Libby, 38 Wash. 366, 107 Am. St. Rep. 851, 80 Pac. 533; Holden v. Stratton, 198 U. S. 202, 49 L. ed. 1018, 25 Sup. Ct. Rep. 656; Holmes v. Marshall, 145 Cal. 777, 69 L.R.A. 67, 104 Am. St. Rep. 86, 79 Pac. 534, 2 Ann. Cas. 88.

The exemption under Act 189 of 1914 is a personal and optional right in favor of the debtor which ceased at his death, and does not continue thereafter in favor of his widow or heirs.

Denis v. Gayle, 40 La. Ann. 286, 4 So. 3; Hebert v. Mayer, 42 La. Ann. 839, 8 So. 590; Abbeville Rice Mill v. Shambaugh, 115 La. 1047, 40 So. 453; Briant v. Lyons, 29 La. Ann. 64; Mallon v. Gates, 26 La. Ann. 610; Martin v. Kirkpatrick, 30 La. Ann. 1214; Allen v. Carruth, 32 La. Ann. 444; Re Kyle, 121 La. 888, 46 So. 910; Fruge v. Fulton, 120 La. 750, 45 So. 505; Cunningham v. Steidman, 133 La. 44, 62 So. 346; L.R.A.1917F.

Harrelson v. Webb, 124 La. 1008, 134 Am. St. Rep. 529, 50 So. 833; Tugwell's Succession, 43 La. Ann. 879, 9 So. 499; Justus's Succession, 44 La. Ann. 721, 11 So. 95.

An insurance policy on the life of the husband in favor of the wife, if living, if not, to his executors, administrators, or assigns, is one in his favor as alternate beneficiary; and in case of her death before him becomes automatically payable to his executors, administrators, or assigns, and not to her heirs.

Roder's Succession, 121 La. 692, 46 So. 697, 15 Ann. Cas. 526; Andrus v. Fidelity Mut. L. Ins. Asso. 168 Mo. 151, 67 S. W. 582; Schumacher v. Schumacher, 32 Tex. Civ. App. 497, 75 S. W. 50.

The policy is considered an incorporeal right or chose in action, which may be given in payment of a debt, sold, or pledged.

25 Cyc. 709; Metropolitan L. Ins. Co. v. Ellison, 72 Kan. 199, 3 L.R.A.(N.S.) 934, 115 Am. St. Rep. 189, 83 Pac. 410, 7 Ann. Cas. 909; Rylander v. Allen, 125 Ga. 206, 6 L.R.A.(N.S.) 128, 53 S. E. 1032, 5 Ann. Cas. 355; Alba v. Providence Sav. Life Assur. Soc. 118 La. 1021, 43 So. 663; Lake v. New York L. Ins. Co. 120 La. 873, 45 So. 959; Stuart v. Sutcliffe, 46 La. Ann. 240, 14 So. 912; Hays v. Lapeyre, 48 La. 749, 25 L.R.A. 647, 19 So. 821; Re Moseman, 38 La. Ann. 219; Verneuille's Succession, 120 La. 607, 45 So. 520.

Messrs. Broussard & Samson, for interveners:

The money must be paid to the estate of Adonis Le Blanc.

Roder's Succession, 121 La. 692, 46 So. 697, 15 Ann. Cas. 526; Martin v. Modern Woodmen, 253 Ill. 400, 97 N. E. 693, Ann. Cas. 1913A, 299; Anderson v. Groesbeck, 26 Colo. 3, 55 Pac. 1086; Andrus v. Fidelity Mut. L. Ins. Asso. 168 Mo. 151, 67 S. W. 582; Schumacher v. Schumacher, 32 Tex. Civ. App. 497, 75 S. W. 50.

The exemption is clearly in favor of the assured and beneficiary under the policies.

Flood v. Libby, 38 Wash. 366, 107 Am. St. Rep. 851, 80 Pac. 533; Holmes v. Marshall, 145 Cal. 777, 69 L.R.A. 67, 104 Am. St. Rep. 86, 79 Pac. 534, 2 Ann. Cas. 88; Holden v. Stratton, 198 U. S. 202, 49 L. ed. 1018, 25 Sup. Ct. Rep. 656.

Exemptions create a personal privilege in favor of the debtor which cannot be transmitted.

Briant v. Lyons, 29 La. Ann. 64; Van Wickle v. Landry, 29 La. Ann. 330; Denis v. Gayle, 40 La. Ann. 292, 4 So. 3; Tugwell's Succession, 43 La. Ann. 879, 9 So. 499; Jones v. McCrary, 123 Ga. 282, 51 S. E. 349; Givens v. Hudson, 64 Tex. 471; Roots v. Robertson, 93 Tex. 365, 55 S. W. 308; Oxford v. Colvin, 134 La. 1094, 64 So. 919;

Jasper County v. Allman, 142 Ind. 573, 39 L.R.A. 67, 42 N. E. 206; Kimmel v. Bean, 68 Kan. 598, 64 L.R.A. 788, 104 Am. St. Rep. 415, 75 Pac. 1118; Taylor v. Winnie, 59 Kan. 16, 68 Am. St. Rep. 339, 51 Pac. 890.

O'Neill, J., delivered the opinion of the court:

Adonis Le Blanc took out three policies of insurance for \$2,000 each, known as 20-annual-payment policies, on his life, during his marriage with Rose Thibault Le Blanc. Two of the policies, in the Equitable Life Assurance Society, were made payable "to his wife, Rose Le Blanc, if living, if not then to the assured's executors, administrators, or assigns, subject to the right of the assured to change the beneficiary." The third policy, in the Fidelity Mutual Life Insurance Company of Philadelphia, was made payable "to his wife, Rose Le Blanc, or, if the insured (should) survive the aforesaid beneficiary, to the administrators, executors, or assigns of the insured."

The beneficiary named in the policies, Rose Thibault Le Blanc, died, on the 16th of December, 1914, leaving eight children, issue of her marriage with Adonis Le Blanc. On the 30th of December, 1915, the surviving husband, availing himself of the privilege of changing the beneficiary named in the two policies in the Equitable Life Assurance Society, had them made payable to his estate. No change was made as to the beneficiary named in the policy in the Fidelity Mutual Life Insurance Company of Philadelphia; but, like the two policies in the Equitable Life Assurance Society, it became, by the death of Mrs. Rose Thibault Le Blanc, payable to the estate, the administrators or executors, of the assured.

Adonis Le Blanc continued to pay the premiums on the three policies after the death of his wife, and kept the insurance in force to the date of his death; that is, the 14th of January, 1916. Two of his children, J. Earl Le Blanc and Mrs. Oneida Le Blanc Melancon, had reached the age of majority. Mr. and Mrs. Melancon were appointed administrators of the succession of her father, and the Crowley Bank & Trust Company was appointed tutor of the six minor children.

The Fidelity Mutual policy, with the accumulations, at the date of the death of the insured amounted to \$3,038, on which the insured had obtained a loan from the company amounting to \$811.27 at the time of his death. The net proceeds or avails of the life insurance collected by the administrators, therefore, amounted to \$6,226.73.

Other property belonging to the community theretofore existing between the as-

sured and his wife consisted of real estate valued at \$1,375, and personal property valued at \$496.50. It appears that the community owed the separate estate of the assured \$226.12 for premiums paid on the insurance policies after the death of Mrs. Le Blanc, and \$90.58 for certain pavement certificates paid by him for the improvement of the community property after her death. The separate estate of Adonis Le Blanc also owns eighty-two shares of the capital stock of the Stauffer-Godchaux Company, valued at \$4,100, on which there is a vendor's lien in favor of Frank A. Godchaux. Albert Stauffer, and O. A. Broussard for an amount exceeding the value of the stock. The administrators also have in their possession \$482.89 cash belonging to the separate estate of Adonis Le Blanc. It appears, therefore, that the assets of the separate estate of Adonis Le Blanc, exclusive of any interest in the life insurance, and excluding also the debts due by the community to the separate estate and the capital stock in the Stauffer-Godchaux Company affected by the vendor's lien, amount to \$1,418.64; that is, about \$200 more than the law charges, costs of the administration, expenses of last illness, and funeral expenses. The other debts due by Adonis Le Blanc at the time of his death, besides the debt of \$6,625 secured by the vendor's lien on the capital stock in the Stauffer-Godchaux Company, amounted to only \$267.35.

The administrators filed an account or a statement showing the proposed method of distribution of the assets of the estate, and prayed for judgment approving the account and ordering that a settlement be made accordingly. They treated the \$6,226.73 collected from the insurance companies as an asset of the community, less the premiums paid by Adonis Le Blanc after the death of his wife, amounted to \$226.12, which amount was charged to the community and credited to the separate estate of Adonis Le Blanc.

J. Earl Le Blanc and the tutor of the minor children of Adonis Le Blanc filed an opposition to the account and manner of settlement of the succession proposed by the administrators, on the ground that the entire proceeds or avails of the life insurance are by the Act No. 189 of 1914 exempt from liability for any debt of the succession of Adonis Le Blanc, and should be paid to his heirs at law.

Frank A. Godchaux, Albert Stauffer, and O. A. Broussard, as creditors of the succession, opposed the account and the proposed manner of settlement of the succession, claiming that the entire proceeds or avails of the life insurance should be treated as an asset of the separate estate of Adonis Le

Blanc, not an asset of the community, and should be applied to the payment of his debts. In the alternative,—that is, in the event the court should hold that the proceeds or avails of the life insurance should be treated as an asset of the community, and not of the separate estate of Adonis Le Blanc,—these three creditors claimed that the estate of the deceased wife of Le Blanc should bear a proportionate share of the law charges and costs of the administration of his estate.

In answer to the opposition filed by J. Earl Le Blanc and the tutor of the minor children of Adonis Le Blanc, the creditors, Godchaux, Stauffer, and Broussard, contend that the Act No. 189 of 1914, purporting to exempt the proceeds or avails of life insurance from liability for any debt, is unconstitutional, in that the text is broader than the title of the statute; and that the statute cannot, in this case, have the retroactive effect of impairing the obligations of contracts. In the alternative, they contend that if the statute should be held constitutional, the exemption was personal to and in favor of the insured, and did not survive in favor of his heirs at law.

Other oppositions were made to the account of the administrators and proposed manner of settlement of the estate, which, however, are not involved in the present appeal.

Judgment was rendered dismissing the opposition of J. Earl Le Blanc and of the tutor of the minor children of Adonis Le Blanc, at their cost, rejecting the demand of Godchaux, Stauffer, and Broussard to have the proceeds or avails of the life insurance treated as an asset of the separate estate of Adonis Le Blanc, but allowing their alternative demand that the estate of the deceased wife of Adonis Le Blanc should be charged with a proportionate share of the costs of the administration of this estate. J. Earl Le Blanc and the tutor of the minor children of Adonis Le Blanc, on the one hand, and the creditors, Godchaux, Stauffer, and Broussard, on the other hand, have appealed from the judgment.

It is argued on behalf of the creditors, Godchaux, Stauffer, and Broussard, that, inasmuch as the proceeds or avails of the life insurance would, if the wife of the insured had survived him, belong to her separately and individually, therefore the life insurance payable to the estate of the assured should belong to his separate estate, not to the community. But the learned counsel who advance that argument overlook the fact that the proceeds or avails of life insurance in favor of a beneficiary named in the policy, other than the insured, belong to the beneficiary named in the policy, and do

not form part of the estate of the insured at his death. In fact, the taking out of life insurance in favor of the wife of the insured is in the nature of a donation by the husband to the wife. Life insurance in favor of the estate, the executors or administrators, of the person insured, forms a part of his estate at his death; and the status of the proceeds or avails of such life insurance—that is, whether it is community property or property of the separate estate of the insured—depends upon whether the contract of insurance was made during the marital community or when the insured was single. The status of the proceeds or avails of such insurance, whether community property or the separate property of the insured, is not governed by the marital status of the insured at the time of his death. See *Buddig's Succession*, 108 La. 406, 32 So. 361; *Vernuille's Succession*, 120 La. 605, 45 So. 520; *Roder's Succession*, 121 La. 692, 46 So. 697, 15 Ann. Cas. 526. The account of the administrators is correct in so far as the amount of the proceeds or avails of the life insurance is credited to the community, and in so far as the amount of the premiums paid after the death of the wife of the assured is charged to the community and credited to the separate estate of the assured. But that is a mere matter of book-keeping, in this case, because the proceeds or avails of the life insurance are by the Act No. 189 of 1914 exempt from liability for debt; and our conclusion that the proceeds or avails of the life insurance in question belonged to the community, and not to the separate estate of the insured, is of no practical importance in this case.

The contention of the learned counsel for the creditors, Godchaux, Stauffer, and Broussard, that the Act No. 189 of 1914 contains objects or provisions not expressed in its title, and that the statute therefore violates article 31 of the Constitution of this state, is founded upon the fact that the statute purports to exempt from liability for debt the *proceeds or avails* of all life insurance, whereas the object expressed in the title of the act is to exempt only the *proceeds* of life insurance. It is contended that the "proceeds" of life insurance means the total amount collected from the insurance company or companies, whereas the "avails" of life insurance means only the balance of the insurance money remaining after the payment of the debts due by the assured or his succession. Our opinion is that the word "avails," as used in this statute, means the net amount or proceeds collected from the insurance company or companies, and that the words "proceeds" and "avails," in the expression, "the proceeds or avails of all life insurance," are synonymous

terms. See Webster's New Int. Dict. and the Century Dict. verbo "avails." See also 6 C. J. 872; 4 Cyc. 1075; 3 Am. & Eng. Enc. Law, 2d ed. 518. It is true the word "avails," in a sense, means only the net proceeds. In that sense, it means the net amount of insurance money collected, after deduction of any debts for which the proceeds or avails of life insurance are not exempt from liability under the statute; as, for example, the amount of a loan or advance payment made on the policy of insurance, or a debt secured by a pledge or assignment of the policy. However, the word "proceeds" being, in a sense, a more comprehensive term than the word "avails," it cannot be said that the terms of the statute, exempting the *proceeds* or *avails* of all life insurance, is broader or more comprehensive than the object expressed in the title of the act, to exempt the *proceeds* of all life insurance. To maintain what the learned counsel contend in their brief, that the "avails" of life insurance means only the amount remaining after payment of the debts due by the estate of the assured, would result in a contradiction of terms, and stultify the act of the legislature. Our conclusion is that the object of the statute is expressed in its title.

The contention that the exemption of the proceeds or avails of the life insurance in contest, under the Act No. 189 of 1914, would give the statute the retroactive effect of impairing the obligations of contracts, refers to the contracts of insurance, not to the contracts by which the debts, for which the proceeds or avails of the life insurance are sought to be held liable, were incurred. It is admitted that the debts due to the creditors, Godchaux, Stauffer, and Broussard, were contracted after the passage of the Act No. 189 of 1914; and that appears to be true of all of the debts due by the deceased, Adonis Le Blanc, or his succession. The statute exempting the proceeds or avails of life insurance from liability for any debt does not in any way impair or affect the obligation of a contract of insurance entered into before the passage of the act.

The contention urged most seriously by the learned counsel for the administrators and for the creditors, and maintained by the district judge, is that the exemption of the proceeds or avails of life insurance made payable to the insured, his executors or administrators, as provided by the Act No. 189 of 1914, is personal to the insured, and does not survive in favor of his heirs at law.

The exact language of the statute is that the proceeds or avails of all life—including fraternal and co-operative, health, and accident—insurance shall be exempt from liability for any debt, except for a debt secured

by a pledge of such policy, or any rights under such policy that may have been assigned, or any advance payments made on or against such policy.

The terms of the statute are sufficiently broad and comprehensive to exempt the proceeds or avails of life insurance from liability for debts due by the succession of the insured after his death, as well as to exempt the cash value or surrender value of policies of insurance during the lifetime of the insured. In fact, it is difficult to conceive of more comprehensive or plainer language than the legislature has used to exempt from liability for the debts of the insured, after his death, the proceeds or avails of life insurance paid or payable to his estate, his executors or administrators. The "proceeds" or "avails" of life insurance means the amount collected from the insurance company or companies; and, as a general rule, there are no proceeds or avails of life insurance until the death of the insured. For example, fraternal life insurance has no commercial or cash value during the lifetime of the insured, and could not possibly be levied upon or rendered liable for debt during his lifetime. We cannot believe that the legislature intended to exempt from seizure or liability for debt, only during the lifetime of the insured, the cash value or surrender value of policies of life insurance made payable to the insured, his executors or administrators, and did not intend to exempt from liability for debts of the insured the proceeds or avails of life insurance made payable to his estate, and collected by his executors or administrators after his death.

The proceeds or avails of life insurance in favor of a beneficiary other than the estate of the insured, his executors or administrators, are not liable for the debts of the insured. Hence it could not have been the intention of the legislature that the exemption from liability for debts of the insured, of the proceeds or avails of life insurance collected after his death, should apply only to insurance in favor of a beneficiary other than the person whose life was insured, and not to insurance in favor of the estate, the executors or administrators, of the insured.

It is contended by the learned counsel for the administrators and the creditors that the mere fact that life insurance is made payable to the administrators, executors, or assigns of the assured implies that the proceeds or avails are liable for the debts to be paid by the executors or administrators. If that had been the idea or intention of the legislature, there would have been no reason for excepting from the operation of the statute a debt secured by a pledge or assignment of a policy of insurance. It is evident, from the exception of a debt secured

by a pledge or assignment of a life insurance policy, that the legislature did not intend that the making of life insurance payable to the estate, the executors, administrators, or assigns, of the assured, should be regarded as a pledge or an assignment of the proceeds or avails of the insurance to the creditors of the assured. The express mention of a debt secured by a pledge or assignment of an insurance policy, a loan, or advance payment made on or against the policy, as excepted from the operation of the statute, implies that there are no other exceptions. "Expressio unius personæ vel rei est exclusio alterius."

It is argued on behalf of the administrators and the creditors that an exemption of any property from seizure or liability for debt is personal to those in whose favor it is granted, and does not survive in favor of their heirs. A number of decisions are cited in support of the proposition that the homestead exemption in favor of the head of a family did not survive in favor of the heirs at law of a deceased beneficiary, until it was expressly provided, in the Constitution of 1879, that the benefit of the homestead exemption might be claimed by the surviving husband or wife or minor children of a deceased beneficiary. The doctrine of those decisions has no application to the exemption claimed in this case, for several reasons. First of all, the exemption under consideration, unlike the homestead exemption, is not granted in favor of, or expressly confined to, any particular person or designated class of persons or individuals. The statute merely exempts the proceeds or avails of all life insurance from liability for any debt, except a debt secured by a pledge or assignment of a policy, or an advance payment or loan on the policy, without regard to who the debtor may be. Secondly, the language of the Act No. 189 of 1914 is that the proceeds or avails of all life insurance shall be "exempt from all liability for any debt;" whereas the language of the Constitution exempting the homestead is that it "shall be exempt from seizure and sale." And, thirdly, it is not only the insurance itself, or the cash value or surrender value of the insurance while in force, but the proceeds or avails—the fund actually realized from the insurance—that is exempt from liability for any debt. Our opinion, is that the language of the statute, that the proceeds or avails of all life insurance shall be exempt from all liability for any debt, expresses the intention that the exemption shall survive the person insured and inure to the benefit of his heirs at law if the insurance be payable to his estate, his executors or administrators.

In *Holmes v. Marshall*, 145 Cal. 777, 69 L.R.A.1917F.

L.R.A. 67, 104 Am. St. Rep. 86, 79 Pac. 534, 2 Ann. Cas. 88, it appears there were three paid-up life insurance policies, two payable to the wife of the assured, and one payable to his estate, his administrators or executors. At the death of the insured, the amount of the two policies made payable to his wife was paid to her, and the amount of the policy that was payable to his estate, his administrators or executors, was paid to the administrators. The balance remaining from that policy, after payment of the costs of administration, was set apart to the widow, as exempt from liability for any debts of the estate, under a provision of the Code of Civil Procedure of California. The proceeds of all three of the policies were deposited by the widow in a bank in Los Angeles, and, after she had drawn against the account from time to time, the balance in bank was seized under a writ of attachment to satisfy a debt due by the widow. She contended that the fund was exempt from seizure, under the section of the Code of Civil Procedure which declared: "All moneys, benefits, privileges, or immunities accruing or in any manner growing out of any life insurance. . . . [are] exempt from execution." Code Civ. Proc. § 690, subd. 18. The seizing creditor contended that the exemption extended only to debts due by the person whose life was insured and who had paid the premiums; but that it did not continue, after his death, in favor of the beneficiary, whether the insurance was payable to the estate of the person insured, his executors or administrators, or to some other person named in the policy of insurance. It was held that the words, "exempt from execution," meant exempt from execution for any debt, whether due by the estate of the insured, or due by the beneficiary named in the policy of insurance. It was observed that in Kentucky and Minnesota the statutes exempting certain insurance benefits, reliefs, etc., from execution or liability for any debt of a member were construed so as to exempt the funds resulting from the insurance benefits or relief from liability for a debt due by the member of the insurance society, or by a beneficiary to whom the benefit or relief was paid, or who was entitled to the benefit or relief. It was observed that in New York a statute declaring certain insurance funds or benefits exempt from execution or liability for any debt of a deceased member of an insurance society exempted the fund from seizure or liability only for a debt of the deceased member insured, and did not extend to debts due by the beneficiary who received the fund. It was also observed that, although the Kentucky and Minnesota decisions had been criticized by Freeman in

his book on Executions, 3d ed. vol. 2, § 234b, the author had admitted that if the statutes of those states had stopped with the words, "exempt from execution," there would be no doubt of the exemption in favor of the beneficiary; but he reasoned that the additional words of the statute, "to pay any debt or liability of a member," indicated that the legislature had in mind only the debts or liabilities of the members of the insurance association, and hence, after the benefit was received by a beneficiary other than the member insured, it was subject to the general laws relating to executions or liability for debts of the person or persons who had received the benefit.

It is not necessary to apply the exemption, in the case before us, to the extent to which it was applied under the statutes of Kentucky, Minnesota, and California.

A statute of Washington exempted the proceeds or avails of all life and accident insurance from all liability for any debt. In *Flood v. Libby*, 38 Wash. 366, 107 Am. St. Rep. 851, 80 Pac. 533, the question at issue was whether the statute applied only to such life insurance as was payable to a beneficiary other than the insured, or applied also to an endowment policy of insurance payable to the insured or to his estate, and having a cash value during his lifetime. It was held that the language of the statute was so sweeping and comprehensive that it exempted from liability for a debt of the assured, during his lifetime, an endowment policy payable to the assured or his estate and having a cash surrender value. It was not disputed, but was, on the contrary, conceded, that the proceeds or avails of the life insurance made payable to the assured

or his estate would be exempted from liability for the debts of the assured at his death.

Our conclusion is that the fund of \$6,226.73, being the proceeds or avails of the life insurance collected by the administrators, is exempt from liability for any debts of the insured, Adonis Le Blanc, or of his succession, and must be paid to his heirs at law.

As the assets of the estate of Adonis Le Blanc, including his half interest in the community property other than the proceeds or avails of the life insurance, are sufficient to pay the law charges, costs of administration, expenses of the last illness, and funeral expenses of the deceased, there is no reason whatever for requiring the half interest belonging to the heirs of Mrs. Le Blanc in the community property to bear any part of the cost of administering his estate.

For the reasons assigned, the judgment appealed from is amended so as to exempt the fund of \$6,226.73, being the proceeds or avails of the life insurance, from liability for any debt of Adonis Le Blanc, or of his succession, and require the administrators to pay that fund to the heirs at law of the deceased, Adonis Le Blanc; and the judgment appealed from is further amended by exempting the property or funds of the estate of the deceased, Rose Thibault Le Blanc, from the payment of any of the costs of administration of the estate of Adonis Le Blanc. As thus amended, the judgment appealed from is affirmed. The appellants, Godchaux, Stauffer, and Broussard, are to pay the costs of this appeal.

Sommerville, J., takes no part.

Annotation—Statutory exemption of proceeds or avails of life insurance as insuring to benefit of estate where policy is payable to executors or administrators, or estate.

As to exemption of proceeds of life insurance after loss, from beneficiary's debts, see annotation to *Reiff v. Armour & Co.* L.R.A.1915A, 1201.

As to whether paid-up or endowment policies are within statutes exempting life insurance policies, see annotation to *Bailey v. Wood*, 25 L.R.A.(N.S.) 722.

For other notes dealing with the right of exemption of insurance money, see L.R.A. Indexes, under the title, "Exemptions."

The scope and extent of the exemption of the proceeds of life insurance policies from the payment of debts depend upon the wording of the statutory provisions. Some of these are sweeping in their L.R.A.1917F.

phraseology, as, for example, the one involved in *LE BLANC SUCCESSION*, ante, 1137, which provided that the proceeds of all life insurance should be exempt from liability for any debt, except one secured by a pledge of the policy or by any advance payments made on the policy. The decision in that case that the exemption was not merely a personal one in favor of the insured, but one that inured to the benefit of his heirs and exempted the proceeds of policies payable to the insured's executors or administrators or assigns from liability for his debts, or the debts of the succession, is supported by the cases.

So the proceeds of policies payable

to the insured's estate or to his personal representatives have been held, after his death, to be exempt from the payment of his debts under statutory provisions—

—that “all moneys, benefits, privileges, or immunities accruing or in any manner growing out of any life insurance” are exempt from execution, *Holmes v. Marshall* (1905) 145 Cal. 777, 69 L.R.A. 67, 104 Am. St. Rep. 86, 79 Pac. 534, 2 Ann. Cas. 88;

—that “any person may insure his own or her life for the benefit of his or her estate,” and that the amount payable “shall be exempt from all creditors,” *Mitchell v. Allis* (1908) 157 Ala. 304, 47 So. 715;

—in one section, that a policy on the life of an individual should inure to the separate use of the husband, wife, and children of the individual “independently of creditors,” and in another section, that “the avails of any life insurance . . . are not subject to the debts of the deceased,” *Kelley v. Mann* (1881) 56 Iowa, 625, 10 N. W. 211;

—that “the proceeds or avails of all life and accident insurance shall be exempt from all liability for any debt,” *German-American State Bank v. Godman* (1915) 83 Wash. 231, 145 Pac. 221; *Flood v. Libby* (1905) 38 Wash. 366, 107 Am. St. Rep. 851, 80 Pac. 533.

And the statute involved in the last cases was so construed in *Holden v. Stratton* (1904) 198 U. S. 202, 49 L. ed. 1018, 25 Sup. Ct. Rep. 656, where it was sought, in bankruptcy proceedings involving the insured and beneficiary, to subject to the payment of creditors a policy payable to the estate of the insured in case the beneficiary predeceased him, and also one which the husband if he survived a certain period might surrender and realize its full cash value. Generally for life insurance as asset of bankruptcy, see notes in 50 L.R.A. 43; 26 L.R.A.(N.S.) 451; 30 L.R.A.(N.S.) 990; 41 L.R.A.(N.S.) 123; and 46 L.R.A.(N.S.) 148.

This statute has been held, however, in subsequent cases to have been modified to the extent that the proceeds of a policy made payable to the insured or his estate are not exempt against his creditors by another statutory provision construed as *in pari materia*, that “if a policy of insurance is effected by any person on his own life or on another life in favor of a person other than himself having an insurable interest therein, the lawful beneficiary thereof other than himself or his legal representatives shall unless contrary to the terms of the policy be entitled to its L.R.A.1917F.

proceeds against the creditors and representatives of the person effecting the same.” *Re Blattner* (1916) 89 Wash. 412, 154 Pac. 796; *Elsom v. Gadd* (1916) 93 Wash. 603, 161 Pac. 483, petition for rehearing denied in (1916) 93 Wash. 607, 162 Pac. 867. And the court in the last case stated that in so far as the case of *German-American State Bank v. Godman* (Wash.) *supra*, might be considered inconsistent with their decision it was overruled.

In *Heflin v. Allen* (1909) 160 Ala. 241, 48 So. 695, where the policy was apparently payable to the insured's estate, a statute providing that “the sum or amount of insurance becoming due and payable by the terms of the application and policy shall be exempt from all creditors of the assured or beneficiary, and must be paid to the beneficiary so named in the policy or to his heirs or assigns” was held not for the protection of the insurance company alone, but also for the protection of the estate of the insured as well as his wife and children, and the avails of the policy involved, which had been collected by the personal representative of the insured, were held not liable for the debts of the insured's estate.

And in *Larrabee v. Palmer* (1897) 101 Iowa, 132, 70 N. W. 100, under provisions that a policy “shall inure to the separate use of the husband or wife and children of said individual independently of his or her creditors,” and that “the avails of any life insurance . . . are not subject to the debts of the deceased . . . but shall in other respects be disposed of like other property left by the deceased,” the proceeds of a policy payable to the heirs at law of the insured were held exempt not only in favor of the husband or wife and children, but also in favor of the collateral heirs of the deceased.

In *Coates v. Worthy* (1895) 72 Miss. 575, 17 So. 606, 18 So. 916, a statutory provision that the proceeds of a life insurance policy payable to the executor or administrator of the insured shall inure to the heirs or legatees, freed from all liability for the debts of the decedent, was held to engraft an exception upon another statutory provision to the effect that the exempt property of the deceased shall be liable for his debt where he leaves neither wife nor children; and accordingly the proceeds of a policy payable to the insured's “executors or administrators” were held exempt, although he left no wife or children.

The phrase, “legal representatives of the assured,” as used in a policy to

designate the beneficiary, was held in *Rose v. Wortham* (1915) 95 Tenn. 505, 30 L.R.A. 609, 32 S. W. 458, not to indicate an intention to direct the proceeds to any other persons than those entitled by law, who were the widow and children, or to give the executor or administrator any beneficial interest in the proceeds so as to defeat the right of the insured's widow, children, and next of kin to an exemptor, under a statute providing that life insurance effected by the husband should inure to the benefit of his widow and next of kin free from the claims of his creditors, and another section providing that any life insurance effected by the husband should inure to the benefit of his widow and children, and should be distributed without being in any manner subject to the husband's debts it was held that although the benefit had been paid to the executor or administrator, this in no way made the proceeds assets of the estate for the payment of debts, but that they went to the widow and children free from the debts of the insured's estate, although it was insolvent.

In *Pietri v. Seguenot* (1902) 96 Mo. App. 258, 69 S. W. 1055, where, after the death of the insured's wife, who was the original beneficiary, the insured requested that the benefit might be made payable to his estate, and a policy was issued, payable to his "executors or administrators," the proceeds of the policy were held not exempt from the demand of his creditors, under a statute providing that the benefit of a policy should not be liable to attachment or other process, and should not be seized, taken, appropriated, or applied to any legal or equitable process, nor by operation of law, to pay any debt or liability of a policy or certificate holder or any beneficiary named in a policy or certificate. The court stated that the purpose of this statute was to permit the insured to secure the immunity described, but that it was not designed, and should not be interpreted, so as to hamper the freedom of action of an insured who might wish to discharge his honest obligations by transmitting to others a fund in which he had an interest, and it was held that the insured's next of kin was entitled only to the amount which was left after the payment of his debts.

In *Gilchrist v. Jeffcoat* (1912) 64 Fla. 79, 59 So. 243, the statute provided that when one should die leaving insurance it should inure exclusively to the benefit of his child or children and husband or wife, or to any person or persons for whose use and benefit the insur-

ance was declared in the policy, and that the proceeds should in no case be liable to attachment, garnishment, or any legal process of any creditor of the insured unless the policy declared that it was effected for such creditor's benefit; but provided that when the insurance was for the benefit of the estate of the insured, or was payable to his estate, executors, or administrators, the proceeds might be bequeathed. It was held that the purpose of the statute was to provide for the wife and children of the insured, and not primarily to exclude creditors in case there was no wife or child; and where a policy naming the wife as beneficiary was made payable to the insured on his wife's death, and she predeceased him and no children were left, the statute was held not to apply to exclude creditors of the insured's estate.

In *Hamilton v. Darley* (1915) 266 Ill. 542, 107 N. E. 798, where a policy was payable to the legal representatives of the insured, a section of the statute governing assessment companies providing that insurance benefits should not be liable to attachment by garnishment or other process, or be taken, appropriated, or applied by any legal process or by operation of law to pay any debt of a certificate holder, was held to have been passed for the purpose of exempting the society from legal process by the insured's creditors, and not for the purpose of exempting the money from his debts after it had been paid to his personal representatives.

In *Rice v. Smith* (1894) 72 Miss. 42, 16 So. 417, it was held that under a provision that "the amount of any life insurance policy . . . shall inure to the party or parties named as the beneficiaries thereof, freed from all liability for the debts of the person paying the premiums thereon," the proceeds of a policy payable to the insured, his executors, administrators, or assigns, could not be recovered from his personal representative by his heirs as exempt property. The court stated that the insured himself was the beneficiary of the policy in this case, and that his personal representative held the proceeds just as he would have done if the terms of the policy had been such that it matured during his life. The insured died prior to the passage of the statute referred to in *Coates v. Worthy* (Miss.) supra, and the court held that a provision of that statute attempting to make it retroactive was unconstitutional.

J. T. W.

NEW JERSEY COURT OF ERRORS
AND APPEALS.AUGER & SIMON SILK DYEING COM-
PANY, Resp't.,

v.

EAST JERSEY WATER COMPANY, Appt.

SAME, Resp't.,

v.

JERSEY CITY WATER SUPPLY COM-
PANY, Appt.

(88 N. J. L. 273, 96 Atl. 60.)

Water — pollution — nuisance.

Where a riparian owner diverts water from a running stream, and so uses it that it becomes polluted to the extent that it is unfit for domestic and other reasonable riparian uses, and when returned, as it must be, to the stream, it appreciably impairs the quality of the water, to the injury of all the people of the state for whom the residue of all flowing water, after reasonable riparian use, is held, a public nuisance is committed, and such unlawful use is not the reasonable use which a riparian owner is entitled to make of passing water, and for the deprivation of water intended to be so used he is only entitled to nominal damages, because the injury he suffers, if any, is that he is deprived of the means of committing a public nuisance.

For other cases, see Damages, I; Waters, II. e, in Dig. 1-52 N. S.

(Garrison, Trenchard, Black, White, and Terhune, JJ., dissent.)

(November 15, 1915.)

APPEAL by defendants from judgments of the Supreme Court in favor of plaintiff in separate actions brought to recover damages for alleged wrongful diversion of water by the defendant corporations. Reversed.

The facts are stated in the opinion.

Messrs. John B. Humphreys and Gilbert Collins, for appellants:

If the plaintiff purchased from the Pas-

Headnote by BERGEN, J.

Note. — A search has disclosed no other cases involving the effect of a riparian owner's unlawful use of the water upon the damages recoverable by him against one who diverts the water.

The logical implication of the court's proposition that the diversion for the mere purpose of returning the water in a polluted condition is not included in the reasonable use to which the riparian owner is entitled would seem to be merely that the riparian owner is not entitled to damages on the basis of the loss of the opportunity to make an unlawful use of the water. The requested instruction, the refusal of which is L.R.A.1917F.

saic Water Company its water supply, not because of insufficient water available for reasonable riparian uses from the Passaic river, but because the water in the river, though sufficient in quantity, had become unfit for its uses through pollution not caused by defendants, there can be no recovery for the water so purchased.

Newark v. Chestnut Hill Land Co. 77 N. J. Eq. 23, 75 Atl. 644; Cuff v. Newark & N. Y. R. Co. 35 N. J. L. 17, 10 Am. Rep. 205.

The maximum of the damages which the defendant companies can be held liable for would be their respective proportion of the damages which would be attributable to the increase of the density of the pollution in the water, caused by the diversions.

Weidmann Silk Dyeing Co. v. East Jersey Water Co. — N. J. L. —, 91 Atl. 338; Doremus v. Paterson, 73 N. J. Eq. 474, 69 Atl. 225; Jenkins v. Pennsylvania R. Co. 67 N. J. L. 331, 57 L.R.A. 309, 51 Atl. 704, 11 Am. Neg. Rep. 464; Little Schuylkill Nav. R. & Coal Co. v. Richards, 57 Pa. 142, 98 Am. Dec. 209, 10 Mor. Min. Rep. 661; Seely v. Alden, 61 Pa. 302, 100 Am. Dec. 642; McIntyre v. McGavin [1893] A. C. 268, 1 Reports, 246, 57 J. P. 548; Cross v. Morristown, 18 N. J. Eq. 305; Jersey City v. Morris Canal & Bkg. Co. 12 N. J. Eq. 547.

The verdict should have been for nominal damages only, because the damages suffered by the plaintiff were purely incidental or consequential, and it was for the jury to determine as a question of fact whether, as against the municipalities and their agents, the pollution by the city of Paterson and other polluters was not an efficient culpable cause, intervening between the defendants' acts and the injury.

Hudson County Water Co. v. McCarter, 209 U. S. 349, 52 L. ed. 828, 28 Sup. Ct. Rep. 529, 14 Ann. Cas. 560; Monongahela Nav. Co. v. Coons, 6 Watts & S. 101; Gibson v. United States, 166 U. S. 269, 275, 41 L. ed. 996, 1002, 17 Sup. Ct. Rep. 578; Beseman v. Pennsylvania R. Co. 50 N. J. L. 235, 13 Atl. 164; Sayre v. Newark, 60 N. J. Eq. 361, 48 L.R.A. 722, 83 Am. St. Rep.

held error, expressly recognizes the right to nominal damages; and its apparent negation of anything more than nominal damages may perhaps be accounted for by the failure of the plaintiff to prove that he could make any profitable use of the water without polluting it. The concession that the plaintiff would be entitled to at least nominal damages would seem logically to carry his right to recover substantial damages if any have been suffered, referable to the loss of the right to use the water in a lawful manner without pollution, assuming that the possibility of such a use and its value were proved.

629, 45 Atl. 985; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341; 4 Ann. Cas. 1175; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437; Scranton v. Wheeler, 179 U. S. 141-164, 45 L. ed. 126-138, 21 Sup. Ct. Rep. 48; New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. Rep. 471; Mills v. United States, 12 L.R.A. 673, 46 Fed. 738; United States v. Lynah, 188 U. S. 445-474, 47 L. ed. 539-550, 23 Sup. Ct. Rep. 349.

Mr. Michael Dunn also for appellants.
Messrs. William I. Lewis and Griggs & Harding for respondent.

Bergen, J., delivered the opinion of the court:

The plaintiff instituted separate actions against the East Jersey Water Company and the Jersey City Water Supply Company, respectively, which were tried by consent before the same jury, resulting in a judgment in favor of the plaintiff in each case, against the East Jersey Water Company for \$3,636.24, and against the other defendant for \$7,031.77. Each defendant appealed to this court, where the cases were argued together under the same exceptions. Among the numerous exceptions on which errors are assigned is one to the refusal of the trial court to charge, as requested: "If they [the jury] should find that the plaintiff would use the diverted water, if it were not diverted, for the purpose of further polluting the river, then the plaintiff cannot claim more than nominal damages from the defendants who stand in the shoes of the municipalities whom they are supplying with the water for depriving the plaintiff of that water;" and another for refusing to charge as requested: "That the plaintiff had no right to complain of the diversion by the defendants if you find that the only damage the plaintiff suffered was being thereby prevented from committing a nuisance."

The facts pertinent to these requests were that the defendants, as upper riparian owners, were diverting water from the Passaic river for the purpose of supplying certain municipalities with potable water, and that such diversion deprived the plaintiff of a sufficient quantity of water to answer what it claims to be such reasonable use to which it is entitled as a riparian owner; that each of the plaintiffs is the owner of land along the river below the point where the defendants abstract the water, and on which they maintain and operate silk dyeing works, and, for the purpose of carrying on that business, draw water from the river, which, after use, is returned to the river in a polluted condition.

Mr. Auger, a witness for the plaintiff, testified that the water discharged from plaintiff's works was colored and not fit to drink, bathe in, or for cattle to drink. Whether this water was polluted, and to what extent, and whether it appreciably injured the quality of the water in the river, was a jury question (Wood, Nuisances, p. 321), the consideration of which was taken from it by the refusal of the court to charge as requested, and therefore, in dealing with these requests, we must assume that the jury could have found that the water was restored to the river in such a polluted condition as to be no longer fit for use as potable water. The plaintiff bases its right of action upon the fact that it is a riparian owner, and therefore entitled to such use of the water as would naturally flow over its lands, if not diverted by the defendant, as incidental to such ownership, and the question presented is whether such use includes the right to pollute the water to the extent of rendering it unfit for use by man or beast, and then return it in that condition to the stream. That its diversion by the plaintiff for the mere purpose of returning it in a polluted condition is not included in the reasonable use to which a riparian owner is entitled is, we think, beyond successful contest, at least in this state, where we have held, in this court, that the riparian owner must return water he may divert from a running stream for his reasonable use, undiminished in quantity and unimpaired in quality, subject to its use "in a reasonable manner for domestic and irrigating purposes." *Doremus v. Paterson*, 65 N. J. Eq. 711, 55 Atl. 304. There is no difference in principle between an initial purpose to divert for the mere purpose of pollution and a diversion for the purpose of a use which must result in its contamination; for in either case it is impregnated, when returned, with substances which impair its quality. After the exercise of legitimate rights by the riparian owner, "there remains a residuum of common or public ownership that, under our system, rests in the state as a trustee for all our people." *McCarter v. Hudson County Water Co.* 70 N. J. Eq. 695, 14 L.R.A. (N.S.) 197, 118 Am. St. Rep. 754, 65 Atl. 489, 10 Ann. Cas. 116. The pollution of the passing water of a stream which, after its reasonable use by upper riparian owners, is held by the state for the use of all of its citizens, when such pollution renders it unfit for ordinary domestic uses because it has been diminished in quality, is a public nuisance, which, under § 215 of our Crimes Act (2 Comp. Stat. 1910, p. 1811), is declared to be a misdemeanor. It is no answer to a criminal prosecution for creating

a public nuisance that a lower riparian owner may have an action for special damage, because that is a personal right which in no way relieves the wrongdoer from the consequences of a crime against the public, for whom the residue of the water is to be conserved by the state. In the present cases we have a plaintiff claiming damages because it is not allowed to divert, as riparian owner, the water of a running stream in order that it may be so used that, when returned to the stream, it is in a condition as to quality which is prohibited by law; in other words, it claims damages because it is deprived of the means of committing an unlawful act. The record discloses facts from which a jury might find that the use to be made by the plaintiff of the water of which it claims to have been deprived was not within the meaning of the term "reasonable," as applicable to cases of this nature; for it cannot be that a riparian use of passing water in which the owner has a limited right, the effect of such use being to return it to the stream in such a polluted condition that it is unfit for use by others having at least equal rights therein, is within the right of a riparian owner, which is confined to a reasonable use for domestic and other legally recognized purposes. We are of opinion that, when the riparian owner abstracts water from a running stream for the purpose of so using it that it will be returned to the stream in such a polluted condition as to appreciably deprive it of its natural qualities and render it unfit for the use of the public, thereby committing a nuisance, he is not making the reasonable use thereof to which he is entitled as such owner,

and that any damage he may suffer because he is not able to do this because of the act of the defendant is not more than nominal, if any, and therefore it was error to refuse the requests above stated. It is no answer to an action or indictment for a nuisance to show that a great many others are committing the same species of nuisance upon the stream, for, if the defendant's acts appreciably add to the pollution, they create a nuisance. Wood, Nuisances, p. 507. The result which we have reached on this branch of the case makes it unnecessary to consider the other exceptions sealed in these cases. The judgment in each case will be reversed, and a new trial awarded.

Garrison, Trenchard, Black, White, and Terhune, JJ., dissent.

Garrison, J., dissenting:

I am unable to concur in the reversal of this judgment upon the ground stated in the opinion.

The responsibility of the plaintiff to lower riparian owners and its liability to the state of New Jersey or some of its public agencies are distinct questions that could not be tried out in this action, and were not attempted to be because of the lack of proper parties, proper pleadings, and proper issues.

The issues that were involved in this suit inter partes were correctly submitted to the jury under what was in effect the law of the case. There was, in my opinion, no trial error.

Petition for rehearing denied.

UNITED STATES SUPREME COURT.
NORTHERN PACIFIC RAILWAY COMPANY, Plff. in Err.,

v.

STATE OF NORTH DAKOTA EX REL. T. F. McCUE, Attorney General. (No. 420.)

MINNEAPOLIS, ST. PAUL, & SAULT STE. MARIE RAILWAY COMPANY,
Plff. in Err.,

v.

SAME. (No. 421.)

(236 U. S. 585, 59 L. ed. 735, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429.)

Appeal — error to state court — review of facts.

1. The Federal Supreme Court, on writ

Note. — As to effect of fact that return as a whole is reasonable on right to require railroad to transport commodity for less than reasonable compensation, see annotation following this case, post, 1158. L.R.A.1917F.

of error to a state court, will review the findings of fact by the latter court, where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and where a conclusion of law as to a Federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts. *For other cases, see Appeal and Error, II. a, 2, in Dig. 1-52 N. S.*

Carriers — rate regulation — reasonableness — cost of transportation.

2. The cost of the transportation of a particular commodity, which must be considered when determining whether the maximum intrastate rates fixed by the state for the carriage of such commodity are adequate or confiscatory, includes all the outlays which pertain to such transportation, there being no basis for distinguishing in this respect between so-called "out-of-pocket costs" or "actual" expenses, and other outlays which are none the less actually made because they are applicable to all traffic,

instead of being exclusively incurred in the traffic in question.

For other cases, see *Carriers*, IV. c, 3, in Dig. 1-52 N. S.

Same — public policy.

3. A statute may not compel a carrier to establish a rate upon a particular commodity which is less than reasonable, in order to build up a local enterprise.

For other cases, see *Carriers*, IV. c, 3, in Dig. 1-52 N. S.

Constitutional law — due process of law — state regulation of railway rates — confiscation.

4. The maximum intrastate rates fixed by a state for the transportation of coal in carload lots are confiscatory, and deny the carrier due process of law, where, taking into account the entire traffic to which such rates are applied, they compel the carrier to transport the commodity for less than cost, or without substantial compensation in addition to cost, although the return to the carrier from its entire intrastate operations may be adequate.

For other cases, see *Constitutional Law*, II. b, 4, c, in Dig. 1-52 N. S.

(Mr. Justice Pitney dissents.)

(March 8, 1915.)

WRITS of Error to the Supreme Court of North Dakota to review judgments commanding defendants to keep in force the intrastate rates fixed by the state laws for the transportation of coal in carload lots. Reversed.

The facts are stated in the opinion.

Messrs. Charles W. Bunn and Charles Donnelly, for plaintiffs in error:

The authority to legislate in regard to rates comes from the power to prevent extortion or unreasonable charges or exactions by common carriers or others exercising a calling and using their property in a manner in which the public have an interest.

Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 698, 43 L. ed. 864, 19 Sup. Ct. Rep. 565.

The police power is confessedly subject to the limitation that property, by the exercise thereof, may not be taken without just compensation.

Monongahela Nav. Co. v. United States, 148 U. S. 312, 336, 37 L. ed. 463, 471, 13 Sup. Ct. Rep. 622; Smyth v. Ames, 169 U. S. 540-543, 42 L. ed. 847, 848, 18 Sup. Ct. Rep. 418; Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 549, 56 L. ed. 308, 312, 32 Sup. Ct. Rep. 108; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 665, 39 L. ed. 567, 573, 15 Sup. Ct. Rep. 484; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. L.R.A. 1917F.

S. 1, 23, 25, 51 L. ed. 933, 943, 944, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Atlantic Coast Line R. Co. v. Florida, 203 U. S. 256, 51 L. ed. 174, 27 Sup. Ct. Rep. 108; Seaboard Air Line R. Co. v. Florida, 203 U. S. 261, 51 L. ed. 175, 27 Sup. Ct. Rep. 109; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 277-279, 54 L. ed. 472, 478-480, 30 Sup. Ct. Rep. 330; Interstate Commerce Commission v. Stickney, 215 U. S. 98, 54 L. ed. 112, 30 Sup. Ct. Rep. 66; Missouri, K. & T. R. Co. v. Interstate Commerce Commission, 164 Fed. 645; Pennsylvania R. Co. v. Philadelphia County, 220 Pa. 100, 15 L.R.A. (N.S.) 108, 68 Atl. 676.

Messrs. John I. Dille, A. H. Bright, and John L. Erdall, for plaintiff in error in No. 421.

The value of the property devoted to the transportation of coal sufficiently appears.

Willcox v. Consolidated Gas Co. 212 U. S. 19, 40, 53 L. ed. 382, 395, 48 L.R.A. (N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Central of Georgia R. Co. v. Railroad Commission, 161 Fed. 925; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 470, 57 L. ed. 1511, 1570, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18.

The power of the state to regulate and control the business of common carriers is limited by the Constitution, broadly speaking, to the securing of adequate and efficient service at reasonable rates to all alike.

Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 549, 56 L. ed. 308, 312, 32 Sup. Ct. Rep. 108; New Memphis Gas & Light Co. v. Memphis, 72 Fed. 952; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 567, 30 L. ed. 244, 248, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Munn v. Illinois, 94 U. S. 113, 127, 24 L. ed. 77, 85; Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts) 94 U. S. 155, 161, 24 L. ed. 94, 95; Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 329, 29 L. ed. 636, 644, 6 Sup. Ct. Rep. 334, 388, 1191; Winona & St. P. R. Co. v. Blake, 94 U. S. 180, 181, 24 L. ed. 99, 102; Dow v. Beidelman, 125 U. S. 681, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18.

The carrier cannot be compelled to carry for less than the net return, and the shipper cannot be compelled to pay more than enough to afford such net return.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 395, 38 L. ed. 1014, 1023, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Missouri P. R. Co. v. Tucker*, 230 U. S. 340, 346, 57 L. ed. 1507, 1509, 33 Sup. Ct. Rep. 961; *Interstate Commerce Commission v. Union P. R. Co.* 222 U. S. 541, 549, 56 L. ed. 308, 312, 32 Sup. Ct. Rep. 108; *Interstate Commerce Commission v. Northern P. R. Co.* 222 U. S. 541, 56 L. ed. 308, 32 Sup. Ct. Rep. 108.

Messrs. **Andrew Miller**, Attorney General, **C. L. Young**, **John Carmody**, and **Alfred Zuger**, for defendant in error:

Though rates under which a carrier is operating are not compensatory, it does not follow inevitably that they are confiscatory. If reasonable in the light of all considerations bearing upon them, they may then be reasonable though not remunerative.

Smyth v. Ames, 169 U. S. 486, 525, 544, 42 L. ed. 819, 842, 848, 18 Sup. Ct. Rep. 418; *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 268, 46 L. ed. 1158, 22 Sup. Ct. Rep. 900; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 596, 597, 41 L. ed. 560, 566, 567, 17 Sup. Ct. Rep. 198; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 412, 38 L. ed. 1014, 1028, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *San Diego Land & Town Co. v. National City*, 174 U. S. 757, 43 L. ed. 1161, 19 Sup. Ct. Rep. 804.

A carrier may, under certain conditions, be compelled to carry a commodity though it derive little or no profit from so doing.

St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484, affirming 54 Ark. 101, 11 L.R.A. 452, 15 S. W. 18; *State ex rel. McCue v. Northern P. R. Co.* 19 N. D. 45, 25 L.R.A.(N.S.) 1001, 120 N. W. 869; *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900.

A carrier is not entitled to a uniform rate of return or profit from each commodity carried or service rendered. If, in view of the return from the entire business, the profit from one item may be reduced below the rate of return deemed adequate as a whole, logically all profit upon such item may be entirely eliminated.

Interstate Consol. Street R. Co. v. Massachusetts, 207 U. S. 79, 85, 52 L. ed. 111, 115, 28 Sup. Ct. Rep. 26, 12 Ann. Cas. 555; *Willcox v. Consolidated Gas Co.* 212 U. S. 19, 52, 53 L. ed. 382, 400, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 51 L.R.A.1917F.

L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; *Matthews v. Corporation Comrs.* 106 Fed. 7; *Southern R. Co. v. McNeill*, 155 Fed. 756; *Re Arkansas R. Rates*, 168 Fed. 730, 187 Fed. 307; *Northern P. R. Co. v. North Dakota*, 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423; *St. Louis & St. F. R. Co. v. Gill*, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; *Southern R. Co. v. Atlanta Stove Works*, 128 Ga. 223, 57 S. E. 429; *Jacobson v. Wisconsin, M. & P. R. Co.* 71 Minn. 519, 49 L.R.A. 389, 70 Am. St. Rep. 358, 74 N. W. 893; *State ex rel. Taylor v. Missouri P. R. Co.* 76 Kan. 467, 92 Pac. 606; *People ex rel. Cantrell v. St. Louis, A. & T. H. R. Co.* 176 Ill. 512, 35 L.R.A. 656, 52 N. E. 292; *State ex rel. McCue v. Northern P. R. Co.* 19 N. D. 45, 25 L.R.A.(N.S.) 1001, 120 N. W. 869; *Re Louisville & N. R. Coal & Coke Rates*, 26 Inters. Com. Rep. 20; *Wyman, Pub. Serv. Corp.* § 1201; *Freund, Pol. Power*, § 551; 3 Enc. U. S. Sup. Ct. Rep. 632.

The commodity affected is one of the lowest classes of freight, and allowance should be made for that fact.

F. Schumacher Mill. Co. v. Chicago, R. I. & P. R. Co. 6 Inters. Com. Rep. 66; *Interstate Commerce Commission v. Chicago G. W. R. Co.* 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. Rep. 493; *Kansas City Southern R. Co. v. Carl*, 227 U. S. 638, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; 2 *Wyman, Pub. Serv. Corp.* §§ 1232, 1348; *Beale & W. R. Rate Regulation*, § 554; *Tift v. Southern R. Co.* 138 Fed. 753; *Louisville, E. & St. L. Consol. R. Co. v. Wilson*, 132 Ind. 517, 18 L.R.A. 105, 32 N. E. 311; *Trades League v. Philadelphia, W. & B. R. Co.* 8 Inters. Com. Rep. 368; *American Cent. Ins. Co. v. Chicago & A. R. Co.* 74 Mo. App. 89; *Hays v. Pennsylvania Co.* 12 Fed. 309; *Denison Light & P. Co. v. Missouri, K. & T. R. Co.* 10 Inters. Com. Rep. 337; *Tift v. Southern R. Co.* 10 Inters. Com. Rep. 548; *Coxe Bros. & Co. v. Lehigh Valley R. Co.* 4 I. C. C. Rep. 535, 3 Inters. Com. Rep. 460; *Colorado Fuel & Iron Co. v. Southern P. Co.* 6 Inters. Com. Rep. 489; *Interstate Commerce Commission v. Chicago G. W. R. Co.* 141 Fed. 1015; *Re Chesapeake & O. R. Co.* 22 Inters. Com. Rep. 604.

Because of the extreme difficulty of determining with particularity the cost apportionable to a single commodity, it is only just that the return of the expenses incurred in handling the commodity be accepted as representative of a reasonable minimum within which "the flexible limit of judgment which belongs to the power to fix rates" may be exercised; otherwise, important considerations will be entirely ignored.

Re Louisville & N. Coal & Coke Rates, 26 Inters. Com. Rep. 20.

In determining whether the right of a carrier to receive just compensation for the service given to the public has been infringed, the basis of calculation is the fair value of the property used for the convenience of the public.

Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 434, 57 L. ed. 1555, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18; Smyth v. Ames, 169 U. S. 546, 42 L. ed. 849, 18 Sup. Ct. Rep. 418; San Diego Land & Town Co. v. National City, 174 U. S. 757, 43 L. ed. 1161, 19 Sup. Ct. Rep. 804; Willcox v. Consolidated Gas Co. 212 U. S. 19, 41, 53 L. ed. 382, 395, 48 L.R.A. (N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

The value of the property used in the intrastate business was not established.

Missouri Rate Cases (Knott v. Chicago, B. & Q. R. Co.) 230 U. S. 499, 57 L. ed. 1591, 33 Sup. Ct. Rep. 975; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 454, 459, 57 L. ed. 1563, 1565, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18, Smyth v. Ames, 169 U. S. 466, 525, 42 L. ed. 819, 842, 18 Sup. Ct. Rep. 418; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A. (N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

There are certain conditions peculiar to the Soo road which contribute to the unfavorable operation of the rates.

St. Louis & S. F. R. Co. v. Gill, 156 U. S. 665, 39 L. ed. 573, 15 Sup. Ct. Rep. 484; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Re Arkansas R. Rates, 168 Fed. 732; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 446, 47 L. ed. 892, 896, 23 Sup. Ct. Rep. 571.

In testing the validity of rates, the carrier complaining of their unreasonableness is burdened with showing the cost of the business affected by them.

Northern P. R. Co. v. North Dakota, 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423; Seaboard Air Line R. Co. v. Florida, 203 U. S. 261, 51 L. ed. 175, 27 Sup. Ct. Rep. 109; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18.

In view of all proper considerations, compensation has not been established.

Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 173, 44 L. ed. 420, 20 Sup. Ct. Rep. 336; Arkansas Rate Cases, 187 Fed. 290; Louisville & N. R. Co. v. Commission, L.R.A.1917F.

208 Fed. 35; San Diego Land & Town Co. v. National City, 174 U. S. 754, 43 L. ed. 1160, 19 Sup. Ct. Rep. 804.

Mr. Justice Hughes delivered the opinion of the court:

By chapter 51 of the Laws of 1907, the legislature of North Dakota fixed maximum intrastate rates, graduated according to distance, for the transportation of coal in carload lots. It was further provided that in case the transportation was over two or more lines of railroad it should be considered as one haul, the compensation for which should be divided among the carriers according to their agreement, or, if they could not agree, as the railroad commissioners should decide, subject to appeal to the courts. While the statutory rates governed all coal shipments, their practical application was almost solely to lignite coal.

The carriers refused to put the rates into effect, and in August, 1907, the attorney general of the state began proceedings in its supreme court to obtain a mandatory injunction against the Northern Pacific Railway Company, the Minneapolis, St. Paul, & Sault Ste. Marie Railway Company, and the Great Northern Railway Company. The companies answered that the statute violated the commerce clause of the Federal Constitution, and also that it infringed the 14th Amendment by fixing rates that were "unremunerative," "unreasonable," and "confiscatory." The supreme court of the state, overruling these contentions, granted the injunction. 19 N. D. 45, 25 L.R.A. (N.S.) 1001, 120 N. W. 869. It was held that the evidence was not sufficient to overcome the presumption in favor of the rates. On writ of error from this court, the decree was affirmed without prejudice to the right of the railroad companies to reopen the case after an adequate trial of the rates. 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423.

This decision was rendered in the early part of the year 1910, and thereupon the rates were put into effect. After a trial for over a year, the case was reopened, voluminous testimony was taken, and the supreme court of the state, making its separate findings of fact as to the effect of the rates in the intrastate business of each carrier, and stating its conclusions of law, entered judgment commanding the carriers to keep the rates in force. 26 N. D. 438, 145 N. W. 135. The Northern Pacific Railway Company and the Minneapolis, St. Paul, & Sault Ste. Marie Railway Company have sued out these writs of error.

The period to which the testimony relates

is the fiscal year ending June 30, 1911. The facts may be thus summarized:

Northern Pacific Railway Company.

The total revenue received by this company for the intrastate carriage of lignite coal for the fiscal year was \$58,953.07. It was also deemed to be practicable to ascertain the amount of expense properly chargeable to this traffic. Upon this point, the court said: "As a result of the painstaking work of the accounting department of this railway company, and its endeavors to render all the assistance possible in determining the matter of the apportionment of expense to this commodity, as is evidenced by the care and detail in the accounting, the information furnished by the exhibits, and that the books of the company have been thrown open to the experts of the state, we are enabled to arrive, with a reasonable degree of certainty, at the proper proportion of expense that should be chargeable against the revenue received from the carriage of this commodity." *Id.* p. 446.

With respect to the division of some of the items of expense (maintenance of way and structures, and taxes) there was no dispute, and, as to the others, the range of controversy was narrow. The company contended that the traffic in question produced at the statutory rates a loss of \$2,253.65; the state insisted that it yielded a profit of \$2,391.63. After a detailed analysis, the state court found the charges against the revenue received from the lignite traffic to be (1) for train operation expense, \$30,850.12; (2) switching, \$4,971; (3) station service, \$4,182.58; (4) freight car repairs, renewals, and depreciation, \$7,121.54; (5) traffic and general expenses (no loss and damage allowed), \$1,456.14; (6) maintenance of way and structures, \$7,119.93; (7) taxes, \$2,424.15; making the total expenses, \$58,125.46, and the surplus income, \$827.61. *Id.* pp. 460, 461. The summary of the findings of fact is as follows:

"That, as to the Northern Pacific Railway Company, out of total freight receipts for lignite coal, amounting to \$58,953, the total cost of transportation, or out-of-pocket costs, together with all fixed or overhead expenses apportionable to said lignite traffic, consumed all of said receipts excepting \$847, its net profit in the handling of the lignite business for the twelve months in question; that such rate is slightly remunerative, but in fact noncompensatory, considering the volume of freight carried and the property of the railroad devoted thereto." *Id.* p. 439.

Minneapolis, St. Paul, & Sault Ste. Marie Railway Company.

The state court regarded the statistics furnished by this company as being in the L.R.A.1917F.

main estimates without satisfactory bases. Still, on making an elaborate examination of the facts disclosed by the record,—all the testimony adduced in the three cases being available in each one, so far as pertinent,—and on taking judicial notice of certain local conditions, the court was able to find sufficient proof to justify it in determining that under the statutory rates the intrastate transportation of lignite coal was conducted by this company at a loss. *Id.* pp. 461-472. A large part of the traffic, after a short haul, was delivered to connecting carriers,—the Northern Pacific and Great Northern lines,—and the prorating of the statutory compensation for the entire haul operated injuriously. As to this part, said to be "nearly half the lignite business," this road was "virtually a branch line of the other two railroads in accumulating for them their lignite traffic." It was found, further, that the value of the railway property within the state had not been established, nor had the portion of value attributable to the intrastate business been determined; and, also, that the carriage of lignite coal increased "the railroad expenses but 60 per cent of the usual statutory rate for the lignite haul;" that is, that this percentage of the rate covered the "out-of-pocket cost" of the traffic, the remaining expenses in this view being such as would have been incurred had no lignite coal been transported.

The gross receipts from the intrastate traffic in question during the fiscal year were \$83,670. The final results of the court's analysis in the case of this company are thus epitomized:

"Its total receipts amount to more than its actual out-of-pocket costs, or actual costs of transportation, but are from \$9,000 to \$12,000 less than the total costs, including fixed and overhead expenses, properly chargeable to the carriage of this commodity and against the earnings therefrom. That the carriage of lignite coal by the Soo line within this state during said fiscal year was not only nonprofitable, but occasioned a loss to it when its fixed expenses apportionable to all traffic are in proper proportion and amount assigned to and charged against the earnings from this commodity." *Id.* p. 439.

In answer to the contention of the state that the company could not be heard to complain with respect to the disadvantage of the prorating with connecting carriers, inasmuch as the basis was agreed upon without an appeal to the board of railroad commissioners, the court said that it was difficult to see what other basis could have been taken, and, further, that the result, in substance, would have been the same.

The amount which could thus have been gained, it was said, would have been taken "from the net revenues of the Northern Pacific carrier principally," and would have been insufficient to have given to the Minneapolis, St. Paul, & Sault Ste. Marie Company a net profit, so that "all the difference in fact would have been that both 'Soo' and Northern Pacific would be then hauling this freight at less than the gross cost, including, of course, out-of-pocket and all fixed charges." *Id.* p. 483.

We understand that all the "fixed charges" to which the findings refer are actual expenses which, while including taxes, do not include any return whatever upon the investment in the property, whether by way of interest or otherwise.

The facts thus found must be taken to be established. This court will review the finding of facts by a state court (1) where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and (2) where a conclusion of law as to a Federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts. *Kansas City Southern R. Co. v. C. H. Albers Commission Co.* 223 U. S. 573, 591, 56 L. ed. 556, 565, 32 Sup. Ct. Rep. 316; *Creswill v. Grand Lodge*, K. P. 225 U. S. 246, 261, 56 L. ed. 1074, 1080, 32 Sup. Ct. Rep. 822; *Wood v. Chesborough*, 228 U. S. 672, 678, 57 L. ed. 1018, 1021, 33 Sup. Ct. Rep. 706. But the present case is not within either branch of the rule. *Portland R. Light & P. Co. v. Railroad Commission*, 229 U. S. 397, 412, 57 L. ed. 1248, 1258, 33 Sup. Ct. Rep. 820; *Miedreich v. Lauenstein*, 232 U. S. 236, 243, 244, 58 L. ed. 584, 589, 590, 34 Sup. Ct. Rep. 309. It cannot be said that the findings of fact made by the state court are unsupported by evidence, and it is apparent that the substantial question raised by the assignments of error and submitted in argument arises upon the facts found. True, the Northern Pacific Company insists that on a critical examination of the evidence it would be ascertained that, instead of a net profit of about \$800, it received no profit at all from the traffic in question under the statutory rate, but the remuneration as found is so slight as not to be more than nominal in view of the extent of the traffic, and in this aspect the finding is that the rate as to this company is non-compensatory. So, while the contention of the Minneapolis, St. Paul, & Sault Ste. Marie Company that it proved the value of the property used by it in the intrastate business is clearly inadmissible under the decisions of this court (*Minnesota Rate* L.R.A.1917F.

Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1151, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729), still in the present case the determination of that value is not necessary, inasmuch as no complaint is made with respect to the company's return upon its entire intrastate business, and, so far as the attempted showing of the value of the property devoted to the traffic in question is concerned, that also is unimportant, as whatever that value might be, it is found that no net return upon it was secured.

As to the law, the state court held:

"(a) The statutory freight rate is presumed to be reasonable which presumption continues until the contrary appears and the rate is shown beyond a reasonable doubt to be confiscatory.

"(b) Proof that a rate is noncompensatory—that is, while producing more revenue than sufficient to pay the actual expenses occasioned by the transportation of the commodity, but insufficient to also reimburse for that proportion of the railroad's fixed or overhead costs properly apportionable to such commodity carried—is not sufficient to establish that the rate is confiscatory in law.

"(c) In order to establish such a non-compensatory rate to be confiscatory, it must further appear that any deficit under the rate affects the net intrastate freight earnings materially, and reduces them to a point where they are insufficient to amount to a reasonable rate of profit on the amount of the value of the railroad property within the state contributing to produce such net earnings."

Accordingly, it was further held that, after establishing the value of the property employed in the production of the net intrastate freight earnings, it must appear, in order to show confiscation, either (1) that such earnings are insufficient to yield a fair return upon that value, and that the commodity in question is carried for less than what is sufficient to meet all expenses, including "out-of-pocket costs" and fixed charges, or (2) that the loss on the commodity under the rate attacked "reduces the balance of the net intrastate freight earnings" to a point where, including the loss on the commodity rate, they fail to yield such return. *Id.* p. 440.

And it was because their case failed to meet these tests that the plaintiffs in error were commended to observe the rate.

The general principles to be applied are not open to controversy. The railroad property is private property devoted to a public use. As a corporation, the owner is subject to the obligations of its charter. As the holder of special franchises, it is subject to the conditions upon which they

were granted. Aside from specific requirements of this sort, the common carrier must discharge the obligations which inhere in the nature of its business. It must supply facilities that are reasonably adequate; it must carry upon reasonable terms; and it must serve without unjust discrimination. These duties are properly called public duties, and the state, within the limits of its jurisdiction, may enforce them. The state may prescribe rules to insure fair remuneration and to prevent extortion, to secure substantial equality of treatment in like cases, and to promote safety, good order, and convenience.

But, broad as is the power of regulation, the state does not enjoy the freedom of an owner. The fact that the property is devoted to a public use on certain terms does not justify the requirement that it shall be devoted to other public purposes, or to the same use on other terms, or the imposition of restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which the carrier has expressly or impliedly assumed. If it has held itself out as a carrier of passengers only, it cannot be compelled to carry freight. As a carrier for hire, it cannot be required to carry persons or goods gratuitously. The case would not be altered by the assertion that the public interest demanded such carriage. The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection, and seek to impose upon the carrier and its property burdens that are not incident to its engagement. In such a case, it would be no answer to say that the carrier obtains from its entire intrastate business a return as to the sufficiency of which in the aggregate it is not entitled to complain. Thus, in *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565, the regulation as to the sale of mileage books was condemned as arbitrary without regard to the total income of the carrier. Similarly, in *Missouri P. R. Co. v. Nebraska*, 217 U. S. 196, 54 L. ed. 727, 30 Sup. Ct. Rep. 461, 18 Ann. Cas. 989, it was held that the carrier could not be required to build mere private connections, and the adequacy of the receipts from its entire business did not enter into the question. And this was so because the obligation was not involved in the carrier's public duty, and the requirement went beyond the reasonable exercise of the state's protective power.

We have, then, to apply these familiar principles to a case where the state has attempted to fix a rate for the transportation of a commodity under which, taking

the results of the business to which the rate is applied, the carrier is compelled to transport the commodity for less than cost, or without substantial compensation in addition to cost. We say this, for we entertain no doubt that, in determining the cost of the transportation of a particular commodity, all the outlays which pertain to it must be considered. We find no basis for distinguishing in this respect between so-called "out-of-pocket costs," or "actual" expenses, and other outlays which are none the less actually made because they are applicable to all traffic, instead of being exclusively incurred in the traffic in question. Illustrations are found in outlays for maintenance of way and structures, general expenses and taxes. It is not a sufficient reason for excluding such, or other, expenses to say that they would still have been incurred had the particular commodity not been transported. That commodity has been transported; the common carrier is under a duty to carry, and the expenses of its business at a particular time are attributable to what it does carry. The state cannot estimate the cost of carrying coal by throwing the expense incident to the maintenance of the roadbed, and the general expenses, upon the carriage of wheat; or the cost of carrying wheat by throwing the burden of the upkeep of the property upon coal and other commodities. This, of course, does not mean that all commodities are to be treated as carried at the same rate of expense. The outlays that exclusively pertain to a given class of traffic must be assigned to that class, and the other expenses must be fairly apportioned. It may be difficult to make such an apportionment, but when conclusions are based on cost, the entire cost must be taken into account.

It should be said, further, that we find nothing in the record before us, and nothing in the facts which have been set forth with the most careful elaboration by the state court, that can be taken to indicate the existence of any standard whatever by reference to which the rate in question may be considered to be reasonable. It does not appear that there has been any practice of the carriers in North Dakota which affords any semblance of support to a rate so low. Whatever inference may be deduced from coal rates in other states, as disclosed by the record, is decidedly against the reasonableness of the rate. And it may be added that, while the rate was found to be compensatory in the case of the Great Northern Railway Company, this was distinctly shown to be due to the peculiar conditions of the traffic over that road, the differences with respect to which were fully detailed by the state court. 26 N. D. pp.

439, 472-480, 145 N. W. 135. Nearly 90 per cent of the total intrastate traffic in lignite coal upon the three roads was over the lines of the plaintiffs in error. It is urged by the state that the commodity in question is one of the lowest classes of freight. This may be assumed, and it may be a good reason for a lower rate than that charged for carrying articles of a different sort, but the mere grade of the commodity cannot be regarded as furnishing a sufficient ground for compelling the carrier to transport it for less than cost, or without substantial reward.

The state insists that the enactment of the statute may be justified as "a declaration of public policy." In substance, the argument is that the rate was imposed to aid in the development of a local industry, and thus to confer a benefit upon the people of the state. The importance to the community of its deposits of lignite coal, the infancy of the industry, and the advantages to be gained by increasing the consumption of this coal and making the community less dependent upon fuel supplies imported into the state, are emphasized. But, while local interests serve as a motive for enforcing reasonable rates, it would be a very different matter to say that the state may compel the carrier to maintain a rate upon a particular commodity that is less than reasonable, or—as might equally well be asserted—to carry gratuitously, in order to build up a local enterprise. That would be to go outside the carrier's undertaking, and outside the field of reasonable supervision of the conduct of its business, and would be equivalent to an appropriation of the property to public uses upon terms to which the carrier had in no way agreed. It does not aid the argument to urge that the state may permit the carrier to make good its loss by charges for other transportation. If other rates are exorbitant, they may be reduced. Certainly, it could not be said that the carrier may be required to charge excessive rates to some in order that others might be served at a rate unreasonably low. That would be but arbitrary action. We cannot reach the conclusion that the rate in question is to be supported upon the ground of public policy if, upon the facts found, it should be deemed to be less than reasonable.

The legislature undoubtedly has a wide range of discretion in the exercise of the power to prescribe reasonable charges, and it is not bound to fix uniform rates for all commodities, or to secure the same percentage of profit on every sort of business. There are many factors to be considered, —differences in the articles transported, the care required, the risk assumed, the

value of the service, and it is obviously important that there should be reasonable adjustments and classifications. Nor is its authority hampered by the necessity of establishing such minute distinctions that the effective exercise of the rate-making power becomes impossible. It is not bound to prescribe separate rates for every individual service performed, but it may group services by fixing rates for classes of traffic. As repeatedly observed, we do not sit as a revisory board to substitute our judgment for that of the legislature, or its administrative agent, as to matters within its province. *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. Rep. 571; *Louisville & N. R. Co. v. Garrett*, 231 U. S. 298, 313, 58 L. ed. 229, 242, 34 Sup. Ct. Rep. 48. The court, therefore, is not called upon to concern itself with mere details of a schedule; or to review a particular tariff or schedule which yields substantial compensation for the services it embraces, when the profitability of the intrastate business as a whole is not involved.

But a different question arises when the state has segregated a commodity, or a class of traffic, and has attempted to compel the carrier to transport it at a loss or without substantial compensation, even though the entire traffic to which the rate is applied is taken into account. On that fact being satisfactorily established, the presumption of reasonableness is rebutted. If in such a case there exists any practice, or what may be taken to be (broadly speaking) a standard of rates with respect to that traffic, in the light of which it is insisted that the rate should still be regarded as reasonable, that should be made to appear. As has been said, it does not appear here. Frequently, attacks upon state rates have raised the question as to the profitability of the entire intrastate business under the state's requirements. But the decisions in this class of cases (which we have cited in the margin¹) furnish no ground for saying that the state may set apart a commodity or a special class of traffic and impose upon it any rate it pleases, provided only that the return from the entire intrastate business is adequate. In *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484, a statute fixing a maxi-

¹ *Stone v. Farmer's Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636, 8 Sup. Ct. Rep. 334, 388, 1191; *Dow v. Beidelman*, 125 U. S. 680, 690, 31 L. ed. 841, 844, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339, 341, 36 L. ed. 176, 177, 12 Sup. Ct. Rep. 400; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters.

mun rate for passengers in the state of Arkansas was challenged, but the allegation and offer of proof that the rate would compel the carriage of passengers at a loss related only to a portion, or division of the railroad, and not to the result of all the traffic to which the rate in question applied. The holding that this was insufficient was in entire accord with the above-stated principle,—that the rate-making power may be exercised in a practical way, and that the legislature is not bound to assure a net profit from “every mile, section, or other part into which the road might be divided.” *Id.* p. 665. A passenger rate may apply generally throughout the state, and the effect of the rate must be considered with respect to the whole business governed by the rate. In *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418, a schedule of freight rates was involved, and, while the entire schedule was under consideration, it was recognized that in order to determine its adequacy the intrastate freight business might be segregated. *Id.* pp. 535, 550. The case of *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900, involved a rate fixed by the Railroad and Warehouse Commission of the State of Minnesota for the intrastate transportation of hard coal in carload lots. There was no proof that the carrier was compelled to transport the coal at a loss or without substantial compensation. The principal testimony, as the court observed, was intended to show that “if the rate fixed by the commission for coal in carload lots were applied to *all* freight, the road would not pay its operating expenses, although in making this showing the interest upon the bonded debt and the dividends were included as part of the operating expenses.” It was said that it was “quite evident” that this testimony had “but a slight, if any, tendency to show that even at the rates fixed by the commission there would not still be a reasonable profit upon coal so carried” (*id.* p. 266); and this conclu-

sion effectually distinguishes the case from the one at bar. In *Interstate Consol. Street R. Co. v. Massachusetts*, 207 U. S. 79, 84, 52 L. ed. 111, 114, 28 Sup. Ct. Rep. 26, 12 Ann. Cas. 555, the decision rested upon the ground that the charter of the company was accepted subject to the obligations imposed by the statute there in question. In *Willcox v. Consolidated Gas Co.* 212 U. S. 19, 53 L. ed. 382, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034, in addition to the rate for gas supplied for general consumption in the city of New York, there was a lower rate fixed for that furnished to the city itself. It was said by the court that the criticism of the “wholesale” rate to the city was met by the fact that the total returns from the sale of gas were adequate. It was not established in that case that this “wholesale” rate required a service without substantial compensation in addition to cost.

It has repeatedly been assumed in the decision of this court, that the state has no arbitrary power over the carrier's rates, and may not select a particular commodity or class of traffic for carriage without reasonable reward. In *Atlantic Coast Line R. Co. v. Florida*, 203 U. S. 256, 260, 51 L. ed. 174, 175, 27 Sup. Ct. Rep. 108, and in *Seaboard Air Line R. Co. v. Florida*, 203 U. S. 261, 270, 51 L. ed. 175, 178, 27 Sup. Ct. Rep. 109, there was an attack upon a rate on a single article, to wit, on phosphates, but the proof as to the effect of the rate and the cost of the transportation was found to be insufficient. The case of *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398, involved the validity of an order of the state commission requiring the railroad company so to arrange its schedule of transportation between two points as to make connections with through trains. It was held that the order merely compelled the carrier to perform a duty which fell within the scope of the obligations it had as-

Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418, *s. c.* 171 U. S. 361, 43 L. ed. 197, 18 Sup. Ct. Rep. 888; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336; *San Diego Land & Town Co. v. Jasper*, *supra*; *Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co.* 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241; *Knoxville v. Knoxville Water Co.* 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; *Willcox v. Con-*

solidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 223 U. S. 665, 56 L. ed. 594, 32 Sup. Ct. Rep. 389; *Louisville v. Cumberland Teleph. & Teleg. Co.* 225 U. S. 430, 56 L. ed. 1151, 32 Sup. Ct. Rep. 741; *Minnesota Rate Cases (Simpson v. Shepard)* 230 U. S. 352, 433, 57 L. ed. 1511, 1555, 33 Sup. Ct. Rep. 729; *Missouri Rate Cases (Knott v. Chicago, B. & Q. R. Co.)* 230 U. S. 474, 497, 57 L. ed. 1571, 1590, 33 Sup. Ct. Rep. 975; *Southern P. Co. v. Campbell*, 230 U. S. 537, 57 L. ed. 1610, 33 Sup. Ct. Rep. 1027; *Allen v. St. Louis, I. M. & S. R. Co.* 230 U. S. 553, 556, 57 L. ed. 1625, 1628, 33 Sup. Ct. Rep. 1030.

assumed. So far from the case being an authority for the conclusion that the validity of a particular rate cannot in any case be challenged if the returns from the entire intrastate operations are deemed to be adequate, the court, in the course of its opinion, expressly conceded the contrary. The court said (id. pp. 25, 26):

"Let it be conceded that if a scheme of maximum rates was imposed by state authority, as a whole adequately remunerative, and yet that some of such rates were so unequal as to exceed the flexible limit of judgment which belongs to the power to fix rates, that is, transcended the limits of just classification and amounted to the creation of favored class or classes whom the carrier was compelled to serve at a loss, to the detriment of other class or classes upon whom the burden of such loss would fall, that such legislation would be so inherently unreasonable as to constitute a violation of the due process and equal protection clauses of the 14th Amendment. Let it also be conceded that a like repugnancy to the Constitution of the United States would arise from an order made in the exercise of the power to fix a rate when the result of the enforcement of such order would be to compel a carrier to serve for a wholly inadequate compensation a class or classes selected for legislative favor even if, considering rates as a whole, a reasonable return from the operation of its road might be received by the carrier. Neither of these concessions, however, can control the case in hand, since it does not directly involve any question whatever of the power to fix rates and the constitutional limitations controlling the exercise of that power, but is concerned solely with an order directing a carrier to furnish a facility which it is a part of its general duty to furnish for the public convenience."

In *Interstate Commerce Commission v. Union P. R. Co.* 222 U. S. 541, 549, 56 L. ed. 308, 312, 22 Sup. Ct. Rep. 108, in speaking of the carriers' concession that they were unable to determine the cost of the particular traffic in question, and that a former rate had not been "less than cost," the court said: "This concession . . . establishes an important fact in dealing with the difficult question of determining what is a reasonable rate on a particular article. Where the rates as a whole are under consideration, there is a possibility of deciding, with more or less certainty, whether the total earnings afford a reasonable return. But whether the carrier earned dividends or not sheds little light on the question as to whether the rate on a particular article is reasonable. For, if the carrier's total income enables it to declare a divi-

dend, that would not justify an order requiring it to haul one class of goods for nothing, or for less than a reasonable rate. On the other hand, if the carrier earned no dividend, it would not have warranted an order fixing an unreasonably high rate on such article." See also *Southern R. Co. v. St. Louis Hay & Grain Co.* 214 U. S. 227, 303, 58 L. ed. 1404, 1406, 29 Sup. Ct. Rep. 678. In *Wood v. Vandalia R. Co.* 231 U. S. 1, 58 L. ed. 97, 34 Sup. Ct. Rep. 7, the rate order of the state commission related to a particular sort of traffic, and it appeared that the proof was insufficient to show the cost of transportation. This was also the case in *Louisville & N. R. Co. v. Garrett*, 231 U. S. 298, 58 L. ed. 229, 34 Sup. Ct. Rep. 48, which related to rates on particular commodities, and the order of the state commission was sustained, not because the state was at liberty to fix such rates as it might see fit upon the ground of local policy, regardless of reasonable compensation, and thus to require the carrier to transport the commodities in question for less than cost, but because the evidence not only failed to show that the rates were not reasonably adequate, but rather tended to establish that they were (id. p. 314). The same conclusion, with respect to the same rates, was reached on further hearing in *Louisville & N. R. Co. v. Finn*, 235 U. S. 601, 607, 59 L. ed. 379, 383, P.U.R.1915A, 121, 35 Sup. Ct. Rep. 146.

To repeat and conclude: It is presumed—but the presumption is a rebuttable one—that the rates which the state fixes for intrastate traffic are reasonable and just. When the question is as to the profitability of the intrastate business as a whole under a general scheme of rates, the carrier must satisfactorily prove the fair value of the property employed in its intrastate business, and show that it has been denied a fair return upon that value. With respect to particular rates, it is recognized that there is a wide field of legislative discretion, permitting variety and classification, and hence the mere details of what appears to be a reasonable scheme of rates, or a tariff or schedule affording substantial compensation, are not subject to judicial review. But this legislative power cannot be regarded as being without limit. The constitutional guaranty protects the carrier from arbitrary action and from the appropriation of its property to public purposes outside the undertaking assumed; and where it is established that a commodity, or a class of traffic, has been segregated and a rate imposed which would compel the carrier to transport it for less than the proper cost of transportation, or virtually at cost,

and thus the carrier would be denied a reasonable reward for its service after taking into account the entire traffic to which the rate applies, it must be concluded that the state has exceeded its authority.

The judgments, respectively, are reversed, and the cases are remanded for further proceedings not inconsistent with this opinion.

Mr. Justice Pitney dissents.

Annotation—Effect of fact that return as a whole is reasonable on right to require railroad to transport commodity for less than reasonable compensation.

The decision of the United States Supreme Court in *NORTHERN P. R. Co. v. NORTH DAKOTA*, ante, 1148, to the effect that the state cannot compel a carrier to establish a rate upon a particular commodity which does not pay the actual cost and yield a substantial compensation, is conclusive upon this question, although some earlier decisions of that court seem to imply a contrary rule.

The supreme court of Kansas in *Union P. R. Co. v. Public Utilities Commission* (1916) 95 Kan. 604, P.U.R.1915D, 377, 148 Pac. 667, said that the rule of law hitherto prevalent, that the rate on each and every commodity transported in intrastate commerce need not return a profit provided the entire intrastate business of the carrier show a fair profit, must be abandoned in deference to the decision of the supreme court in *NORTHERN P. R. Co. v. NORTH DAKOTA*. The court further said that this decision discredited two former decisions of the United States Supreme Court; namely, *St. Louis & S. F. R. Co. v. Gill* (1895) 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484, and *Minneapolis & St. L. R. Co. v. Minnesota* (1902) 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900. In the first of these cases, as quoted by the Kansas court, the Supreme Court said: "As to whether a state rate fixing the rates of fare requires a railroad to do business at a loss, and therefore constitutes a taking of its property without just compensation or due process of law, the correct test is the effect of the law on the entire line of such railroad." In the latter decision the court said: "A tariff fixed by the commission for coal in carload lots is not proved to be unreasonable by a showing that if such tariff were applied to all freight the road would not pay its operating expenses, since it might well be that the existing rates upon other merchandise which were not disturbed by the commission might be sufficient to earn a large profit to the company though it might earn little or nothing upon coal in carload lots." L.R.A.1917F.

A number of the more recent decisions have laid down a similar rule, some of which are based upon this decision of the United States Supreme Court.

Thus, in *Interstate Commerce Commission v. Union P. R. Co.* (1912) 222 U. S. 541, 56 L. ed. 908, 32 Sup. Ct. Rep. 108, Mr. Justice Lamar said: "If the carrier's total income enables it to declare a dividend, that would not justify an order requiring it to haul one class of goods for nothing; or for less than a reasonable rate." Similar language was used in *State ex rel. Railroad Comrs. v. Florida East Coast R. Co.* (1916) — Fla. —, P.U.R.1917B, 1023, 73 So. 171.

So, in *Morgan's L. & T. R. & S. S. Co. v. Railroad Commission* (1910) 127 La. 636, 53 So. 890, the court said that while, in establishing a complete schedule of rates, the total revenue of the road is a factor to be considered, nevertheless when a rate is fixed for a particular commodity, the only question is whether such rate will pay the actual cost of the service and a fair return on the investment. This decision was followed in *Louisiana R. & Nav. Co. v. Railroad Commission* (1912) 131 La. 387, 59 So. 820.

In *Re Atchison, T. & S. F. R. Co. (Mo.)* P.U.R.1916A, 594, the Missouri Public Service Commission said that, in view of the decision in *NORTHERN P. R. Co. v. NORTH DAKOTA*, whatever had been said in decisions and textbooks to the effect that a state legislature or commission could establish a rate not in itself compensatory, provided all the intrastate rates were profitable, might as well be discarded.

The North Dakota statute condemned in *NORTHERN P. R. Co. v. NORTH DAKOTA* had been before the supreme court of that state once before, and had been upheld. *State ex rel. McCue v. Northern P. R. Co.* (1909) 19 N. D. 45, 25 L.R.A.(N.S.) 1001, 120 N. W. 869. In the course of its opinion the state court said that there was no contention that the railroad would not be able upon its entire intrastate traffic to earn, in ad-

dition to its gross operating expenses, a sum amply sufficient to yield a reasonable income upon its investment, and consequently it could not successfully urge the unconstitutionality of the statute. This decision was affirmed by the United States Court, upon the ground that the evidence left the question of reasonableness in doubt; but the affirmation was without prejudice to the right of the railroad to reopen the case, if, after adequate trial, it thought it could prove the confiscatory character of the rates. *Northern P. R. Co. v. North Dakota* (1910) 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423.

Two earlier decisions to the contrary must be considered as overruled.

Thus, in *Atchison, T. & S. F. R. Co. v. United States* (1913) 203 Fed. 56, it was held that a carrier cannot complain of a violation of its constitutional rights in being compelled to make a rate for some particular commodity which would be confiscatory as applied to all its freight.

So, in *State ex rel. Railroad Comrs. v. Florida East Coast R. Co.* (1913) 65 Fla. 424, 62 So. 591, the court said that the railroad commission had the power to reduce the charges for a particular class or kind of service, provided such reduction does not in fact render the carrier unable to earn a fair profit upon the entire business, or a reasonable compensation for the service it rendered as an entirety.

From the rule that a railroad cannot be required to carry a commodity at a loss or without a substantial profit merely because its return as a whole is adequate, there follows naturally the corollary that a railroad cannot increase its rates upon a particular commodity merely because its return as a whole is not adequate. Among the cases asserting this latter rule may be noted *Tift v. Southern R. Co.* (1905) 10 Inters. Com. Rep. (Fed.) 548, affirmed by the Supreme Court in (1907) 206 U. S. 428, 51 L. ed. 1124, 27 Sup. Ct. Rep. 709, 11 Ann. Cas. 846; *Re Rates on Common Brick* (1913) 26 Inters. Com. Rep. (Fed.) 129; *Re Denver & S. L. R. Co. (Colo.)* P.U.R.1917C, 195; *State ex rel. Railroad Comrs. v. Florida East Coast R. Co.* (1916) — Fla. —, P.U.R.1917B, 1023, 73 So. 171.

So, in *Garwood v. Colorado & S. R. Co. (Colo.)* P.U.R.1916A, 911, the Colorado district court said: "If it be the law, as held by the Federal Supreme Court in the North Dakota case, that the rate on one commodity or class must not be reduced below a profitable amount, even though a general profit still remains on the whole traffic of the road, it must, conversely, be true that such rates must not be raised above a reasonable amount, even though a general loss still remains on the whole traffic of the road." W. M. G.

UNITED STATES SUPREME COURT.

CHARLES C. PENNINGTON, Plff. in Err.,
v.

FOURTH NATIONAL BANK OF CINCINNATI, OHIO.

(243 U. S. 269, 61 L. ed. 718, 37 Sup. Ct. Rep. 282.)

Constitutional law — substituted service on nonresident — satisfying alimony out of bank deposit.

The alimony obligations of a nonresident husband served only by publication, though inchoate at the commencement of the divorce suit, may, consistently with the due process of law guaranteed by U. S. Const. 14th Amendment, be enforced out of his bank deposit in a local bank, where, upon the filing of the suit, the court entered a preliminary order enjoining the bank from

paying out any part of the deposit, such order being as effective a seizure for this purpose as the customary garnishment or taking by trustee process.

For other cases, see Constitutional Law, II, b, 7, c, in Dig. 1-52 N. S.

(March 6, 1917.)

ERROR to the Supreme Court of the State of Ohio to review a judgment which affirmed a judgment of the Court of Appeals for Hamilton County affirming a judgment of the Circuit Court in favor of defendant in an action brought to recover a bank deposit. Affirmed.

The facts are stated in the opinion.

Mr. Guy W. Mallon, for plaintiff in error:

Service of process by publication where actions are brought against nonresidents is effectual only where, in connection with process against the person for commencing the action, property in the state is brought under the control of the court. and sub-

Note. — The power to grant alimony in a divorce proceeding without personal service of process is discussed in the annotation following this case, post, 1161.
L.R.A.1917F.

jected to its disposition by process adapted to that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest therein; in other words, where the action is in the nature of a proceeding in rem.

Pennoyer v. Neff, 95 U. S. 733, 24 L. ed. 572.

Suit for alimony is strictly a proceeding in personam.

Minor, Conf. L. p. 191, § 88; 14 Cyc. 745; 2 *Bishop, Marr. & Div.* § 9; *Bunnell v. Bunnell*, 25 Fed. 216.

By no loose definition of a proceeding in rem can money, much less a bank credit, be made the subject of such proceeding. Before having a proceeding in rem, you must have some definite res, the status of which it is sought to establish.

Cross v. Armstrong, 44 Ohio St. 613, 10 N. E. 160.

A proceeding quasi in rem, such as attachment, can be employed only as a process to compel the payment of a debt.

27 *Harvard L. Rev.* p. 107.

There can be no proceeding in rem against a bank credit.

27 *Harvard L. Rev.* pp. 108, 109, 115, 118.

Messrs. W. S. Little and M. C. B. Wilby, for defendant in error:

Where defendant's property is brought under control of the court when action is commenced, a suit for alimony to the extent of said property is substantially a suit in rem.

Minor, Conf. L. pp. 184, 207, §§ 85, 95; *Pennoyer v. Neff*, 95 U. S. 714, 733, 734, 24 L. ed. 565, 572, 573; *Benner v. Benner*, 63 Ohio St. 220, 58 N. E. 569; *Harshberger v. Harshberger*, 26 Iowa, 503; *Twing v. O'Meara*, 59 Iowa, 326, 13 N. W. 321; *Wesner v. O'Brien*, 56 Kan. 724, 32 L.R.A. 289, 54 Am. St. Rep. 604, 44 Pac. 1090; *Thurston v. Thurston*, 58 Minn. 279, 59 N. W. 1017; *Bailey v. Bailey*, 127 N. C. 474, 37 S. E. 502.

Intangible property can be controlled by injunction against its custodian.

Benner v. Benner, 63 Ohio St. 220, 58 N. E. 569; *Cleveland & B. Transit Co. v. Beeman*, 12 Ohio C. C. (N. S.) 460, 31 Ohio C. D. 500, affirmed in 81 Ohio St. 509, 91 N. E. 1126.

So far as the defendant in error was concerned, this bank credit was a debt owed by it to the plaintiff in error, and as such was subject to the law in regard to the situs of debts.

Chicago, R. I. & P. R. Co. v. Sturm, 174 U. S. 710, 715, 716, 43 L. ed. 1144, 1146, 19 Sup. Ct. Rep. 797; *Minor*, Conf. L. § 125. L.R.A.1917F.

Mr. Justice Brandeis delivered the opinion of the court:

Mrs. Pennington obtained in a state court of Ohio a decree of divorce which is admitted to be valid. In the same proceeding she sought alimony; and in order to insure its payment joined as a defendant the Fourth National Bank of Cincinnati, in which her husband had a deposit account. When the suit was filed the court entered a preliminary order enjoining the bank from paying out any part of the deposit. Under later orders of the court the bank made payments from it to the wife. Finally it was perpetually enjoined from making any payment to the husband, and ordered to pay the balance to the wife, which it did. The husband then presented to the bank a check for the full amount of the deposit, asserting that the court's orders deprived him of his property without due process of law, in violation of the 14th Amendment, and were void; since he was a nonresident of Ohio, had not been personally served with process within the state, had not voluntarily appeared in the suit, and had been served by publication only, all of which the bank knew. Payment of the check was refused. Thereupon Pennington brought, in another state court of Ohio, an independent action against the bank for the amount. Judgment being rendered for the bank, he took the case by writ of error to the court of appeals for Hamilton county, and from there to the supreme court of Ohio. Both these courts affirmed the judgment below. Then the case was brought to this court for review, Pennington still claiming that his constitutional rights had been violated.

The 14th Amendment did not, in guaranteeing due process of law, abridge the jurisdiction which a state possessed over property within its borders, regardless of the residence or presence of the owner. That jurisdiction extends alike to tangible and to intangible property. Indebtedness due from a resident to a nonresident—of which bank deposits are an example—is property within the state. *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797. It is, indeed, the species of property which courts of the several states have most frequently applied in satisfaction of the obligations of absent debtors. *Harris v. Balk*, 198 U. S. 215, 49 L. ed. 1023, 25 Sup. Ct. Rep. 625, 3 Ann. Cas. 1084. Substituted service on a nonresident by publication furnishes no legal basis for a judgment in personam. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565. But garnishment or foreign attachment is a proceeding quasi in rem. *Freeman v. Alderson*, 119 U. S. 185, 187, 30 L. ed. 372, 373, 7 Sup. Ct. Rep. 165. The thing be-

longing to the absent defendant is seized and applied to the satisfaction of his obligation. The Federal Constitution presents no obstacle to the full exercise of this power.

It is asserted that these settled principles of law cannot be applied to enforce the obligation of an absent husband to pay alimony, without violating the constitutional guaranty of due process of law. The main ground for the contention is this: In ordinary garnishment proceedings the obligation enforced is a debt existing at the commencement of the action, whereas the obligation to pay alimony arises only as a result of the suit. The distinction is, in this connection, without legal significance. The power of the state to proceed against the property of an absent defendant is the same whether the obligation sought to be enforced is an admitted indebtedness or a contested claim. It is the same whether the claim is liquidated or is unliquidated, like a claim for damages in contract or in tort. It is likewise immaterial that the claim is, at the commencement of the suit, inchoate, to be perfected only by time or the action

of the court. The only essentials to the exercise of the state's power are presence of the res within its borders, its seizure at the commencement of proceedings, and the opportunity of the owner to be heard. Where these essentials exist, a decree for alimony against an absent defendant will be valid under the same circumstances and to the same extent as if the judgment were on a debt; that is, it will be valid not in personam, but as a charge to be satisfied out of the property seized. Cases are cited in the margin.¹

The objection that this proceeding was void, because there was no seizure of the res at the commencement of the suit, is also unfounded. The injunction which issued against the bank was as effective a seizure as the customary garnishment or taking on trustee process. Such equitable process is frequently resorted to in order to reach and apply property which cannot be attached at law. Cases are cited in the margin.²

Affirmed.

¹ Enforcement of allowance of alimony from property of absent defendant, seized at the commencement of the suit by attachment or similar process. *Hanscom v. Hanscom*, 6 Colo. App. 97, 39 Pac. 885; *Thurston v. Thurston*, 58 Minn. 279, 59 N. W. 1017; *Wood v. Price*, 79 N. J. Eq. 1, 9, 10, 81 Atl. 1093. See *Bailey v. Bailey*, 127 N. C. 474, 37 S. E. 502; *Twigg v. O'Meara*, 59 Iowa, 326, 331, 13 N. W. 321. Cf. *Bunnell v. Bunnell*, 25 Fed. 214, 218.

The wife's inchoate right to alimony makes her a creditor of the husband under the statutes against fraudulent conveyances. *Livermore v. Boutelle*, 11 Gray, 217, 220,

71 Am. Dec. 708; *Thurston v. Thurston*, 58 Minn. 279, 59 N. W. 1017; *Murray v. Murray*, 115 Cal. 266, 274, 37 L.R.A. 626, 56 Am. St. Rep. 97, 47 Pac. 37; *Hinds v. Hinds*, 80 Ala. 225, 227.

² An injunction issued against a resident debtor of a nonresident defendant is a sufficient seizure of the defendant's property to give jurisdiction. *Bragg v. Gaynor*, 85 Wis. 468, 487, 21 L.R.A. 161, 55 N. W. 919. See *Murray v. Murray*, 115 Cal. 266, 276, 37 L.R.A. 626, 56 Am. St. Rep. 97, 47 Pac. 37. See *Tyler v. Judges of Ct. of Registration*, 175 Mass. 71, 77, 51 L.R.A. 433, 55 N. E. 812.

Annotation—Power to grant alimony in a divorce proceeding without personal service of process.

The earlier cases on this question are discussed in the note to *Stallings v. Stallings*, 9 L.R.A.(N.S.) 593, to which the present note is supplementary.

Whatever view may be taken as to the validity and effect on the marital status of a decree of divorce rendered upon constructive service against a nonresident who did not appear (as to which see note in L.R.A.1917B, 1032, and earlier notes there referred to), it is established beyond dispute that a purely personal decree or judgment for alimony rendered against a nonresident who was served constructively by publication or by actual service out of the state, and who did not appear, is void not only in the state where rendered, but in every other jurisdiction as well. In addition to the cases L.R.A.1917F.

cited in that behalf in the note in 9 L.R.A.(N.S.) 593, this rule is supported by *Re McMullen* (1912) 19 Cal. App. 481, 126 Pac. 368, and *Shillock v. Shillock* (1914) 24 Cal. App. 191, 140 Pac. 954.

So it is stated in *McSherry v. McSherry* (1910) 113 Md. 395, 140 Am. St. Rep. 428, 77 Atl. 653, that a decree for alimony is a decree in personam, and unless the court has jurisdiction over the person against whom it is passed, it is not binding upon him; that such jurisdiction over a nonresident can be acquired only by service of process upon him within the state, or by his voluntary appearance in person or by attorney; that constructive service by publication or personal service of process beyond the limits of the state is not sufficient, nor

does a special appearance for the purpose of objecting to the jurisdiction of the court confer upon that court jurisdiction to decree on the merits of the case. Here, however, service of a copy of the application for alimony and the order to show cause on the nonresident husband's attorney of record was held sufficient to give jurisdiction to render a decree fixing the amount of alimony, for after the court had acquired jurisdiction over the parties, they, through their attorneys, agreed that the amount of alimony, etc., should be determined by the court upon the application of either of the parties, and jurisdiction was accordingly retained by the court for that purpose.

Roberts v. Roberts (1917) 35 *Mich.* 397, *L.R.A.*1917C, 1140, 161 N. W. 148, recognizes this rule as to nonresident defendants, but holds that where a defendant is a resident of the state, but cannot be found therein, because he secretes himself within the state so service cannot well be made, the court acquires jurisdiction on a service by publication only, to render a personal judgment for alimony. The general question as to constructive or substituted service on resident in action in personam as due process of law is treated in notes to *Pinney v. Provident Loan & Invest. Co.* 50 *L.R.A.* 585; *Raher v. Raher*, 35 *L.R.A.*(N.S.) 292, and *Roberts v. Roberts*, *L.R.A.*1917C, 1143.

A voluntary appearance by the nonresident removes the objection to the jurisdiction.

Thus, it was held in *Austin v. Austin* (1912) 173 *Mich.* 47, 138 N. W. 237, *Ann. Cas.* 1914D, 749, that the court acquired jurisdiction to award alimony or allowance where the nonresident defendant appeared by his solicitor in the divorce suit.

The decision in *Parker v. Parker* (1912) 211 *Mass.* 139, 97 N. E. 988, holds that, by virtue of later statutes removing previous statutory limitations, the court can grant alimony where the husband, at the time of the petition for the same, had become a resident of the state and was personally served with process, although the decree of divorce was rendered on constructive service, the husband then being a nonresident of the state, and there being no appearance or attachment of his property.

As shown in the earlier note, constructive service of process or personal service outside the state, even in the case of a nonresident, will give jurisdiction to render a decree for alimony that shall *L.R.A.*1917F.

be binding upon property within the jurisdiction which has been specifically proceeded against, assuming, of course, that the nature and situs of the property are such as to support a proceeding in rem or quasi in rem. That, it will be observed, is the ground of the decision in *PENNINGTON v. FOURTH NAT. BANK*, ante, 1159, holding that an injunction restraining a bank joined as defendant from paying out any part of the deposit standing in the name of the husband was a sufficient seizure to support a judgment ordering the payment of the balance of the deposit to the wife, although the husband was a nonresident, was not served within the state, and did not appear.

In *Transit Co. v. Beaman* (1910) 31 *Ohio C. C.* 500, it was held upon the authority of *Benner v. Benner* (1900) 63 *Ohio St.* 220, 58 N. E. 569, cited in the note in 9 *L.R.A.*(N.S.) 594, that an order restraining corporations joined as defendants in a suit originally brought for divorce, but afterwards prosecuted for alimony, from transferring on their books any stock in the name of the husband, sufficiently put the stock in the custody of the court to support a decree in effect transferring the stock from the husband to the wife, although he was a nonresident, was served constructively only, and did not appear.

But where a wife procured a decree of divorce on constructive service, the husband being a nonresident of the state, under a statute authorizing orders of publication in divorce suits, it was held in *Chapman v. Chapman* (1917) 269 *Mo.* 663, 192 S. W. 448, reversing (1916) 194 *Mo. App.* 483, 185 S. W. 221, that she could not by sequestration reach his equitable interest in land situated within the state, under a statute authorizing the enforcement by sequestration of an order touching the alimony when a divorce shall be adjudged. In this case it was conceded that a judgment in personam for alimony on constructive service was void, but it was contended that by describing the property in the petition with a prayer for its sequestration in satisfaction of the alimony, and by the inclusion of all those things in the order of publication, the proceeding was made one in rem as to such property, and that a judgment in accordance with the prayer of the petition would be valid. The court, however, took the view that the suit for divorce and alimony was one at law, and not in equity; that, a personal judgment for alimony being invalid, the law would give no

remedy by execution or otherwise, and consequently no relief could be obtained in equity; that there was nothing in either of the statutes above mentioned authorizing a proceeding in rem against the property.

Apparently, it was the lack of such statutory authority, rather than any doubt of the constitutional power of the state to authorize such a proceeding in rem or quasi in rem, that led the court to deny the jurisdiction to rent the property in question.

In *McGuinness v. McGuinness* (1908) 72 N. J. Eq. 381, 68 Atl. 768, reversing (1906) 71 N. J. Eq. 1, 62 Atl. 937, set out in the note in 9 L.R.A.(N.S.) 595, it is held that a decree for alimony is not enforceable against a defendant's property within the state under a statute authorizing the sequestration of such property, where the decree for divorce was void because rendered against such defendant without service upon him within the territorial limits of the state, and without appearance by him. The court said that, if a judgment in personam rendered against a person over whom the court has not obtained jurisdiction violates the 14th Amendment of the Federal Constitution, as was

declared in *Pennoyer v. Ness* (1878) 95 U. S. 714, 24 L. ed. 565, and is for that reason absolutely void even in the state where rendered, as is declared to be the case in *Haddock v. Haddock* (1906) 201 U. S. 567, 50 L. ed. 867, 26 Sup. Ct. Rep. 525, 5 Ann. Cas. 1, no legislation of that state can operate to give it life.

It will be observed that in the *McGuinness Case* there was no attempt to seize any property within the state prior to the final decree, and thus impress the suit with the character of a proceeding in rem or quasi in rem, but the effort was to sequester property within the state to provide the sum awarded by the decrees for the future support of the complainant and the children. The lower court sought to sustain its decision by drawing a distinction between a judgment for alimony in a suit for absolute divorce, and provision for future support and maintenance in a decree of divorce a mensa et thoro,—a distinction which seems in effect to be repudiated by the decision of the court of errors and appeals, so far as the question of jurisdiction upon constructive service of process against a nonresident is concerned.

J. D. C.

UNITED STATES SUPREME COURT.

JOE ADAMS et al., Appts.,

v.

W. V. TANNER, Attorney General of the State of Washington, et al.

(244 U. S. 590, 61 L. ed. 1336, 37 Sup. Ct. Rep. 662.)

Injunction — restraining criminal proceedings.

1. The enforcement by the attorney general and county prosecuting attorney of the provisions of the Washington Employment Agency Law making it criminal to collect fees from workers for furnishing them with employment or with information leading thereto may be restrained by a court

Note. — The decision of the United States Supreme Court above reported reversed the decision of the Federal district court in *Wiseman v. Tanner*, 221 Fed. 694, which is cited in the note to *State v. Rossman*, L.R.A. 1917B, 1280, as supporting the decision of the state court in the latter case, upholding the constitutionality of the Washington statute. The decision in the *Rossman Case* is in effect overruled by the decision in *ADAMS v. TANNER*.

Generally, as to police power to license employment agency, see note to *People v. Brazee*, L.R.A.1916E, 1150. L.R.A.1917F.

of equity at the instance of persons conducting employment agencies under municipal licenses, who assert that their business will be destroyed, contrary to U. S. Const. 14th Amend., by the enforcement of such statute.

For other cases, see *Injunction*, I. i, in *Dig* 1-52 N. S.

Employment agency — prohibition or regulation.

2. Prohibition, not regulation, is what is accomplished by the provisions of the Washington Employment Agency Law making it criminal to collect fees from workers for furnishing them with employment or information leading to such employment, although fees may still be collected from those seeking workers.

For other cases, see *Employment Agencies*, in *Dig* 1-52 N. S.

Constitutional law — prohibiting employment agencies — police power.

3. The right of the individual under U. S. Const. 14th Amend. to engage in a useful and lawful business is unwarrantably infringed by the provisions of the Washington Employment Agency Law, enacted in the purported exercise of the police power, which make it criminal to demand or receive, either directly or indirectly, from any person seeking employment, or from any person on his or her behalf, any remuneration or fee for furnishing such person with

employment or with information leading thereto.

For other cases, see Constitutional Law, II, c. 4, b, in Dig. 1-52 N. S.

(Mr. Justice McKenna, Mr. Justice Brandeis, Mr. Justice Holmes, and Mr. Justice Clarke dissent.)

(June 11, 1917.)

APPEAL by complainants from a judgment of the District Court of the United States for the Eastern District of Washington dismissing a bill filed to enjoin the enforcement of the Employment Agency Law. Reversed.

The facts are stated in the opinion.

Messrs. Dallas V. Halverstadt; George Ferris, Edward J. Cannon, and Samuel H. Piles, for appellants:

The measure is prohibition, not regulation, of employment agencies.

Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, L.R.A.1915A, 960, 35 Sup. Ct. Rep. 240; Lochner v. New York, 198 U. S. 45, 64, 49 L. ed. 937, 944, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Mugler v. Kansas, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; State v. Redmon, 134 Wis. 89, 14 L.R.A. (N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 Ann. Cas. 408; Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; Kansas City, Ft. S. & M. R. Co. v. Botkin, 240 U. S. 227, 231, 60 L. ed. 617, 618, 36 Sup. Ct. Rep. 261; Watson v. Maryland, 218 U. S. 173, 176, 54 L. ed. 987, 989, 30 Sup. Ct. Rep. 644.

The legislature cannot prohibit an inherently lawful business.

Brazee v. Michigan, 241 U. S. 340, 60 L. ed. 1034, 36 Sup. Ct. Rep. 561; Cooley, Taxn. 404; Friebis v. United States, 157 U. S. 160, 166, 39 L. ed. 657, 659, 15 Sup. Ct. Rep. 586; Hammond Packing Co. v. Montana, 233 U. S. 331, 58 L. ed. 985, 34 Sup. Ct. Rep. 596; Little v. Tanner, 208 Fed. 605, 240 U. S. 369, 384, 60 L. ed. 691, 702, 36 Sup. Ct. Rep. 379; McCray v. United States, 195 U. S. 27, 63, 49 L. ed. 78, 98, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; Murphy v. California, 225 U. S. 623, 628, 629, 41 L.R.A.(N.S.) 153, 56 L. ed. 1229, 1232, 32 Sup. Ct. Rep. 697; Smith v. Texas, 233 U. S. 630, 636, 58 L. ed. 1129, 1132, L.R.A. 1915D, 677, 34 Sup. Ct. Rep. 681, Ann. Cas. 1015D, 420; Spokane v. Macho, 51 Wash. 322, 21 L.R.A.(N.S.) 263, 130 Am. St. Rep. 1100, 98 Pac. 755; State v. Moore, 113 N. C. 697, 22 L.R.A. 472, 18 S. E. 342; State v. Brown, 37 Wash. 103, 68 L.R.A. 880, 107 Am. St. Rep. 798, 79 Pac. 635; State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 190, 37 L.R.A.(N.S.) 466, 117 Pac. 1101, 2 N. C. C. A. 823, 3 N. C. C. A. 599; Tiedeman, L.R.A.1917F.

Pol. Power, 290; Allgeyer v. Louisiana, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427; Andrews v. Swartz, 156 U. S. 272, 39 L. ed. 422, 15 Sup. Ct. Rep. 389; Austin v. Tennessee, 179 U. S. 343, 361, 45 L. ed. 224, 233, 21 Sup. Ct. Rep. 132; Bailey v. Baker Ice Mach. Co. 239 U. S. 268, 272, 60 L. ed. 275, 285, 36 Sup. Ct. Rep. 50; Booth v. Illinois, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 762, 28 L. ed. 585, 588, 4 Sup. Ct. Rep. 652; W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 468, 45 L. ed. 619, 626, 21 Sup. Ct. Rep. 423; Lottery Case (Champion v. Ames) 188 U. S. 321, 355, 47 L. ed. 492, 500, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; Clark Distilling Co. v. Western Maryland R. Co. 242 U. S. 311, 61 L. ed. 326, L.R.A.1917B, 1218, 37 Sup. Ct. Rep. 180; Cohen v. Virginia, 6 Wheat. 264, 399, 5 L. ed. 257, 290; Com. v. Perry, 155 Mass. 117, 14 L.R.A. 325, 31 Am. St. Rep. 533, 28 N. E. 1126; Crowley v. Christensen, 137 U. S. 86, 90, 34 L. ed. 620, 623, 11 Sup. Ct. Rep. 13; Deatmore v. Hindley, 83 Wash. 326, 145 Pac. 462; Re Donnellan, 49 Wash. 460, 95 Pac. 1085; Re Ferguson, 80 Wash. 102, 141 Pac. 322; House v. Mayes, 219 U. S. 270, 281, 55 L. ed. 213, 217, 31 Sup. Ct. Rep. 234; Lawton v. Steele, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; Malette v. Spokane, 77 Wash. 205, 51 L.R.A.(N.S.) 686, 137 Pac. 496, Ann. Cas. 1915D, 225; McKane v. Durston, 153 U. S. 684, 38 L. ed. 867, 14 Sup. Ct. Rep. 913; Merrick v. Halsey & Co. 242 U. S. 568, 61 L. ed. 498, 37 Sup. Ct. Rep. 227; Mountain Timber Co. v. Washington, 243 U. S. 219, 61 L. ed. 685, 37 Sup. Ct. Rep. 260; New York C. R. Co. v. White, 243 U. S. 188, 61 L. ed. 667, L.R.A.1917D, 1, 37 Sup. Ct. Rep. 247; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; Patterson v. The Eudora, 190 U. S. 169, 47 L. ed. 1002, 23 Sup. Ct. Rep. 821; People ex rel. Tyroler v. Ward, 157 N. Y. 116, 43 L.R.A. 264, 68 Am. St. Rep. 763; 51 N. E. 1006; Phalen v. Virginia, 8 How. 163, 12 L. ed. 1030; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Reetz v. Michigan, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; Reinman v. Little Rock, 237 U. S. 171, 179, 59 L. ed. 900, 904, 35 Sup. Ct. Rep. 511; Smith v. Spokane, 55 Wash. 220, 104 Pac. 249, 19 Ann. Cas. 1220; Spokane v. Spokane & I. E. R. Co. 75 Wash. 651, 135 Pac. 636; State v. Rossman, 93 Wash. 530, L.R.A.1917B, 1276, 161 Pac. 349; State Medical Examiners v. Jordan, 92 Wash. 234, 158 Pac. 982; State Medical Ex-

aminers v. Macy, 92 Wash. 614, 159 Pac. 601; *State ex rel. Washington Pav. Co. v. Clausen*, 90 Wash. 450, L.R.A.1917A, 436, 156 Pac. 554; *Tacoma v. Boutelle*, 61 Wash. 445, 112 Pac. 661; *Rast v. Van Denman & L. Co.* 240 U. S. 342, 364, 60 L. ed. 679, 689, L.R.A.1917A, 421, 36 Sup. Ct. Rep. 370, Ann. Cas. 1917B, 455; *Truax v. Raich*, 239 U. S. 33, 60 L. ed. 131, L.R.A.1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283; *Wilson v. New*, 243 U. S. 332, 61 L. ed. 755, 37 Sup. Ct. Rep. 295.

The measure and the order or decree sustaining it forbid the liberty of contract, deprive appellants of property without due process of law, infringe their privileges and immunities and those of the so-called workers, and deprive appellants of the equal protection of the law, in violation of the 14th Amendment to the Constitution of the United States.

Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; *Allgeyer v. Louisiana*, 165 U. S. 578, 579, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Re Aubrey*, 36 Wash. 308, 104 Am. St. Rep. 952, 78 Pac. 900, 1 Ann. Cas. 927; *Bailey v. Alabama*, 219 U. S. 219, 55 L. ed. 191, 31 Sup. Ct. Rep. 145; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *Coppage v. Kansas*, 236 U. S. 1, 59 L. ed. 441, L.R.A.1915A, 960, 35 Sup. Ct. Rep. 240; *Dent v. West Virginia*, 129 U. S. 114, 121, 32 L. ed. 623, 625, 9 Sup. Ct. Rep. 231; *Ex parte Dickey*, 144 Cal. 234, 66 L.R.A. 928, 103 Am. St. Rep. 82, 77 Pac. 924, 1 Ann. Cas. 428; *Henderson v. New York (Henderson v. Wickham)* 92 U. S. 259, 23 L. ed. 543; *Holden v. Hardy*, 169 U. S. 366, 391, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383; *Jones v. Leslie*, 61 Wash. 107, 42 L.R.A.(N.S.) 893, 112 Pac. 81, Ann. Cas. 1912B, 1158; *Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; *Re O'Neill*, 41 Wash. 174, 3 L.R.A.(N.S.) 558, 83 Pac. 104, 6 Ann. Cas. 860; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Smith v. Texas*, 233 U. S. 630, 58 L. ed. 1129, L.R.A.1915D, 677, 34 Sup. Ct. Rep. 681, Ann. Cas. 1915D, 420; *State ex rel. Richey v. Smith*, 42 Wash. 247, 5 L.R.A.(N.S.) 674, 114 Am. St. Rep. 114, 84 Pac. 851, 7 Ann. Cas. 577; *State ex rel. Mackintosh v. Rossman*, 53 Wash. 1, 21 L.R.A.(N.S.) 821, 101 Pac. 357, 17 Ann. Cas. 625; *Truax v. Raich*, 239 U. S. 33, 60 L. ed. 131, L.R.A.1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283; *Williams v. Fears*, L.R.A.1917F.

179 U. S. 270, 274, 45 L. ed. 186, 188, 21 Sup. Ct. Rep. 128.

Considered as a regulation the measure is unreasonable, unnecessary, arbitrary, and oppressive, and an unjust discrimination, in violation of the 14th Amendment to the Federal Constitution.

Brazee v. Michigan, 241 U. S. 340, 60 L. ed. 1034, 36 Sup. Ct. Rep. 561; *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423; *Chesapeake & P. Telegraph Co. v. Manning*, 186 U. S. 238, 246, 46 L. ed. 1144, 1147, 22 Sup. Ct. Rep. 881; *Ex parte Dickey*, 144 Cal. 234, 66 L.R.A. 928, 103 Am. St. Rep. 82, 77 Pac. 924, 1 Ann. Cas. 428; *Dobbins v. Los Angeles*, 195 U. S. 223, 236, 49 L. ed. 169, 175, 25 Sup. Ct. Rep. 18; *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 58 L. ed. 1011, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612; *Guillotte v. New Orleans*, 12 La. Ann. 432; *Holden v. Hardy*, 169 U. S. 366, 391, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383; *Horney v. Nixon*, 213 Pa. 20, 1 L.R.A.(N.S.) 1184, 110 Am. St. Rep. 520, 61 Atl. 1088, 5 Ann. Cas. 349, 19 Am. Neg. Rep. 496; *House v. Mayes*, 219 U. S. 270, 281, 55 L. ed. 213, 217, 31 Sup. Ct. Rep. 234; *Lawton v. Steele*, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; *Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; *Low v. Rees Printing Co.* 41 Neb. 127, 24 L.R.A. 702, 43 Am. St. Rep. 670, 59 N. W. 362; *Re Opinions of Justices*, 163 Mass. 589, 28 L.R.A. 344, 40 N. E. 713; *People v. Steele*, 231 Ill. 340, 14 L.R.A.(N.S.) 361, 121 Am. St. Rep. 321, 83 N. E. 236; *Ex parte Quarg*, 149 Cal. 79, 5 L.R.A.(N.S.) 183, 117 Am. St. Rep. 115, 84 Pac. 766, 9 Ann. Cas. 747; *Schmidinger v. Chicago*, 226 U. S. 578, 57 L. ed. 364, 33 Sup. Ct. Rep. 182, Ann. Cas. 1914B, 284; *Smith v. Texas*, 233 U. S. 630, 58 L. ed. 1129, L.R.A.1915D, 677, 34 Sup. Ct. Rep. 681, Ann. Cas. 1915D, 420; *Southern R. Co. v. Greene*, 216 U. S. 400, 417, 54 L. ed. 536, 541, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; *State ex rel. Star Pub. Co. v. Associated Press*, 159 Mo. 410, 51 L.R.A. 151, 81 Am. St. Rep. 368, 60 S. W. 91; *State v. McCool*, 83 Kan. 428, 111 Pac. 477; *State v. Redmon*, 134 Wis. 89, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 Ann. Cas. 408; *State v. Fire Creek Coal & Coke Co.* 33 W. Va. 188, 6 L.R.A. 359, 25 Am. St. Rep. 891, 10 S. E. 288; *Williams v. Fears*, 179 U. S. 270, 274, 45 L. ed. 186, 188, 21 Sup. Ct. Rep. 128.

Messrs. L. L. Thompson and W. V. Tanner, Attorney General of Washington, for appellees:

This statute does not prohibit the business of operating an employment agency.

State v. Rossman, 93 Wash. 530, L.R.A. 1917B, 1276, 161 Pac. 349.

The police power of the state extends not only to measures designed to promote the public peace, health, morals, and safety, but also to those intended to promote the general welfare and prosperity.

Munn v. Illinois, 94 U. S. 113, 124, 24 L. ed. 77, 83; *Crowley v. Christensen*, 137 U. S. 86, 89, 34 L. ed. 620, 621, 11 Sup. Ct. Rep. 13; *Camfield v. United States*, 167 U. S. 518, 524, 42 L. ed. 260, 262, 17 Sup. Ct. Rep. 864; *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 592, 50 L. ed. 596, 609, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; *Karasek v. Peier*, 22 Wash. 426, 50 L.R.A. 345, 61 Pac. 33; *State v. Mountain Timber Co.* 75 Wash. 581, L.R.A.1917D, 10, 135 Pac. 645, 4 N. C. C. A. 811.

If the court can conclude that a state of facts might possibly exist which would justify the statute under consideration, then the correlative presumption follows that those facts do exist, and the court is bound to sustain the statute.

Munn v. Illinois, 94 U. S. 113, 132, 24 L. ed. 77, 86; *Antoni v. Greenhow*, 107 U. S. 769, 775, 27 L. ed. 468, 471, 2 Sup. Ct. Rep. 91; *Austin v. Tennessee*, 179 U. S. 343, 361, 363, 45 L. ed. 224, 233, 234, 21 Sup. Ct. Rep. 132; *Otis v. Parker*, 187 U. S. 606, 609, 47 L. ed. 323, 327, 23 Sup. Ct. Rep. 168; *Atkin v. Kansas*, 191 U. S. 207, 222, 48 L. ed. 148, 157, 24 Sup. Ct. Rep. 124; *Missouri, K. & T. R. Co. v. May*, 194 U. S. 267, 269, 48 L. ed. 971, 972, 24 Sup. Ct. Rep. 638; *Bacon v. Walker*, 204 U. S. 311, 317, 51 L. ed. 499, 502, 27 Sup. Ct. Rep. 289; *Ozan Lumber Co. v. Union County Nat. Bank*, 207 U. S. 251, 255, 257, 52 L. ed. 195-197, 28 Sup. Ct. Rep. 89; *McLean v. Arkansas*, 211 U. S. 539, 548, 551, 53 L. ed. 315, 320, 321, 29 Sup. Ct. Rep. 206; *Welch v. Swasey*, 214 U. S. 91, 107, 53 L. ed. 923, 930, 29 Sup. Ct. Rep. 567; *Southwestern Oil Co. v. Texas*, 217 U. S. 114, 126, 54 L. ed. 688, 694, 30 Sup. Ct. Rep. 496; *Watson v. Maryland*, 218 U. S. 174, 179, 54 L. ed. 988, 990, 30 Sup. Ct. Rep. 644; *Lindsley v. Natural Carbonic Gas Co.* 220 U. S. 61, 78, 55 L. ed. 369, 377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; *Bartlett v. Indiana*, 229 U. S. 26, 57 L. ed. 1050, 33 Sup. Ct. Rep. 692; *Tanner v. Little*, 240 U. S. 369, 60 L. ed. 691, 36 Sup. Ct. Rep. 379.

Although the court may differ with the legislative power as to the wisdom, policy, or expediency of legislation, it will not interfere unless the legislative action be palpably arbitrary and unreasonable.

Otis v. Parker, 187 U. S. 606, 609, 47 L. ed. 323, 327, 23 Sup. Ct. Rep. 168; *Atkin v. Kansas*, 191 U. S. 207, 223, 48 L. ed. 148, L.R.A.1917F.

158, 24 Sup. Ct. Rep. 124; *Missouri, K. & T. R. Co. v. May*, 194 U. S. 267, 269, 48 L. ed. 971, 972, 24 Sup. Ct. Rep. 638; *Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 291, 3 Ann. Cas. 520; *McLean v. Arkansas*, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; *Schmidinger v. Chicago*, 226 U. S. 578, 57 L. ed. 364, 33 Sup. Ct. Rep. 182, Ann. Cas. 1914B, 284; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 293, 42 L. ed. 1037, 1042, 18 Sup. Ct. Rep. 594; *Quong Wing v. Kirkendall*, 223 U. S. 59, 62, 56 L. ed. 350, 351, 32 Sup. Ct. Rep. 192; *Metropolis Theatre Co. v. Chicago*, 228 U. S. 61, 57 L. ed. 730, 33 Sup. Ct. Rep. 441; *Patsone v. Pennsylvania*, 232 U. S. 138, 144, 58 L. ed. 539, 543, 34 Sup. Ct. Rep. 281.

Persons deficient in education, who are compelled to depend upon their daily or monthly wages for the support of themselves and families, are, by virtue of their necessities, easy victims of fraud and extortion, and hence proper subjects for legislative protection.

Patterson v. The Eudora, 190 U. S. 169, 47 L. ed. 1002, 23 Sup. Ct. Rep. 821; *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1; *Keokee Consol. Coke Co. v. Taylor*, 234 U. S. 224, 58 L. ed. 1288, 34 Sup. Ct. Rep. 856; *Muller v. Oregon*, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957; *Riley v. Massachusetts*, 232 U. S. 671, 58 L. ed. 788, 34 Sup. Ct. Rep. 469; *Hawley v. Walker*, 232 U. S. 718, 58 L. ed. 813, 34 Sup. Ct. Rep. 479; *Miller v. Wilson*, 236 U. S. 373, 59 L. ed. 628, L.R.A.1915F, 829, 35 Sup. Ct. Rep. 342; *Bosley v. McLaughlin*, 236 U. S. 385, 59 L. ed. 632, 35 Sup. Ct. Rep. 345; *McLean v. Arkansas*, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; *Rail & River Coal Co. v. Yapple*, 236 U. S. 338, 59 L. ed. 607, 35 Sup. Ct. Rep. 359; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Erie R. Co. v. Williams*, 233 U. S. 685, 58 L. ed. 1155, 51 L.R.A.(N.S.) 1097, 34 Sup. Ct. Rep. 761; *Mutual Loan Co. v. Martell*, 222 U. S. 225, 56 L. ed. 175, 32 Sup. Ct. Rep. 74, Ann. Cas. 1913B, 529; *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; *Brazee v. Michigan*, 241 U. S. 340, 60 L. ed. 1034, 36 Sup. Ct. Rep. 561; *Lehon v. Atlanta*, 242 U. S. 53, 61 L. ed. 145, 37 Sup. Ct. Rep. 71; *Rast v. Van Deman & L. Co.* 240 U. S. 342-368, 60 L. ed. 679-691, L.R.A.1917A, 421, 36 Sup. Ct. Rep. 370, Ann. Cas. 1917B, 455.

The employment agency business as now conducted commonly results in fraud, imposition, and extortion.

People v. Brazee, 183 Mich. 259, L.R.A. 1916E, 1146, 149 N. W. 1053, 241 U. S.

340, 60 L. ed. 1034, 36 Sup. Ct. Rep. 561; Price v. People, 193 Ill. 114, 55 L.R.A. 588, 86 Am. St. Rep. 306, 61 N. E. 844; Williams v. Fears, 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128; People ex rel. Armstrong v. Warden, 183 N. Y. 223, 2 L.R.A. (N.S.) 859, 76 N. E. 11, 5 Ann. Cas. 325; Moore v. Minneapolis, 43 Minn. 418, 45 N. W. 719.

If a business as ordinarily carried on is inimical to the public welfare, then that business may be prohibited, and this without regard to whether a detriment arises from the inherent character of the business or from the general practices commonly followed in its conduct.

Booth v. Illinois, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425; Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; Schneider v. Turner, 130 Ill. 28, 6 L.R.A. 164, 22 N. E. 497; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; State ex rel. Goodsill v. Woodmansee, 1 N. D. 246, 11 L.R.A. 420, 46 N. W. 970; Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. Rep. 44; Merrick v. Halsey & Co. 242 U. S. 568, 61 L. ed. 498, 37 Sup. Ct. Rep. 227; Rast v. Van Deman & L. Co. 240 U. S. 342, 60 L. ed. 679, L.R.A.1917A, 421, 36 Sup. Ct. Rep. 370, Ann. Cas. 1917B, 455.

This act is not discriminatory.

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283-293, 42 L. ed. 1037-1042, 18 Sup. Ct. Rep. 594; Quong Wing v. Kirkendall, 223 U. S. 59-62, 56 L. ed. 350, 351, 32 Sup. Ct. Rep. 192; Mutual Loan Co. v. Martell, 222 U. S. 225, 56 L. ed. 175, 32 Sup. Ct. Rep. 74, Ann. Cas. 1913B, 529; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Barrett v. Indiana, 229 U. S. 26, 57 L. ed. 1050, 33 Sup. Ct. Rep. 692; Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 59 L. ed. 364, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570; Metropolis Theatre Co. v. Chicago, 228 U. S. 61, 57 L. ed. 730, 33 Sup. Ct. Rep. 441; Tanner v. Little, 240 U. S. 369-382, 60 L. ed. 691-701, 36 Sup. Ct. Rep. 379; Central Lumber Co. v. South Dakota, 226 U. S. 157, 57 L. ed. 164, 33 Sup. Ct. Rep. 66; Patson v. Pennsylvania, 232 U. S. 138, 58 L. ed. 539, 34 Sup. Ct. Rep. 281; Keokee Consol. Coke Co. v. Taylor, 234 U. S. 224, 58 L. ed. 1288, 34 Sup. Ct. Rep. 856; Williams v. Fears, 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128; Miller v. Wilson, 236 U. S. 373, 59 L. ed. 628, L.R.A.1915F, 829, 35 Sup. Ct. Rep. 342; Carroll v. Greenwich Ins. Co. L.R.A.1917F.

199 U. S. 401, 50 L. ed. 246, 26 Sup. Ct. Rep. 66; International Harvester Co. v. Missouri, 234 U. S. 199, 58 L. ed. 1276, 52 L.R.A. (N.S.) 525, 34 Sup. Ct. Rep. 859.

This act does not impair the obligation of any contract.

Stone v. Mississippi, 101 U. S. 814, 25 L. ed. 1079; Lottery Case (Champion v. Ames) 188 U. S. 356, 47 L. ed. 501, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; Douglas v. Kentucky, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. Rep. 199; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036.

Mr. Justice McReynolds delivered the opinion of the court:

Initiative Measure Number 8,—popularly known as “the Employment Agency Law,”—having been submitted to the people of Washington at the general election, received a majority vote and was thereafter declared a law, effective December 3, 1914, as provided by the state Constitution. Wash. Laws 1915, chap. 1. It follows:

“Be it enacted by the people of the state of Washington:

“Section 1. The welfare of the state of Washington depends on the welfare of its workers and demands that they be protected from conditions that result in their being liable to imposition and extortion.

“The state of Washington therefore exercising herein its police and sovereign power declares that the system of collecting fees from the workers for furnishing them with employment, or with information leading thereto, results frequently in their becoming the victims of imposition and extortion and is therefore detrimental to the welfare of the state.

“Section 2. It shall be unlawful for any employment agent, his representative, or any other person to demand or receive either directly or indirectly from any person seeking employment, or from any person on his or her behalf, any remuneration or fee whatsoever for furnishing him or her with employment or with information leading thereto.

“Section 3. For each and every violation of any of the provisions of this act the penalty shall be a fine or [of] not more than \$100 and imprisonment for not more than thirty days.”

In *Huntsworth v. Tanner*, 87 Wash. 670, 152 Pac. 523, the supreme court held school-teachers were not “workers” within the quoted measure, and that it did not apply to one conducting an agency patronized only by such teachers and their employers. And in *State v. Rossman*, 93 Wash. 530, L.R.A.1917B, 1276, 161 Pac. 349, the same

court declared it did not in fact prohibit employment agencies, since they might charge fees against persons wishing to hire laborers; that it was a valid exercise of state power; that a stenographer and book-keeper is a "worker;" and that one who charged him a fee for furnishing information leading to employment violated the law.

As members of copartnership and under municipal licenses, during the year 1914 and before, appellants were carrying on in the city of Spokane well-established agencies for securing employment for patrons who paid fees therefor. November 25, 1914, in the United States district court, they filed their original bill against W. V. Tanner, attorney general of the state, and George H. Crandall, prosecuting attorney for Spokane county, asking that Initiative Measure Number 8 be declared void because in conflict with the 14th Amendment, Federal Constitution, and that the defendants be perpetually enjoined from undertaking to enforce it. On the same day they presented a motion for preliminary injunction, supported by affidavits which were subsequently met by countervailing ones. Appellees thereafter entered motions to dismiss the original bill because (1) "said bill of complaint does not state facts sufficient to warrant this court in granting any relief to the plaintiffs; (2) that plaintiffs have a plain, speedy, and adequate remedy at law; (3) this court has no jurisdiction over the persons of these defendants or either of them, or the subject-matter of this action." A temporary injunction was denied. The motions to dismiss were sustained and a final decree to that effect followed.

Considering the doctrine affirmed in *Truax v. Raich*, 239 U. S. 33, 60 L. ed. 131, L.R.A.1916D, 545, 36 Sup. Ct. Rep. 7, and cases there cited, the record presents no serious question in respect of jurisdiction.

The bill alleges "that the employment business consists in securing places for persons desiring to work," and unless permitted to collect fees from those asking assistance to such end the business conducted by appellants cannot succeed and must be abandoned. We think this conclusion is obviously true. As paid agents their duty is to find places for their principals. To act in behalf of those seeking workers is another and different service, although, of course, the same individual may be engaged in both. Appellants' occupation as agent for workers cannot exist unless the latter pay for what they receive. To say it is not prohibited because fees may be collected for something done in behalf of other principals is not good reasoning. The statute L.R.A.1917F.

is one of prohibition, not regulation. "You take my house when you do take the prop that doth sustain my house; you take my life when you do take the means whereby I live."

We have held employment agencies are subject to police regulation and control. "The general nature of the business is such that, unless regulated, many persons may be exposed to misfortunes against which the legislature can properly protect them." *Brazee v. Michigan*, 241 U. S. 340, 343, 60 L. ed. 1034, 1036, 36 Sup. Ct. Rep. 561. But we think it plain that there is nothing inherently immoral or dangerous to public welfare in acting as paid representative of another to find a position in which he can earn an honest living. On the contrary, such service is useful, commendable, and in great demand. In *Spokane v. Macho*, 51 Wash. 322, 324, 21 L.R.A.(N.S.) 263, 130 Am. St. Rep. 1100, 98 Pac. 755, the supreme court of Washington said: "It cannot be denied that the business of the employment agent is a legitimate business; as much so as is that of the banker, broker, or merchant; and under the methods prevailing in the modern business world it may be said to be a necessary adjunct in the prosecution of business enterprises." Concerning the same subject, *Ex parte Dickey*, 144 Cal. 234, 236, 66 L.R.A. 928, 103 Am. St. Rep. 82, 77 Pac. 924, 1 Ann. Cas. 428, the supreme court of California said: "The business in which this defendant is engaged is not only innocent and innocuous, but is highly beneficial, as tending the more quickly to secure labor for the unemployed. There is nothing in the nature of the business, therefore, that in any way threatens or endangers the public health, safety, or morals." And this conclusion is fortified by the action of many states in establishing free employment agencies charged with the duty to find occupation for workers.

It is alleged "that plaintiffs have furnished positions for approximately ninety thousand persons during the last year, and have received applications for employment from at least two hundred thousand laborers, for whom they have been unable to furnish employment. . . . That such agencies have been established and conducted for so long a time that they are now one of the necessary means whereby persons seeking employment are able to secure the same." A suggestion in behalf of the state, that while a pursuit of this kind "may be beneficial to some particular individuals or in specific cases, economically it is certainly nonuseful, if not vicious, because it compels the needy and unfortunate to pay for that which they are entitled to without fee or price, that is, the right to work," while

possibly indicative of the purpose held by those who originated the legislation, in reason, gives it no support.

Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skilfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked.

The general principles by which the validity of the challenged measure must be determined have been expressed many times in our former opinions. It will suffice to quote from a few.

In *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427, we held invalid a statute of Louisiana which undertook to prohibit a citizen from contracting outside the state for insurance on his property lying therein because it violated the liberty guaranteed to him by the 14th Amendment. "The liberty mentioned in that Amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."

"If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the state thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law." *Booth* L.R.A.1917F.

v. Illinois, 184 U. S. 425, 429, 46 L. ed. 623, 626, 22 Sup. Ct. Rep. 425.

"It is also true that the police power of the state is not unlimited, and is subject to judicial review, and when exerted in an arbitrary or oppressive manner such laws may be annulled as violative of rights protected by the Constitution. While the courts can set aside legislative enactments upon this ground, the principles upon which such interference is warranted are as well settled as is the right of judicial interference itself. The legislature, being familiar with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power. . . . If there existed a condition of affairs concerning which the legislature of the state, exercising its conceded right to enact laws for the protection of the health, safety, or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail." *McLean v. Arkansas*, 211 U. S. 539, 547, 548, 53 L. ed. 315, 319, 320, 20 Sup. Ct. Rep. 206.

"The 14th Amendment protects the citizens in his right to engage in any lawful business, but it does not prevent legislation intended to regulate useful occupations which, because of their nature or location, may prove injurious or offensive to the public. Neither does it prevent a municipality from prohibiting any business which is inherently vicious and harmful. But, between the useful business which may be regulated and the vicious business which can be prohibited lie many nonuseful occupations which may, or may not be harmful to the public, according to local conditions, or the manner in which they are conducted." *Murphy v. California*, 225 U. S. 623, 628, 56 L. ed. 1229, 1232, 41 L.R.A. (N.S.) 153, 32 Sup. Ct. Rep. 697.

We are of opinion that Initiative Measure Number 8, as constructed by the supreme court of Washington, is arbitrary and oppressive, and that it unduly restricts the liberty of appellants, guaranteed by the 14th Amendment, to engage in a useful business. It may not therefore be enforced against them.

The judgment of the court below is re-

versed and the cause remanded for further proceedings in conformity with this opinion.

Mr. Justice McKenna dissents upon the ground that, under the decisions of this court,—some of them so late as to require no citation or review,—the law in question is a valid exercise of the police power of the state, directed against a demonstrated evil.

Mr. Justice Brandeis, dissenting:

To declare the statute of a state, enacted in the exercise of the police power, invalid under the 14th Amendment, is a matter of such seriousness that I state the reasons for my dissent from the opinion of the court.

The statute of the state of Washington, commonly known as the "Abolishing Employment Offices Measure," was proposed by Initiative Petition No. 8, filed July 3, 1914, and was adopted November 3, 1914, at the general election; 162,054 votes being cast for the measure and 144,544 against it. In terms the act merely prohibits the taking of fees from those seeking employment.¹

Plaintiffs, who are proprietors of private employment agencies in the city of Spokane, assert that this statute, if enforced, would compel them to discontinue business and would thus, in violation of the 14th Amendment, deprive them of their liberty and property without due process of law. The act leaves the plaintiffs free to collect fees from employers; and it appears that private

employment offices thus restricted are still carrying on business.² But even if it should prove, as plaintiffs allege, that their business could not live without collecting fees from employees, that fact would not necessarily render the act invalid. Private employment agencies are a business properly subject to police regulation and control. *Brazee v. Michigan*, 241 U. S. 340, 60 L. ed. 1034, 36 Sup. Ct. Rep. 561. And this court has made it clear that a statute enacted to promote health, safety, morals, or the public welfare may be valid, *although* it will compel discontinuance of existing businesses in whole or in part. Statutes prohibiting the manufacture and sale of liquor present the most familiar example of such a prohibition. But where, as here, no question of interstate commerce is involved, this court has sustained also statutes or municipal ordinances which compelled discontinuance of such business as (a) of manufacturing and selling oleomargarin (*Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257); (b) of selling cigarettes (*Austin v. Tennessee*, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132); (c) of selling futures in grain or other commodities (*Booth v. Illinois*, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425); (d) of selling stocks on margin (*Otis v. Parker*, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168); (e) of keeping billiard halls (*Murphy v. California*, 225 U. S. 623, 56 L. ed. 1229, 41 L.R.A.(N.S.) 153, 32 Sup. Ct. Rep. 697); (f) of selling

¹ "An Act to Prohibit the Collection of Fees for the Securing of Employment, or Furnishing Information Leading Thereto, and Fixing a Penalty for Violation Thereof.

"Be it enacted by the people of the state of Washington:

"Section 1. The welfare of the state of Washington depends on the welfare of its workers and demands that they be protected from conditions that result in their being liable to imposition and extortion.

"The state of Washington therefore exercising herein police and sovereign power declares that the system of collecting fees from the workers for furnishing them with employment, or with information leading thereto, results frequently in their becoming the victims of imposition and extortion and is therefore detrimental to the welfare of the state.

"Section 2. It shall be unlawful for any employment agent, his representative, or any other person to demand or receive either directly or indirectly from any person seeking employment, or from any person in his or her behalf, any remuneration or fee whatsoever for furnishing him or her with employment or with information leading thereto.

"Section 3. For each and every violation of any of the provisions of this act the penalty shall be a fine or [of] not more than \$100 and imprisonment for not more than thirty days."

alty shall be a fine or [of] not more than \$100 and imprisonment for not more than thirty days."

The supreme court of Washington has twice passed upon the scope of the act; holding in *Huntsworth v. Tanner*, 87 Wash. 670, 152 Pac. 523, that it is not applicable to teachers, and in *State v. Rossman*, 93 Wash. 530, L.R.A.1917B, 1276, 161 Pac. 349, that it is applicable to stenographers and bookkeepers.

² See Report of the State of Washington Bureau of Labor (1915, 1916), pp. 120, 121.

"The free agencies, we are pleased to be able to say, are growing in popularity, and while they do not advertise their business with the same thrift that the other fellows did, they are coming into general service. There are three services of this kind: The private agency that receives all compensation from employers, either by the month, year, or per the service rendered; the Federal agency, and the municipal agency; these latter two have offices in the larger places and are doing good work and the service is free to both employee and the employer. In the smaller cities and towns the Federal is the prevailing agency and the postmaster of the place is usually the local representative."

trading stamps (*Rast v. Van Deman & L. Co.* 240 U. S. 342, 368, 60 L. ed. 679, 691, L.R.A.1917A, 421, 36 Sup. Ct. Rep. 370).

These cases show that the scope of the police power is not limited to regulation as distinguished from prohibition. They show also that the power of the state exists equally, whether the end sought to be attained is the promotion of health, safety, or morals, or is the prevention of fraud or the prevention of general demoralization. "If the state thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere unless in looking at the substance of the matter, they can see that it 'is a clear, unmistakable infringement of rights secured by the fundamental law.'" *Otis v. Parker*, 187 U. S. 606, 609, 47 L. ed. 323, 327, 23 Sup. Ct. Rep. 168; *Booth v. Illinois*, 184 U. S. 425, 429, 46 L. ed. 623, 626, 22 Sup. Ct. Rep. 425. Or, as it is so frequently expressed, the action of the legislature is final, unless the measure adopted appears clearly to be arbitrary or unreasonable, or to have no real or substantial relation to the object sought to be attained. Whether a measure relating to the public welfare is arbitrary or unreasonable, whether it has no substantial relation to the end proposed, is obviously not to be determined by assumptions or by a priori reasoning. The judgment should be based upon a consideration of relevant facts, actual or possible—*Ex facto jus oritur*. That ancient rule must prevail in order that we may have a system of living law.

It is necessary to inquire, therefore: What was the evil which the people of Washington sought to correct? Why was the particular remedy embodied in the statute adopted? And, incidentally, what has been the experience, if any, of other states or countries in this connection? But these inquiries are entered upon, not for the purpose of determining whether the remedy adopted was wise, or even for the purpose of determining what the facts actually were. The decision of such questions lies with the legislative branch of the government. *Powell v. Pennsylvania*, 127 U. S. 678, 685, 32 L. ed. 253, 256, 8 Sup. Ct. Rep. 992, 1257. The sole purpose of the inquiries is to enable this court to decide whether, in view of the facts, actual or possible, the action of the state of Washington was so clearly arbitrary or so unreasonable that it could not be taken "by a free government without a violation of fundamental rights." See *McCray v. United States*, 195 U. S. 27, 64, 49 L. ed. 78, 99, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561. L.R.A.1917F.

1. The evils.³

The evils with which the people of Washington were confronted arose partly from the abuses incident to the system of private employment agencies and partly from its inadequacy.

(a) The abuses.

These are summarized in a report published by the United States Bureau of Labor in October, 1912,⁴ thus:

"Private employment agencies, which charge a fee for their services, are found in every city of any size in the United States. The nature of their business is such as to make possible most iniquitous practices. Their patrons are frequently men and women with only a dollar or two, which they are eager to give up for the opportunity of earning more. They are often of small intelligence and easily duped. Stories of how these agencies have swindled and defrauded those who sought employment through them are heard universally. Some of the more common of the fraudulent methods said to be used by these agencies are the following:

"1. Charging a fee and failing to make any effort to find work for the applicant.

"2. Sending applicants where no work exists.

"3. Sending applicants to distant points where no work or where unsatisfactory work exists, but whence the applicant will not return on account of the expense involved.

"4. Collusion between the agent and employer, whereby the applicant is given a few days' work and then discharged to make way for new workmen, the agent and employer dividing the fee.

"5. Charging exorbitant fees, or giving jobs to such applicants as contribute extra fees, presents, etc.

"6. Inducing workers, particularly girls, who have been placed, to leave, pay another fee, and get a 'better job.'

"Other evils charged against employment agents are the congregating of persons for

³ The evils incident to private employment agencies first arrested public attention in America about 1890. During the fifteen years preceding the enactment of the Washington law there were repeated investigations, official and unofficial, and there was much discussion and experimentation. See Free Public Employment Offices in the United States; U. S. Bureau of Labor, Bulletin No. 68, p. 1; Statistics of Unemployment and the Work of Employment Offices, U. S. Bureau of Labor Bulletin 109, p. 5; Subject Index of the U. S. Bureau of Labor Statistics, Bulletin No. 174, pp. 85-87; Munro, Bibliography of Municipal Government, pp. 379-381.

⁴ United States Bureau of Labor Bulletin No. 109, p. 36.

gambling or other evil practices, collusion with keepers of immoral houses, and the sending of women applicants to houses of prostitution; sometimes employment offices are maintained in saloons, with the resulting evils."

In the report to Congress of the United States Commission on Industrial Relations, created by Act of August 23, 1912 (chap. 351, 37 Stat. at L. 415, Comp. Stat. 1916, § 8913), which gave public hearings on the subject of employment offices in May, 1914, the abuses are found to be as follows:⁵

"23. There are many private employment agents who try to conduct their business honestly, but they are the exception rather than the rule. The business as a whole reeks with fraud, extortion, and flagrant abuses of every kind. The most common evils are as follows:

"Fees are often charged out of all proportion to the service rendered. We know of cases where \$5, \$9, \$10, and even \$16 apiece has been paid for jobs at common labor. In one city the fees paid by scrub-women is at the rate of \$24 a year for their poorly paid work. Then there is discrimination in the charges made for the same jobs. Often, too, men are sent a long distance, made to pay fees and transportation, only to find that no one at that place ordered men from the employment agent. A most pernicious practice is the collusion with foremen or superintendents by which the employment agent 'splits fees' with them. That is, the foreman agrees to hire men of a certain employment agent on condition that one fourth or one half of every fee collected from men whom he hires be given to him. This leads the foreman to discharge men constantly in order to have more men hired through the agent and more fees collected. It develops the 'three-gang' method so universally complained of by railroad and construction laborers, namely, one gang working, another coming to work from the employment agent, and a third going back to the city.

"Finally, there is the most frequent abuse,—misrepresentation of terms and condition of employment. Men are told that they will get more wages than are actually paid, or that the work will last longer than it actually will, or that there is a boarding house when there really is an insanitary camp, or that the cost of transportation will be paid, when it is to be deducted from the wages. They are not told of other de-

ductions that will be made from wages; they are not informed about strikes that may be on at the places to which they are sent, nor about other important facts which they ought to know. These misrepresentations, it must be said, are often as much the fault of the employer as of the labor agent. Also the employer will place his call for help with several agents, and each will send enough to fill the whole order, causing many to find no jobs. Labor agents and laborers alike are guilty of the misuse of free transportation furnished by employers to prospective help. And it is true also that many applicants perpetrate frauds on the labor agents themselves; as, for example, causing them to return fees when positions actually were secured. This is the result of the general feeling that the whole system of paying fees for jobs is unjust; and if they must pay in order to get work, then any attempt to get the fee back is justifiable."

(b) The inadequacy.

But the evils were not limited to what are commonly called abuses—like the fraud and extortion described above. Even the exemplary private offices charging fees to workers might prove harmful, for the reason thus stated in the report to Congress of the United States Commission on Industrial relations, cited *supra*.

"18. . . . Investigations show, however, that instead of relieving unemployment and reducing irregularity, these employment agencies actually serve to congest the labor market and to increase idleness and irregularity of employment. They are interested primarily in the fees they can earn, and if they can earn more by bringing workers to an already overcrowded city, they do so. Again, it is an almost universal custom among private employment agents to fill vacancies by putting in them people who are working at other places. In this way new vacancies are created and more fees can be earned.

"19. They also fail to meet the problem because they are so numerous and are necessarily competitive. With few exceptions, there is no co-operation among them. This difficulty is further emphasized by the necessity of paying the registration fees required by many agencies; obviously the laborer cannot apply to very many if he has to pay a dollar at each one.

"20. The fees which private employment offices must charge are barriers which prevent the proper flow of labor into the channels where it is needed and are a direct influence in keeping men idle. In the summer, when employment is plentiful, the fees are as low as 25 cents, and men are even referred to work free of charge. But

⁵ Final Report and Testimony submitted to Congress by the Commission on Industrial Relations created by the Act of August 23, 1912, 64th Congress, 1st Session, Doc. 415, vol. 1, pp. 109-111. See also vol. 2, pp. 1185-1440. L.R.A.1917F.

this must necessarily be made up in the winter, when work is scarce. At such times, when men need work most badly, the private employment offices put up their fees and keep the unemployed from going to work until they can pay \$2, \$3, \$5, and even \$10 and more for their jobs. This necessity of paying for the privilege of going to work, and paying more the more urgently the job is needed, not only keeps people unnecessarily unemployed, but seems foreign to the spirit of American freedom and opportunity.

"21. An additional injustice inevitably connected with labor agencies which charge fees is that they must place the entire cost of the service upon those least able to bear it. Employment agents say that employers will not pay the fees; hence they must charge the employees. Among the wage earners, too, however, those who are least in need and can wait for work pay the least for jobs and even get them free, while those who are most in need make up for all the rest and pay the highest fees. The weakest and poorest classes of wage earners are therefore made to pay the largest share for a service rendered to employers, to workers, and to the public as well."

2. The remedies.

During the fifteen years preceding 1914 there had been extensive experimentation in the regulation of private employment agencies. Twenty-four states had attempted *direct* regulation under statutes, often supplemented by municipal ordinances.⁶ Nineteen states had attempted *indirect* regulation through the competition of state offices, and seven others through competition of municipal offices.⁷ Other experiments in direct regulation through competition were made by voluntary organizations, philanthropic, social, and industrial.⁸

"It is not necessary here to enter into the relative merits of governmental regulation and governmental operation. Suffice it to say that twenty-four states and the District of Columbia have attempted to regulate private employment agencies and have made a miserable failure of it. The business lends itself easily to fraud and imposition, and it is far more true of the private agencies than of the public offices that they have been frauds as well as failures."

Public Employment Offices—W. M. Leiserson, 29 *Political Science Quarterly* (March, 1914), p. 36.

"The United States possesses at the present time no adequate system, either state or national, for the regulation of private employment agencies, either from the point of view of the content of the laws, affording regulations of the business and restric-

The results of those experiments were unsatisfactory. The abuses continued in large measure; and the private offices survived to a great extent the competition of the free agencies, public and private. There gradually developed a conviction that the evils of private agencies were inherent and ineradicable, so long as they were permitted to charge fees to the workers seeking employment. And many believed that such charges were the root of the evil.

On September 25, 1914, the American Association of Public Employment Offices adopted at its annual meeting the following resolutions:

"Resolved, That this association go on record as favoring the elimination as soon as possible, of all private employment agencies operating for a profit within the United States, and that it recommends to the consideration of the United States Commission on Industrial Relations and Congress and the various state legislatures legislation having this end in view."

The United States Commission on Industrial Relations declared in its report to Congress:

"24. Attempts to remove these abuses by regulation have been made in thirty-one states, but with few exceptions they have proved futile, and at most they have served only to promote a higher standard of honesty in the business and have not removed the other abuses which are inherent in the system. Where the states and cities have spent much money for inspectors and complaint adjusters there has been considerable improvement in the methods of private employment agencies, but most of the officers in charge of this regulation testify that the abuses are in 'the nature of the business' and never can be entirely eliminated. They therefore favor the total abolition of private labor agencies. This is also the com-

tions as to how the business shall be carried on, or as to proper methods of enforcement." (Labor Laws and Their Enforcement, edited by Susan M. Kingsbury [Boston, 1911] p. 366. See chapter 6 of this work for a study of the regulation of private employment agencies by Mabelle Moses. See also chapter 663, Laws of 1913, state of Wisconsin.)

⁷ Proceedings of the Association of Public Employment Offices (September 25, 1914), U. S. Dep. of Labor, Bureau of Labor Statistics, Bulletin 192, p. 61.

⁸ Unemployment and Work of Employment Offices, Bulletin of U. S. Bureau of Labor No. 109, pp. 5, 37 (October, 1912).

⁹ Made in August, 1915, and cited *supra*, Note 4. Between 1914 and this date six states had legislated on the subject. See Unemployment Survey, 1914, 1915. 5 *American Labor Legislation Review*, p. 560.

mon opinion among working people, and in the several states attempts have already been made to accomplish this by law."

But the remedies proposed were not limited to the suppression of private offices charging fees to workers, and the extension of the system of state and municipal offices. The conviction became widespread that, for the solution of the larger problem of unemployment, the aid of the Federal government and the utilization and development of its extensive machinery was indispensable. During the seven years preceding 1914 a beginning had been made in this respect. The Immigration Act of February 20, 1907 (chap. 1134, 34 Stat. at L. 898, 909, Comp. Stat. 1916, §§ 4242, 960), created within the Bureau of Immigration and Naturalization a Division of Information, charged with the duty of promoting "a beneficial distribution of aliens." The services rendered by this division included, among others, some commonly performed by employment agencies. While it undertook to place in positions of employment only aliens, its operations were national in scope. The Act of March 4, 1913, creating the Department of Labor, resulted in a transfer of the Bureau of Immigration, including the Division of Information, to that department. 37 Stat. at L. 736, chap. 141, Comp. Stat. 1916, § 932. By this transfer the scope of the division's work was enlarged to correspond with the broad powers of the Labor Department. These were declared by Congress to be—

"to foster, promote and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment."

Then its efforts "to distribute" (that is both to supply and to find places for) labor were extended to include citizens as well as

aliens; and much was done to develop the machinery necessary for such distribution. In the summer of 1914, and in part before the filing in the state of Washington of the proposal for legislation here in question, action had been taken by the Department of Labor which attracted public attention. It undertook to supply harvest hands needed in the Middle West and also to find work for the factory hands thrown out of employment by the great fire at Salem, Massachusetts, June 25, 1914.¹⁰ The division was strengthened by co-operation with other departments of the Federal government (Agriculture, Interior, Commerce, and the Post-office, with its 60,000 local offices) and with state and municipal employment offices. As early as June 13, 1914, the United States Department of Labor had also sought the co-operation in this work of all the leading newspapers in America, including those printed in foreign languages.¹¹

3. Conditions in the state of Washington.

The peculiar needs of Washington emphasized the defects of the system of private employment offices.

(a) The evils.

The conditions generally prevailing are described in a report recently published by the United States Department of Labor, thus: ¹²

"In no part of the United States perhaps is there so large a field for employment offices as in the Pacific states. As has been noted, industrial conditions there favor inconstancy of employment. Much of the business activity is based upon the casual, short-time job. This in itself means the frequent shifting of workers from place to place. And the shifting is the more difficult, as much of the work offered is in more or less remote districts of the country. . . .

¹⁰ The fire was so extensive that the Congress appropriated \$200,000 for relief of all sufferers (Act of August 1, 1914, chap. 223, 38 Stat. at L. 681).

¹¹ Annual Report of the Secretary of Labor, 1914, pp. 48-55; Monthly Review of the U. S. Bureau of Labor Statistics, July, 1915, p. 8; see also Annual Report of the Secretary of Labor, 1915, p. 36: "Interdepartmental co-operation.—Through the co-operation of the Postoffice Department it became possible to bring to the aid of this labor distribution service some 60,000 post-offices and thereby to create a network of communication between employers needing help without knowing where to get it and workers wanting employment without knowing where to find it. Either employer or workman may obtain at any postoffice in the United States a blank application supplied by this department, which, after filling out and signing it, he may deposit in the mails L.R.A.1917F.

anywhere, free of postage." "Employment bulletins.—The bulletins contain a statement of unmatched applications, no matter what part of the country they may come from. It is not expected, of course, that applications for work of a minor character will ordinarily be matched by applications for workers of that kind from distant stations. It is assumed, however, that bulletined applications may possibly be matched through the co-operation of near-by stations within a reasonable radius. The bulletins are also systematically sent to such newspapers as have indicated their desire to receive them for possible publication as news matter of interest to their respective readers."

¹² Labor Laws and their Administration in the Pacific States. United States Department of Labor, Bureau of Labor Bulletin No. 211 (1917), pp. 17, 18.

"The necessity laid upon so many workers of constantly seeking new jobs opens a peculiarly fertile field for their exploitation by unscrupulous private employment agencies. There is much testimony to the fact and frequency of such exploitation. The most striking evidence of this is that in the state of Washington private agencies made themselves so generally distrusted that in 1915 their complete abolition was ordered by popular vote. . . .

"Prior to 1914 there was practically no legislation regarding private employment agencies, and there had been no attempt at state supervision of their conduct. But distrust of such agencies was constantly increasing and culminated in the year mentioned in the passage by popular initiative of an act aiming at the total suppression of all private employment agencies of the commercial type."

The reports of the Washington State Bureau of Labor give this description:

"The investigations of the Bureau show that the worst labor conditions in the state are to be found on highway and railroad construction work, and these are largely because the men are sent long distances by the employment agencies, are housed and fed poorly at the camps, and are paid on an average of \$1.75 to \$2.25 a day, out of which they are compelled to pay \$5.50 to \$7 per week for board, generally a hospital fee of some kind, always a fee to the employment agency and their transportation to the point where the work is being done. The consequence is that they usually have but little money left when the work is finished, and if, as frequently happens, they work only a week or two and are then discharged, they are in as bad a situation as they were before they went to work, and sometimes worse, if they do not have enough money to get back to the place from which they started." ¹³

"That the honest toiler was their victim there is no question; not alone of a stiff fee for the information given, but a syste-

matic method was adopted in order to keep the business going. Managers of agencies and managers of jobs, their superintendents, foremen, or subforemen, were in this scheme for fleecing the workingman. Men in large numbers would be sent to contract jobs, and if on the railroads 'free fare' was part of the inducement, or perhaps the agency would charge a nominal fee if the distance was great, and this, too, would become a perquisite of the bureau, to finally go through the clearing house. In many cases men would be unsatisfactory; at least they would be told so, discharged in a few days and sent adrift as poor, may be poorer, than when they came there. New men would have to be secured, and thus the thing would go on revolving. So it went until at last it became so obnoxious that the public indignation was at length aroused, resulting in the passing of a law doing away with them."¹⁴

The abuses and the inadequacy of the then existing system are also described by state officials in affidavits included in the record.

(b) The remedies.

Washington had not tried direct regulation of private employment offices, but that method was being considered as late as 1912.¹⁵ Its people had had, on the other hand, exceptional opportunities of testing public employment offices. The municipal employment office established at Seattle in 1894 under an amendment of the city charter is among the oldest public offices in the United States. Tacoma established a municipal office in 1904, Spokane in 1905, and Everett in 1908.¹⁶ The continuance and increase of these municipal offices indicate that their experience in public employment agencies was at least encouraging. And the low cost of operating them was extraordinary. In Spokane the fees charged by private agencies ranged from \$1 upward, and were usually about \$2.¹⁷ In the Seattle free municipal agency the cost of operation, per position filled, was reduced to a trifle

¹³ Washington State Bureau of Labor. Report 1913, 1914, pp. 27, 28.

¹⁴ Washington State Bureau of Labor. Report 1915, 1916, p. 120.

¹⁵ Washington State Bureau of Labor, 1911-1912. Report of Commissioner, p. 16: "It has been demonstrated that state control of employment agencies is the most effective way to properly regulate them. I would earnestly recommend a state law similar to the one in Illinois that went into effect July 1, 1911, and has proven to be the best law for this purpose in this country."

¹⁶ The first free public employment office in the United States was the municipal agency established in Cleveland in 1890. L.R.A.1917F.

Then followed (in 1893) the Los Angeles office. Bulletin of United States Bureau of Labor No. 68, p. 1 (Jan. 1907).

¹⁷ Washington State Bureau of Labor Report, 1913, 1914, p. 291.

W. D. Wheaton, Labor Agent.—"The complaint against the private office is almost universal. The experience of this office is that private agencies charge all that the traffic will bear and that in hard times, when work is scarce and the worker poverty-stricken, the fee is placed so high as to be almost prohibitive, and the agencies take longer chances, sometimes sending men on only a rumor, depending on their financial straits to make it impossible to return. "The fees charged run from \$1 for the

over 4 cents.¹⁸ The preliminary steps for establishing "Distribution Stations" under the Federal system, including one at Seattle, had been taken before the passage of the Washington law.¹⁹ Later branch offices were established in thirteen other cities.²⁰

4. The fundamental problem.

The problem which confronted the people of Washington was far more comprehensive and fundamental than that of protecting workers applying to the private agencies. It was the chronic problem of unemployment,—perhaps the gravest and most

poorest job of uncertain duration to as high as 10 per cent of the first year's salary in educational lines, and 30 per cent of the first month's salary in office or mercantile lines. Most of the agencies catering to the better class of positions charge a registration fee which is worked to the limit—or rather without limit. Advertisements for attractive positions are placed with the newspapers and registration is made of all that apply, irrespective of whether the position has been filled or not, and generally at a fee of \$2 or more. This registration fee is always followed by a percentage of the earnings when a position is secured, but only a small proportion of those registering are placed in positions.

"The average charge per position in all agencies will run high, and yet the applicant cannot have a feeling of security in the position obtained for the reason that the great majority of private agencies are primarily interested in the fee, and are not as careful in placing applicants as they would be did the possibility of another fee not exist."

¹⁸ United States Bureau of Labor Bulletin No. 109, p. 136.

"The extremely low cost of each position filled is noteworthy, as is the large number of positions secured. A total of 37,834 positions were filled in 1906, and in 1909, 38,846. The cost per position was lowest in 1906, only 4.03 cents. Only twice since 1897 has the average cost gone above 6 cents."

¹⁹ See Report of Secretary of Labor, 1914, p. 51.

²⁰ "Aberdeen, Bellingham, Custer, Everett, Friday Harbor, Lynden, Noosack, North Yakima, Port Angeles, Port Townsend, Spokane, Takoma, Walla Walla. Monthly Review of U. S. Labor Statistics, July, 1915, p. 9. See Report of Secretary of Labor, 1915, p. 36; 1916, p. 54. Hearings Committee on Labor, on H. R. 5783, to establish a National Employment Bureau. 64th Cong. 1st Session, February, 1916, p. 49.

²¹ The Unemployment Crisis of 1914, 1915, 5 American Labor Legislation Review, p. 475.

²² Washington State Bureau of Labor Report, 1913, 1914, pp. 13, 16, 17. Unemployment Survey, 5 American Labor Legislation Review, 482, 483 (1915).

²³ Recent Advances in the Struggle against Unemployment, by Prof. Charles R. L.R.A. 1917F.

difficult problem of modern industry,—the problem which, owing to business depression, was the most acute in America during the years 1913 to 1915.²¹ In the state of Washington the suffering from unemployment was accentuated by the lack of staple industries operating continuously throughout the year and by unusual fluctuations in the demand for labor, with consequent reduction of wages and increase of social unrest.²² Students of the larger problem of unemployment appear to agree that establishment of an adequate system of employment offices or labor exchanges²³ is an im-

Henderson, 2 American Labor Legislation Review, 105, 106 (1911). "The point of starting ameliorative effort is the employment agency or 'labor exchange.'"

"When we compare the ordinary employment office with the board of trade for cotton or grain, or with the bankers' clearing house, we begin to realize how belated, rudimentary, and primitive our present labor exchange is. Yet the issues at stake are quite as vital in the case of demand and supply in the labor market as in the stock and grain exchange."

A Problem of Industry, 4 American Labor Legislation Review, p. 211.

"The labor market is unorganized, resulting in confusion, waste, and loss to employers and employees. It means suffering to individual workers and their families, a lowering of the standard of living, impaired vitality and efficiency, and a tendency for the unemployed to become unemployable, dependent, degraded. In fact, the demoralizing effect of unemployment upon the individual is matched only by its wastefulness to society."

The Prevention of Unemployment, 5 American Labor Legislation Review, p. 176:

"An essential step toward a solution of the problem of unemployment is the organization of the labor market through a connected network of public employment exchanges. This is vitally important as a matter of business organization, and not of philanthropy. It is of as much importance for the employer to find help rapidly and efficiently as it is for the worker to find work without delay. The necessity of organized markets is recognized in every other field of economic activity, but we have thus far taken only timid and halting steps in the organization of the labor market. The peddling method is still, even in our 'efficient' industrial system, the prevalent method of selling labor. Thus a purely business transaction is carried on in a most businesslike, not to say medieval, manner."

Public Employment Bureaus, Charles B. Barnes, 5 American Labor Legislation Review, p. 195:

"Unemployment is no longer intermittent in this country; it has come to be a chronic condition which needs to be dealt with in a regular and systematic manner. The first step in properly dealing with this situation is the establishing of a se-

dispensable first step toward its solution. There is reason to believe that the people of Washington not only considered the collection by the private employment offices of fees from employees a social injustice,²⁴ but that they considered the elimination of the practice a necessary preliminary to the establishment of a constructive policy for dealing with the subject of unemployment.²⁵

It is facts and considerations like these which may have led the people of Washington to prohibit the collection by employment agencies of fees from applicants for work. A weight should be given to the fact that the statute has been held constitutional by the supreme court of Washington and by the Federal district court (three judges sitting),—courts presumably familiar with the local conditions and needs.

In so far as protection of the applicant is a specific purpose of the statute, a precedent was furnished by the Act of Congress, December 21, 1898, 30 Stat. at L. 755, 763, chap. 28, Comp. Stat. 1916, §§ 8306, 8323 (considered in *Patterson v. The Eudora*, 190 U. S. 189, 47 L. ed. 1002, 23 Sup. Ct. Rep. 821), which provides, among other things:

"If any person shall demand or receive, either directly or indirectly, from any seaman or other person seeking employment as seaman, or from any person on his behalf, any remuneration whatever for providing

him, with employment, he shall for every such offense be liable to a penalty of not more than \$100."

In so far as the statute may be regarded as a step in the effort to overcome industrial maladjustment and unemployment by shifting to the employer the payment of fees, if any, the action taken may be likened to that embodied in the Washington Workmen's Compensation Law (sustained in *Mountain Timber Co. v. Washington*, 243 U. S. 219, 61 L. ed. 260, 37 Sup. Ct. Rep. 260), whereby the financial burden of industrial accidents is required to be borne by the employers.

As was said in *Holden v. Hardy*, 169 U. S. 368, 387, 42 L. ed. 780, 789, 18 Sup. Ct. Rep. 383.

"In view of the fact that from the day Magna Charta was signed to the present moment, amendments to the structure of the law have been made with increasing frequency, it is impossible to suppose that they will not continue, and the law be forced to adapt itself to new conditions of society, and particularly to the new relations between employers and employees as they arise."

In my opinion, the judgment of the district court should be affirmed.

Mr. Justice Holmes and Mr. Justice Clarke concur in this dissent.

ries of co-operating public employment bureaus."

The unemployed in Philadelphia, Department of Public Works (1915) p. 113.

What is done for the unemployed in European Countries, U. S. Bureau of Labor Bulletin, No. 76, pp. 741-934; The British System of Labor Exchanges, U. S. Bureau of Labor Statistics, No. 206.

²⁴ Washington State Employment Agency Referendum, by W. M. Leiserson, 33 Survey, 87 (October 24, 1914):

"Anyone who knows the employment agency business and everyone who has tried earnestly to regulate private agencies will testify to the futility of regulation.

"But the inherent justice of the proposed Washington act can be shown in a better way. Ask the employment agent to whom he rendered the service, and he will answer 'to employer and to employee.'

"Then why don't you charge the employer?"

"It is impossible. If we depended upon employers for our fees, we would have to go out of business. They simply will not pay."

"Every time this question is put to employment agents the answer is the same: 'We charge the worker because we can get the fee from him and we cannot get it from the employer.'

"This is the downright wrong against which Washington Initiative No. 8 is directed."

²⁵ General Discussion on Unemployment, L.R.A.1917F.

5 American Labor Legislation Review, p. 451; T. S. McMahon, Univ. of Washington.

"The people of the state of Washington are not indifferent to the problem of unemployment, nor do they show any tendency to offer charitable panaceas as a permanent remedy. They are trying to work out some constructive policy, and as a preliminary step have made it illegal for employment offices to charge fees for jobs.

"A bill will be presented to the next legislature for the establishment of a network of public employment offices all over the state. This will make possible the complete organization of the labor market, which we hope is the first step toward the organization of industry itself.

"The aggressive attitude of the leaders among the workers has impressed upon the mind of the people the fact that the problem will have to be met in another way than by providing food and clothing for a period of distress such as we are passing through at the present time.

"I believe that this attitude on the part of the working people, which is characteristically western, will do more towards the solution of this problem than perhaps we, who discuss it in a theoretical way, can accomplish. They do have some plan of action, and some definite program. Either we shall have to work out some program of ultimate solution of unemployment, or we will have to accept the solution they are offering us. The one they are offering us is socialism."

WASHINGTON SUPREME COURT.
(Department No. 1.)

STATE OF WASHINGTON EX REL. CITY
OF TACOMA, Resp't.,

v.

SUNSET TELEPHONE & TELEGRAPH
COMPANY, Impleaded, etc., Appt.

(86 Wash. 309, P.U.R.1915F, 947, 150 Pac.
427.)

**Municipal corporation — authority to
use streets — condition.**

1. Statutory power conferred upon a municipal corporation to regulate and control the use of streets, and authorize or prohibit the use of electricity upon them, and prescribe the terms and conditions upon which they may be so used, includes power to provide that a franchise granted a telephone company to use the streets shall not be transferred.

For other cases, see Telephones, in Dig.
1-52 N. S.

**Telephone — provision against transfer
of franchise — judicial sale.**

2. A transfer of the property of a telephone company under sale to foreclose a mortgage securing its bonds is not within the operation of a provision in its franchise forbidding transfer to any other telephone company without consent of the municipality granting the franchise.

For other cases, see Telephones, in Dig.
1-52 N. S.

**Same — authority to operate automatic
system — change — effect.**

3. The franchise of a telephone company empowered to operate an automatic telephone system is not forfeited by the abandonment of such system, and installation of a system other than automatic.

For other cases, see Telephones, in Dig.
1-52 N. S.

(July 21, 1915.)

APPEAL by the Sunset Telephone Company from a judgment of the Superior Court for Pierce County in favor of relator in a quo warranto proceeding to enforce the forfeiture of a franchise. Reversed.

The facts are stated in the opinion.

Messrs. Pillsbury, Madison, & Sutro and Bates, Peer, & Peterson for appellant.

Messrs. T. L. Stiles and Frank M. Car-nahan, for respondent:

The city had an absolute right to grant the franchise subject to any terms or conditions it saw fit.

Note. — The right to transfer or mortgage the privilege to use streets for telegraph, telephone, or other quasi public purposes is considered in the notes to Michigan Teleph. Co. v. St. Joseph, 47 L.R.A. 87, and People ex rel. Pearce v. Commercial Teleph. & Telegraph Co. L.R.A.1917D, 707. L.R.A.1917F.

State ex rel. Spokane & B. C. Teleph. & Telegr. Co. v. Spokane, 24 Wash. 53, 63 Pac. 1116; Southern Bell Teleph. & Telegr. Co. v. Richmond, 44 C. C. A. 147, 103 Fed. 31; Vermillion v. Northwestern Teleph. Exch. Co. 111 C. C. A. 21, 189 Fed. 289; Tacoma R. & Power Co. v. Tacoma, 79 Wash. 508, 140 Pac. 565; Western U. Telegr. Co. v. Richmond, 224 U. S. 160, 56 L. ed. 710, 32 Sup. Ct. Rep. 449; Joyce, Electric Law, § 203, p. 364; McQuillin, Mun. Corp. § 1653, and notes; Reynolds v. Pacific Electric R. Co. 146 Cal. 261, 80 Pac. 77.

Holcomb, J., delivered the opinion of the court:

The respondent brought action against appellant and Home Telephone Company of Puget Sound in the nature of quo warranto, to enforce the forfeiture of a franchise. The information or complaint shows that in December, 1905, the city council of the city of Tacoma passed ordinance No. 2522, granting a telephone and telegraph franchise. The title and material parts of the ordinance were as follows:

Ordinance No. 2522. An Ordinance Granting to Edward E. Webster, His Successors and Assigns, the Right to Lay and Maintain Underground Conduits, Cables, and Wires, and to Construct Necessary Manholes, Make House Connections, and to Erect Poles and Thereon to Fasten Wires in the Streets and Alleys, and to Operate an Automatic Telephone System and Telegraph System and Business, in the City of Tacoma.

Be it ordained by the city of Tacoma:

Section 1. That Edward E. Webster, his successors and assigns, be and is hereby granted for a period of twenty-five years, the right, privilege, and franchise to erect poles with the necessary supports, cross arms, and fixtures, and to string wires and cables thereon, and to construct underground conduits, together with the necessary manholes and other appliances, and to lay, place, and stretch wires and cables therein and along, over, upon, under, and across the streets, alleys, avenues, and public places of the city of Tacoma, Washington, for the transmission of sounds, signals, conversation, and intelligence through and over said wires and cables by means of electricity, and to construct, establish, equip, install, maintain, and operate an automatic telephone system and a telegraph system, and to conduct a general telephone and telegraph business within said city of Tacoma.

Section 2 provides that the ordinance shall not be deemed exclusive.

Section 3 provides for the manner in

which conduits shall be laid and excavations made in the streets.

Section 4 provides the manner in which traps and manholes shall be constructed.

Section 5 provides the manner in which the poles shall be erected, and provides that the city shall have the right to have certain poles removed and the wires placed underground.

Section 6 provides that, before the construction of the conduits, the grantee shall file with the commissioner of public works of the city of Tacoma detailed plans and specifications, etc., and that, before work shall be done, the same shall be approved by the commissioner of public works or the city council.

Section 7 provides that, in the event of change of any grade, the laying of a sewer, or the making of any public improvement in any of the streets and alleys along or under which the said conduits may be placed, which shall render necessary any changes in the position of the conduits, the grantee, or its successors and assigns, shall move the same at his or its own cost and expense, and failing to do so within a reasonable time, the city may do so at the expense of the grantee.

Section 8 provides for the holding of the city harmless from any costs or damages during the construction of the work; and that the grantee shall put up a bond for \$10,000, conditioned to hold the city harmless.

Section 9 provides for the cutting, raising, or removal of any of the wires of the grantee, so as to allow moving of buildings through the streets.

Section 10 provides that the city shall have the right at any time during the life of this franchise to purchase at a reasonable price the property of the grantee, its successors or assigns, obtained, constructed, and maintained under the provisions of this ordinance, and provides for the manner of arriving at the value thereof.

"Section 11. That the said grantee, his successors and assigns, shall within thirty days from the date of the commencement of the operation of said telephone system furnish to the city of Tacoma on demand the telephones necessary for the transaction of the city business, not to exceed sixty telephones and fifteen desk extension telephones connected and operated with said system, and shall thereafter maintain and keep the same in repair without expense or charge to said city. Said grantee, his successors and assigns, shall, if required by said city for municipal purposes, furnish space in his conduits for twenty-five pairs of wires and space on his poles equal to one pair to be installed by said city and to be used for

fire and police alarm purposes: Provided, however, that said city in its use of such space comply with the reasonable plans and rules of said grantee, his successors and assigns, and in no case shall the wires of said city so installed carry an electric current greater than, nor dangerous to the proper operation of the wires of said grantee, his successors and assigns.

"Section 12. That the work of constructing said system shall be commenced in good faith within four months of the date of the acceptance of this franchise and shall be continuously prosecuted thereafter in good faith, and such system shall be completed within not more than two and one-half years thereafter, with an ultimate capacity and extent to accommodate at least 6,000 subscribers, and if said work be not so commenced, prosecuted, and completed and in continuous operation within the time and manner herein specified and if the grantee shall expend in the construction of said telephone system less than \$50,000 during the first six months after commencing the work of construction under this franchise and less than an additional \$100,000 in the construction of said system within one year thereafter, then this franchise shall be subject to forfeiture."

Section 13 fixes the rates to be charged for telephone service.

"Section 14. That except as hereinafter provided said grantee, his successors and assigns, shall not without the consent of the city evidenced by ordinance passed by two-thirds vote of all the members of the city council, sell or transfer the conduits, poles, wires, or appliances of any kind or description or sell, lease, transfer, or assign any of the rights or privileges herein authorized or granted to any person, company, trust, or corporation now or hereafter engaged in the telephone or conduit business in said city of Tacoma; and shall not at any time enter into any combination directly or indirectly with any person or persons or any corporation concerning the rates to be charged for telephone service; and no officers, directors, employees, or managers of the conduit or telephone system authorized under this franchise shall at any time be in charge of, or officers, directors, employees, or managers of any other conduit or telephone system constructed or being operated in said city: Provided, however, that said grantee may assign this franchise to a corporation organized by him under the laws of the state of Washington or some other state of the United States for the purpose of carrying on a general telephone and telegraph business.

"Section 15. That the person, copartnership, company, or corporation who shall own

and operate under this franchise shall during the life of this franchise pay to the city of Tacoma in lawful money of the United States the sum of 1 per cent of the gross annual receipts of such grantee, his successors and assigns, from the telephone rentals within said city for each and every year, and the city reserves the right to increase the amount of said license fee to 2 per cent at any time after the first five years during the life of this franchise: Provided that no increase in the rate of said tax shall be made until all other telephone companies doing business in said city shall be required to pay an equal rate of taxation.

"Said grantee, his successors and assigns, shall on or before the second Monday in January of each year furnish to the city comptroller of said city a sworn statement of such gross receipts for the previous year's business, and shall on or before the 15th day of January in each year for the first five years of the life of this franchise pay the amount of 1 per cent thereof to the city treasurer and after the expiration of said five years shall pay such sum as the city council may require, not exceeding 2 per cent of such gross receipts. The city comptroller or such other person or persons as the city council of said city shall by resolution appoint for that purpose shall, if said statement is not satisfactory to said city, have the right to inspect the books of grantee, his successors and assigns, and this franchise may be forfeited by failure to make the payments herein provided for or by refusal to allow the inspection within ten days after demand therefor duly made."

Section 16 provides for matters that have no bearing on this case.

Section 17 provides for the acceptance of the franchise by the grantee.

Section 18 provides for a deposit with the city treasurer as a guaranty that the grantee will commence construction of said telephone system within a certain time.

"Section 19. That any neglect, failure, or refusal to comply with any of the conditions of this franchise or grant shall render the same subject to forfeiture.

"Section 20. By the acceptance of this franchise the grantee, his successors or assigns, hereby expressly agree that when any portion of the city of Tacoma is without telephone service and the number of persons in such locality desiring same shall equal at least one subscriber for every 300 feet of new pole line required to reach such new subscriber the same shall be installed by said grantee, its successors or assigns, within six months after application is made for same; and it is further expressly agreed that the charges for the same kind of tele-

phone service shall be uniform throughout the city.

"Section 21. The city of Tacoma reserves the right to make any reasonable amendment of this ordinance which necessity may require, having due regard, however, to the vested rights and business interests of the grantee, his successors and assigns."

Webster accepted the ordinance in due time, and the council at his request passed ordinance No. 2694, consenting to his assigning the franchise of the Home Telephone Company of Puget Sound. This ordinance recited the history of the matter and ordained as follows:

"Section 1. That the consent of the city of Tacoma be and the same hereby is given to the said Edward E. Webster, to assign, transfer, and set over to the Home Telephone Company of Puget Sound, a corporation organized under the laws of the state of Washington, the said franchise and all rights, privileges, and authority therein granted by ordinance No. 2522, entitled, 'An Ordinance Granting to Edward E. Webster, His Successors and Assigns, the Right to Lay and Maintain Underground Conduits, Cables, and Wires and to Construct Necessary Manholes, Make House Connections, and to Erect Poles and Thereon to Fasten Wires in the Streets and Alleys, and to Operate an Automatic Telephone and Telegraph System and Business in the City of Tacoma.' And the said Home Telephone Company of Puget Sound shall take the same subject to all the terms and conditions set out and contained in said ordinance."

Respondent in its complaint, after alleging the passage of the ordinance above mentioned, and the other matters stated, set forth that the Home Telephone Company of Puget Sound constructed, maintained, and operated an automatic telephone business in the city, established a large central station, and had subscribers for more than 6,000 telephones, whom it furnished with telephone service at the rates prescribed in the ordinance, furnished the city sixty telephones of the value of \$100 per month free of charge, and paid the city 1 per cent of its gross annual earnings. Breaches of the terms and conditions of the ordinance were then alleged, as follows:

"1. That the Home Telephone Company of Puget Sound in May, 1911, became insolvent and was unable to continue the operation of its telephone system, and suffered its creditors to seize and sell all of its property by judicial decree, and without the consent of the city suffered the Sunset Telephone & Telegraph Company to become the purchaser at such sale; and that the Sunset company had been and was a California corporation doing business as a telephone

company and operating a telephone system in the city pursuant to rights, privileges, and franchises granted by ordinance No. 21, passed March 24, 1884, and certain ordinances amendatory thereof.

"2. That thereupon the said Sunset Telephone & Telegraph Company, by its managers, servants, and agents, took possession of the telephone station of said Home Telephone Company of Puget Sound, in said city, and of all its automatic telephones, and its conduits, poles, wires, and appliances of every description, and wrecked, dismantled, and destroyed the same as an automatic telephone system, and entirely ceased to operate the same, and deprived said city and its inhabitants of all automatic telephones and of all competition in the telephone business, and deprived said city of the sixty telephones contracted for by said ordinance No. 2522, and of all revenue from 1 per cent of the gross receipts of said Automatic Telephone Business; and said Sunset Telephone & Telegraph Company refused to allow subscribers for said automatic telephones, who had contracts with said Home Telephone Company of Puget Sound, to retain their automatic telephones already installed within their premises, and compelled said subscribers, if they desired telephone service at all, to make new contracts with it for the same, and allow its Bell telephones to be installed in their place.

"3. That said Home Telephone Company of Puget Sound and said Sunset Telephone & Telegraph Company have, and each of them has, wholly abandoned the enterprise of constructing and operating the automatic telephone system in said city of Tacoma, contemplated and stipulated for by said ordinance No. 2522, and said abandonment has continued for more than two years last past; and it is not the intention of either of said defendants to resume the operation of said automatic telephone system in said city, or to furnish the said city or its inhabitants with any competitive telephone system whatever."

On the 27th day of March, 1912, the council passed ordinance No. 4907, declaring the franchise granted by ordinance No. 2522 forfeited for the reasons therein and hereinbefore set forth, and repealing the ordinance. This ordinance directed the city attorney to procure from the courts a confirmation of the declaration of forfeiture, and the commissioner of public works to remove the telephone poles, wires, etc., from the streets after sixty days from the time the repealing ordinance should go into effect, and take possession of the manholes and conduits.

Appellant's answer denied breaches of the L.R.A.1917F.

conditions and affirmatively averred, among other things, that under a certain mortgage foreclosure proceeding in the United States circuit court for the western district of Washington northern division, under a certain mortgage and deed of trust given by the Home Telephone Company of Puget Sound to the Title Insurance & Trust Company to secure bonds issued by the Home Telephone Company, a decree of foreclosure was had, in which it was, among other things, provided that all of the property of the Home Telephone Company of Puget Sound, including the franchise originally granted to E. E. Webster by ordinance No. 2522 of Tacoma be sold as a unit; that after a number of unsuccessful public offers of sale under the decree of sale, on December 9, 1911, the defendant purchased at public sale under the foreclosure decree all of the property as a unit for the sum of \$550,000, which sum was accepted and the sale confirmed to defendant by the court, and a deed duly executed and delivered to defendant by a special trustee of the court.

There are further affirmative allegations in the answer tending to show that appellant has complied with every condition of the Home telephone franchise, except that it does not use the automatic phone system, but furnishes, in place of the automatic phone furnished by the Home Telephone Company, manual phones used and furnished by appellant.

The Home Telephone Company defaulted in this action. The relator demurred to the answer of appellant, the demurrer was sustained, and a judgment of forfeiture was entered against appellant.

The superior court based its judgment sustaining the demurrer to appellant's answer solely upon the ground that the fourteenth section of ordinance No. 2522 "expressly prohibits the Sunset Company from acquiring any rights under the franchise; that the Home Company took its franchise subject to all its conditions, and it follows that the judicial sale passes only such rights as the Home Company had."

1. We are not impressed with appellant's contentions: (1) That the city had no power to attach conditions to the Webster franchise; and (2) that, even if it had the power to attach conditions, the conditions attached were void.

The state had previously delegated to cities of the first class, of which relator is one, the general power "to lay out, establish, . . . streets, alleys, etc., and to regulate and control the use thereof, . . . and to authorize or prohibit the use of electricity at, in, or upon any of said streets, or for other purposes, and to prescribe the terms and conditions upon which the same may

be so used, and to regulate the use thereof." Rem. & Bal. Code, § 7507, subd. 7. Though appellant insists that this statutory provision is not a grant of power in regard to telephone franchises, because "it does not, in express terms, refer to telephone lines, or purport to confer the right to grant telephone franchises," we do not agree therewith. The power is both generally and specifically conferred. Again, appellant urges that even if the power were conferred by § 7507, supra, it was repealed by the subsequent enactment by the same legislature of § 9314, Rem. & Bal. Code (Laws 1890, pp. 292-294; Rem. & Bal. Code, §§ 9300 et seq.), being the general Telephone Franchise Act. These contentions were certainly decided adversely to appellant's views in *State ex rel. Spokane & B. C. Teleph. & Teleg. Co. v. Spokane*, 24 Wash. 53, 63 Pac. 1116, and in *Tacoma R. & Power Co. v. Tacoma*, 79 Wash. 508, 140 Pac. 565. Notwithstanding appellant's argument to the contrary, in both the cases mentioned it was distinctly held that the power to regulate and control the use of the streets was conferred by § 7507, subd. 7, supra, including the power to attach conditions. The question is not open to debate. All of the conditions imposed were within the city's corporate powers and valid conditions attaching to the franchise. Indeed, if not then, Webster never obtained the city's assent to the use of the streets and never had a franchise therefor. For it is incontrovertible that the city gave its assent upon certain conditions accepted by the grantee in express and positive terms. The grantee assigned to the Home Company by and with the consent of the city formally expressed, and subject to all the terms and conditions of the original grant. "If," as said by the court in *Southern Bell Teleph. & Teleg. Co. v. Richmond*, 44 C. C. A. 147, 1 Fed. 31, "the terms were distasteful to the company, it could have refused them, or, at least protested against them. It is contended [by the company] that under the act of the legislature the city council could give only a categorical answer to the request for its consent, 'Yes' or 'No,' without terms or conditions. . . . It may safely be assumed that without such qualifications and conditions consent would not have been given; that they were the reasons and motive cause for the consent. Then if the city council could not have given—had no authority to give—a conditional or qualified consent, its attempt to consent was unauthorized, ultra vires, and void, and in fact it never has consented in the only way in which complainants maintain it could consent. From this point of view, the condition precedent of the act of the general assembly L.R.A.1917F.

has not been performed. In order to maintain and operate its line in Richmond, the telephone company is without the consent of the council, and must obtain it."

The statute of Virginia delegating power to cities, the conditions imposed by the city for the grant of franchise, and the acceptance thereof were extremely analogous with the case here, and the foregoing observations are exactly pertinent to the case in hand. The terms and conditions, however, must in respect to certain restrictions, exceptions, and limitations, as to both parties, be deemed to be subject to the general law. This leads us to the consideration of the condition prohibiting alienation of the franchise.

2. The ordinance forbids any sale or transfer of the franchise and telephone system, except to a corporation to be organized by the original grantee, which was effected by and with the express consent of the city formally expressed in its subsequent ordinance No. 2694, by which the Home Company became the franchise holder. The clause against alienation contained in section 14, ordinance No. 2522, expressly forbade transfer to any other telephone company, without the consent of the city; the purpose evidently being to maintain competition in telephone service and prevent monopoly. The relator maintains and was sustained therein by the trial court, that this condition was absolute, and prevents and avoids even an involuntary transfer by operation of law. In general, the provision was a valid condition with valid reasons to support it, and was an agreed provision of the contract. It was not, as appellant supposes, void as against public policy, nor ultra vires and void as beyond the corporate power of the city. But we know of no case where any such condition has been held to defeat a transfer purely in invitum. Relator makes no pretension, in pleading or argument, that the foreclosure and sale under the deed of trust were collusive or colorable. There are many cases to the effect that covenants not to assign during the term of a lease, where the covenant is well known to be for the benefit of the landlord's right to personally select his tenant, will not be held to prevent a transfer, by operation of law, as by judicial sale, where there is no indication that the proceedings are voluntary and collusive, or colorable. A case directly to the point is *Detroit v. Mutual Gas Co.* 43 Mich. 594, 5 N. W. 1039. There, as here, a company accepting a franchise, coupled with a covenant not to assign or transfer, mortgaged its property and franchise, and the mortgage was defaulted, foreclosed, and the franchise and property sold under the foreclosure. The court there held that the

condition against alienation did not avoid the transfer. For cases analogous upon such covenants in lease contracts, see *Riggs v. Pursell*, 66 N. Y. 193; *Doe ex dem. Goodbehare v. Bevan*, 3 Maule & S. 353, 2 Rose, 456, 16 Revised Rep. 293; *Dunlop v. Mulry*, 85 App. Div. 498, 83 N. Y. Supp. 477, 1104; *Bemis v. Wilder*, 100 Mass. 446; *Crouse v. Michell*, 130 Mich. 347, 97 Am. St. Rep. 479, 90 N. W. 32; *Randol v. Scott*, 110 Cal. 590, 42 Pac. 976; *Fleming v. Fleming Hotel Co.* 69 N. J. Eq. 715, 61 Atl. 157; *Re Bush* (D. C.) 126 Fed. 878; *Munkwitz v. Uhlig*, 64 Wis. 380, 25 N. W. 424; *Gazlay v. Williams*, 14 L.R.A.(N.S.) 1199, 77 C. C. A. 662, 147 Fed. 678; *Taylor, Land*, & T. 9th ed. § 408. To constitute a breach of a covenant not to assign (in a lease), there must have been a sufficiently formal assignment by the lessee, voluntarily, carrying the legal estate. *Re Bush* (D. C.) 126 Fed. 878. The argument of relator seems to imply that the voluntary giving of a mortgage by the Home company renders the alienation by judicial sale voluntary. But, as pointed out in *Detroit v. Mutual Gas Co.* supra, the giving of a mortgage is only pledging the property as security for a debt, and conveying only an equitable interest, and not the legal title. The same reasoning was applied in the lease case, *Re Bush*, supra. Our law provides that franchises may be sold upon execution, and may be mortgaged and sold under mortgage foreclosure. *Rem. & Bal. Code*, § 520 (P. C. 81, § 841). Our Constitution (art. 12, § 8) provides that "No corporation shall lease or alienate any franchise, so as to relieve the franchise, or property held thereunder, from the liabilities of the lessor or grantor, lessee or grantee, contracted or incurred in operation, use, or enjoyment of such franchise or any of its privileges."

It must therefore be considered that all parties dealt with the subject-matter with full consideration of the existing law, and that such duties and privileges as the law expressed were portions of the contracts and transactions. The law authorizing the judicial sale of property and franchise was part of the contract. The constitutional provision making the franchise and property subject to all liabilities under the franchise also entered into the entire series of transactions, and follows and binds even the purchaser at judicial sale, for it must be held to purchase with full knowledge and understanding of all legal conditions attaching under the paramount law to the franchise. The purchaser even at judicial sale, of a public franchise, cannot enjoy the easements and other privileges without assuming the burdens attached.

Upon principle and precedent, therefore, L.R.A.1917F.

we are agreed that the involuntary transfer of the Home company's franchise and property through judicial sale and by operation of law did not give rise to a cause of forfeiture against a purchaser in good faith.

3. The court did not give heed to any of the other grounds of forfeiture alleged in the complaint, denied in the answer, and affirmatively alleged not to exist in fact, by appellant in its answer.

As to the maintenance of an "automatic" phone system, relator contends that to have been a condition of the franchise. We do not find in the ordinance relating to the franchise, and the maintenance of the system, any stipulation that the grantee would establish, operate, and maintain automatic phones *exclusively*. We use the word "exclusively" advisedly, for the title to ordinance No. 2522 and the first section use the words "automatic telephone system," but the granting words contained in the first section are as follows: ". . . To lay, place, and stretch wires and cables therein and along, over, upon, under and across the streets, alleys, etc., for the transmission of sounds, signals, conversation, and intelligence through and over said wires, etc., by means of electricity, and to construct, establish, equip, install, maintain, and operate an automatic telephone system and a telegraph system, and to conduct a general telephone and telegraph business."

It appears to us:

Firstly. That the word "automatic" is purely descriptive of one kind of telephone system that might be "installed, established, maintained, and operated" by the grantee, but that the grantee would not be held to establish, maintain, and operate only an "automatic" or self-acting system of appliances. It was authorized, but not compelled, to establish, maintain, and operate such system; in fact, it was authorized, but not compelled, to establish, maintain, and operate a telephone system. As aptly argued by counsel for appellant: "Relator could with equal justification argue that there was a condition absolutely requiring the maintenance of a telegraph system, or that, if a system were installed with all the wires underground, the franchise would be forfeitable for the failure to erect poles."

Secondly. If the automatic telephone system, whatever that consisted of, proved in time to be inadequate or unsatisfactory, doubtless the city or its citizens would hasten to complain to the constituted authorities to compel the telephone company to replace the same with adequate and satisfactory equipment and appliances, such as inventive ingenuity provided as the highest standard of convenience and utility. The argument of relator that "one of the purposes

es of chartering the automatic system was to get something like decent service" is now not sound. In these days ample and effectual regulation and control of all such public utilities obtain by and through the state's mandatory agencies, both as to economy and as to conveniences. The old clamor for competition and against monopoly in public utilities of almost every character has largely ceased, and the fundamental reasons therefor, in general, have vanished, under public regulation. Monopoly of service in public utilities no longer terrifies. Economy of service and of cost to the public, together with the highest kind of efficiency and adaptability to use, is now demanded and enforced. Whether the automatic or the manual system of telephones is the better we consider of small concern to the corporation of Tacoma; but whichever may be most efficient and convenient to the citizens of Tacoma, we doubt not, will in time be demanded and obtained. The argument of relator that the abandonment by the appellant of the automatic telephones constituted nonuser of the franchise is also unsound. We must concede that it is not only the right, but the duty, of the public utility concern to discard inconvenient or obsolete apparatus and provide the best available.

We do not know whether it has merely done that or not. But it is a principle of universal application that forfeitures are abhorred in the law and will not be declared, except in the clearest and most positive cases, or where the contract broken so provides in express terms. A forfeiture will be avoided, if possible. The franchise ordinance was not plain and positive that one of the conditions upon which it was granted was that the holder of the franchise should establish, maintain, and operate an automatic system only, during the term of the franchise, for it was authorized also to "conduct a general telephone business," and therefore dedicated its property to public use, with all the duties, liabilities, and requirements, as well as privileges, under our Constitution and laws, such dedication implied. It seems clear that the mere nonuse

or abandonment of the automatic telephone would no more be a ground of forfeiture than the nonuse or abandonment of poles and wires upon the streets or conduits under the streets.

4. It is apparently conceded by relator that appellant has paid or tendered all or more than the stipulated 1 per cent of the gross earnings of the total business earned under the Home Telephone Company's franchise, so that there is no ground of forfeiture there.

5. We are not entirely clear as to whether relator relies upon the alleged failure of appellant to furnish relator with the sixty telephones and fifteen desk extension telephones connected and operated with the system without expense to the city, as stipulated in the ordinance. We are under the impression, however, from statements by counsel in argument and in relator's brief, that the situation is that appellant is not furnishing the automatic telephones, but is furnishing relator, without expense to it, manual telephones to the specified number under the franchise. If that is the case, we do not consider the relator has a ground for forfeiture under that provision. In fact, we should consider a failure in that respect a trivial failure, and believe that relator is also indifferent to that reason for asserting a forfeiture, if no other more valid and substantial reason exists.

We conclude, therefore, that appellant has a valid title, by purchase at judicial sale, of the franchise and property of the Home Telephone Company of Puget Sound, and holds same subject to all the conditions stipulated as conditions in the grant of the franchise by the relator, and implied under the Constitution, and general laws of the state, and has not given cause of forfeiture thereof.

The judgment is therefore reversed, and the cause dismissed.

Morris, Ch. J., and Mount, Chadwick, and Parker, JJ., concur.

Petition for rehearing denied.

UNITED STATES SUPREME COURT.

SEABOARD AIR LINE RAILWAY COMPANY, Plff. in Err.,

v.

ELIZABETH BLACKWELL.

(244 U. S. 310, 61 L. ed. 1160, 37 Sup. Ct. Rep. 640.)

Commerce — state regulation — slowing down for grade crossing.

The requirement of a state statute, that L.R.A.1917F.

the engineer of a railway train shall begin to check the speed of his train when 400 yards from each public road crossing at grade, and shall keep checking the speed so as to stop in time should any person or thing be crossing the track on the road, is invalid under U. S. Const. art. 1, § 8, as a direct burden on interstate commerce, when applied to an interstate passenger train

Note. — The right to limit the speed of an interstate or mail train is discussed in the annotation following this case, post, 1187.

which, under the facts as admitted by demurrer, crosses 124 highways at grade in a distance of 123 miles, none of which crossings present conditions making them peculiarly dangerous, but at each of which such train would be compelled by the law to slow down practically to a full stop, thereby consuming not less than three minutes at each crossing, which would more than double the running time of the train for the distance.

For other cases, see Commerce, II. c, in Dig. 1-52 N. S.

(Mr. Chief Justice White, Mr. Justice Pitney, and Mr. Justice Brandeis dissent.)

(June 4, 1917.)

ERROR to the Court of Appeals of the State of Georgia to review a judgment entered pursuant to the opinion of the Supreme Court affirming a judgment of the City Court of Elberton in favor of plaintiff in an action brought to recover damages for the death of her son, alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Lamar C. Rucker, Andrew J. Cobb, Howell C. Erwin, and W. L. Erwin, for plaintiff in error:

The Blow Post Law directly regulates and burdens interstate commerce.

Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 334, 52 L. ed. 234, 28 Sup. Ct. Rep. 121; *Central of Georgia R. Co. v. Hall*, 109 Ga. 369, 34 S. E. 605.

The police power will not protect a statute where it regulates and burdens interstate commerce.

Charleston & W. C. R. Co. v. Varnville Furniture Co. 237 U. S. 597, 59 L. ed. 1137, 35 Sup. Ct. Rep. 715, Ann. Cas. 1916D, 333.

No brief filed for defendant in error.

Mr. Justice McKenna delivered the opinion of the court:

This writ of error is directed to a judgment entered upon a verdict for the sum of \$1,000 in the city court of Elberton, Georgia, for the death of a son of defendant in error, alleged to have been caused by the railway company. The judgment was affirmed by the court of appeals of Georgia.

The facts as charged are that the deceased was driving a horse and buggy along a public road in the county of Elbert, and while crossing the railroad track of the railway company at a public crossing outside of the city of Elberton, he was struck by the engine of one of the company's passenger trains and received injuries from which he died three days later.

That the employees of the company in L.R.A.1917F.

charge of the train failed to blow the engine whistle at the blow post 400 yards south of the crossing, failed to keep blowing it until the train arrived at the crossing, and failed to check the speed of the train at such blow post and keep it checked until the train reached the crossing, and, so failing, the company was guilty of negligence.

That the employees of the company failed to keep the train under control, and approached the crossing at a high and dangerous rate of speed, so that they could not stop the same in time to save the life of the deceased, and that such conduct was negligence. And that "such conduct was negligence if they saw said deceased on the crossing, and it was negligence if they did not see him, and it was negligence under the Blow Post law,¹ and it was negligence regardless of the Blow Post law."

The company by its answer denied the various acts of negligence charged against it and its employees and denied "that the failure to comply with said Blow Post Law was negligence on its part relatively to the transaction in question."

The company set out the applicable sections of the law and alleged that its train was running in interstate commerce between the states, and especially between Georgia and South Carolina. That between the city of Atlanta, Georgia, and the Savannah river, a distance of 123 miles, where the

¹"Sec. 2675. A post to be erected.—There must be fixed on the line of said roads, and at the distance of 400 yards from the center of each of such road crossings, and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts, to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road.

"Sec. 2676. Neglecting to erect such posts.—Should any company fail or neglect to put up said posts, the superintendent thereof shall be guilty of a misdemeanor.

"Sec. 2677. Failing to blow whistle.—If any engineer neglects to blow said whistle as required, and to check the speed required, he is guilty of a misdemeanor. Provided, that within the corporate limits of the cities, towns, and villages of this state, the several railroad companies shall not be required to blow the whistle of their locomotives on approaching crossings or public roads in said corporate limits, but in lieu thereof the engineer of said locomotives shall be required to signal the approach of their trains to such crossings and public roads in said corporate limits, by tolling the bell of said locomotives; and on failure to do so, the penalties of this section shall apply to such offense." [Ga. Code 1914.]

same is the boundary line of Georgia, there are 124 points where the line of the railroad crosses public roads of the different counties of the state, established pursuant to law, and that all of such crossings are at grade.

That in order to comply with the law the speed of a train would have to be so slackened that there would be practically a full stop at each of the road crossings; that the time required for such purpose would depend upon various conditions, which might or might not exist at the time and at the crossings; among others, the state of the weather and the percentage of grade; but it would not be less than three minutes for a train composed of an engine and three cars, and for a train of a greater number of cars the time would be greater,—for an average freight train, not less than five minutes.

That the train alleged to have caused the death of the deceased was composed of an engine, a mail car, and two coaches, and that if the Blow Post Law had been complied with on the day in question at least three minutes would have been consumed at each crossing,—more than six hours between Atlanta and the Savannah river. That the running time between those points according to the adopted schedule was four hours and thirty minutes. That if the law had been complied with the time consumed between those points would have been more than ten and one-half hours.

That for freight trains the time consumed would be more than sixteen hours, the maximum speed of such trains on the company's road being 20 miles an hour.

That the crossings are the usual and ordinary grade crossings and there are no conditions which make any one of them peculiarly dangerous other than such danger as may result from the crossing of a public road by a railroad track at grade.

That between the city of Atlanta and the Savannah river the line of the company's railroad crosses the tracks of two other railroads, and that under the laws of the state a train is required to come to a full stop 50 feet from the crossing, and that the time so consumed would increase the time required to operate between the points referred to.

That the law as applied to the train in question is an unreasonable regulation of interstate commerce and a violation of ¶ 3, § 8, article I., of the Constitution of the United States, and that therefore the company is not guilty of the various acts of negligence charged against it.

Upon demurrer to the answer of the company the averments in regard to the law were struck out except the denial that the L.R.A.1917F.

failure to comply with the law was negligence on the company's part "relatively to the transaction in question."

The case so went to the jury, including the defense that the deceased failed to exercise ordinary care and diligence for his own safety. The jury returned a verdict for the sum of \$1,000.

A motion for a new trial was denied.

The railway company then took the case to the court of appeals of the state, and that court invoked the instruction of the supreme court upon the question whether that part of the law (Civil Code of the state, § 2075) which requires the engineer to check the speed of the train on approaching a public crossing, so as to stop in time should any person or thing be crossing the railroad track on its road, is unconstitutional so far as an interstate train is concerned, under the conditions set forth in the answer of the company, for the reason that, as thus applied, the statute is a regulation of interstate commerce and repugnant to the commerce clause of the Constitution of the United States.

The supreme court answered the question in the negative. The opinion of the court is very elaborate, but the basis of it is that the law is a valid exercise of the police power of the state, that there was no displacement of its exercise by congressional action, and that by its exercise in the law in question it did not directly burden interstate commerce.

The court of appeals accepted necessarily the views of the supreme court and sustained the ruling of the trial court upon the demurrer to the plea of the company that the law violated the commerce clause of the Constitution.

To the contention of the company that the deceased had not observed ordinary care for his own safety, and could have avoided the injury which resulted in his death, the court answered that it was a jury question, and said: "In view of the evidence as to the defendant's failure to comply with the provisions of the Blow Post Law there is sufficient testimony as a whole to support the jury's findings in favor of the plaintiff." The court hence affirmed the judgment.

It will be observed, therefore, from this statement, that the law of the state was an element in the decisions of the state tribunals and its constitutionality was sustained against the attacks of the railway company. The question is therefore presented for our consideration. In its consideration we need not descant upon the extent of the police power of the state and the limitations upon it when it encounters the powers conferred upon the national

government. There is pertinent exposition of these in *Southern R. Co. v. King*, 217 U. S. 524, 54 L. ed. 868, 30 Sup. Ct. Rep. 594, in which the law now under review was passed upon. The case is clearer as to the relation of the powers and that the power of the state cannot be exercised to directly burden interstate commerce. It was recognized that there might be crossings the approach of which the state could regulate. But, on the other hand, it was said there might be others so numerous and so near together that to require the slackening of speed would be practically destructive of the successful operation of interstate passenger trains; and therefore "statutes which require the speed of such trains to be checked at all crossings so situated might not only be a regulation but also a direct burden upon interstate commerce, and therefore beyond the power of the state to enact."

That case went off on a question of pleading. An answer was filed that did not invoke the Federal Constitution. This was attempted to be done by an amended answer which was very general and to which a demurrer was sustained. At the trial of the action there was an offer of evidence of the specific effect of the law upon the operation of trains as showing the impediment of the law to interstate commerce. The evidence was excluded. This court sustained the ruling on the ground that the evidence was not admissible under the pleadings. The ruling upon the demurrer to the answer was sustained on the ground that the answer contained only general averments constituting "mere conclusions." It was said that the averments "set forth no facts which would make the operation of the statute unconstitutional. They do not show the number or location of the crossings at which the railway company

would be required to check the speed of its trains so as to interfere with their successful operation. For aught that appears as allegations of fact in this answer the crossing at which this injury happened may have been so located and of such dangerous character as to make the slackening of trains at that point necessary to the safety of those using the public highway, and a statute making such requirement only a reasonable police regulation, and not an unlawful attempt to regulate or hinder interstate commerce. In the absence of facts setting up a situation showing the unreasonable character of the statute as applied to the defendant under the circumstances, we think the amended answer set up no legal defense, and that the demurrer thereto was properly sustained."

The facts so specified, and which it was decided would give illegal operation to the statute, are alleged in the present case, and, assuming them to be true,—and we must so assume,—compel the conclusion that the statute is a direct burden upon interstate commerce, and, being such, is unlawful. The demurrer to the answer averring them was therefore improperly sustained.

We express no opinion on the third defense of the company.

Reversed and case remanded for further proceedings not inconsistent with this opinion.

The Chief Justice, Mr. Justice Pitney, and Mr. Justice Brandeis dissent on the ground that the regulation in question was within the class which the state is entitled to enact in the absence of congressional action, and until such action. There having been no action by Congress, there is therefore no ground for holding the state action void as a regulation of interstate commerce.

Annotation—Right to limit speed of interstate or mail train.

This question is considered also in the note to *Peterson v. State*, 14 L.R.A. (N.S.) 293.

That note so far as concerns the stopping of interstate and mail trains has been supplemented in the notes to *Missouri, K. & T. R. Co. v. State*, 29 L.R.A. (N.S.) 159, and *St. Louis & S. F. R. Co. v. Langer*, 44 L.R.A. (N.S.) 481.

That, in the absence of congressional action, the state and municipalities may limit the speed of interstate trains or mail trains without violating the commerce laws of the Federal Constitution, providing the limitation is such as under the circumstances is reasonable, is approved in *L.R.A. 1917F*.

parently settled by the decisions cited in the present and the earlier note on this question. It was so held in *Erb v. Morasch* (1900) 177 U. S. 584, 44 L. ed. 897, 20 Sup. Ct. Rep. 819 (where an ordinance limited the speed of trains in Kansas City to 6 miles per hour), and *Chicago & A. R. Co. v. Carlinville* (1902) 200 Ill. 314, 60 L.R.A. 391, 93 Am. St. Rep. 190, 65 N. E. 730 (where a municipal ordinance limited the speed of trains to 10 miles an hour), both of which are cited in the earlier note.

The same conclusion is stated in *Southern R. Co. v. King* (1909) 217 U. S. 524, 54 L. ed. 868, 30 Sup. Ct. Rep.

594, which is discussed in *SEABOARD AIR LINE R. Co. v. BLACKWELL*, ante, 1184.

And in *Southern R. Co. v. Grizzle* (1908) 131 Ga. 287, 62 S. E. 177, in which only the court's syllabus is reported, it was held that the Georgia statute requiring an engineer to check the speed of his engine on approaching a public crossing, so as to be able to stop in time should any person or thing be crossing the track at the crossing, is not, with respect to a railroad company doing an interstate business, violative of the commerce clause of the Federal Constitution, but is a valid police regulation; and that no error was committed in refusing to allow an amendment offered by the railroad company, alleging that the statute was void because in violation of the commerce clause of the Federal Constitution, and that the failure to comply with its requirements by a railroad company in the operation of an interstate train could not lawfully be attributed to it as negligence.

So, on facts beyond the scope of the note, the court in *Crutcher v. Kentucky* (1891) 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851, said arguendo: "It is also within the undoubted province of the state legislature to make regulations with regard to the speed of railroad trains in the neighborhood of cities and towns; with regard to the precautions to be taken in the approach of such trains to bridges, tunnels, deep cuts, and sharp curves; and generally, with regard to all operations in which the lives and health of people may be endangered, even though such regulations affect to some extent the operations of interstate commerce. Such regulations are eminently local in their character, and, in the absence of congressional regulations over the same subject, are free from all constitutional objections, and unquestionably valid."

In *Georgia R. & Bkg. Co. v. Auchinachie* (1914) 142 Ga. 513, 83 S. E. 127, an action for the death of one walking on a railroad track, due to his being struck by a train, it was held that an amendment to the defendant's plea, alleging that the Blow Post Law, considered in *SEABOARD AIR LINE R. Co. v. BLACKWELL*, was unconstitutional as constituting a burden on interstate commerce, was properly disallowed, as there was no allegation in the petition charging the railroad company with a violation of the law, and the amendment was therefore irrelevant.

It was held also in *Georgia R. & Bkg. Co. v. Auchinachie* (Ga.) supra, that L.R.A.1917F.

the isolated circumstance that the train by which the alleged wrongful death was caused carried interstate passengers was insufficient to render the statute void as being an unreasonable burden upon interstate commerce, and that evidence of this circumstance was therefore properly excluded.

And without discussing the question whether a statute prohibiting the running of trains at more than 6 miles an hour across a highway in or near the compact part of a town constituted an unlawful regulation of interstate commerce, the court in *Clark v. Boston & M. R. Co.* (1887) 64 N. H. 323, 10 Atl. 676, stated that the statute was an exercise of the police power of the state for the safety and welfare of the inhabitants, and was applicable to railroads which extended into an adjoining state as well as those which were wholly within the state. It was contended that the statute did not apply to interstate railroads. The decision apparently assumed the constitutionality of the statute as applied to such railroads.

The question whether a statute or ordinance limiting the speed of interstate or mail trains contravenes the commerce clause of the Federal Constitution depends, it seems, in the absence of congressional action, upon its reasonableness; that is, in the absence of congressional action, the states may enact police regulations limiting the speed of interstate or mail trains, provided an unreasonable burden on interstate commerce is not thereby imposed, even though such commerce is to some extent affected thereby. This is brought out clearly by the cases of *SEABOARD AIR LINE R. Co. v. BLACKWELL*, ante, 1184, and *Southern R. Co. v. King* (U. S.) supra, which is cited in the *BLACKWELL* CASE. In the *King* Case, the Federal Supreme Court, by Mr. Justice Day, said: "Applying the general rule to be deduced from these cases to such regulations as are under consideration here, it is evident that the constitutionality of such statutes will depend upon their effect upon interstate commerce. It is consistent with the former decisions of this court, and with a proper interpretation of constitutional rights, at least in the absence of congressional action upon the same subject-matter, for the state to regulate the manner in which interstate trains shall approach dangerous crossings, the signals which shall be given, and the control of the train which shall be required under such circumstances. Crossings may be so situated

in reference to cuts or curves as to render them highly dangerous to those using the public highways. They may be in or near towns or cities, so that to approach them at a high rate of speed would be attended with great danger to life or limb. On the other hand, highway crossings may be so numerous and so near together that to require interstate trains to slacken speed indiscriminately at all such crossings would be practically destructive of the successful operation of such passenger trains. Statutes which require the speed of such trains to be checked at all crossings so situated might not only be a regulation, but also a direct burden upon interstate commerce, and therefore beyond the power of the state to enact."

And statutes or ordinances imposing an unreasonable restraint upon the speed of interstate trains have been held unconstitutional.

Thus, it was held in *Lusk v. Dora* (1915) 224 Fed. 650, that an injunction against enforcement of a municipal ordinance limiting the speed of trains within the corporate limits to 6 miles an hour would be granted on the application of an interstate carrier, on the ground that the ordinance imposed an unreasonable burden on interstate commerce, where it appeared that the town had about 1,000 inhabitants, that its corporate limits were approximately 1½ miles in extent; that, because of the difference in the level of the right of way and of the town, the track could not well be used for travel except at points of the crossing of the streets; that four streets, only one of which was considerably traveled, crossed the railroad at grade, and that the operation of trains through the town at low speed was especially difficult because of the grade and curvature of the track. The injunction was granted on condition that the railroad company maintain adequate protection at the grade crossings to those using the streets, the court saying that the finding that the ordinance imposed an unreasonable burden on interstate commerce was predicated upon the idea that the danger to be apprehended could be adequately guarded against by properly protecting the crossings that needed protection by flagmen, without unnecessarily impeding the operation of the railroad by so stringent a speed limit.

And a city ordinance prohibiting the running of trains at a speed of more than 4 miles an hour was held in *Meyers v. Chicago, R. I. & P. R. Co.* (1881) 57 L.R.A.1917F.

Iowa, 555, 42 Am. Rep. 50, 10 N. W. 896, to impose an unreasonable restraint upon commerce as applied to a railroad which ran for 3 miles within the limits of the city through farm lands fenced on both sides before it reached the inhabited portion of the city.

See also *SEABOARD AIR LINE R. Co. v. BLACKWELL*.

Ordinances limiting the speed of trains have been upheld in several cases as against objections that they unconstitutionally interfered with the carriage of the United States mail.

Thus, it has been held that the fact that a train is composed only of mail cars, and is devoted exclusively to the carriage of United States mail, does not, in the absence of action by Congress with respect to the speed of mail trains, preclude a city, in the exercise of its police power, from regulating by ordinance the speed of such trains within its limits. *Lasater v. St. Louis, I. M. & S. R. Co.* (1913) 177 Mo. App. 534, 160 S. W. 818. The court said: "Defendant's contention is that the entire subject of the handling and transportation of the mails is one exclusively within the control of Congress, and that the latter cannot be hampered in the regulations designed to accomplish this object by mere police regulations of a city with respect to the operation of trains. That this assignment of error is not well taken is quite apparent, and we shall not enter upon an extended discussion of the question involved. That the state has the power to make and enforce reasonable regulations designed to secure the safety and comfort of passengers, employees, persons crossing railway tracks, etc., in the exercise of the police power of the state, is beyond dispute.

. . . Local laws of this character are undoubtedly valid as affecting the operation of mail or other trains engaged in interstate commerce, when they do not directly conflict with regulations prescribed by Congress respecting the movements of such trains. It may be that Congress has the power to prescribe certain regulations with respect to the speed of mail trains; but, if so, it does not appear that Congress has attempted to occupy this field, nor is any authority shown for the proposition that such regulations by Congress would supersede local laws and regulations of the precise character above mentioned."

And see *Whitson v. Franklin* (1870) 34 Ind. 392, which is cited in the earlier note on this question and sustains the validity of a city ordinance limiting the

speed of trains within the corporate limits to 4 miles an hour, as against the objection that the railroad company violating the ordinance was engaged in carrying the mail between certain cities in the state, that by contract with the government it was required to transport the mail between the said cities within a prescribed time, and that this could not be done if the towns and cities through which the road ran were allowed to regulate the speed of the trains passing through them. It was held that a demurrer to this defense was properly sustained. The court said: "We are unable to see why the appellant was justified in violating the ordinance of the city from the fact the company was engaged in carrying the mails, under contract with the Federal government. To recognize this as a defense would virtually deprive the municipal authorities of the power of regulating the speed of trains, which would place the safety of the inhabitants in the towns and cities through which such trains would run at the mercy of those in charge of trains carrying the mail."

In *Southern R. Co. v. King* (1909) 217 U. S. 524, 54 L. ed. 868, 30 Sup. Ct. Rep. 594, it was held (Mr. Justice

Holmes dissenting) that general averments in the answer in an action to recover damages from a railway company for wrongful death caused by violation of the Georgia Blow Post Statute, requiring the slackening of speed at highway crossings, that the statute violated the commerce laws and was a direct burden upon and impeded traffic, and impaired the usefulness of the railway company's facilities for that purpose, and that it was impossible to observe the statute in carrying mails and in interstate commerce business, were not sufficient as against demurrer, since they were mere conclusions, and did not show the number or locations of the crossings at which the railway company would be required to check the speed of its trains, nor that the particular crossing was not a dangerous one. See quotation from this case in *SEABOARD AIR LINE R. CO. v. BLACKWELL*, ante, 1184.

As to constitutionality of statutes fixing minimum rate of speed at which carrier may transport special kinds of freight, see notes to *Downey v. Northern P. R. Co.* 26 L.R.A.(N.S.) 1017, and *Davison v. Chicago & N. W. R. Co.* L.R.A.1917C, 142. R. E. H.

WEST VIRGINIA SUPREME COURT OF APPEALS.

CHESAPEAKE & OHIO RAILWAY COM- PANY v.

PUBLIC SERVICE COMMISSION.

(75 W. Va. 100, 83 S. E. 286.)

Railroad — compulsory service — re- turns.

1. Though competent upon an inquiry as to the reasonableness of an order entered by the Public Service Commission, requiring installation and operation of a passenger-carrying service on a lateral line constructed under the provisions of § 2983, Code 1913, a comparison of the expenses incident thereto, with prospective returns therefrom, is not controlling.

For other cases, see *Carriers, IV. d, in Dig.* 1-52 N. S.

Same — branch line — factors involved.

2. Quære: Whether, in determining that question, the relation of the branch line

Headnotes by LYNCH, J.

Note. — As to consideration of entire return of railroad company in passing upon its duty to operate a branch line at a loss, see annotation following this case, post, 1193.

L.R.A.1917F.

to the system of which it is a part, the public convenience to be served, the character and volume of traffic, personal and freight, present and prospective, the necessary cost of installation and of service, and the effect on the revenues of the entire system, are factors to be considered and viewed in the light of all the circumstances and conditions attendant upon the performance required.

For other cases, see *Carriers, IV. d, in Dig.* 1-52 N. S.

Same — scope of traffic.

3. Quære: Whether, in a proceeding to obtain from the Commission an exercise of the power conferred by chapter 9, Acts 1913, the question of revenue to a railroad company from a branch line, in so far as deemed controlling on the fairness and reasonableness of a requirement for passenger service thereon, is to be determined by consideration of both freight and passenger traffic originating on the branch line in connection with the railroad system as a whole; and if, when so considered, the total returns from such traffic permit of a reasonable margin of profit to the company, it can properly complain that the requirement entails a loss on the passenger service alone.

For other cases, see *Carriers, IV. d, in Dig.* 1-52 N. S.

Same — confiscatory order.

4. Quære: Whether, before an order of the Commission requiring adequate passenger

facilities on a lateral line can be deemed confiscatory, it must appear that the revenues of the entire system are insufficient to meet the additional expense necessary therefor, with a fair margin of profit.

For other cases, see Carriers, IV. d, in Dig. 1-52 N. S.

Same — authority of Commission.

5. Such Commission has authority, under chapter 9, Acts 1913, to require railroads to provide adequate facilities for the transportation of persons and property on both main and lateral lines.

For other cases, see Carriers, IV. d, in Dig. 1-52 N. S.

Same — adequate service — cost.

6. So long as it retains its corporate entity, a railroad is legally compellable to furnish reasonably adequate facilities for the transportation of persons and property on the lines operated, whether main or branch lines, subject to such regulations and charges as are prescribed by statute, or by the corporation, not inconsistent with general statutory provisions; provided only that the requirement therefor, viewed in the light of all the circumstances attendant thereon, does not entail a substantial loss to the operator.

For other cases, see Carriers, IV. d, in Dig. 1-52 N. S.

Evidence — burden of proof — confiscatory rate.

7. On the operator rests the burden of showing data from which to determine whether the required service is in effect confiscatory.

For other cases, see Evidence, II. in Dig. 1-52 N. S.

Same — weight — excess of expense.

8. Mere excess of estimated operating expenses above prospective returns from the required service on a branch line is inadequate upon the question of reasonableness. Other factors are requisite for that purpose.

For other cases, see Evidence, XII. k, in Dig. 1-52 N. S.

Railroad — requirement of adequate service — effect.

9. Requirement of adequate service and facilities therefor does not presuppose the previous existence of either service or facilities. It applies alike to cases where the carrier has failed to provide any service and where it has provided insufficient service or facilities.

For other cases, see Carriers, IV. d, in Dig. 1-52 N. S.

(October 13, 1914.)

PETITION by the Railway Company for suspension of an order of the Public Service Commission requiring it to inaugurate and maintain a passenger service between certain points. Refused.

The facts are stated in the opinion.

Messrs. Enslow, Fitzpatrick, Alderson, & Baker for petitioner.

L.R.A.1917F.

Messrs. A. A. Lilly, Attorney General, and Frank Lively, Assistant Attorney General, for respondent.

Lynch, J., delivered the opinion of the court:

After due notice and hearing, upon the petition of John Vawter and others similarly situated, the Public Service Commission entered an order requiring the Chesapeake & Ohio Railway Company, a common carrier, to inaugurate and maintain a passenger service, to consist of two trains daily each way, except Sunday, between Hawk's Nest, a station on its main line, and Ansted, a distance therefrom of 2½ miles. Ansted, according to the proof, has a population of 1,200 to 1,500 people, and is the trade center for an active business community surrounding it, with an estimated total of about 6,000 persons, including those residing within its corporate limits. At the date of the order, and prior thereto, the only method of travel between the two points was, and so far still is, on foot or by hack or other vehicle of like character, over unimproved and dangerous mountain roads. Although the company had constructed and since 1890 has continuously operated a branch or lateral line to and beyond Ansted, it has at no time installed a passenger service over it, but has exclusively devoted the line to the haulage of freight, consisting for the most part of coal from collieries near Ansted. On the contrary, it has persistently refused to provide such service, to require which Vawter, a resident of Ansted, and those associated with him, instituted the proceeding before the Public Service Commission, with the result stated. Of this order the railroad complains.

At common law, and, in this state, under constitutional and statutory provisions, railroad companies, because their corporate existence emanates from the public, owe to it in return therefor certain duties, performance of which they cannot evade, among them being the establishment and maintenance of reasonable facilities for transportation of both persons and freight. Such duties have always existed. They were not created by any statute. They are common-law requirements. *Southern P. Co. v. Railroad Commission*, 60 Or. 400, 119 Pac. 727; *Mills, Em. Dom.* § 14; *Olcott v. Fond du Lac County*, 16 Wall. 678, 21 L. ed. 382. By § 9, art. 11, of the Constitution, and § 71, chap. 54, Code 1913 (§ 2995), railroads are declared to be public highways, and as such "free to all persons for the transportation of their persons and property thereon, under such regulations as shall be prescribed by law." As the most available method for the enforcement of these common-law

duties, confirmed by statutes, the legislature created a Public Service Commission, and clothed it with ample authority to require railroad and other transportation companies to establish and maintain such adequate and suitable public service facilities and conveniences, and perform such service in respect thereto as shall be deemed reasonable, safe, and sufficient, and in all respects just and fair.

Though upon appeal the company charges failure on the part of the Commission properly to conceive and apply § 4, chap. 9, Acts 1913, § 4, serial § 639, Code 1913, it does not point out, in argument or otherwise, any particulars wherein the Commission either misconceived the purpose or meaning of the section or misapplied it to the facts upon which the order was based. Nor does it now argue that the section does not empower the Commission to require the corporation to install and maintain adequate facilities in respect to its public duties. And reasonably it could not, because, as the statute provides: "Every railroad and other transportation company may be required by the Commission to establish and maintain such suitable public service facilities and conveniences as may be reasonable and just."

So that we are concerned only with the inquiry whether the company was derelict in the performance of such duties, and, if so, whether the Commission's order was reasonable and just.

Evidently, the branch line was constructed under the provisions of § 2983, Code 1913, chap. 54, § 69, authorizing the building of lateral lines. The company intended the line to Ansted chiefly for the haulage of freight, and not for the transportation of passengers. But the purpose then contemplated avails not as an excuse for avoiding duties imposed by law upon common carriers. When built, the line became an integral part of the extensive Chesapeake & Ohio System, and must be treated and controlled as such, and not merely as a segregated part of it; for chapter 9, Acts 1913, clearly evinces an intention on the part of the legislature, through the Commission, to control both main and lateral lines, whether operated under the same or different management or ownership.

What, then, did the legislature intend when it required the establishment and maintenance of adequate and suitable facilities and the performance of reasonable, safe, and sufficient railroad service? Surely, one important purpose was to secure adequate facilities and conveniences for serving the public. The failure or refusal of the company to perform any service, or to provide the facilities therefor, cannot be deemed adequate, reasonable, or sufficient. To be L.R.A.1917F.

adequate, the service and facilities must be commensurate with the duties to be performed, the extent of the demand for transportation, the cost and returns of the additional service when properly ascertained, and found to be consonant with the various other circumstances and conditions under which performance is required. That such conditions exist, necessitating the additional service, is obvious. The proof shows a large tributary population, accessible to the line already constructed and actively operated, whose comfort and convenience will be promoted by the service required; and that the railroad company has made no attempt to provide any facilities for the carriage of passengers between Hawk's Nest and Ansted. Nor does the mere fact that such service and facilities therefor have not heretofore been provided prevent the requirement of both service and facilities. The word "adequate" does not presuppose the previous existence of either service or facilities therefor. It is applicable alike to cases where the railroad company has failed to provide any service, and where it has provided insufficient service. *Southern P. Co. v. Railroad Commission*, supra; *Colorado & S. R. Co. v. State R. Commission*, 54 Colo. 64, 129 Pac. 506.

But the main ground of complaint urged by the company relates to the expense incident to compliance with the order, and the probable inadequacy of returns from the service required. It is insisted that, because operating expenses, when limited to the branch line, will, under the same limitation, exceed the revenues derivable from the service thereon, the Commission's order is essentially unreasonable and should not be enforced. So to hold would operate as a valid excuse for the refusal of personal transportation on many sections of transcontinental lines and, it may be, most lateral lines. Though competent upon an inquiry as to the reasonableness of the requirement, the result of a comparison of expenses with prospective returns, under such limitations, is not controlling. While, when segregated from the system of which they are integral parts, branch lines may not yield profitable returns, it does not follow that because part of the system is operated at a loss, results of general operations do not leave a margin of profit. As feeders, they assemble passengers and freight for transportation over the main lines, and thereby add valuable increments to the gross revenues of the operating companies; and, though not conclusive, this result is an important factor in the solution of the question of profits.

The facts established by proof introduced by the railroad company aptly illustrate our meaning. From the haulage of freight over

the Hawk's Nest branch to Ansted for the year 1913, the gross returns to the company, on 242,280 tons, were \$301,881.70, of which an amount ranging from \$3,018.81 to \$7,547.02 was credited to that branch as its share; and for the transportation of passengers from the service required it estimates an annual outlay of \$12,000 for maintenance and \$2,400 as prospective returns therefrom, or 2 per cent of the cost,—thus entailing serious loss from the required service. From these facts alone, the corporation urges a determination in its favor upon the question of the reasonableness of the order of which it complains. It furnishes no other data, except that which pertains to location of the branch and the hazard of the service, due to the topography of the country through which the branch line is operated.

These facts, however, do not afford the true basis for determination of the issues involved. Something more is required. Many competent authorities hold that, "in determining the reasonableness of any branch line service, the relation of the branch line to the system as a whole, the needs of the public tributary to the branch, the character and volume of traffic, both present and prospective, the cost of operation, and its effect upon the revenues of the entire system, must be considered, and every factor given such weight as, in the light of all the circumstances, the situation warrants." *Nelson v. Northern P. R. Co.* 8 Wis. R. C. 685; *Yazoo & M. Valley R. Co. v. Railroad Commission*, 130 La. 1012, 58 So. 862; *State v. Chicago, B. & Q. R. Co.* 239 Mo. 196, 143 S. W. 785; *Chicago, B. & Q. R. Co. v. Railroad Commission*, 152 Wis. 654, 140 S. W. 296; *Colorado & S. R. Co. v. State R. Commission*, 54 Colo. 64, 129

Pac. 506; *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Railroad & W. Comrs. v. Eureka Springs R. Co.* 7 Inters. Com. Rep. 69; *Brabham v. Atlantic Coast Line R. Co.* 11 Inters. Com. Rep. 464. These decisions are based on the theory of the corporate entity, or unity of ownership. Other authorities, however, determine the question of the reasonableness of any particular service or rate from the prospective revenues derivable from the same service or rate on the railroad system as a whole. Or, as held in *Pennsylvania R. Co. v. Philadelphia County*, 220 Pa. 100, 15 L.R.A. (N.S.) 108, 68 Atl. 676, "in determining whether the passenger rates prescribed by Act April 5, 1907 (P. L. 59), were unjust as to a particular carrier, the passenger traffic of the road should be considered as a separate and independent subject from the freight traffic." Others, again, further limit the comparison to intrastate traffic.

But what constitutes a proper collocation of factors adequate for a just determination upon an inquiry as to the reasonableness of any public service required and sought to be enforced, we deem it unnecessary now to decide; because, while competent and to be considered, those furnished here are not all the factors necessary for a just decision upon such inquiry. In the absence of such data, the burden of providing which the company assumed upon this appeal, we cannot condemn as unreasonable the requirement of which complaint is made. Order refused.

Affirmed by the Supreme Court of the United States, February 5, 1917, in 242 U. S. 603, 61 L. ed. 520, 37 Sup. Ct. Rep. 234.

Annotation—Consideration of entire return of railroad company in passing upon its duty to operate a branch line at a loss.

This note is not concerned with the broad question of the right generally of a railroad company to abandon all or a portion of its road, nor with cases dealing solely with the charter or franchise duty of a company to continue service although operating at a loss, nor with the question whether the reasonable needs of the public require the continuance of operations; but the note is limited to the particular question whether, in considering the duty of a company to operate an unprofitable branch line, it is proper to consider the earnings of the road as a whole, or only the earnings of the particular branch line. L.R.A.1917F.

Generally as to the right of railroads to abandon operation of road, see note to *State v. Old Colony Trust Co.* L.R.A. 1915A, 549.

Upon the question whether a railroad company may be required to establish or maintain a station that will not pay expenses, see note to *Chicago, R. I. & P. R. Co. v. Nebraska State R. Commission*, 26 L.R.A. (N.S.) 444.

The great weight of the decisions, both court and commission, is to the effect that, in considering the question whether or not a railroad company should be compelled to continue the operation of a branch line, the entire revenues of the system are to be con-

sidered, and not merely the direct return from the branch line itself; in other words, the branch line is not to be considered as an independent enterprise, but rather in the nature of a feeder to the system.

Thus, in *Nelson v. Northern P. R. Co.* (1912) 8 Wis. R. C. 685, the Wisconsin Railroad Commission said: "Every part of a railroad system cannot be expected to be profitable. There are many short lines acting as feeders to main lines which could not be operated independently of the main lines. Therefore, in determining the reasonableness of any branch line service, the relation of the branch line to the system as a whole, the needs of the public tributary branch, the character and volume of traffic, both present and prospective, the cost of operation and its effect upon the revenues of the entire system, must be considered and every factor given such weight as, in the light of all the circumstances, the situation warrants."

So, too, in *Northwestern Cooperage & Lumber Co. v. Minneapolis, St. P. & S. Ste. M. R. Co.* (Mich.) No. D-1048, March 23, 1917, the Michigan Railroad Commission said: "We do not believe it can consistently be urged that each and every branch line of any system of railroad should be permitted to enjoy such rates as will insure its operation at a profit. In fact, we believe it will not be disputed that railroads often build or acquire such lines as feeders to the main line, and even purchase outright or buy a controlling interest in the stock of other railroads whose operation has not shown a profit, for the express purpose of using the same as feeders to the main line, believing that, as such an agency, in the originating of traffic, they will prove a good investment."

And in *Billings Chamber of Commerce v. Chicago, B. & Q. R. Co.* (1910) 19 Inters. Com. Rep. (Fed.) 71, the Commission said: "We are not unmindful that these branch lines traverse a new country where transportation conditions are difficult and the volume of business comparatively small. These lines, however, are operated as part of a great and prosperous system. They are feeders to the main line and help to swell the revenue of that line. A part of any great railroad system might be selected, and, counting cost of operation and fixed charges, such part be shown to be unprofitable. This, however, would not truly indicate its value and profitableness as an integral part of the whole property. The fact that these

branch lines, considered by themselves, fail to show large earnings, does not justify the charging of unreasonable rates."

So, in *People ex rel. Cantrell v. St. Louis, A. & T. H. R. Co.* (1896) 176 Ill. 512, 35 L.R.A. 656, 45 N. E. 824, 52 N. E. 292, it was held that the sufficiency of the earnings of a railroad to justify the expense of running a separate passenger train over a certain branch line constituting part of an entire system is not to be determined by considering the profits of that branch alone, but of the whole business of the various parts operated as one line.

And in *Colorado & S. R. Co. v. State R. Commission* (1911) 54 Colo. 64, 129 Pac. 506, where it was sought to compel a railroad company to restore service upon a branch line, the court said that the question of loss must be considered in connection with the duty of the railroad company and the productiveness of its corporate business as a whole.

In *Werner v. Chicago, M. & St. P. R. Co.* (1914) 14 Wis. R. C. 573, the Wisconsin Railroad Commission said that it could not be expected that the passenger business on a branch line would be entirely self-supporting.

In *Re Arkansas R. Rates* (1909) 168 Fed. 720, it was said that a company operating a great railroad system could not expect the same return from branch lines built as feeders to the main line as though the line had been built merely to accommodate local traffic.

In *State ex rel. Missouri P. R. Co. v. Atkinson* (1917) 269 Mo. 634, L.R.A. 1918A, P.U.R.1917C, 971, 192 S. W. 82, it was held that proof of a pecuniary loss in sleeping car service on a branch line will not, of itself, render invalid an order requiring such service, in the absence of evidence that the sleeping car service on the entire road was unprofitable.

The Supreme Court of the United States in *St. John v. Erie R. Co.* (1875) 22 Wall. (U. S.) 136, 22 L. ed. 743, in determining what were the "net earnings" of a railroad out of which dividends on preferred stock were to be paid, said: "The business of the road was a unit. If it had been disintegrated, as proposed by the complainant, we apprehend it would have been found that the correlations of the main stem and the branches were such, and that the expenses and charges incident to the entire business and those of the several parts were so interwoven and blended, that an accurate ascertainment

of the net profit of the main line and any of the auxiliaries, taken separately from the rest, would have been impracticable. An ancillary road may be short and yield but little income, yet, by reason of its reaching to coal fields, or from other local causes, its contributions to other roads of the series may be very large and profitable."

The rule that a railroad company may be compelled to continue the operation of a branch line although the return therefrom is not sufficient to pay the expenses of the operation and any return upon the investment is not applicable in a case where the loss upon the branch road is so great that its continued operation would jeopardize the successful operation of the remainder of the road.

Thus, in *Iowa v. Old Colony Trust Co.* (1914) L.R.A.1915A, 549, 131 C. C. A. 581, 215 Fed. 307, it is held that a railroad company should be permitted to abandon a branch line which is not self-supporting and for the continued operation of which there is little public necessity, where the road is insolvent, with no means of obtaining money for rehabilitating the branch, the operation of which in its present condition is dangerous, while its attempted operation jeopardizes the successful operation of the remainder of the system, for which there is a public need.

In *Culver v. St. Joseph & G. I. R. Co.* (1916) 4 Mo. P. S. C. 381, P.U.R.1917B, 542, it was held that the Missouri Commission has power to compel the owner of an abandoned branch line to restore service, in the absence of satisfactory evidence that its operation would result in losses to such an extent as to hamper the railroad in maintaining adequate service on the remaining cars of its system.

The United States Supreme Court, in

Northern P. R. Co. v. North Dakota (1915) 236 U. S. 585, ante, 1148, P.U.R. 1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1 (commonly called the *North Dakota Lignite Coal Rate Cases*), decided that the state had no power to compel a carrier to transport a particular commodity for less than cost, or without substantial compensation in addition to the cost, although the return to the carrier from its entire intrastate operation was adequate. In *Re Minneapolis, St. P. & S. Ste. M. R. Co.* (1915) 30 N. D. 221, P.U.R.1915D, 434, 152 N. W. 513, Ann. Cas. 1917B, 1205, in passing upon the validity of an order of the State Board of Railroad Commissioners, requiring the installation of separate daily passenger and freight service upon a branch line, the North Dakota supreme court held that the case was governed by the decision of the United States Supreme Court, referred to above. The Railroad Commissioners had found that the entire system was earning a reasonable return, and the court said: "The only purpose of such finding was to allow the court to reason along lines parallel with those heretofore followed by this court in the *Lignite Coal Rate Cases*; but as this reasoning was recently condemned by the Federal Supreme Court, when applied to a commodity or a classification, it must be equally untenable when used as a basis for determining whether or not the income of a branch line is to be treated with reference to the earnings of the whole system within the state. The Federal Supreme Court negatives any such conclusion, and by analogous reasoning we must determine the question as one of receipts and expenditures of the branch line alone." Bruce, J., and Burr, D. J., dissented, but apparently upon other grounds.

W. M. G.

IDAHO SUPREME COURT.

FEDERAL MINING & SMELTING COMPANY

v.

PUBLIC UTILITIES COMMISSION et al.

(26 Idaho, 391, 143 Pac. 1173.)

Discovery — production of books and papers — reasonableness.

1. It is not unjust or unfair to a public service corporation to require it to produce

Note.—As to power of commission to compel production of papers and records for inspection, see annotation following this case, post, 1202.
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its books and papers for the inspection of the attorneys and experts of a patron in a proceeding to determine the reasonableness of rates for service rendered him.

For other cases, see Discovery and Inspection, I. in Dig. 1-52 N. S.

Searches — production of books — validity.

2. The constitutional protection against searches and seizures is not violated by requiring a public service corporation to produce its books and papers for inspection by the attorneys and experts of a patron seeking to determine the reasonableness of the rates charged it for service.

For other cases, see Search and Seizure, in Dig. 1-52 N. S.

Public service corporation — inspection of records — power of commission.

3. A public utility commission may require a foreign public service corporation furnishing service within the state to produce its books and papers for inspection by a patron contesting the reasonableness of rates exacted from it, so far only as they are pertinent to the issues, under statutes giving the commission power to supervise public utilities and do all things necessary to carry out the spirit of the act, requiring any person other than a commissioner or officer of the commission demanding inspection to produce authority therefor under the seal of the commission, and authorizing the commission to require the production in the state of books and records kept without the state, so that examination thereof may be made by the commission or under its direction.

For other cases, see Public Service Commissions, in Dig. 1-52 N. S.

(October 17, 1914.)

ORIGINAL proceeding by petitioner for a writ of review to determine the validity of an order of the Commission, denying its motion to require the Washington Water Power Company to produce its books and papers for the inspection of petitioner's attorneys in a proceeding to determine the reasonableness of rates for services rendered it. Order of Commissioner affirmed.

The facts are stated in the opinion.

Messrs. James E. Babb, A. H. Featherstone, John H. Wourms, and C. W. Beale, for petitioner:

Any business affected with a public interest is subject to public control and direction,—the power to regulate rates and get necessary information being the police power.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; *Ukiah v. Snow Mountain Water & P. Co.* 4 Cal. R. C. 293; *Wilson v. United States*, 220 U. S. 614, 55 L. ed. 610, 31 Sup. Ct. Rep. 718; *Hale v. Henkel*, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370; *Burnett v. State*, 47 L.R.A. (N.S.) 1175, note; *Hammond Packing Co. v. Arkansas*, 212 U. S. 322, 53 L. ed. 530, 29 Sup. Ct. Rep. 370, 15 Ann. Cas. 645.

Accounts kept of such a public use belong to the public use, and the consumers have an interest therein, and in the facts reposing therein as to the success or failure of the enterprise, which affects the rate to be paid.

New York Edison Co. v. New York, 133 App. Div. 728, 118 N. Y. Supp. 238; *United Electric Light & P. Co. v. New York*, 133 App. Div. 732, 118 N. Y. Supp. 240; *Veiller v. Oppenheim*, 75 Hun, 21, 28 N. Y. Supp. 1051; *Thomas v. Guy B. Waite Co.* 113 App. Div. 494, 99 N. Y. Supp. 297; *Brig-L.R.A.* 1917F.

ham v. Zaiss, 48 App. Div. 144, 62 N. Y. Supp. 706; *People v. American Ice Co.* 54 Misc. 67, 105 N. Y. Supp. 650; *Home Teleph. Co. v. Carthage*, 235 Mo. 644, 48 L.R.A. (N.S.) 1055, 139 S. W. 547, Ann. Cas. 1912D, 301.

Messrs. J. H. Peterson, Attorney General, J. J. Guheen, T. C. Coffin, and E. G. Davis, Assistant Attorney General, for defendant.

Mr. John P. Gray for Washington Water Power Company.

Mr. W. H. Hanson, amicus curiae.

Sullivan, Ch. J., delivered the opinion of the court:

The Federal Mining & Smelting Company filed its formal complaint with the Public Utilities Commission of this state on the 5th of September, 1913, under the provisions of the Public Utilities Act, approved March 13, 1913 (Sess. Laws 1913, p. 247). The purpose of said proceeding was to litigate the reasonableness of rates for power furnished to the plaintiff by the Washington Water Power Company.

The complaint was answered by the Water Power Company, and thereafter the complainant made a motion for the production and inspection of all books and records, or certified copies thereof, of the Water Power Company, within the state of Idaho, for examination by the attorneys or expert accountants of the plaintiff or petitioner. It was the purpose of this motion, if favorably acted upon, to secure to the plaintiff company an opportunity to examine the books and records of the defendant company and to obtain therefrom such information as it might consider necessary in preparing itself for the hearing before the Commission.

That motion was resisted by the Washington Water Power Company on the following specified grounds: First, that it will be unjust, unfair, unreasonable, and work an irreparable damage to the defendant, to make any such order; second, that the Commission is without power to make such an order under chapter 61, Laws of 1913, or any other statute or law in the state of Idaho; third, that the making of such an order would be a violation of the defendant's right under, and contrary to, the provisions of the 4th Amendment to the Constitution of the United States.

After a hearing, the Utilities Commission denied the motion. Thereafter the plaintiff company filed a petition for a rehearing, which was denied. Application was made to this court, under the provisions of § 63a of said Utilities Act, for a writ of review to review the action of said Commission in refusing to grant said motion.

After a consideration of the three grounds

above set forth by the Washington Water Power Company against the granting of said motion, we conclude that there is nothing in said first and third grounds. Then the question directly presented is whether it was within the power of the Commission to grant said order under said Public Utilities Act, or any other statute or law of the state, and, if it possessed the authority and power to grant such order, whether it erred in denying said motion.

Counsel for plaintiff contends that the Commission has full power and authority under the provisions of said Public Utilities Act, and especially under § 55 thereof, to grant its motion for an inspection of all the books and records of said corporation, and that it erred in refusing to do so. To determine this question several sections of said act must be referred to and construed. Sections 26 (d), 29, 54, and 55 are as follows:

"Sec. 26 (d). No information furnished to the commissioner by a public utility except such matters as are specifically required to be open to public inspection by the provisions of this act, shall be open to the public inspection or made public except on order of the Commission, or by the Commissioner or a commissioner in the course of a hearing or proceeding. Any commissioner, officer or employee of the Commission who, in violation of the provisions of this subsection, divulges any such information shall be guilty of felony."

"Sec. 29. The Public Utilities Commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in the state and to do all things necessary to carry out the spirit and intent of the provisions of this act."

"Sec. 54. The Commission, each commissioner and each officer and person employed by the Commission shall have the right at any and all times to inspect the accounts, books, papers and documents of any public utility, and the Commission, each commissioner and any officer of the Commission or any employee authorized to administer oaths shall have power to examine under oath any officer, agent or employee of such public utility in relation to the business and affairs of said public utility: Provided, that any person other than a commissioner or an officer of the Commission demanding such inspection shall produce under the seal of the Commission his authority to make such inspection: And provided, further, that a written record of the testimony or statement so given under oath shall be made and filed with the Commission.

"Sec. 55. The Commission may require, by order served on any public utility in the manner provided herein for the service of L.R.A.1917F.

order, the production within this state at such time and place as it may designate, of any books, accounts, papers or records kept by said public utility in any office or place without this state, or, at its option, verified copies in lieu thereof so that an examination thereof may be made by the Commission or under its direction."

Said § 54 is the only part of said act which attempts to designate the officers or individuals who may be authorized to inspect the books, accounts, and records of a public utility, and applies equally to public utilities whose records are kept within the state and to those whose records are kept without the state. Section 55 relates to the books and records of public utilities doing business within the state, but whose books and records are kept without the state. It provides that the Commission may require such books and records, or verified copies in lieu thereof, to be produced within the state, "so that an examination thereof may be made by the Commission or under its direction." The books and records of such corporations kept without the state are clearly subject to the same limitations as is the inspection of such books and records as are kept permanently within the state. There can be no doubt of the right of the complainant to ask that the books and records of this foreign corporation be produced within the state at the time of the hearing, and the right to such facilities as are necessary in order to enable it to inspect the books, records, and documents specified by it in order to enable it to meet the issues presented by the case before the Commission. Reasonable time for such inspection and examination as may be found necessary under the circumstances of each case must be given by the Commission. All of which is conceded by the Commission in its written decision in this case, denying the motion for such examination and inspection of the records of the defendant company as was asked by the plaintiff in this proceeding; but, as we understand it, this motion of the plaintiff calls for the production of any and all documents, books, records, letters, and papers of the defendant company, whether the matters contained in them relate to the question in issue or not; and, if granted, would permit it to make such use as it might desire of all the records, etc., thus inspected.

The question is then directly presented: What was the purpose intended to be served by the provisions of said sections of said act with reference to the inspection of the books and records of public utilities? It was, no doubt, for the purpose of enabling the Commission to ascertain fully at any time the manner in which any public utility

is conducting its business, and whether it is violating the law or acting unjustly toward the public in the matter of rates. Those sections were not intended to enable those who complain against public utilities to go on "fishing expeditions" through all the correspondence, papers, and records of a utility corporation, to see if they can obtain some evidence against the legality of the acts of such corporation, or to procure information that might be valuable to one contemplating the purchase or duplication of such plant, or for the purpose of procuring information that one was not entitled to without the consent of the corporation. In a contest between a party and a utility corporation in regard to rates, etc., the Commission has power to require the utility to produce any record, contracts, or papers bearing upon the questions in issue in the case, or that would throw any light upon the question of reasonable rates. It evidently has full power and authority in the matter of compelling the production of evidence in a case before it.

Said § 54 gives the right and authority to the Commission, or each commissioner, and any officer or person employed by the Commission, at any and all times to inspect the accounts, books, papers, and documents of any public utility, and also provides that any person other than a commissioner or officer of the Commission, demanding such inspection, shall produce under seal his authority to make such inspection. That section refers to persons who are authorized to inspect the books and records of a utility by the Commission, and does not refer to the production of any books or records required to be produced and introduced as evidence on the trial of some question or issue before the Commission.

It is provided by § 26 (d) that no information furnished to the commissioner by a public utility, except such matters as are specifically required to be open to public inspection by the provisions of said act, shall be open to the public inspection or made public, except in the course of a hearing or proceeding; and it is there also provided that any commissioner, officer, or employee of the Commission, who, in violation of the provisions of such section, divulges any such information, shall be guilty of a felony. What would be the necessity or reason for making it a felony for a commissioner or an employee of the Commission to reveal certain facts that might be obtained from an investigation of the books and records of a utility, if it were the right of any and all persons to procure an order from the Commission for the inspection of all books, records, and files of a utility, and not make them guilty of a felony if they should reveal

any of the facts which they might discover on such investigation?

The provisions of said act are sufficient to give authority to the Commission, and do give it, to make all investigations of books and other documents of public utilities necessary for the decision of all questions that might arise involving the control by the Commission of such utilities within the state. Section 20 of said act empowers the Commission to supervise and regulate every public utility in the state, and "to do all things necessary to carry out the spirit and intent of the provisions of this act." It has full power and authority to require the production of all records and documents that may be pertinent and necessary to use as evidence in cases brought before said Commission, and to grant the litigants time and place sufficient for an examination of the same. The motion of the plaintiff company in this case is based on the ground that the issues raised by the pleadings require an investigation into all of the affairs of the defendant company from its organization to the present time. It no doubt has the right to an examination of all books, contracts, and files of the company that would tend in any wise to fix the value of the plant and the cost of the manufacture of electric power, and that would show or tend to show reasonable rates to be charged for the same.

The Commission has authority, under said act, to determine or pass upon the relevancy and competency of all evidence offered to prove or disprove the issues made by the pleadings, and this authority vested in the Commission should be liberally exercised, to enable parties to properly prepare for trial. The plaintiff's business is affected with a public interest, and is subject to state control and direction, and the power of the Commission to regulate rates and get information necessary for that purpose is a power that has been conferred by said act on said board, and the Commission has the legal right to demand information as to the business involved, and as to the value of all the property involved therein as a basis for the regulation of its business and the fixing of reasonable rates for its services.

Under the provisions of § 46 of said act, the accounts of such corporations are required to be so kept that, in case of a controversy over rates or service, there may be reliable evidence to which the consumer may appeal. Each consumer of the product of a utility corporation is a party in interest in its public use, and such corporations' accounts should be subject to the reasonable inspection of the consumer in any matter affecting his relation with the utility, so far as reasonable rates are concerned. The relation established by law between the utility

and the consumer is that the consumer must pay a fair return on the value of assets reasonably acquired and necessary for the accomplishment of such utility's object and purpose. The ascertainment of a just rate involves, among other things, the reasonable cost of the plant, the cost of production, transportation to the point of intended use, etc.

In *New York Edison Co. v. New York*, 133 App. Div. 728, 118 N. Y. Supp. 238, it was held that the defendant was entitled to an inspection of the books and records of the plaintiff company, and an examination of its plant, so far as the same would show, or tend to show, the actual cost of production and distribution of electricity during the time it was alleged to have been furnished. In that case the court said, among other things: "And it is quite apparent that the defendant, unless it can have an inspection and discovery, cannot prepare its case for trial. How can it determine what is the reasonable and fair market value, unless it can ascertain what it actually cost the plaintiff to manufacture and deliver?"

And after reviewing a number of cases the court further said: "Here the plaintiff's business is the manufacture and sale of electricity to thousands of customers, and the reasonable cost thereof can only be determined by showing the amount of capital invested, the actual cost to manufacture and deliver, including taxes and all disbursements for that purpose, and the depreciation of its plant, plus a fair return on the money invested. This will necessitate an examination of its entire business; and for that reason the defendant, in order to prepare itself for trial, should have an inspection of all the books, papers, and documents of the plaintiff, and of its plant, in so far as the same will show, or tend to show, what it actually cost it to manufacture and deliver the electricity for which a recovery is sought."

In *Brigham v. Zaiss*, 48 App. Div. 144, 62 N. Y. Supp. 706, the court said: "Manifestly, the plaintiff has no way of ascertaining what the net amount is, except from the defendants themselves, or from an inspection of their books of account. . . . No good reason can be suggested why they should not furnish the same to the plaintiff, and, in the interest of justice, we think they should be required, under suitable conditions, to permit the plaintiff to inspect their books and to take copies of them, in so far as they contain entries relating to, or in any way connected with, the subject-matter of the action."

In *Hart v. Ogdensburg & L. C. R. Co.* 69 Hun, 497, 23 N. Y. Supp. 713, the court said: "The discretion vested in the court L.R.A.1917F.

should be liberally exercised, to enable parties to properly prepare for trial."

And it then quoted from *Powers v. Elmen-dorf*, 4 How. Pr. 60, as follows: "I can see no good reason why a party should be permitted to withhold from the knowledge of his adversary documentary evidence affecting the merits of the controversy, only to surprise him by its production at the trial, unless, for some satisfactory reason, to be made apparent to the court, each party ought to be required, when it is desired, to disclose to the other any books, papers, and documents within his power which may contain evidence pertinent to the issue to be tried."

In *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563, the court said: "The inquiry of a board of the character of the Interstate Commerce Commission should not be too narrowly constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation, and it should not be hampered in making inquiry pertaining to interstate commerce by those narrow rules which prevail in trials at common law, where a strict correspondence is required between allegation and proof."

The principle or rule there declared is substantially the rule that should govern the Public Utilities Commission in its hearings and investigations as provided by § 49 of said act, and it is there provided that in the conduct of investigations before said Commission it should not be bound by the technical rules of evidence. By § 29 of said act it is declared that said Commission is vested with power and jurisdiction to supervise and regulate every public utility in the state and do all things necessary to carry out the spirit and intent of said act. In *Matthews v. Corporation Comrs. (C. C.)* 106 Fed. 7, the court said: "The basis of all calculations as to the reasonableness of rates is the fair value of the property used for the convenience of the public." And it then proceeded to state what may be taken into consideration in determining such rate.

The Commission, no doubt, will admit all competent evidence offered showing, or tending to show, what would be a reasonable rate for the service rendered by said public utility, and it must permit the plaintiff to inspect all books and papers of the Water Power Company that would throw any light upon that subject, and we understand from the decision of the Commission that it will do so, and give the plaintiff ample time and opportunity to examine them.

The defendant corporation has been in existence nearly a quarter of a century, and all of its files and records, contracts and communications cover a great many years,

much of which can have no application whatever to the issues made by the pleadings, and it is stated in the opinion of the Commission as follows: "No investigation by the accountants of the Commission has as yet been begun, and no examination of the works and premises of the defendant has as yet been undertaken by the engineers of the Commission. In view of the present status of the case, we think it would be going rather far for the Commission to grant the application in its present form. We doubt very seriously if the statute confers such extreme visitatorial power to be exercised by the Commission over public service corporations, and as the Commission will have full power to control the investigation to be had, ample opportunity during the hearing can be granted to the plaintiff company to make such investigation of the books and records of the defendant as will insure a fair hearing of all the issues involved. If, after the hearing before the Commission has begun, it may appear that it will be necessary for the plaintiff company to inspect any book, account, record, or other document in the possession of the defendant, and that such record is material to the issues in the case, it will be the duty of the Commission to require the production of such document, and to grant to the plaintiff company permission to inspect such documents, although the same may have to be inspected by the experts of the plaintiff company, and time afforded them for such inspection. Questions will arise during the hearing, as we imagine, concerning such proceeding, and when they do arise the Commission will consider the same and grant such facilities and opportunities to the plaintiff company to make such examination of the books, accounts, and other records of the defendant as may appear just and reasonable."

The above-quoted part of the decision of the Commission clearly sets forth the construction placed by the Commission on the powers given them by said act in the matter under consideration. The Commission has full power and authority to compel the production of all material evidence on the trial of said case, and on proper application no doubt will do so; but, in the first instance, it is for the Commission to determine whether the document or evidence demanded is material and necessary, and, if the Commission concludes that it is not, it is its duty to decline to receive immaterial evidence and to decline to grant any application of the parties for an inspection of the records and files of a public corporation which it considers is not material to any of the issues involved.

The plaintiff is not entitled to an examination of the records and files of a corporation which can possibly have no bearing on the issues of the case, and to compel the corporation to produce the same would be most unreasonable; and the Constitution of the United States, as well as the Constitution of the State of Idaho, prohibits unreasonable searches and seizures. State Const. § 17, art. 1; *Hale v. Henkel*, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370; *Wilson v. United States*, 221 U. S. 361, 55 L. ed. 771, 31 Sup. Ct. Rep. 538, Ann. Cas. 1912D, 558. In general, parties litigant who desire to inspect the books and records of opposing parties must make some showing as to the necessity of such inspection, and their demands must specify with reasonable exactness the particular books and papers which they desire to examine. If it is made to appear that an examination of any of the books, records, and files of the corporation is necessary to a proper determination of the issues involved, the Commission certainly will require their production on its own motion, or on the application of the plaintiff, before or during the hearing, and give ample opportunity for an inspection thereof. But the Commission has no authority under said act to permit a party litigant to examine the records and files of a utility corporation that do not pertain to the issues made by the pleadings, and the Commission has no authority under said act to permit a party to examine the records and files of the Washington Water Power Company, in a case pending before it, which are not pertinent or material to the issues made by the pleadings.

We therefore conclude that the action of the Commission in refusing to grant said motion must be affirmed and it is so ordered, with costs in favor of the commission.

Truitt, J., concurs.

A petition for rehearing having been filed, *Sullivan, Ch. J.*, on November 19, 1914, handed down the following additional opinion:

A petition for rehearing has been filed in this case, and it is contended that in our order affirming the decision of the Public Utilities Commission we overlooked the fact that the plaintiff had made certain specific demands for the examination of particular records, naming them, among which were: (1) The balance sheets for the calendar years 1904-1913, inclusive, as shown by the affidavit of Beukes (see page 36 of record); (2) the ledgers and journals of the Power Company, covering the entire existence of that company; (3) the minute books of the corporation with reference to the stock issue of \$1,000,000 and the bond issue of

\$500,000; (4) a complete list of the names of the consumers of the Power Company in the Cœur d'Alene district in the state of Idaho, both past and present.

It appears that the expert accountants of the plaintiff, by mutual understanding or agreement with the officers of the Water Power Company, commenced an inspection of some of the books and records of said company, but had not proceeded very far before said officers refused any further inspection of their records, claiming that they were unwilling to have any accountant employed by the Federal Company, or the complainants, or any of them, make an investigation of any of the books, accounts, papers, records, or documents whatsoever of the Water Power Company, but were willing that an examination should be made by the regular official accountant of the Public Utilities Commission, or by the regular official engineer of that Commission.

We intended to hold in our original opinion, and now hold, that the Commission must require the Water Power Company to produce for examination by the Federal Mining Company, its expert accountants, and others employed by the Federal Mining Company, all books, papers, and accounts that would throw any light upon the question of reasonable rates to be charged for electrical energy or power furnished to the Federal Mining Company by the Water Power Company, as well as a complete list of the names of the consumers of electricity furnished by said Power Company in the Cœur d'Alene district in the state of Idaho, and the books, papers, and accounts showing the rate charged each consumer and class of consumers and the amount of electrical power furnished to each, since such matters are proper to be investigated in determining reasonable rates, and the Commission must compel the Water Power Company to produce the same, and give the Federal Company reasonable opportunity and time for a thorough investigation of such books, papers, and documents.

In this case it will be necessary to apportion the expenses of the utility supplying the service to the several classes of consumers. Such consumers are divided into well-defined groups or classes, such as street lighting, commercial power, street railway, etc. Each of those classes demands its special equipment or class of service. Some costs are peculiar to certain kinds of service, and not to others, and it is only right and proper that the Federal Mining Company should be furnished all the documentary evidence that would throw any light upon the several classes of consumers and the amount charged each consumer for the

service given. As bearing upon this question, see *Racine v. Racine Gaslight Co.* 6 Wis. R. C. 228, 235, 244 (1911).

It is stated by counsel in their petition for rehearing that it is not clear to them whether or not it was the intention of this court to disapprove of a portion of the opinion in the case of *New York Edison Co. v. New York*, 133 App. Div. 731, 118 N. Y. Supp. 240, which distinguished the cases requiring a specification of the particular books required from the rate cases where all of the books were required. Counsel quotes from that opinion as follows: "This will necessitate an examination of its entire business, and for that reason the defendant, in order to prepare itself for trial, should have an inspection of all the books, papers, and documents of the plaintiff," and there stops the quotation with a period, when, as a matter of fact, in the original opinion a comma follows the word "plaintiff" and the following language is used thereafter: "And of its plant, *in so far as the same will show, or tend to show*, what it actually cost it to manufacture and deliver the electricity for which a recovery is sought."

That is identically what we intended to hold in the original opinion in this case, and we did hold in effect that it was the duty of the Commission to grant to the plaintiff the right to inspect all books, papers, and documents of the Water Power Company and of its plant, *in so far as the same will show, or tend to show*, what it actually cost to manufacture and deliver electricity, electrical energy, or power.

It is to be supposed that the Power Company keeps a list of its customers, and that its books indicate the class to which each customer belongs, the amount of electricity furnished to each, and the price charged each customer therefor. Such a list, showing the above-indicated facts, would no doubt bear upon the reasonable rates to be charged. And all such lists, books, records, and accounts should be produced by the Power Company for inspection by the Federal Company, and, as we understand the decision of the Commission, it will require the Power Company to produce all such books, records, and accounts for the inspection of the Federal Company, and time and opportunity will be given for a thorough inspection thereof.

The court does not question the good faith of the Federal Company in making the application it did in this case, and it must be distinctly understood that this court holds that it is the duty of the Commission, under the law, to require the Power Company to produce all of its books, records, and accounts so far as the same will show,

or tend to show, what it actually cost to manufacture and deliver electricity to the plaintiff.

This decision is rendered without prejudice to the rights of the Federal Company to renew its application before the Commission for the inspection of the books, records, accounts, etc., above indicated, that show, or tend to show, what it actually cost

to manufacture and deliver electricity to the plaintiff. And the Commission may permit the Federal Company, under the present application, through its officers and experts, to examine all such books, accounts, and records.

The petition for rehearing is denied.

Truitt, J., concurs.

Annotation—Power of commission to compel production of papers and records for inspection.

There is but very little authority upon the question of the power of a commission to compel a public service corporation to produce its books and papers for inspection. Such rights, however, have been upheld in the few cases passing upon the question.

FEDERAL MIN. & SMELTING Co. v. PUBLIC UTILITIES COMMISSION, ante, 1195, was cited as authority by the Alabama Public Service Commission in *Birmingham v. Southern Bell Teleph. & Teleg. Co.* (Ala.) P.U.R.1917A, 200, for its decision that it had power to require a utility to produce, in advance of a hearing, under the Commission's supervision, its books and papers pertinent to the proceeding for examination by attorneys and experts of the adverse parties, by virtue of its general jurisdiction in respect to supervising, regulating, and controlling utilities in all matters relating to rates, charges, service, and facilities, and to compel the production of the books, papers, and accounts in order that an examination thereof may be made by the Commission, or under its direction."

The production of contracts under which railroad companies engaged in interstate carriage of coal, which had acquired certain collieries the proprietors of which were about to build a competing line, guaranteed the stock and bonds issued in payment therefor by a corporation whose charter they had purchased for that purpose, may be compelled, in a proceeding before the Interstate Commerce Commission on a complaint charging such railroad companies with violation of the Interstate Commerce Act by the pooling of freights and the charging of unreasonable rates in carrying coal. L.R.A.1917F.

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The compulsory production of documentary evidence in a proceeding before the Interstate Commerce Commission on a complaint alleging violation by railroad companies of the Act to Regulate Commerce does not infringe the immunity from unreasonable searches and seizures guaranteed by the Federal Constitution, since that act, as amended by the Act of February 11, 1893, expressly extends immunity from prosecution or forfeiture of estate because of testimony given in pursuance of the requirements of the law. *Ibid.*

In *Ayrshire Coal Co. v. Southern R. Co. (Ind.)* P.U.R.1917C, 872, the Indiana Public Service Commission required a carrier to furnish a shipper, owning and operating a coal mine on the line of railroad upon which were also located various other mines, all selling and shipping coal similarly in interstate and intrastate commerce, information relative to the number of coal cars requested by each mine on its railroad; the number of cars actually received by each mine; the rating of each mine during that period; and the percentage of coal cars actually requested which were actually furnished,—to be compiled in tabulations covering semimonthly periods.

Cases involving the power of the courts to compel the production of papers have not been included. Upon the general question of power to compel production of papers, records, etc., see L.R.A. Indexes under the title, "Discovery and Inspection." W. M. G.

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Right of carrier to grant exclusive train privilege to baggage of passenger transfer companies. 1917F, 1085.

Grant by carrier of exclusive privilege to baggage company at station. 1917F, 1080.

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Effect of fact that return as a whole is reasonable on right to require railroad to transport commodity for less than reasonable compensation. 1917F, 1158.

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Constitutionality of Blue Sky Laws. 1917F, 524.

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Contract made to prevent attack upon divorce decree as contrary to public policy. 1917F, 621.

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May substantive law of state as to damages be invoked in an action for personal injuries, not resulting in death, on waters within the maritime jurisdiction. 1917F, 678.

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Criminal responsibility for act committed under influence of insane delusion as to facts as affected by question whether such facts would, if actually existing, excuse the act. 1917F, 650.

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Right of carrier to grant exclusive train privilege to baggage or passenger transfer companies. 1917F, 1085.

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Contract made to prevent attack upon divorce decree as contrary to public policy. 1917F, 621.

Liability of married woman for legal services in divorce suit. 1917F, 362.

Validity of contract to prevent attack upon divorce decree. 1917F, 618.

Liability of wife for services of attorney in divorce proceedings. 1917F, 359.

Right of woman divorced from her husband to maintain action for death of child. 1917F, 851.

Competency of divorced wife to testify in action by her former husband for alienation of her affections. 1917F, 935.

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Desertion by wife as ground for divorce where husband had subjected her in household affairs to interference of his mother, who had assailed her conduct and reputation, and he makes no effort to induce her to return to her home free from his mother's interference. 1917F, 738.

Alimony; suit money.*Annotations.*

Power to grant alimony in a divorce proceeding without personal service of process. 1917F, 1161.

Power to modify alimony awarded by a decree of absolute divorce in the absence of reservation by decree of statute. 1917F, 729.

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Statutory exemption of proceeds or avails of life insurance as inuring to benefit of estate where policy is payable to executors or administrators or estate. 1917F, 1143.

Life insurance as assets of decedent's estate. 1917F, 1137.

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What property other than realty may be assessed for the construction and maintenance of levees. 1917F, 1003.

Partial invalidity of statute as to. 1917F, 999.

Validity of agreement by property owner to waive statutory limitation of assessments. 1917F, 493.

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PUBLIC RIGHT.

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PUBLIC SERVICE COMMISSION.**Annotation.**

Power or Commission to compel production of papers and records for inspection. 1917F, 1202.

Power requiring foreign public service corporation to produce its books and papers for inspection by patron contesting reasonableness of rates. 1917F, 1195.

PUBLIC SERVICE CORPORATIONS.

See also **CARRIERS; GAS; RAILROADS; STREET RAILWAYS; TELEGRAPHS; TELEPHONES; WATERS.**
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Annotation.

Power or Commission to compel production of papers or records for inspection. 1917F, 1202.

Requiring public service corporation to produce its books and papers for inspection by the attorneys and experts of patron. 1917F, 1195.

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Statute making one who purchases or receives iron, brass or other material belonging to railroad company, without written consent of the company, guilty of a misdemeanor. 1917F, 706.

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What constitutes gross negligence of engineer permitting recovery for death of boy, notwithstanding his contributory negligence. 1917F, 118.

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Compelling production of books and papers of public service corporation in proceeding to determine reasonableness of rates exacted. 1917F, 1195.

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Annotation.

Purchase or improvement of, as a family expense or necessary within statute rendering wife or her property liable therefor. 1917F, 862.

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RECEIVERS.

Annotation.

Right of stockholder to sue for appointment of receiver on account of transactions occurring prior to his acquisition of stock. 1917F, 704.

Right of one who buys stock in corporation for sole purpose of bringing suit for appointment of receiver to maintain action to demand such appointment. 1917F, 700.

RECEIVING STOLEN PROPERTY.

Annotation.

Constitutionality of statute making the receiving of certain kinds of property a criminal offense. 1917F, 709.

Statute making one who purchases or receives iron, brass or other material belonging to railroad company, without written consent of the company, guilty of a misdemeanor. 1917F, 706.

RECORDS AND RECORDING LAWS.

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Annotation.

Who may take advantage of failure to file assignment of a building contract or of the money due thereunder. 1917F, 1127.

Effect of failure to record as against creditors and subsequent purchasers. 1917F, 1123.

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Review on appeal of rulings on exceptions to a master's report not appealed from. 1917F, 755.

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What words uttered concerning clergymen are actionable per se. 1917F, 551.

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Right of action for fraud or deceit causing loss of remedy. 1917F, 712.

REMEDY AT LAW.

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As a family expense or necessary within statute rendering wife or her property liable therefor. 1917F, 862.

Wife's liability for rent of family home. 1917F, 860.

REPAIRS.*Annotation.*

Effect of making repairs to impose on landlord implied duty to keep the leased premises in repair. 1917F, 998.

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REPLY.

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RESERVOIRS.*Annotation.*

Contributory negligence of child falling into. 1917F, 109.

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RESIGNATION.

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REVOCATION.

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RIPARIAN OWNERS.

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Master's duty to servant as to condition of.
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Rights and remedies of parties.*Annotation.*

*Must seller or buyer bear loss from
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Who must bear loss of goods in transit
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SEAMEN.*Annotation.*

*May substantive law of state be invoked
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on waters within the maritime jur-
isdiction. 1917F, 678.*

Jurisdiction of common-law courts of state
of suit in personam against shipowner
for injury to seamen. 1917F, 671.

Extent of relief which may be granted in
suit in common-law state court for in-
jury to seamen. 1917F, 671.

Question for jury in action for injury to.
1917F, 671.

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SEARCH AND SEIZURE.

Requiring public service corporation to pro-
duce its books and papers in proceeding
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charged by it. 1917F, 1195.

SECONDHAND DEALERS.*Annotation.*

*Constitutionality of statute making the
receiving of certain kinds of prop-
erty a criminal offense. 1917F,
709.*

Statute making one who purchases or receives iron, brass, or other material belonging to railroad company, without written consent of the company, guilty of a misdemeanor. 1917F, 706.

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Assignment or release of the right to a third person's services. 1917F, 842.

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SET-OFF AND COUNTERCLAIM.

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Effect of assignment on. 1917F, 1006.

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Contributory negligence of children falling into. 1917F, 105.

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SITUS.

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SKIDDING.

Injury to bystander by skidding of automobile due to slippery condition of pavement because of oil placed thereon. 1917F, 710.

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Duty to protect passengers on, from assault. 1917F, 888.

Liability of sleeping car company for assault on passenger. 1917F, 885.

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Necessity of alleging, in libel suit. 1917F, 548.

SPECIFIC PERFORMANCE.

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Contracts for real property.

Annotation.

Right of vendee to specific performance with abatement from purchase price where vendor is unable to convey a good and unencumbered title. 1917F, 597.

Discretion as to. 1917F, 594.

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Right of vendee to specific performance with abatement from purchase price because wife of vendee did not join in deed as required by law. 1917F, 594.

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STATUTE OF FRAUDS.

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STATUTE OF LIMITATIONS.

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Statute exempting proceeds of life insurance from liability for debt. 1917F, 1137.

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Effect of name given to statute by way of designation in the report of the committee accompanying introduction of bill. 1917F, 502.

Strict construction of statute imposing inheritance tax. 1917F, 436.

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STOLEN PROPERTY.

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Receiving of, see **RECEIVING STOLEN PROPERTY**.
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STORE.**Annotation.**

Validity of public restriction as to location of. 1917F, 1060.

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Liability for injury due to oiling tracks. 1917F, 712.

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Controversy over "open" or "closed" shop as justification for means employed to aid a strike. 1917F, 760.

Liability of master for intentional killing or injury of a servant by strikers. 1917F, 753.

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Effect on liability on subscription to fund of specified total of increase of such total to larger amount. 1917F, 1132.

Estoppel of subscriber to seek release from subscription on ground that plans have been changed. 1917F, 1132.

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SUCTION.**Annotation.**

Contributory negligence of child beside track drawn under train by suction. 1917F, 150.

SURETIES.

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TAXES.**What taxable.**

Taxation of interest of grantee under conveyance of oil and gas. 1917F, 989.

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Admissibility of evidence to show charitable nature of corporations. 1917F, 741.

Effect of fact that charitable hospital receives pay from some patients. 1917F, 741.

Where taxable; situs.**Annotation.**

Situs of mill site or water power for purposes of taxation. 1917F, 591.

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Assessment.

Lowering valuation for taxation in one township of mill site because site is flooded by a dam located in another township. 1917F, 585.

Tax sale.**Annotation.**

Purchase of homestead by widow under foreclosure of tax lien. 1917F, 433.

Succession tax.**—in general.**

Who must pay inheritance tax under terms of contract selling heirs' interest. 1917F, 821.

Inheritance tax as one imposed upon the decedent's estate and not on the interest of the heirs. 1917F, 821.

Strict construction of statute imposing inheritance tax. 1917F, 436.

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Annotations.

Liability to pay transfer or inheritance tax in respect of stock in a domestic corporation belonging to estate of nonresident. 1917F, 270.

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Succession or inheritance tax on interest of pledgeor to pledgee. 1917F, 278.

On personal property to which widow is entitled by law. 1917F, 436.

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Income tax.**—in general.****Annotations.**

Income tax on dividends declared after but paid from earnings accrued before act went into effect. 1917F, 814.

Provision of contract for payment without deduction for taxes as applicable to income tax. 1917F, 205.

Right of corporation to deduct Federal income tax from bonds containing provision against deduction of any tax which the corporation may be required to pay. 1917F, 203.

Taxing as income stock and cash dividends declared and paid after income tax law goes into effect out of profits earned before that time. 1917F, 806.

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—equality; uniformity.

Taxing income from purchase and sale of corporate stock at different rate from income derived from dividends on such stock. 1917F, 806.

TELEGRAPHS.**In general.**

Liability of telegraph company for injury to pedestrian by its messenger who, having snatched a paper from a newsboy, in attempting to escape runs heedlessly against the person injured. 1917F, 489.

Messages.**—in general.****Annotation.**

Contract for telegrams not written on company's blank. 1917F, 845.

Presumption that no discriminatory service is intended where telegraph message is received for transmission by telephone. 1917F, 844.

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Considering telegraphic message received by telephone as if it were written on the ordinary blank of the company in determining liability for error in transmission. 1917F, 844.

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Reasonableness of limitation of liability. 1917F, 844.

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Telegrams given by telephone. 1917F, 849.

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Forfeiture of franchise to operate automatic system by installation of a different system. 1917F, 1178.

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TERMINATION.

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Of trusts, see **TRUSTS**.

THEFT.

Of property of guest at inn, see **INNKEEPERS**.
Insurance against, see **INSURANCE**.

THREATS.

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TITLE.

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